CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 139/16

In the matter between:

GENESIS MEDICAL SCHEME Applicant

and

REGISTRAR OF MEDICAL SCHEMES First Respondent

COUNCIL FOR MEDICAL SCHEMES Second Respondent

Neutral citation:	*Genesis Medical Scheme v Registrar of Medical Schemes and Another* [2017] ZACC 16
Coram:	Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J
Judgments:	CAMERON J (first judgment) (majority): [1] to [66] JAFTA J (second judgment): [67] to [143] MOJAPELO AJ (third judgment): [144] to [154] ZONDO J (fourth judgment) (majority): [155] to [179]
Heard on:	7 February 2017
Decided on:	6 June 2017
Summary:	Medical Schemes Act 131 of 1998 — section 35(9)(c) – funds in members' personal medical savings account to be treated as liabilities of the scheme — nature of funds in members' personal medical savings account — funds not trust property — relationship between scheme and member not trustee and beneficiary

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Western Cape Division, Cape Town):

The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside and substituted with the following:

   "The appeal is dismissed with costs, including the costs of two counsel."
4. The respondents are to pay the applicant's costs, including where applicable the costs of two counsel.

JUDGMENT

CAMERON J (Mogoeng CJ, Nkabinde ADCJ, Froneman J, Khampepe J, Madlanga J, Mhlantla J, Pretorius AJ and Zondo J concurring):

Introduction

[1] Does a medical scheme hold any portion of its members' contributions in trust for them as a trustee? That is the issue. Behind it lurks a practical question, which is not directly at issue in this litigation. What happens to members' contributions if the scheme becomes insolvent?[1] This case does not involve insolvency, but the parties are at odds about how to characterise members' contributions to medical schemes,

[1] The following cases instance several medical scheme insolvencies: *Sechaba Medical Solutions v Sekete* [2015] ZASCA 8; *Muller NO v Community Medical Scheme* [2011] ZASCA 228; 2012 (2) SA 286 (SCA); and *Registrar of Medical Schemes v Ledwaba NO* [2007] ZAGPHC 24 (*Omnihealth*).

which, in turn, may shed light on the insolvency problem. Two conflicting judgments in the High Court and a divided Supreme Court of Appeal bench necessitate a decision.

Background and litigation history

[2] The applicant, Genesis Medical Scheme (Genesis), is registered as a medical scheme under the Medical Schemes Act[2] (MSA). The first respondent is the Registrar of Medical Schemes (Registrar), appointed under the MSA[3] as the executive

[2] 131 of 1998. Sections 24(1) and 26(1) provide for the registration and establishment of medical schemes.

Section 24(1) provides:

> "The Registrar shall, if he or she is satisfied that a person who carries on the business of a medical scheme which has lodged an application in terms of section 22, complies or will be able to comply with the provisions of this Act, register the medical scheme, with the concurrence of the Council, and impose such terms and conditions as he or she deems necessary."

Section 26(1) provides:

> "Any medical scheme registered under this Act shall—
>
> (a) become a body corporate capable of suing and being sued and of doing or causing to be done all such things as may be necessary for or incidental to the exercise of its powers or the performance of its functions in terms of its rules;
>
> (b) assume liability for and guarantee the benefits offered to its members and their dependants in terms of its rules; and
>
> (c) establish a bank account under its direct control into which shall be paid every amount—
>
> (i) received as subscription or contribution paid by or in respect of a member; and
>
> (ii) received as income, discount, interest, accrual or payment of whatsoever kind."

[3] Section 18 provides:

> "(1) The Minister shall, after consultation with the Council, appoint a Registrar and one or more Deputy Registrars of Medical Schemes.
>
> (2) The Registrar shall be the executive officer of the Council and shall manage the affairs of the Council.
>
> (3) The Registrar shall act in accordance with the provisions of this Act and the policy and directions of the Council.
>
> (4) The Registrar may assign to any staff member such of his or her functions or duties as he or she may from time to time determine.
>
> (5) The Registrar shall supervise the staff appointed under section 8(a) or (c) or placed at his or her disposal in terms of section 19(1).
>
> (6) A Deputy Registrar shall assist the Registrar in the performance of his or her functions and the carrying out of his or her duties and may, subject to the approval of

officer of the Council for Medical Schemes (Council), which is the second respondent.[4]

[3] Genesis seeks leave to appeal against a decision of the Supreme Court of Appeal[5] that overturned a decision of the High Court of South Africa, Western Cape Division, Cape Town (High Court).[6] The dispute between Genesis and the Registrar arose on 19 June 2013 when the Registrar rejected Genesis's annual financial statements. The MSA does not invest independent legal authority in the Registrar's circulars or prescripts. Instead, it requires that a scheme's annual financial statements be furnished to the Registrar "in the medium and form determined by the Registrar".[7] And it then adds bite – by empowering the Registrar to reject a scheme's annual financial statements if they do not comply with the statute's provisions or do not "correctly reflect the revenue and expenditure or financial position" of the scheme.[8] And here the Registrar rejected Genesis's financial statements. That rejection, and that alone, was the crucial decision at issue here.

> the Registrar, exercise any power conferred upon the Registrar by the Council or by this Act."

[4] Section 3 provides:

> "(1) There is hereby established a juristic person called the Council for Medical Schemes.
>
> (2) The Council shall be entitled to sue and be sued, to acquire, possess and alienate moveable and immovable property and to acquire rights and incur liabilities.
>
> (3) The registered office of the Council shall be situated in Pretoria or such other address as the Council may from time to time determine.
>
> (4) The Council shall, at all times, function in a transparent, responsive and efficient manner."

[5] *Registrar of Medical Schemes v Genesis Medical Scheme* [2016] ZASCA 75; 2016 (6) SA 472 (SCA) (SCA judgment).

[6] *Genesis Medical Scheme v Registrar of Medical Schemes* [2014] ZAWCHC 206; 2015 (4) SA 91 (WCC) (High Court judgment).

[7] Section 37(2).

[8] Section 38 provides:

> "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—
>
> (a) he or she shall notify the medical scheme concerned of the reasons for such rejection; and
>
> (b) the medical scheme shall be deemed not to have furnished the said document to the Registrar."

[4] The reason for the Registrar's rejection of Genesis's statements goes to the heart of the issue before us. Three crucial provisions illuminate what happened. The first provides the setting. It creates a power. The second and the third provisions create obligations when a scheme exercises that power.

[5] The first provision is section 30(1)(e). It stipulates that a medical scheme may in its rules make provision for the allocation to a member of a personal medical savings account (PMSA).[9] A PMSA is a portion of the contributions the scheme receives from those members who select benefit options that include savings accounts. The purpose is to enable members to set aside funds to meet healthcare costs that the particular benefit option they choose doesn't cover.[10] So a PMSA allows – indeed, helps, and is designed to help – a member to engage in structured saving for medical eventualities.

[6] The second key provision is section 35(1). Section 35 is headed "Financial arrangements". It stipulates how medical schemes must deal with their assets, and how PMSAs are to be rendered in their accounting. Section 35(1) requires a scheme at all times to "maintain its business in a financially sound condition".[11] Section 35(3)

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[9] Section 30(1)(e) provides:

> "A medical scheme may in its rules make provision for—
>
> . . .
>
> (e) the allocation to a member of a personal medical savings account, within the limit and in the manner prescribed from time to time, to be used for the payment of any relevant health service."

Section 32 provides:

> "The rules of a medical scheme and any amendment thereof shall be binding on the medical scheme concerned, its members, officers and on any person who claims any benefit under the rules or whose claim is derived from a person so claiming."

[10] See *Omnihealth* above n 1 at 1.

[11] Section 35(1) 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);
>
> (b) Providing for its liabilities; and

adds precision to the general requirement of section 35(1). It demands that a scheme sustain a healthy solvency margin, and sets out how. It must do so by ensuring that "on any day" its aggregate assets exceed its aggregate liabilities and nett assets.[12]

[7] The terms "assets" and "liabilities" in section 35(3) are pivotal to answering the question before us. This is because the third key provision, section 35(9), spells out how a medical scheme must reflect the amount standing to the credit of a PMSA on its balance sheet. The section specifies that PMSAs must be reflected as liabilities of the medical scheme. Because of its importance to the argument, it claims space here:

> "For the purposes of this Act, the liabilities of a medical scheme shall include—
>
> (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
>
> (c) the amount standing to the credit of a member's personal savings account."

Completing the rigorous statutory framework within which medical schemes operate, the MSA also requires them to prepare and furnish audited annual financial statements to the Registrar.[13]

> (c) Generally conducting its business so as to be in a position to meet its liabilities at all times."

[12] Section 35(3) provides:

> "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."

[13] Section 36 requires a medical scheme to appoint at least one auditor, with attendant provisions. Section 37, titled "Annual financial statements", provides:

> "(1) The board of trustees shall in respect of every financial year cause to be prepared annual financial statements and shall within four months after the end of a financial year furnish copies of the statements concerned together with the report of the board of trustees to the Registrar.
>
> (2) 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—
>
> (a) a balance sheet dealing with the state of affairs of the medical scheme;

[8] In rejecting Genesis's financial statements, the Registrar stated that in two respects they did not correctly reflect the scheme's financial position. First, Genesis's accounting was wrong. It mistakenly reflected PMSA funds as assets in its balance sheet. This was erroneous. Second, the Registrar said Genesis understated its liabilities. This was a reference to the duty section 35(9) imposes to include in its liabilities the amount standing to the credit of members' PMSAs. Genesis excluded from its list of liabilities the interest the PMSA balances were yielding. This was because it was appropriating that interest to itself, on the premise that the PMSA funds were themselves its assets. The Registrar said this, too, was wrong.

(b) an income statement;

(c) a cash-flow statement;

(d) a report by the auditor of the medical scheme; and

(e) such other returns as the Registrar may require.

(3) The annual financial statements of a medical scheme shall, subject to the provisions of the Public Accountants' and Auditors' Act, 1991, be audited by an accountant and auditor registered in terms of that Act except where such accounts are to be audited by the Auditor-General in terms of any law.

(4) The annual financial statements shall—

(a) be prepared in accordance with general accepted accounting practice;

(b) fairly present the state of affairs and the business of the medical scheme and the results thereof at the end of the financial year concerned and the surplus or deficiency of the medical scheme for that financial year;

(c) by means of figures and a descriptive report, set out and explain any matter or information material to the affairs of the medical scheme; and

(d) be accompanied by the management accounts in respect of every benefit option offered by the medical scheme indicating the financial performance thereof and the number of members enrolled per option.

(5) The board of trustees' report referred to in subsection (1) shall—

(a) deal with every matter which is material for the appreciation by members of the medical scheme of the state of affairs and the business of the medical scheme and the results thereof; and

(b) contain relevant information indicating whether or not the resources of the medical scheme have been applied economically, efficiently and effectively.

(6) Notwithstanding anything to the contrary in this section, and without derogating from other powers conferred on the Registrar in terms of this Act, the Registrar may, on a quarterly basis, require the board of trustees to prepare and furnish to him or her financial statements, in any specified medium or form."

[9] With this, battle was joined. At stake were just two issues – those that now require decision. Is Genesis the right-holder of PMSA funds or does it hold them in trust? And, flowing from this, may Genesis claim the interest earned on the PMSAs?

[10] Though the Registrar in rejecting Genesis's statements cited five grounds, they all derived from, and integrally invoked, a decision the High Court gave in 2007 in *Omnihealth*.[14] The second judgment, by Jafta J, reads the Registrar's rejection of Genesis's annual financial statements as based on more than just *Omnihealth*. I do not agree. The Registrar's rejection letter shows that the grounds for rejecting Genesis's statements all stemmed from *Omnihealth*, solely and only. Indeed, at the outset the letter states:

> "Following 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 member's personal medical savings accounts."

[11] The correctness of *Omnihealth* is thus key: and if it is wrong, the Registrar's formal statutory rejection of Genesis's statements must tumble, together with the circulars that embody and explain the Registrar's approach. In *Omnihealth*, the liquidators of an insolvent medical scheme, Omnihealth, contended that its PMSA funds fell into its insolvent estate, to be divided up between its creditors.[15] The Registrar disputed this, arguing that PMSA funds constituted "trust property" in terms of the Financial Institutions (Protection of Funds) Act[16] (FIA). They therefore did not fall into Omnihealth's pool of assets for distribution amongst its creditors.

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[14] *Omnihealth* above n 1.

[15] Id at 3.

[16] 28 of 2001. Section 1 of the FIA defines trust property as—

> "any corporeal or incorporeal, movable or immovable asset 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 hereinafter referred to as the principal."

[12] The Court in *Omnihealth* (Du Plessis J) agreed. It held that the PMSA funds constituted "trust property" under the FIA and therefore did not fall into Omnihealth's insolvent estate.[17] Instead, the funds were to be administered separately in accordance with the FIA.[18] This finding in the *Omnihealth* judgment was the foundation for the Registrar's decision to reject Genesis's financial statements. The incorrect reflection of the PMSA funds as Genesis's assets in its books of account and the understating of the corresponding interest liability were wrong, the Registrar said, because *Omnihealth* had found that those funds constituted "trust property". This the Council interpreted to mean that the funds had to be treated entirely off-balance sheet.

[13] Genesis launched an application to review the Registrar's decision under the Promotion of Administrative Justice Act[19] (PAJA). It said the decision had to be set aside because following *Omnihealth* constituted "an error of law", which materially influenced the Registrar's decision.[20]

[14] The High Court (Davis J) agreed. Upholding Genesis's contention, it said *Omnihealth* was wrongly decided.[21] It was important that the statute be interpreted to make financial sense as doubtless it was intended to do. The Court concluded that a medical scheme is the right-holder of all the funds it holds, including PMSA funds.

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[17] *Omnihealth* above n 1 at 10.

[18] Section 4(4) and (5) of the FIA provides:

> "(4) A financial institution must keep trust property separate from assets belonging to that institution, and must in its books of account clearly indicate the trust property as being property belonging to a specified principal.
>
> (5) 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."

[19] 3 of 2000.

[20] Section 6(2)(d) of PAJA provides:

> "A court or tribunal has the power to judicially review an administrative action if—
>
> . . .
>
> (d) the action was materially influenced by an error of law."

[21] High Court judgment above n 6.

The FIA did not assist the Registrar because the funds are not trust property. The Court reviewed and set aside the Registrar's decision.

[15] On appeal, with the leave of the High Court, the Supreme Court of Appeal split. The minority[22] affirmed the analysis of the Court below and its rejection of *Omnihealth*. It observed that neither Genesis's rules, nor the regulations,[23] had any bearing on whether the funds in PMSAs constituted "trust property" for the purposes of the FIA. The nature of the funds could be determined only by examining the provisions of the MSA. On this basis, the minority concluded that the MSA did not treat PMSA funds as "trust property". The funds, once paid into the medical scheme's bank account, became assets of the scheme, regardless of whether a proportion was later allocated by the scheme to a PMSA.

[16] Central to the minority's reasoning was the requirement of section 35(3) that a medical scheme must maintain a daily solvency margin of aggregate assets over aggregate liabilities.[24] Those liabilities by express statutory stipulation must include PMSAs. And if the PMSAs are liabilities, but not assets, how to fulfil the solvency requirement? If the Registrar and *Omnihealth* were right, the minority reasoned, a medical scheme would somehow, somewhere, every day have to find assets *additional* to its non-PMSA assets in order to off-set the compulsory PMSA liability in achieving the solvency margin.

[17] The majority disagreed.[25] It reversed the High Court's decision and affirmed *Omnihealth,* though with qualification. It held that "divination of justice" was an important aid in interpreting legislation.[26] When applied to the provisions of the MSA, this yielded the conclusion that the FIA definition of "trust property" applies to

[22] Cachalia JA with Dambuza JA concurring.

[23] Regulations in terms of the Medical Schemes Act 131 of 1998, GN R1262 *GG* 20556, 20 October 1999 (regulations).

[24] Section 35(3) above n 12.

[25] Willis JA with Seriti JA and Tsoka AJA concurring.

[26] SCA judgment above n 5 at para 54.

PMSA funds, which therefore constitute "trust property" for the purposes of that statute.[27] These funds must therefore be ring-fenced from creditors. And they do not fall into the throng of creditors (*concursus creditorum*) on insolvency.

[18] The majority nevertheless criticised the Court's approach in *Omnihealth*,[28] and distanced itself from the Registrar's position that PMSA funds must be entirely off-balance sheet. It held that section 35(9) "clearly" requires that a medical scheme's liability to its members in respect of their savings accounts "must be an 'on balance sheet' item".[29] The majority considered it nevertheless "quite easily possible, both legally and in the practice of accounting" for medical schemes to reflect PMSAs as assets, even though they were in fact trust property the scheme holds on behalf of its members.[30]

Jurisdiction and leave to appeal

[19] The parties' dispute raises an arguable point of law of general public importance that this Court ought to decide.[31] The Court has jurisdiction. The questions at issue have led to conflicting High Court decisions and division in the

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[27] Id.

[28] In *Omnihealth* above n 1 at 7, Du Plessis J stated:

> "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".

The SCA majority said this statement showed "considerable confusion" about accounting methods and was "incorrect" (SCA judgment above n 5 at para 69). As a matter of logic, it would follow from the majority's rejection of the proposition by Du Plessis J that the majority thought, unlike Du Plessis J, that it *does* follow in law that PMSA credits must be the scheme's assets because they are regarded as a liability. This seems flatly incompatible with the overall reasoning of the majority. The confusion may arise from inconsistent use of the word "assets" in the majority judgment. The majority uses the term "asset" to refer to the legal nature of the funds but also uses it in the accounting context – on its approach, PMSA funds can be both "assets" of the scheme for accounting purposes while simultaneously "assets" of the member (not the scheme) in the legal sense. It may be that the majority erroneously took Du Plessis J to be speaking about accounting methods, rather than the legal nature of funds, even though the context makes plain that Du Plessis J was referring to the legal nature of the funds since he states "I shall return to the accounting perspective".

[29] SCA judgment above n 5 at para 60.

[30] Id at para 73.

[31] Section 167(3)(b)(ii) of the Constitution provides that, apart from constitutional matters, the Court may hear "any other matter" if it grants leave on the grounds "that the matter raises an arguable point of law of general public importance" that the Court ought to consider. See *Paulsen v Slipknot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC).

Supreme Court of Appeal. Genesis's arguments are strong and there are good prospects. Leave must be granted.

Ground of review

[20] Genesis's review of the Registrar's decision was based on the assertion that, since *Omnihealth* was incorrectly decided, the rejection of Genesis's financial statements was materially influenced by an error of law. This review ground traditionally finds application where an administrator wrongly misconstrues or misinterprets a legislative provision.[32] The second judgment suggests:

> "It follows that the error of law relied on by Genesis must arise from the misinterpretation or misapplication of the MSA provisions by the Registrar which relate to the submission of annual financial statements."[33]

[21] This seems an inappropriately rigid characterisation of both the ground of review and of what happened between the parties here. Constitutional precepts caution against adopting so rigid an approach. By explicitly affording the right to just administrative action,[34] the Constitution bestows on courts the power to review every error of law, provided of course it is "material".[35] PAJA embodies this right, in explicit terms. There is nothing in the statute that narrows or stifles it.

[22] The Registrar's decision to reject Genesis's financial statements was not merely influenced by *Omnihealth*. That decision was what caused, created and drove the rejection. *Omnihealth* was effectively the be-all and end-all of the Registrar's decision. Without *Omnihealth*, the Registrar would not have taken it. The parties would never have been at odds. In lawyers' language, *Omnihealth* was "material" to

[32] Hoexter *Administrative Law in South Africa* 2 ed (Juta & Co Ltd, Cape Town 2012) at 282.

[33] See [93].

[34] Section 33(1) of the Constitution provides:

> "Everyone has the right to administrative action that is lawful, reasonable and procedurally fair."

[35] Hoexter above n 32 at 288.

the disputed decision.[36] And if *Omnihealth* was wrong, that means the Registrar's decision was wrong then – and that it is wrong now.

Assessment

[23] A good starting point for establishing whether medical schemes hold PMSA funds in trust is the MSA's definition of the "business of a medical scheme".[37] The statute stipulates that the "business of a medical scheme" means "the business of undertaking, in return for a premium or contribution, the liability associated with one or more of the . . . activities" listed in the section. The liability the scheme undertakes may include obtaining health services, defraying expenditure in connection with health services or rendering health services.[38]

[24] This definition is striking in three respects. First, a medical scheme is not supposed to be profit-directed[39] (and multiple memberships are proscribed).[40] And it

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[36] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC) at para 91.

[37] Section 1 of the MSA provides that—

> "'business of a medical scheme' means the business of undertaking, in return for a premium or contribution, the liability associated with one or more of the following activities—
>
> (a) providing for the obtaining of any relevant health service;
>
> (b) granting assistance in defraying expenditure incurred in connection with the rendering of any relevant health service; or
>
> (c) rendering a relevant health service, either by the medical scheme itself, or by any supplier or group of suppliers of a relevant health service or by any person, in association with or in terms of an agreement with a medical scheme."

[38] This definition, though not cited in the judgments of the High Court or SCA or in the parties' argument, was at issue in an unrelated context in *Guardrisk Insurance Company Ltd v Registrar of Medical Schemes* [2008] ZASCA 39; 2008 (4) SA 620 (SCA). In this case, the Court held that sub-paragraphs (a), (b) and (c) of the then definition must be read conjunctively, not disjunctively, with the result that a short-term insurer transgresses the prohibition on sale of policies constituting the "business of a medical scheme" only if all three sub-paragraphs apply together (para 15). It must be pointed out that the Court was concerned with the definition of "business of a medical scheme" before its amendment. The amendment took effect from 1 April 2017 when the Financial Services Laws General Amendment Act 45 of 2013 came into force. The amended definition replaced the word "and" after sub-paragraph (b) with an "or". The amendment has no effect on the reasoning or outcome of this judgment.

[39] Section 26(5) provides:

> "No payment in whatever form shall be made by a medical scheme directly or indirectly to any person as a dividend, rebate or bonus of any kind whatsoever."

[40] Section 28 provides:

> "No person shall—

is subject to rigorous statutory and institutional control. But the statute nonetheless sees it as a "business".[41] Why? Because, by elementary entrepreneurial principle, a scheme must survive on what it gets in.[42] And the statute requires that it balances its books while doing so. It demands that schemes keep afloat in a fraught, competitive insurance, reinsurance and healthcare market. To keep afloat means keeping solvent – and this inevitably demands a sensible, practical, realistic, business-based approach to managing and accounting for both assets and liabilities.

[25] Second, the definition posits two contracting parties, and a mutual exchange of value (quid pro quo). The parties, obviously, are the scheme and its member. The quid pro quo is that the scheme undertakes liability – the kinds spelled out in the definition – in exchange for money. The statute calls this "a premium or contribution". The word "premium" comes from the commercial world of insurance,[43] where it means the amount the insured pays to the insurer for undertaking liability for the loss the specified eventuality, should it supervene, would inflict.[44] To "premium", the statute's definition adds "or contribution" since this is the synonym it uses for the money the member pays for the value the scheme offers in exchange.[45]

(a) be a member of more than one medical scheme;

(b) be admitted as a dependant of—

(i) more than one member of a particular medical scheme; or
(ii) members of different medical schemes; or

(c) claim or accept benefits in respect of himself or herself or any dependant from any medical scheme other than the medical scheme of which he or she is a member."

[41] See section 20, which is headed "Business of Medical Scheme".

[42] Section 26(11) provides:

> "No medical scheme shall carry on any business other than the business of a medical scheme and no medical scheme shall enroll or admit any person as a member in respect of any business other than the business of a medical scheme."

[43] Reinecke et al "Insurance: Part 2" in *LAWSA* 2 ed (2012) vol 12(2) at para 1.

[44] In *Commissioner for Inland Revenue v Butcher Bros (Pty) Ltd* 1945 AD 301 at 302, the Appellate Division, in the context of a revenue statute imposing tax on certain accruals from leases, defined "premium or like consideration" as meaning "consideration having an ascertainable money value passing from a lessee to a lessor".

[45] "Contribution" is used in various places throughout the MSA: see the definition of "rules" (section 1); the scheme's obligation to pay members' contributions into its bank account (section 26(1)(c)(i)); only an employer is permitted to receive, hold or deal with the contribution payable by a member (section 26(6)); all contributions shall be paid directly to a medical scheme within three days of becoming due (section 26(7)); a medical scheme's rules must provide for the giving of advance written notice to members of any change in contributions

[26] The third, obvious, point, flows from these. It is that, within the confines the statute stipulates, the definition is steeped in the language of a business-based, contractual relationship. It frames two parties dealing with each other in a commercial setting for a statutorily regulated bargain: that of undertaking liability in return for payment of a premium or contribution.

[27] Why this is important becomes evident when we turn to the definitions of the FIA. The statute expressly defines "financial institution" to include any medical scheme under the MSA.[46] So its strict framework applies in general to medical schemes. The FIA specifically provides that a financial institution must "keep trust property separate from assets belonging to [it], and must in its books of account clearly indicate the trust property as being property belonging to a specified principal".[47] The FIA also provides that despite anything to the contrary elsewhere, trust property held by a financial institution "under no circumstances forms part of the assets or funds of the financial institution".[48]

[28] The crucial provision is the FIA's definition of "trust property". The statute provides that this means any "asset invested, held, kept in safe custody, controlled, administered or alienated by any person, partnership, company or trust for, or on behalf of, another person". The "[other] person" the definition refers to as the "principal". The core of this definition is that the right-holder in respect of the asset is

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(section 29(1)(l)) and must provide for the terms and conditions applicable to the admission of a person as a member, which terms and conditions shall provide for the determination of contributions (section 29(1)(n)); a medical scheme's rules may provide for the contribution to any association instituted for the benefit of medical schemes (section 30(1)(c)) or may provide for the contribution to any fund which is conducted for the benefit of its officers (section 30(1)(d)); the duties of the board of trustees include informing members on contributions (section 57(4)(d)) and taking all reasonable steps to ensure that contributions are paid timeously (section 57(4)(e)).

[46] Section 1 of the FIA defines a "financial institution" as—

> "(b) any medical scheme contemplated in section 1 of the Medical Schemes Act, 1998."

[47] Section 4(4) of the FIA. It follows that, if the funds in PMSAs are trust assets, and not those of the scheme, this provision requires the scheme in its books to clearly indicate that the trust property is trust property of a "specified principal". It would appear, from a book-keeping perspective, that each PMSA would have to be separately entered with each member indicated as a "specified principal".

[48] Section 4(5) of the FIA.

not the financial institution. It is held "for, or on behalf of, another person". Title to dispose of the asset lies not with the financial institution, but with the principal.

[29] The fundamental tenet of the trust relationship in our law[49] is that a trustee, though generally the legal owner of the trust assets, holds them not in the trustee's own interest, but for or on behalf of another person, the trust beneficiary.[50] The FIA's phrase "for, or on behalf of, another person" gives statutory expression to this tenet. A further tenet is that the trust relationship must be deliberately constituted. It cannot arise unintentionally. Constructive and resulting trusts are unknown to South African law.[51] A trust can therefore come into existence only by testamentary disposition, by statute or by contract between living persons.

[30] Once established, a trust creates a legal relation of fiduciary obligation on the part of the trustee towards the beneficiary. That relation is distinct from a purely contractual or commercial relationship. This is because a trustee occupies a fiduciary office that is subject to supervision and regulation by the courts. Even in a consensual

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[49] See generally *Land and Agricultural Bank of South Africa v Parker* [2004] ZASCA 56; 2005 (2) SA 77 (SCA) (*Parker*).

[50] The Trust Property Control Act 57 of 1988 provides that a trust is an arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed to either a trustee (ownership trust) or the beneficiaries, with control residing in the trustee (bewind-trust).

The statute provides that—

> "'Trust' means the arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed—
>
> (a) to another person, the trustee, in whole or in part, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument; or
>
> (b) to the beneficiaries designated in the trust instrument, which property is placed under the control of another person, the trustee, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument,
>
> but does not include the case where the property of another is to be administered by any person as executor, tutor or curator in terms of the provisions of the Administration of Estates Act, 1965."

[51] See Cameron et al *Honoré's South African Law of Trusts* 5 ed (Juta Law, Lansdowne 2002) at 128.

trust, the trustee is not simply a contracting party, but assumes an office subject to court supervision and public control, as no contractant does.[52]

[31] These principles prompt an immediate observation. Since a trust can be created by agreement between parties, nothing stops a particular medical scheme, subject to approval from the Registrar,[53] from agreeing with its members that it holds particular funds it receives "for, or on behalf of" them in trust. So whether the FIA definition of "trust property" applies may depend on any pertinent agreement between the scheme and its members as to a specified benefit option that the Registrar has approved. The MSA itself contains no provision that precludes a medical scheme from agreeing with its members to hold their contributions, or a portion of them, in trust. I return to this later.

[32] That is not the problem this litigation presents. The parties' dispute, in the form the Registrar's rejection of Genesis's financial statements precipitated, is whether, where no specific agreement is at issue, the provisions of the MSA and FIA, without more, impose a trust relationship on the scheme and its members regarding PMSA funds. That is the question the Supreme Court of Appeal, affirming *Omnihealth* and reversing the High Court, answered Yes.

[33] Is this right? That depends on the interrelation between the MSA and FIA. For members' contributions to be "trust property" under the FIA, the scheme must hold a member's contributions under the MSA as assets "for, or on behalf of" that member as

[52] *Parker* above n 49 at paras 23, 34 and 37.

[53] Section 33(1) and (2) of the MSA provides:

> "(1) A medical scheme shall apply to the Registrar for the approval of any benefit option if such a medical scheme provides members with more than one benefit option.
>
> (2) The Registrar shall not approve any benefit option under this section unless the Council is satisfied that such benefit option—
>
> (a) includes the prescribed benefits;
>
> (b) shall be self-supporting in terms of membership and financial performance;
>
> (c) is financially sound; and
>
> (d) will not jeopardise the financial soundness of any existing benefit option within the medical scheme."

principal. For this to be so, members' contributions must enter the scheme's bank account impressed with, or thereafter be impressed by, a fiduciary obligation on the part of Genesis toward its members.

[34] As is evident from the earlier exposition,[54] the MSA's definition of "business of a medical scheme" contains no tinge of trust or of fiduciary obligation. It provides for the conduct of a business in return for payment of money. So from the outset the relation between the scheme and its members is that of service provider and payer; debtor and creditor. The scheme through its rules undertakes to provide specified services on the basis of a quid pro quo, namely the premium or contribution. The statute constitutes the scheme and its member contracting parties, not trustee and beneficiary. The relation is commercial, not fiduciary.

[35] Nor does any trust obligation arise from any provisions regarding a medical scheme's bank accounts and receipts, which the MSA strictly regulates. Section 26(1)(c) requires a scheme to "establish a banking account under its direct control into which shall be paid every amount" that it receives "as subscription or contribution paid by or in respect of a member".

[36] Established doctrine on payments, which this Court recently confirmed in *Absa Bank*,[55] indicates that funds that enter a bank account are held by the bank subject to a claim by the bank's client, as its creditor, to pay the funds to the client's order. The suggestion by counsel for the Registrar that ordinary bank accounts constitute trust property where the bank is the trustee for the client of the amount in the account was far-goingly incorrect and cannot be sustained.

[37] The medical scheme here is the bank's creditor. It is empowered, as title-holder to the money, to instruct the bank how to dispose of it.[56] A medical

[54] See [23] to [26].

[55] *Absa Bank Ltd v Moore* [2016] ZACC 34; 2017 (1) SA 255 (CC); 2017 (2) BCLR 131 (CC) (*Absa Bank*).

[56] *Fuhri v Geyser NO* 1979 (1) SA 747 (N) at 749C-D:

scheme does not receive a member's premium or contribution as trustee or fiduciary. It receives the funds as a debtor in respect of the liability it undertakes to provide a service in return for the contribution it receives. In the language the FIA employs to define "trust property", a medical scheme receives its members' contributions *for or on behalf of* its own business, and not as trustee on behalf of the members. In short, the funds enter the scheme's bank account without being impressed by a trust or fiduciary relationship.

[38] Are funds allocated to a PMSA any different? The answer is No. Section 30(1)(e) of the MSA provides that a scheme "may in its rules make provision for the allocation to a member of a personal medical savings account, within the limit and in the manner prescribed from time to time, to be used for the payment of any relevant health service". The provision entails that "the allocation" is done by the scheme itself, for it is into the scheme's bank account that the funds allocated have already been received and credited. The allocation is done by the scheme as right-holder in respect of the funds it so allocates.[57] From the point of view of the MSA, no question of fiduciary relationship arises.

[39] The accounting provisions of the MSA reinforce, though are not themselves dispositive of, this conclusion. Chapter 7 of the statute provides for "Financial Matters", including a scheme's financial arrangements and its annual financial statements. Section 35(1) requires the scheme at all times to "maintain its business in a financially sound condition". Section 35(3) requires that it do this amongst other things by having 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

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> "But, despite the separation of trust moneys from an attorney's assets thus affected by section 33(7), 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 . . . and it is the attorney who is entitled to operate on the account and to make withdrawals from it."

[57] Id.

(b) the nett assets as may be prescribed."

[40] During argument counsel described this requirement as the scheme's "solvency margin". Its practical calculation lay at the heart of the difference between the minority and the majority in the Supreme Court of Appeal.

[41] Section 35(3) requires a medical scheme at all times to have aggregate–value assets that exceed aggregate–value liabilities and nett assets. It would flout logic, accounting practice, and principles of trust law for any funds held in trust to be included in the calculation of "assets" for the purposes of this "solvency margin". Because of this, section 35(9)(c) became pivotal in argument. This provision requires medical schemes to include PMSAs in their liabilities. And section 35(3), in turn, requires a scheme's "liabilities" to be exceeded by, on any day, its total assets.

[42] Genesis contended that, if PMSAs were trust funds to be excluded as assets for all purposes, these provisions would require a scheme – to meet the section 35(3) "solvency margin" – to find *outside, non-PMSA* assets to the value of the PMSA trust assets section 35(9)(c) obliges it to include in its liabilities. The logic of this contention is irrefutable. And its implication – that the statute requires medical schemes, running as businesses, to sustain a solvency margin to off-set an accounting-entry liability it may not mirror as an asset – is at odds with the plain commercial logic the statute imposes from the outset on medical schemes. It follows that I differ from the conclusion in the third judgment, by Mojapelo AJ, that there is "no confusion created and there is no need for the medical scheme to raise additional funds to cover the PMSA fund liability".[58]

[43] The difficulty the Registrar's contention would create for a medical scheme were it obliged to render PMSAs as its liabilities without holding them as its assets in any practical sense is underscored by section 35(6)(c). This prohibits a medical scheme from borrowing any money, directly or indirectly, without the prior approval

[58] See [152].

of the Council. This prevents the scheme from borrowing money in the ordinary course of business that could in turn be invested to generate additional revenue for the purpose of meeting the solvency requirements.

[44] The language, logic and practical sense of the statutory scheme thus negate the notion that a medical scheme ordinarily holds PMSA funds as a trustee for its members. It follows from this that section 35(9)(c) entails that Genesis, not its members, are the right-holders of the PMSA funds.

[45] The second judgment places much emphasis on section 37 of the MSA. This provides that a scheme's annual financial statements must be furnished to the Registrar "in the medium and form determined by the Registrar".[59] But section 38 is the provision that gives this operational effect. It is what gives punch to the "form and medium" the Registrar determines. It is the provision that invests the Registrar's prescripts with legal power, because it empowers the Registrar to reject financial statements.

[46] This is what happened here. Genesis's financial statements were rejected because the Registrar considered they did not, in the words of section 38, "correctly reflect" its "financial position". That was because Genesis's statements did not conform with the Registrar's "medium and form" prescriptions, as conveyed in the circulars. The rejection letter itself said:

> "This letter therefore constitutes the notice foreshadowed in section 38 of the MSA in terms of which I reject the [annual financial statements] and returns of the scheme."

[59] See [105] which states that—

> "while the High Court in *Omnihealth* had interpreted certain provisions of the MSA and FIA, it did not construe section 37 which confers on the Registrar the power to determine the form in which financial statements must be submitted. That is the power to issue the circulars which required medical schemes to follow a specific form. As illustrated earlier, the Registrar is free to determine *whatever form* he deems necessary. And this is what he did in the relevant circulars which are still binding on medical schemes because they were not set aside. This means even if the MSA is given an interpretation that differs from *Omnihealth* on the question whether PMSA funds are trust monies, the current facts would still lead to the conclusion that Genesis failed to comply with the form determined by the Registrar."

Nothing could more clearly indicate that what was at issue between the parties, and what Genesis was required to attack, was the Registrar's decision to reject under section 38, not the "medium and form" specified in the circulars that underlay the rejection.

[47] The other sub-provisions of section 35(9), sub-paragraphs (a) and (b), strengthen this conclusion. For simple intelligibility of statutory meaning, section 35(9)(c) must be read with them as being of like kind (*eiusdem generis*). They require that estimates of claims submitted and assessed, but not yet paid, plus claims incurred but not yet submitted, must be included as liabilities. This squares with the requirement of section 35(9)(c) that the amounts standing to the credit of PMSAs must also be included as liabilities. The three kinds of liability: (a) unpaid claims; (b) unsubmitted claims; and (c) PMSAs, are collectively intelligible. All three relate to merely ordinary outgoings for which the scheme is ordinarily liable in the course of its business. None of them are trust assets that the statute, artificially, ordains must be accounted for as liabilities.

[48] The attempt by counsel for the Registrar to extract significance from the opening phrase of section 35(9), "[f]or the purposes of this Act", cuts no ice. The phrase doesn't serve to create an MSA-specific meaning of "liability" that insulates the accounting treatment of the liabilities it mentions from ordinary practice and common sense. It creates an MSA-specific meaning that matches ordinary practice and common sense.

[49] PMSA liabilities are thus not treated separately or differently from any other run-of-the-mill liabilities the scheme must account for in its ledger. They are simply part of the ordinary receipt-and-payment business of the scheme.

[50] The MSA, in requiring that PMSAs be accounted for as liabilities of the scheme, proceeds from the premise that Genesis is the right-holder of PMSA funds

and these funds are indeed unencumbered assets of the scheme; but the statute insists that, together with unpaid claims, amounts standing to the credit of PMSAs must be considered liabilities. That makes both statutory sense and common sense. No conceptual or practical difficulties arise if one accepts, in accordance with the definition of a medical scheme's "business", that all members' contributions, including those later allocated to PMSAs, are received, not as trust property, but as debts the scheme owes the member in return for services it has yet to render.

[51] It is not possible to reverse-engineer any conclusion as to the "juridical nature" of PMSA funds from the regulations promulgated under the MSA, as the dissenting minority in the Supreme Court of Appeal rightly noted.[60] In any event, no aspect of the regulations is inconsonant with the conclusion that PMSAs are assets of the scheme for all intents and purposes.[61]

[52] It must follow from the conclusion that PMSAs are not trust assets that the scheme may, in accordance with section 26(1)(c)(ii),[62] keep the interest accruing from PMSAs in its bank account. Counsel for Genesis explained lucidly in argument why this entitlement makes business sense. Members are entitled at the start of any financial year to the benefit of a three-month projected total of their own PMSA.[63]

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[60] SCA judgment above n 5 at para 22 held:

> "The content of the rules and the regulations cannot be used as an aid to the construction of the MSA."

[61] See particularly regulations 4(4), 10(3) and 29.

[62] Section 26(1)(c) provides:

> "Any medical scheme registered under this Act shall—
>
> . . .
>
> (c) establish a bank account under its direct control into which shall be paid every amount—
>
> (i) received as subscription or contribution paid by or in respect of a member; and
>
> (ii) received as income, discount, interest, accrual or payment of whatsoever kind."

[63] Rule 1.2 of Appendix 2 to Annexure B of Genesis's rules (effective 1 January 2017) provides:

> "At the beginning of each three month period in any financial year, the Scheme will make available to the Savings Account of a member a financial facility not exceeding three times the monthly contributions due in the financial year according to the stipulated column of

This means that the scheme carries, for the rest of the year, a member who invokes his or her total PMSA benefit at the start of the year. The quid pro quo is that the scheme earns interest on the PMSA.

[53] Some days before the hearing,[64] the Court directed Genesis to make its Rules available to the Court. These were mentioned in the parties' argument, but were nowhere in the record. Genesis did so. From them, it transpired that PMSAs are stipulated to "remain the property of the member".[65] It may be, as postulated earlier,[66] that this has the effect that the amounts in PMSAs are trust property. If so, Genesis will, in accordance with the FIA[67] and other comparable statutory provisions dealing with trust property,[68] have to open a separate bank account for PMSAs. And it will have to comply with the accounting provisions of the MSA, regardless of any negative commercial consequences. And it may be that, if Genesis does so, and becomes insolvent, rule 14.5 will have the effect of protecting the amounts in the PMSAs from Genesis's creditors.

[54] But that was not what was at stake in this litigation, and that is not what need be decided now. What was at stake is whether the Registrar's decision under section 38 to reject Genesis's annual financial statements was materially influenced by

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> Annexure A, plus any amount unused from a previous three month period in the same financial year, plus any amount transferred from another medical scheme or unused benefits accumulated from any previous financial year, less all claims paid and deducted from this Account in terms of these rules. Where a member in any financial year withdraws from his Savings Account an amount in excess of the actual amount standing to the credit of such Account, the additional amount withdrawn shall constitute a loan by the Scheme, to the limits set out in these rules, to the member."

[64] Directions dated 31 January 2017 were issued on 1 February 2017 directing Genesis to "make available to the Court, on or before Thursday, 2 February 2017, an electronic copy of its rules as referred to in the respondents' written argument in this Court".

[65] Rule 14.5 of Genesis's rules provides:

> "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 set out in Annexure B of these Rules."

[66] See [31].

[67] Section 4(4) of the FIA.

[68] Section 79 of the Attorneys Act 53 of 1979; section 88 of the Legal Practice Act 28 of 2014; and sections 10 and 12 of the Trust Property Control Act 57 of 1988.

the judgment in *Omnihealth*. Plainly it was. In listing the PMSAs as its assets, Genesis's statements were properly drawn in accordance with the requirements of the statute.

[55] A motivating factor in the reasoning of the majority in the Supreme Court of Appeal was that justice required the interpretation it favoured in order to protect the poorest members of Genesis, since, unable to afford full cover, they had opted to put money to one side to cover eventualities.[69] This proved an unsafe basis of decision. Before us, there was some contention as to whether it was just that a PMSA might fall into a scheme's insolvent estate given that members have through their choice of benefit option specially sought to save. The parties argued both ways, and their arguments proved inconclusive.

[56] What seems clear is that it was wrong to approach PMSAs as though the MSA creates them for the benefit of poorer medical scheme members. This cannot be, simply as a matter of logic, since those who choose to set aside savings must, to do so, have at least some disposable income additional to those who choose options entirely without PMSAs. The fact that they have less disposable income than members who are able to afford the "Rolls Royce" option of total cover puts them, at best, in the "missing middle" category – and not in a category that requires us to twist the ordinary meaning of the statute's language.

Validity of the circulars and impact on this litigation

[57] A final observation must be made. The approach in this judgment to section 37 and the circulars the Registrar issued under that provision differs significantly from that in the second judgment. This judgment seeks to approach the provisions of the statute, including sections 37 and 38, as an integrated whole. This is necessary to attain a proper appreciation of the Registrar's powers. To approach the statute as if sections 37 and 38 create separate and distinct powers is to cleave the Registrar's

[69] The SCA majority considered that "divination of justice" supported its conclusion: see SCA judgment above n 5 at para 54.

powers in two when the statute offers no warrant for this. This does not seem to me to be correct.

[58] To issue a circular that is binding under section 37, without the power to enforce it under section 38 – by rejecting a scheme's financial statements – would be lopsided, limping and illogical. The statute does not do this. It affords the two powers together, and conjoins them. The power to issue circulars informing schemes of the Registrar's determination is linked up with the power to reject a scheme's financial statements when not conforming with that determination. The two provisions when read together make holistic sense.

[59] The converse, too, applies. To set aside the Registrar's rejection of a scheme's financial statements without that entailing the undoing of the circulars from which the rejection sprang would be equally lopsided, limping and illogical.

[60] Given this reading of the statute, and the understanding it provides of the Registrar's power to issue circulars, there is no disregard of this Court's important precedents, adherence to which the second judgment rightly commends.

[61] The second judgment considers the Registrar's circulars binding on Genesis as they have not been set aside. It follows from the discussion above that this approach does not take into account two aspects. First, the statutory bite of the Registrar's determination under section 37 of what "medium and form" a scheme's statements must take springs from section 38.[70] It is this provision that empowers the Registrar to reject a scheme's financial statements if they do not comply with the statute or if they do not "correctly reflect" its "financial position". And it is this power that the Registrar exercised here, and that Genesis was obliged to contest.

[62] Second, the circulars themselves derive their sole force and impact from *Omnihealth*. When *Omnihealth* tumbles, as it must, they must tumble too. It would

[70] See [45] to [46].

be a far-going misconstruction not only of the statute, but of the parties' dispute, to require Genesis to have sought, separately, to set the circulars aside – when what it did do was to challenge the Registrar's decision that sought to enforce the circulars. When *Omnihealth* tumbles, the Registrar's decision tumbles, and with it the circulars, all in one.

[63] Indeed, it was the Registrar who linked non-compliance with the circulars directly to the *Omnihealth* judgment:

> "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 member's personal medical savings accounts."

[64] There is thus no sound basis for suggesting that Genesis or the Registrar "ignored" the circulars.[71] For these reasons, Genesis was not required to seek separately to set the circulars aside.

[65] It follows that Genesis must succeed and the order of the Supreme Court of Appeal be reversed.

Order

[66] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside and substituted with the following:
   "The appeal is dismissed with costs, including the costs of two counsel."
4. The respondents are to pay the applicant's costs, including where applicable the costs of two counsel.

[71] See [111].

JAFTA J (Mojapelo AJ concurring):

[67] I have read the judgment prepared by my colleague Cameron J (first judgment). While I agree that leave to appeal must be granted, I cannot support an order that upholds the appeal. In my view the appeal must be dismissed but for reasons that differ from those furnished by the majority in the Supreme Court of Appeal.

[68] As I see it, the real issue here is whether the applicant has established the ground of review relied on in the High Court. The applicant impugned the decision of the Registrar which rejected its financial statements on the sole ground that it was "materially influenced by an error of law" in contravention of section 6(2)(d) of the Promotion of Administrative Justice Act (PAJA). The determination of this issue requires us to pay attention to the standard applicable to an error of law as a ground for review and apply that test to the current facts. This is the right approach to adjudicating a review claim. However, a good point from which to begin is the relevant statutory framework.

Statutory background

[69] Central to this case is the Medical Schemes Act (MSA). It regulates medical schemes and prescribes how they should carry out their business. To operate lawfully a medical scheme must be registered in terms of the MSA. A medical scheme that wishes to enter the industry must submit an application for registration to the Registrar who is empowered to register a medical scheme if satisfied that it complies with relevant provisions of the MSA and also if the Council for Medical Schemes concurs.[72]

[72] This power is conferred by section 24(1) quoted above n 2.

[70] The Registrar is appointed by the Minister of Health after consultation with the Council.[73] As the executive officer, he or she is mandated to manage the affairs of the Council. The Registrar does this in accordance with the MSA and the policies and directions of the Council.[74] But apart from these duties, the Registrar is also empowered to prescribe the form that must be followed by medical schemes when they submit annual financial statements to him or her. Within four months from the end of a financial year, medical schemes are obliged to submit annual financial statements to the Registrar. Section 37 defines the form and content of these statements.

[71] Section 37(2) provides:

> "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—
>
> (a) a balance sheet dealing with the state of affairs of the medical scheme;
> (b) an income statement;
> (c) a cash-flow statement;
> (d) a report by the auditor of the medical scheme; and
> (e) such other returns as the Registrar may require."

[72] And section 37(6) reads:

> "Notwithstanding anything to the contrary in this section, and without derogating from other powers conferred on the Registrar in terms of this Act, *the Registrar may*, on a quarterly basis, *require the board of trustees to prepare and furnish to him or her financial statements, in any specified medium or form.*"

[73] A plain reading of these provisions shows that the Registrar *determines the medium and form* in which financial statements are submitted. Section 37(6) puts it

[73] Section 18(1) of the MSA.

[74] Section 18(2) and (3) of the MSA.

beyond doubt that the Registrar has a free hand to determine any medium or form he or she deems necessary. Once the form of lodging financial statements has been determined, medical schemes have no choice but to comply. Otherwise they run the risk of having their financial statements rejected by the Registrar for want of compliance with the prescribed medium or form.

[74] Section 38 confers on the Registrar the power to reject any document submitted in terms of section 37 if it does not comply with any provision of the Act or does not correctly reflect the revenue and expenditure or financial position of a medical scheme. This extremely wide power is necessary for the effective enforcement of the Act.

[75] As section 38 is also pivotal to the present issue, it is necessary to quote it. It reads:

> "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—
>
> (a) he or she shall notify the medical scheme concerned of the reasons for such rejection; and
>
> (b) the medical scheme shall be deemed not to have furnished the said document to the Registrar."

[76] Once the Registrar has rejected a document submitted to him or her, he or she is obliged to furnish the medical scheme concerned with reasons for the rejection. If its document is rejected the medical scheme is deemed not to have submitted the document.

[77] Three years after the MSA was enacted, Parliament passed the Financial Institutions (Protection of Funds) Act (FIA). It is apparent from the FIA that it was designed to apply to medical schemes registered in terms of the MSA.

Section 1 of the FIA defines "financial institution" as including any medical scheme contemplated in the MSA. And "registrar" is also defined as including the registrar of medical schemes as defined in the MSA. The FIA also defines "trust property" as:

> "[A]ny corporeal or incorporeal, movable or immovable asset 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 hereinafter referred to as the principal."

[78] In terms of the definition of trust property any asset held in safe custody or controlled or administered or alienated by one person on behalf of another person is regarded as trust property. The person on whose behalf the asset is held, controlled, administered or alienated is referred to as the principal. If the FIA were to apply, this definition would cover funds administered by a medical scheme on behalf of its members. Section 30(1)(a) of the MSA permits medical schemes to allocate PMSAs to its members and funds deposited in those accounts are used to pay for certain health services. These funds are for the exclusive benefit of members.

[79] On the assumption that the definition of trust property and section 4 of the FIA apply to PMSA funds, the High Court in *Omnihealth*[75] held that those funds constitute trust property of members of a medical scheme and must not be treated as part of the assets of the insolvent medical scheme's estate upon insolvency. No appeal was lodged against this judgment.

[80] Relevant sectors adjusted their affairs to accord with the legal principle pronounced in *Omnihealth*. First, the South African Institute of Chartered Accountants (SAICA) amended its accounting rules to accord with the *Omnihealth* principle. Second, the Registrar of medical schemes issued circulars, based on *Omnihealth,* which required financial statements to reflect PMSA funds as trust

[75] See *Omnihealth* above n 1.

monies and not as the scheme's assets. These circulars were issued in terms of section 37(2) of the MSA and constituted the form or medium in which financial statements were to be submitted to the Registrar.[76] From then onwards medical schemes were required to lodge their annual financial statements in the manner prescribed in the circulars. It is now convenient to set out the facts.

Facts

[81] Genesis Medical Scheme (Genesis) submitted to the Registrar financial statements for 2012. But these statements did not comply with the circulars issued by the Registrar. In June 2013 the Registrar rejected them on a number of grounds, including the failure to adhere to the form for drawing up financial statements as set out in the circulars. On 19 June 2013 the Registrar addressed a letter to Genesis which contained his decision and the reasons for it.

[82] As this decision and reasons are at the heart of the dispute, it is necessary to quote the entire letter. It reads:

> "GENESIS MEDICAL SCHEME: REJECTION OF 2012 ANNUAL FINANCIAL STATEMENTS AND STATUTORY RETURNS
>
> We refer to the annual financial statements and annual statutory returns (AFS and returns) of Genesis Medical Scheme for the 2012 financial year.
>
> We have reviewed all the documents submitted in terms of section 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 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:

[76] These were Circulars 38 of 2011, 5 of 2012 and 41 of 2012.

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 member's personal medical savings accounts (PMSA).

2. In addition, the South African Institute of Chartered Accountants (SAICA), after conferring with Accounting Practices 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 of 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 Institutions (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 owing to members who have PMSA balances is understated as it excludes interest rightfully earned on the trust monies compromising the PMSA balances. See note 6 and part 4.5.1.

5. The auditors' assurance report in terms of section 36, 37 and 39 of the MSA is incorrect as it omitted the prescribed paragraph 13, 14 and 15 of the prescribed auditors' assurance report.

The scheme is therefore directed to resubmit the following signed documents within 14 days of receipt of this letter.

- Revised annual statutory returns and Annual Financial Statements reflecting
  - the correct disclosures for the above mentioned areas of concern
  - the revised interest earned on investments and the revised net surplus for the year.
  - Revised statement of financial position and solvency calculation
  - the prescribed paragraph 13, 14 and 15 of the prescribed auditors' assurance report.

A copy of this letter will also be forwarded to the scheme's auditors."

[83] Aggrieved by the rejection of its financial statements, Genesis instituted a review application in the High Court of South Africa, Western Cape Division, Cape Town (High Court). In impugning the Registrar's decision, Genesis raised only one ground of review. Having stated that the application was instituted in terms of PAJA, Genesis averred:

"I am advised that in terms of PAJA a court has the power to judicially review an administrative action if the action was materially influenced by an error of law (section 6(2)(d)) . . . .

. . .

Inasmuch as the rejection is premised on the *Omnihealth* judgment *and the resultant circulars*, this is not a case in which the internal appeal remedies . . . will ultimately be of any assistance to Genesis. The outcome of the appeals is a foregone conclusion.

. . .

The Registrar's refusal was materially influenced by an error of law."

[84] Genesis sought to be exempted from the obligation to exhaust internal appeal remedies because in its view *Omnihealth* was wrongly decided and the internal appeal tribunals were bound by that judgment which could only be reversed by a competent court. Genesis further asserted that the rejection of its financial statements may well be justified if the *Omnihealth* judgment was right.

[85] In opposing the application, the Registrar contended:

> "The Registrar's decision is correct and was based on the applicable statutory framework as interpreted by the Court in the *Omnihealth* judgment. . . .
>
> . . .
>
> It is submitted that the Registrar's decision was based on a correct interpretation of the applicable statutory framework which was, in terms of the court in *Omnihealth* judgment."

[86] Against this background the High Court observed:

> "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."[77]

[87] Having considered the judgment in *Omnihealth*, other authorities and the relevant statutory provisions, the High Court held that the PMSA funds belong to a medical scheme and not members. Accordingly it concluded:

> "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 of law. It therefore follows that the applicant is entitled to the relief it seeks."

[77] See High Court judgment above n 6 at para 38.

[88] It is apparent from this conclusion that the High Court proceeded from the premise that if *Omnihealth* was wrong, without more the Registrar's decision must be set aside as it was "directly and exclusively" predicated on *Omnihealth.* This is at variance with the case pleaded by Genesis. It will be recalled that Genesis had asserted that the decision was based on *Omnihealth* and the circulars. Moreover, the reasons furnished by the Registrar show that the decision was not based solely on *Omnihealth*.

[89] Furthermore, it appears that an incorrect approach was followed by the High Court in evaluating the ground of review advanced by Genesis. The correct approach is set out below.

[90] Both the Registrar and the Council appealed to the Supreme Court of Appeal. By a split of 3 to 2, that Court reversed the High Court's decision. Although the majority held that the PMSA funds constituted trust property in terms of the FIA, they agreed that these funds must be reflected on the financial statements as the scheme's liability to its members. The majority rejected the contention that this form of reporting would be inconsistent with accounting principles.

In this Court

[91] The core issue is whether the impugned decision was vitiated by an error of law. Its determination gives rise to two subsidiary questions. The first is whether an error of law was established. If it was, the second issue is whether that error had materially influenced the decision. Put differently whether the standard laid down for showing that a decision was materially influenced by an error of law has been met. At the hearing it emerged that this matter is not about whether upon insolvency, the PMSA funds form part of the assets of the insolvent medical scheme. Therefore, the question whether in terms of the MSA those funds constitute trust property is relevant to the limited extent of showing the existence of the error of law.

Error of law

[92] Ordinarily an error of law would arise if an administrative functionary misconstrues the enabling provision or misapplies it.[78] The misinterpretation or misapplication giving rise to an error of law must be that of the decision-maker. This is apparent from all the cases cited in footnote 78. In *Administrator, South West Africa* the Court said:

> "In my opinion the Legislature intended that the regulations should be interpreted in the first instance by the inspector and on appeal by the Administrator. It is for the Administrator to decide any legal issues involved in a dispute as to the pegging of a claim, and the most important legal issue is the interpretation of the regulations. It cannot be said that the wrong interpretation of a regulation would prevent the Administrator from fulfilling its statutory function or from considering the matter left to it for decision. On the contrary, in interpreting the regulations the Administrator is actually fulfilling the function assigned to it by the statute, and it follows that the wrong interpretation of a regulation cannot afford any ground for review by the Court."[79]

[93] It follows that the error of law relied on by Genesis must arise from the misinterpretation or misapplication of the MSA provisions by the Registrar which relate to the submission of annual financial statements. This is so because the impugned decision was reached in the exercise of power conferred on the Registrar alone by those provisions. It will be recalled that section 38 of the MSA empowers the Registrar to reject any document submitted in terms of section 37 if it did not comply with any provision of the MSA. It will also be remembered that section 37 authorises the Registrar to determine any form or medium in which annual financial statements must be submitted by medical schemes.

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[78] *Administrator, South West Africa v Jooste Lithium Myne (Eiendoms) Bpk* 1955 (1) SA 557 (A); *Local Road Transportation Board v Durban City Council* 1965 (1) SA 586 (A) (*Durban City Council*); *Reynolds Brothers Ltd v Chairman, Local Road Transportation Board, Johannesburg* 1985 (2) SA 790 (A); and *Hira v Booysen* 1992 (4) SA 69 (A).

[79] *Administrator, South West Africa* id at 569C-E.

[94] In the exercise of this power the Registrar issued circulars that required financial statements to reflect PMSA funds as trust monies. Those circulars continue to apply as they were not challenged in these proceedings. Of course, the circulars were based on *Omnihealth* and SAICA's guidelines which were also influenced by *Omnihealth*. In addition, the reasons underpinning the impugned decision included *Omnihealth*.

[95] But more importantly, sight must not be lost of the fact that *Omnihealth* was a judgment of the High Court that interpreted the MSA and the FIA. It was not challenged on appeal and at the time the impugned decision was taken, it was good law. Therefore relying on the law as interpreted by the High Court, the Registrar *committed no error*. On the contrary, he followed a judgment that was binding on him. It follows in my view that there was no error of law here. But even if such error existed, it could not have influenced the rejection of the financial statements in a material way.

Materiality of an error

[96] As it appears from the statement in *Administrator, South West Africa*, in determining whether a particular decision must be set aside on account of a mistake of law, the common law applies a standard followed in judicial proceedings. In *Goldfields Investment Ltd* this standard was formulated in these terms:

> "A mistake of law per se is not an irregularity but its consequences amount to gross irregularity where a judicial officer, although perfectly well-intentioned and bona fide, does not direct his mind to the issues before him and so prevents the aggrieved party from having his case fully and fairly determined."[80]

[80] *Goldfields Investment Ltd v City Council of Johannesburg* 1938 TPD 551.

[97] According to this test an error of law by itself is not a ground for review. This test was followed in *Durban City Council* and *Reynolds Brothers Ltd*.[81] In the latter case Miller JA stated:

> "The ground upon which the appellant contends that it is proper for the Court to review the decision of the board is that the board wrongly interpreted s 18(3) read with s 1(2)(y) of the Act and by reason of such wrong interpretation failed to apply its mind to certain aspects of the matter, more particularly to the distance separating the mill from Piet Retief station, which, on a proper interpretation of the Act, it was incumbent on the board to consider when deciding whether such station represented a railway service that was 'available' to the appellant for purposes of conveyance of its sugar. The decision of the board would clearly be reviewable upon such a ground."[82]

[98] With reference to some of the cases on this issue in *Hira,* Corbett CJ pointed out that our courts drew a distinction between an error of law on the merits and the mistake which causes the decision-maker to fail to appreciate the nature of the discretion or power conferred upon him and as a result the power is not exercised.[83] It was the latter error which was taken as amounting to a ground of review that justified interference. This accords with the distinction our law draws between a review and appeal. A court does not interfere merely because the decision was wrong in a review application.

[99] In *Hira* the test was reformulated in these words:

> "Whether or not an erroneous interpretation of a statutory criterion, such as is referred to in the previous paragraph (i.e. where the question of interpretation is not left to the exclusive jurisdiction of the tribunal concerned), renders the decision invalid depends upon its materiality. If, for instance, the facts found by the tribunal are such as to justify its decision even on a correct interpretation of the statutory criterion, then normally (i.e. in the absence of some other review ground) there would be no ground for interference. *Aliter*, if applying the correct criterion, there are no facts upon

[81] *Durban City Council* and *Reynolds Brothers Ltd* above n 78.

[82] *Reynolds Brothers Ltd* above n 78 at 801G-I.

[83] *Hira* above n 78 at 90.

> which the decision can reasonably be justified. In this latter type of case it may justifiably be said that, by reason of its error of law, the tribunal 'asked itself the wrong question', or 'applied the wrong test', or 'based its decision on some matter not prescribed for its decision', or 'failed to apply its mind to the relevant issues in accordance with the behests of the statute'; and that as a result its decision should be set aside on review."[84]

[100] This statement reveals that at common law, for an error of law to constitute a ground for review, it must have materially influenced the challenged decision in the sense that it gave rise to one of the recognised grounds of review. *The erroneous interpretation of a statute would vitiate the decision taken only if on the application of the correct construction, the facts do not support the decision.* In terms of this standard it is not enough to merely show that the empowering statute has been incorrectly interpreted. One must go further and apply the correct meaning to the relevant facts. If the decision is justified, interference is not permitted. But if on the application of the right interpretation, the facts do not support the impugned decision, the erroneous interpretation is taken to have materially influenced the decision.

[101] This common law test has been codified in PAJA as one of the grounds of review. In *Johannesburg Municipality* this Court affirmed the standard in these terms:

> "However, a mere error of law is not sufficient for an administrative act to be set aside. Section 6(2)(d) of the Promotion of Administrative Justice Act permits administrative action to be reviewed and set aside only where it is 'materially influenced by an error of law'. An error of law is not material if it does not affect the outcome of the decision. This occurs if, on the facts, the decision maker would have reached the same decision despite the error of law."[85]

[84] Id at 93G-I.

[85] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC) (*Johannesburg Municipality*) at para 91.

Applying the standard

[102] Genesis may succeed on the ground of erroneous interpretation only if it has established that, when the correct construction is applied to the facts, they do not support the Registrar's rejection of its financial statements. This enquiry directs our attention not only to the relevant facts but also to the terms of the rejection itself which exhibits reasons for the decision.

[103] In applying the test we must begin by pointing out that the Registrar did not construe provisions of the MSA erroneously. They were interpreted by the High Court in the fulfilment of its constitutional role of interpreting legislation. Once so interpreted the Registrar was bound to apply the *Omnihealth* construction. He did not himself interpret that statute but merely applied the meaning assigned to it by *Omnihealth*.

[104] In *Re Racal Communications Ltd*, which was quoted with approval by Corbett CJ in *Hira*,[86] Lord Diplock stated:

> "It is a legal landmark; it has made possible the rapid development in England of a rational and comprehensive system of administrative law on the foundation of the concept of *ultra vires*. It proceeds on the presumption that where Parliament confers on an administrative tribunal or authority as distinct from a court of law, power to decide particular questions defined by the Act conferring the power, Parliament intends to confine that power to answering the question as it has been so defined, and if there has been any doubt as to what that question is this is a matter for courts of law to resolve in fulfilment of their constitutional role as interpreters of the written law and expounders of the common law and rules of equity."[87]

[105] Here, while the High Court in *Omnihealth* had interpreted certain provisions of the MSA and FIA, it did not construe section 37 which confers on the Registrar the power to determine the form in which financial statements must be submitted. That is

[86] *Hira* above n 78 at 92G-J.

[87] *Re Racal Communications Ltd* [1980] 2 All ER 634 (HL) at 638G-H.

the power to issue the circulars which required medical schemes to follow a specific form. As illustrated earlier, the Registrar is free to determine *whatever form* he deems necessary. And this is what he did in the relevant circulars which are still binding on medical schemes because they were not set aside. This means even if the MSA is given an interpretation that differs from *Omnihealth* on the question whether PMSA funds are trust monies, the current facts would still lead to the conclusion that Genesis failed to comply with the form determined by the Registrar.

[106] The fact that the circulars in question remain binding in requiring financial statements to reflect the PMSA funds as assets of members cannot be gainsaid. The first judgment does not address the status and legal effect of those circulars, following the overruling of *Omnihealth* which constitutes a separate act. On the authority of this Court, even if those circulars were invalid, they continue to bind medical schemes until set aside on review.[88]

[107] In *Merafong* Cameron J reaffirmed the principle that an invalid administrative action is binding in these terms:

> "The import of *Oudekraal* and *Kirland* was that government cannot simply ignore an apparently binding ruling or decision on the basis that it is invalid. The validity of the decision has to be tested in appropriate proceedings. And the sole power to pronounce that the decision is defective, and therefore invalid, lies with the courts. Government itself has no authority to invalidate or ignore the decision. It remains legally effective until properly set aside."[89]

And later he emphasised:

> "But it is important to note what *Kirland* did not do. It did not fossilise possibly unlawful – and constitutionally invalid – administrative action as indefinitely

[88] *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC) *(Kirland)*; *Merafong City Local Municipality v AngloGold Ashanti Limited* [2016] ZACC 35; 2017 (2) SA 211 (CC); 2017 (2) BCLR 182 (CC) (*Merafong*); and *Department of Transport v Tasima (Pty) Limited* [2016] ZACC 39; 2017 (2) SA 622 (CC); 2017 (1) BCLR 1 (CC) (*Tasima*).

[89] *Merafong* id at para 41.

> effective. It expressly recognised that the *Oudekraal* principle puts a provisional brake on determining invalidity. The brake is imposed for rule of law reasons and for good administration. It does not bring the process to an irreversible halt. What it requires is that the allegedly unlawful action be challenged by the right actor in the right proceedings. Until that happens, for rule of law reasons, the decision stands."[90]

[108] In these proceedings Genesis has not challenged the validity of the circulars. As a result, the respondents contended in their written submissions that even if *Omnihealth* was wrong, the impugned decision cannot be set aside because:

> "Genesis' 2012 [financial statements] did not comply with the form determined by the Registrar as per circular 41 and the Registrar accordingly rejected Genesis' 2012 [financial statements]."

[109] This argument together with decisions like *Tasima, Merafong* and *Kirland* creates an insurmountable obstacle in the way of setting aside the impugned decision. The principle of judicial precedent obliges us to take the circulars in question as binding even if they were invalid. For as long as they are not set aside by a competent court on review they are binding on all medical schemes.

[110] This Court has affirmed judicial precedent in *Camps Bay*.[91] There Brand AJ said:

> "Observance of the doctrine has insisted upon, both by this Court and by the Supreme Court of Appeal. And I believe rightly so. The doctrine of precedent not only binds lower courts, but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong. *Stare decisis* is therefore not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn

[90] Id at para 43.

[91] *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] ZACC 19; 2011 (4) SA 42 (CC); 2011 (2) BCLR 121 (CC) (*Camps Bay*).

> is a founding value of our Constitution. To deviate from this rule is to invite legal chaos."[92]

[111] Therefore when the Registrar considered whether the financial statements submitted by Genesis complied with the form in which they should have been submitted, he was bound by the circulars in question. This was the only form determined by him. Consequently it was not open to the Registrar to accept the financial statements that were not in compliance with the required form. He could not ignore the circulars.

[112] A similar situation arose in *Kirland* where an invalid approval to establish a private hospital was granted. This Court rejected argument by the MEC for Health to the effect that the invalid approval had no legal effect. There Cameron J stated:

> "By corollary, the Department's argument entails that administrators can, without recourse to legal proceedings, disregard administrative actions by their peers, subordinates or superiors if they consider them mistaken. This is a licence to self-help. It invites officials to take the law into their own hands by ignoring administrative conduct they consider incorrect. That would spawn confusion and conflict, to the detriment of the administration and the public. And it would undermine the courts' supervision of the administration."[93]

[113] It follows that it cannot be said here that the Registrar was entitled to disregard the circulars and accept the financial statements submitted by Genesis. If he did so, he would have acted in breach of section 37 of the MSA which requires in peremptory terms that financial statements be submitted in the form determined by the Registrar.

[114] The fact that the circulars were based on *Omnihealth* has little effect, if any, on this enquiry. For as long as it is not shown that in issuing the circulars in question the Registrar failed to comply with section 37 of the MSA, the circulars must be followed.

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[92] Id at para 28.

[93] *Kirland* above n 88 at para 89.

Moreover, SAICA too had amended its accounting practices as a result of *Omnihealth*. It will be remembered that section 37 requires that financial statements should adhere to those accounting practices.

[115] To suggest that the circulars automatically fell away upon setting aside *Omnihealth* as the first judgment does, misses the point that these circulars constitute administrative action distinct and separate from *Omnihealth* which was a judicial decision. If, as here, an appeal court overturns a judicial decision, it does not automatically follow that all administrative decisions based on that judicial decision are also set aside. The claim brought by Genesis was limited to challenging the validity of the rejection of its financial statements and nothing else.[94] Therefore, excluding the circulars from Genesis' attack does not amount to "a far-going misconstruction" of the parties' dispute suggested by the first judgment.[95]

[116] It cannot be gainsaid that the circulars in question constitute administrative action. Those circulars were issued by the Registrar, exercising a public power conferred on him by section 37 of the MSA. They are an outcome of the exercise of public power.[96]

[117] According to authorities like *Tasima*, *Merafong* and *Kirland*, even if these circulars were invalid for the reason that they were based on *Omnihealth*, they continued to be binding until set aside on review. Their validity must be challenged in a formal application. This is what *Kirland* proclaimed. Therefore, there is no legal justification for deviating from the authorities mentioned here. Unquestionably this Court is bound by its own decisions from which it can depart only if satisfied that they were clearly wrong. To do otherwise would be a breach of the rule of law which forms part of the supreme law, the Constitution which this Court is duty-bound to

[94] See [3].

[95] See [62].

[96] *Minister of Health v New Clicks South Africa (Pty) Ltd* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at paras 128 and 135; and *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* [2009] ZASCA 87; 2010 (3) SA 589 (SCA) at para 10.

uphold. The proposition that the circulars tumble together with *Omnihealth* which is the mainstay of the first judgment on the validity of the circulars, is at odds with all of this. No authority was cited for the proposition.

[118] The flaw that lies at the heart of the proposition that if *Omnihealth* tumbles, the circulars must tumble too is that it proceeds from the wrong assumption. This is if *Omnihealth* was wrongly decided and the circulars were based on it, they too must be invalid. But this does not mean that those circulars, invalid as they may be, evaporate into thin air. They continue to exist at the level of fact until set aside on review. And decisions of this Court tell us that invalid as they may be, for as long as they continue to exist as a matter of fact, the circulars are binding. Overruling *Omnihealth* does not set aside the circulars but renders them invalid. Therefore, the tumbling down mentioned in the first judgment does not extend beyond the question of invalidity. It does not wipe the circulars into non-existence. Hence they remain binding until set aside on review.

[119] The conclusion reached in the first judgment does not only depart from authorities but also suggests that section 37 of the MSA plays an unimportant role in the enquiry on the validity of the circulars.[97] The conclusion focuses on section 38 only despite the fact that in its text section 38 expressly refers to section 37 and affirms the latter as the only vehicle through which financial statements may be submitted and that if in the opinion of the Registrar, the submitted statements do not comply with section 37, he may reject them. This is exactly what has occurred here. Genesis submitted financial statements which were not in compliance with section 37, pertaining to the form set out in the circulars.

[120] To hold that the Registrar should have accepted those financial statements means that, despite the peremptory language of section 37, the Registrar may not reject financial statements which, in his opinion, do not comply with section 37. This section stipulates that "annual financial statements . . . shall be furnished to the

[97] See [45] and [57].

Registrar in the medium and form determined by the Registrar". It is apparent from the provision that for its operation there must be a form determined by the Registrar for the lodgement of financial statements by medical schemes. Absent the form, the section is unworkable because in order to comply with the section financial statements must adhere to a form determined by the Registrar and by him or her alone.

[121] Therefore, to conclude that financial statements may be submitted to the Registrar even if they do not comply with the form determined by him would be in conflict with the express language of section 37. All of this has nothing to do with *Omnihealth* which was not called upon to interpret section 37. But here the section is pivotal to the decision to reject financial statements submitted by Genesis.

[122] In addition, the conclusion of both the High Court and the first judgment on the validity of the rejection suggests that the Registrar in June 2013, when he took the impugned decision, should not only have ignored the circulars but must have known then that the decision in *Omnihealth* was wrong. As a result he could disregard that judgment. This is remarkably dangerous. Administrative officials are not entitled to second-guess judicial decisions and if in their opinion a decision by a court is wrong, to ignore it. Especially where the judicial decision was not challenged on appeal. Such an approach is a recipe for chaos.

[123] Furthermore, the reasons furnished by the Registrar for his decision include the fact that "the auditors' assurance report in terms of sections 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". The Registrar then directed Genesis to resubmit within 14 days annual financial statements in which the defects, including the prescribed paragraphs 13, 14 and 15 of the auditors' assurance report, were cured. In this regard Genesis was called upon to include the omitted paragraphs.

[124] Significantly, Genesis does not dispute this omission in its papers. Instead it confines itself to contending that *Omnihealth* was wrong. As mentioned, establishing

that *Omnihealth* was wrong alone does not take Genesis beyond showing that the circulars were based on an incorrect legal position and that in rejecting its financial statements, the Registrar applied an incorrect interpretation that was announced in *Omnihealth*. This falls short of proving that the error in question materially influenced the rejection in the sense pointed out by authorities.

[125] The first judgment overrules *Omnihealth* and holds that properly construed the MSA does not mean that the PMSA funds constitute trust property. It relies on this conclusion to set aside the impugned decision, just like the High Court did. This deviates from the decision of this Court in *Johannesburg Municipality* and that of the Supreme Court of Appeal in *Hira*. In *Johannesburg Municipality* this Court said an error of law is not material, even if it had influenced the decision challenged, if the outcome would have been the same on the facts if the correct principle was followed. Here this is exemplified by the circulars and their legal effect. Even if the Registrar had applied the meaning ascribed to the MSA in the first judgment, he would still have rejected the financial statements submitted by Genesis for not complying with the binding circulars.

[126] Here this Court is obliged by judicial precedent to follow its own previous decisions. On the one hand those decisions are *Tasima*, *Merafong* and *Kirland* as well as *Johannesburg Municipality*, on the other. Conflicting messages that come from our decisions with regard to precedent must be avoided. They confuse lower courts. Those courts end up not knowing which of our decisions they must follow. Especially where a later decision does not overrule the earlier one but contradicts it.

[127] A timely caution on the need to respect and uphold precedent was sounded recently in *Tasima*. We were again reminded that we may depart from our previous decisions only if convinced that they were clearly wrong.[98] However, it was also pointed out in *Tasima* that we have been guilty of not adhering to judicial precedent in

[98] *Tasima* above n 88 at para 226.

specific cases in the past.[99] Now is the time to do so. To do otherwise is at odds with our primary duty which is to uphold the Constitution and the rule of law that forms part of the Constitution.

[128] It is apparent from the letter quoted in [82] that the rejection was based on five grounds. These included the failure to comply with *Omnihealth*; the prescribed paragraphs 13, 14 and 15 in the auditors' assurance report; the relevant circulars and the accounting standards determined by SAICA. It will be recalled that section 37(4) demands that financial statements be prepared in accordance with general accepted accounting principles.[100] The financial statements submitted by Genesis did not comply with the standard prescribed by SAICA which required that PMSA funds be reflected as trust monies in financial statements. Whether this rule was also invalid because it was based on *Omnihealth* is beside the point.

[129] Another fact that would have led to the same outcome is the reason that the auditors' assurance report omitted prescribed information. That omission too would have entitled the Registrar to reject the financial statements lodged by Genesis.

[130] I have read the judgments of Mojapelo AJ (third judgment) and Zondo J (fourth judgment). I concur in the third judgment.

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[99] Id at paras 221-3.

[100] Section 37(4) of the MSA provides:

> "The annual financial statements shall—
>
> (a) be prepared in accordance with general accepted accounting practice;
>
> (b) fairly present the state of affairs and the business of the medical scheme and the results thereof at the end of the financial year concerned and the surplus or deficiency of the medical scheme for that financial year;
>
> (c) by means of figures and a descriptive report, set out and explain any matter or information material to the affairs of the medical scheme; and
>
> (d) be accompanied by the management accounts in respect of every benefit option offered by the medical scheme indicating the financial performance thereof and the number of members enrolled per option."

[131] Regarding the strident and emotive critique in the fourth judgment, my response will be limited to pointing out three fundamental errors I believe it makes. The first is that it proceeds from the mistaken premise that it was incumbent upon the respondents to say in their affidavit that, even if *Omnihealth* was wrong, the impugned decision was correct for some other reason.[101] This incorrect premise colours a host of other findings and the conclusion reached in the fourth judgment.[102]

[132] This approach is mistaken because it overlooks the basic point which is that it was Genesis, and not the respondents, which relied on the error of law as a ground for review. It follows therefore, that the onus was on Genesis to prove the ground on which it relied, before the impugned decision could be set aside. In establishing this ground Genesis may not be helped by what was omitted in the opposing papers. Even if there were no opposing papers, Genesis would not succeed if it did not, on its own papers, prove the ground relied on.

[133] Genesis was required to prove that ground with all its indivisible components. Those are that an impugned decision was materially influenced by an error of law. It was not enough for Genesis to merely show that the rejection was influenced by an error of law. It needed to prove that that error had materially influenced the decision. It was not for the respondents to plead and prove that the error had not materially influenced the decision. Section 6(2)(d) of PAJA, as construed by this Court in *Johannesburg Municipality*, means that an applicant like Genesis must not only prove the existence of an error of law but must also show the materiality of the error. That is, on the facts, the decision-maker would not have reached the same decision without the error.

[134] This approach was followed also by the Supreme Court of Appeal in *Security Industry Alliance*. There Mpati P said:

[101] See [164].

[102] See [165] to [171].

> "It follows that, contrary to the view conveyed to the Minister by the Authority that current legislation did not permit it to classify businesses by size or income in order to arrive at differentiated fees, it was so permitted. The Authority thus misconstrued the provisions of the repealed legislation which empower it to make regulations. It committed an error of law. The question to be considered now is whether the error of law was material. In *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (6) SA 182 (CC) Jafta J observed that an error of law is not material if it does not affect the outcome of the decision. This occurs, he said, if, on the facts, the decision-maker would have reached the same decision, despite the error of law."[103]

[135] The second error in the critique is that my conclusion that Genesis has failed to prove the materiality of the error relied on was impermissibly based on "an annexure to one of the affidavits and not from the respondents' answering affidavit".[104] Relying on *D & F Wevell Trust,* the fourth judgment boldly proclaims:

> "If a litigant is not permitted to engage in a trial by ambush, it follows that a court may also not do so."

[136] I must confess that I do not understand what this means because reliance on an annexure to the founding affidavit of Genesis can hardly be described as amounting to a court engaging in a trial by ambush. Courts do not engage in litigation but in adjudication. In fact *D & F Wevell Trust* is not relevant to any of the present issues. It is apparent from the judgment that there the Court was dealing with reliance on an annexure that was "undated, unsigned and unattested and no indication as to its author(s) appear from it".[105] This annexure was merely identified as volume 2 of a report by Ernst & Young and the annexure itself comprised 25 pages. In rejecting reliance on it, Cloete JA said:

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[103] *Security Industry Alliance v Private Security Industry Regulatory Authority* [2014] ZASCA 99; 2015 (1) SA 169 (SCA) at paras 25-6.

[104] See [171].

[105] *Minister of Land Affairs and Agriculture v D & F Wevell Trust* [2007] ZASCA 153; 2008 (2) SA 184 (SCA) at para 17.

> "The passage in the Ernst & Young report relied on in the argument advanced in this court comprises less than half a page of the 25 pages annexed. Specific attention was not drawn to this passage in Andreas' affidavit. The import of the passage is that valuers who were appointed by or on behalf of the respondents met with Visagie during August 2003 to review the valuations of the farms made by the former; that the valuations were increased in a report backdated to 23 June 2003; and that the valuer principally responsible for the valuations was unable to justify the increases to Ernst & Young. The submission in argument was that all of this is evidence of a fraud perpetrated on the respondents. But the valuation submitted by the applicants was done by Roux, who is not implicated in the passage relied on in the report; and Roux did his valuation on 4 March 2003, some four months before the meeting to which the report refers. There is simply nothing to suggest that the applicants (or Roux) were a party to any fraud. The valuers present at the meeting were not appointed by the applicants; according to the applicants, they had nothing to do with Visagie (see paragraphs [19] and [20] above); and no such connection was remotely demonstrated by any credible evidence produced by the respondents."[106]

[137] That is not what happened here. The annexure we are concerned with here is a letter of two pages that was annexed to the founding affidavit by Genesis. And this annexure was properly introduced into evidence by the deponent of the affidavit to which it was attached. It was introduced in these terms:

> "On 19 June 2013 the Registrar addressed to Genesis the letter of which a copy is annexed marked "DM5". He rejected the 2012 AFS of Genesis. He did so on the basis of the *Omnihealth* judgment and the aforesaid three circulars."

[138] And on the circulars the affidavit by Genesis avers:

> "Circular 38 does not have a binding effect on medical schemes. It merely contains guidelines, and has no regulatory effect. Neither the MSA nor the regulations make any reference to circulars . . . .

[106] Id at para 44.

> Nevertheless, circulars 41 of 2012, of which a copy is annexed marked "DM4" sought to prescribe the format for statement of comprehensive income and the disclosure required for PMSAs."

[139] But apart from the fact that the annexure in question was introduced into evidence by Genesis, it constitutes the expression of the impugned decision. Put differently, it is the embodiment of the Registrar's decision and the reasons underpinning it. Therefore, it is difficult for me to appreciate how it can be impermissible for a court to ground its reasoning on the decision that it is called upon to set aside. As I see it, it would be impossible for any court to adjudicate a review without evaluating the decision it is asked to set aside on review.

[140] In the present circumstances reliance on *D & F Wevell Trust* was misconceived. But not only that. The conclusion that one was engaged in a trial by ambush does not accord with authority of this Court in *KwaZulu-Natal Joint Liaison Committee*.[107] There the applicant had sought payment of certain amounts based on a breach of contract. During the hearing in this Court and responding to questions, senior counsel for the applicant had confirmed that his client "stood or fell" on the claim based on contract. This did not preclude the majority in this Court from granting the applicant relief based on departmental circulars, having found that no contract existed.

[141] The last error relates to circulars. The fourth judgment repeats what is stated in the first judgment and equates *Omnihealth* to walls of a house and the circulars as its roof. The logic is stated to be that if the walls fall, so does the roof. Examples of cases where regulations were not set aside when the empowering legislation was declared invalid, are cited for the proposition. But all of this overlooks a fundamental point. This is whether the declaration of invalidity in relation to the empowering

[107] *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, Kwazulu-Natal* [2013] ZACC 10; 2013 (4) SA 262 (CC); 2013 (6) BCLR 615 (CC).

statute meant that the regulations made under it, were set aside without any reference to them.

[142] A point missed in the analysis of the fourth judgment is that on the assumption that *Omnihealth* was wrong, my judgment accepts that upon *Omnihealth* being overruled, the circulars become invalid but remain in existence at the level of fact until they are set aside. This is what *Kirland* held. An administrative act that is invalid in law continues to exist as a matter of fact until set aside. As a matter of logic and common sense, if *Omnihealth* is overruled that means that the legal basis of the circulars is removed and therefore they become invalid for lack of a legal basis. But this does not mean that they do not exist as a matter of fact. Both *NSPCA*[108] and *Premier, Limpopo Province*[109] are not authority for the proposition that if an Act of Parliament is declared invalid, the regulations made under it are set aside. At best the declaration of invalidity in those circumstances render the regulations invalid but does not set them aside.

[143] For these reasons, which differ in substance from those of the majority in the Supreme Court of Appeal, I would grant leave to appeal but dismiss the appeal.

MOJAPELO AJ (Jafta J concurring):

Introduction

[144] I have had the pleasure of reading the judgments written by my Colleagues, Cameron J, Jafta J and Zondo J. Although I appreciate certain parts of the first judgment, I agree with the reasoning and outcome of the second judgment that would

[108] *NSPCA v Minister of Agriculture, Forestry and Fisheries* [2013] ZACC 26; 2013 (5) SA 571 (CC); 2013 (10) BCLR 1159 (CC).

[109] *Premier, Limpopo Province v Speaker of the Limpopo Provincial Legislature* [2012] ZACC 3; 2012 (4) SA 58 (CC); 2012 (6) BCLR 583 (CC).

grant leave to appeal, but dismiss the appeal. I would also take the following further considerations into account when dismissing the appeal.

[145] In holding that PMSAs constitute trust property, *Omnihealth* was dealing with an insolvency situation where the rights of the holders of those accounts were directly in issue. The effect of the *Omnihealth* decision is that protection was given to the interests of those members holding PMSAs in the event of insolvency. Prior to the events that gave rise to this case, the decision in *Omnihealth* was good law on the status of PMSAs. Genesis appears to have deliberately submitted non-compliant annual financial statements so as to engineer a pure legal question, namely, whether PMSAs constitute trust property. The effect of the first judgment is that a reconsideration of rights of members of a medical scheme is to be made. An insolvency situation or similar matter where rights of members are directly before court would be a better occasion. That, however, is only one of the concerns.

Creating a trust relationship

[146] As mentioned in the first and second judgments, a medical scheme is a financial institution for purposes of the FIA.[110] For purposes of this judgment, it is necessary to reiterate that the FIA defines trust property as—

> "any corporeal or incorporeal, movable or immovable asset 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 hereinafter referred to as the principal."[111]

[147] The question that arises in the matter before us is: when is the trust relationship created? In general, a trust can be created through legislation, court orders, wills, or

[110] In terms of section 1 of the FIA, a "financial institution" is defined to include—

> "(b) any medical scheme contemplated in section 1 of the Medical Schemes Act, 1998."

[111] See section 1 of the FIA.

by contract between living persons.[112] Section 30(1)(e) of the MSA empowers the medical scheme to allocate funds to the PMSAs.[113] The trust relationship in this case is created when the medical scheme creates and allocates funds to a PMSA of a particular member. Once created, the medical scheme becomes the holder of funds as "trust property" as contemplated in the FIA. While the medical scheme (as trustee) administers the trust property, the members (as trust beneficiaries) retain beneficial interest in the trust property.[114] The property which is held in trust does not lose the character of trust property just because the trustee has intermingled it with what is not trust property. It is for the medical schemes to ensure compliance with the provisions of section 4 of the FIA.[115] Breach of the law in regard to dealings with trust property is an unlawful act that invites legal sanction but does not change the nature of the relationship between the trustee (or medical scheme), trust property and trust beneficiary (or member) as established by the FIA.[116]

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[112] See [29]. See Olivier et al *Trust Law and Practice* (LexisNexis, Durban 2008) at 2-5. There is also a distinction between a trust in the wide sense and a trust in the strict sense. Most relevant for this judgment is a trust in the wide sense which exists "whenever someone is bound to hold or administer property on behalf of another or for some impersonal object and not for his or her own benefit". See Cameron above n 51 at 3. See also MJ De Waal "The Law of Succession (including the Administration of Estates) and Trusts" (2007) *Annual Survey of South African Law* 1055 at 1075 where the author indicates that—

> "trusts [in the wide sense] include attorneys' trust accounts and 'trust property' held by financial institutions on behalf of investors. As far as these examples are concerned (there are also others), there are special statutory measures aimed at the protection of the money in such accounts in the form of section 78(7) of the Attorneys Act 53 of 1979 and section 4(5) of the Financial Institutions (Protection of Funds) Act."

[113] The subsection provides as follows:

> "(1) A medical scheme may in its rules make provision for—
>
> . . .
>
> (e) the allocation to a member of a personal medical savings account, within the limit and in the manner prescribed from time to time, to be used for the payment of any relevant health service".

[114] *Estate Kemp v McDonald's Trustee* 1915 AD 491 at 499, 504 and 508.

[115] In particular see section 4(4) of the FIA which provides that—

> "[a] financial institution must keep trust property separate from assets belonging to that institution, and must in its books of account clearly indicate the trust property as being property belonging to a specified principal."

It is worth noting that Circular 38 indicates that PMSA contributions should be kept in a separate trust bank account.

[116] Section 10 of the FIA, headed "Offences", reads as follows:

> "(1) A person who contravenes or fails to comply with any provision of Chapter 1 is guilty of an offence and on conviction liable to a fine not exceeding R10 million or to

[148] It is an established principle in our law of statutory interpretation that "every part of a [s]tatute should be so construed as to be consistent, so far as possible, with every other part of that statute, and with every other unrepealed statute enacted by the same Legislature".[117] This must mean that, unless there is a tension between the FIA and the MSA, the Acts must be read together. Seeing that the trust relationship is triggered upon allocation as contemplated in section 30(1)(e), the relevant provisions of the FIA come into play at that stage. I see no difficulty in reading the relevant provisions of the MSA and FIA together – which would lead to the conclusion that PMSAs established in terms of the MSA are trust property as contemplated in the FIA.

[149] Once a PMSA has been created it is administered in terms of the regulations and the rules of the medical scheme. The regulations under the MSA as well as the rules of Genesis clearly emphasise the juridical nature of PMSA funds as trust property.[118] This emphasis from the rules and regulations should not be construed as a "bottom-up" approach as the trust nature of PSMAs is created at the time when the funds are allocated in terms of section 30(1)(e) of the MSA. The regulations and the rules merely provide a basis for the protection and administration of PMSAs as trust

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imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment.

(2) A court may, in addition to any penalty it may impose in terms of subsection (1), order that such person—

(a) pay the institution or principal concerned any profit he or she made; and

(b) compensate the institution or principal concerned for any damage suffered, as a result of the contravention or failure.

(3) A court may, in addition to any penalty imposed in terms of subsection (1) and an order made in terms of subsection (2), order that such person may not serve as a director, member, partner or manager of any financial institution for such period as the court may deem fit."

[117] *Chotabhai v Union Government (Minster of Justice) and Registrar of Asiatics* 1911 AD 13 at 24. See also *Shaik v Minister of Justice and Constitutional Development* [2003] ZACC 24; 2004 (3) SA 599 (CC); 2004 (4) BCLR 333 (CC) at para 18 where the principle enunciated in *Chotabhai* was applied when interpreting section 28(6)(a) of the National Prosecuting Authority Act 32 of 1998 against section 196(1)(a) of the Criminal Procedure Act 51 of 1977.

[118] See regulation 10 of the MSA, in particular regulation 10(3) and (4) which caters for, *inter alia*, (i) the funds being used for the benefit of a particular member; and (ii) the transfer of a member's funds when such member changes medical schemes.

property and, according to the existing law, the protection continues to operate upon the insolvency of the medical scheme.

The accounting problem

[150] From a certain perspective, the problem is seen as an accounting one. Hence in *Omnihealth* Du Plessis J, expressly (and correctly) disavowed any expertise in the accounting field and directed his mind to answering the legal question.[119] What determines whether there is a trust created is the nature of the relationship. Both the High Court in *Genesis* and the minority in the SCA saw an accounting absurdity which results from PMSA funds having to be reflected as a liability in the financial statements of the medical scheme while it is seen as a trust asset and not a free asset of the medical scheme.[120] They see the basic double entry rule of accounting as being offended by the interpretation that makes PMSA funds trust property.[121] However, it must now be accepted that what was perceived as an accounting difficulty or absurdity is no difficulty at all. The experts in that field have resolved the problem and the circulars and actions of the Registrar of Medical Schemes are based on their guidance.[122] The South African Institute of Chartered Accountants (SAICA) has given guidance which complies with International Financial Reporting Standards (IFRS) and the Registrar issued circulars to the medical schemes based thereon. With the accounting "problem" resolved, what remains is for medical schemes to comply. This is what the Registrar of Medical Schemes sought to enforce by rejecting the annual financial statements of Genesis, as he is authorised by the MSA to do.[123]

[151] Although a reading of Circular 38, read together with the clarification thereof issued by the Council for Medical Schemes, indicates that the savings plan monies

[119] *Omnihealth* above n 1 at 7.

[120] High Court judgment above n 6 at para 37 and SCA judgment above n 5 at para 7.

[121] Id.

[122] See Circular 38 of 2011, Circular 5 of 2012 and Circular 41 of 2012.

[123] Section 38 of the MSA.

should be "*treated* off balance sheet", it clearly indicates that—

> "additional disclosure is required to enable users of the financial statements to understand the impact of the transactions on the financial position and financial performance of the scheme; such disclosure being provided in terms of paragraph 17 of IAS 1 *Presentation of financial statements* of IFRS. Annexure A to this circular provides examples of additional disclosure required to give effect to the requirements of paragraph 17."

[152] There is, on this approach, no confusion created and there is no need for the medical scheme to raise additional funds to cover the PMSA fund liability. The medical scheme would, in any event have to keep funds available to cover the interest of a member who is a holder of a PMSA in the event of that member opting to move to another medical scheme.

Conclusion

[153] Following the decision in *Omnihealth*, there is a layer of protection enjoyed by members of medical schemes with PMSAs which operates in the case of insolvency. Medical schemes are primarily for the protection of the interest of members. The members enjoy a protection on insolvency of a scheme. The financial statements of each medical scheme should, however, reflect that position. This Court is invited to make a decision with far-reaching consequences, taking away rights without proper facts and articulation. I would opt not to. A self-created challenge against the decision of the Registrar, which is authorised by law, is not such an occasion.

[154] I would, for these reasons, in addition to all the reasons set out in the second judgment, grant leave to appeal and dismiss the appeal with costs.

ZONDO J (Mogoeng CJ, Cameron J, Froneman J, Khampepe J, Madlanga J, Mhlantla J and Pretorius AJ concurring):

Introduction

[155] I have had the benefit of reading the judgments prepared by my Colleagues, Cameron J (first judgment), Jafta J (second judgment) and Mojapelo AJ (third judgment). I concur in the first judgment but write separately to give additional reasons why the first judgment's conclusion and order are correct and why I am unable to agree with the second judgment.

Background

[156] The Registrar of Medical Schemes (Registrar or first respondent) rejected Genesis Medical Scheme's (Genesis) annual financial statements and returns in 2012 on the bases that those financial statements and returns did not comply with certain provisions of the Medical Schemes Act[124] (MSA) as interpreted by Du Plessis J in *Registrar of Medical Schemes v Ledwaba NO*[125] (*Omnihealth*) and did not correctly reflect Genesis' revenue.

High Court

[157] Genesis brought a review application in the High Court of South Africa, Western Cape Division, Cape Town (High Court) to have the Registrar's decision set aside. The sole ground upon which Genesis relied for its review application was that the Registrar's decision was materially influenced by an error of law as envisaged in section 6(2)(d) of the Promotion of Administrative Justice Act[126] (PAJA). Genesis' contention that the Registrar's decision was materially influenced by an error of law was based on the proposition that the *Omnihealth* judgment was wrongly decided. The Registrar and the Council for Medical Schemes (Medical Council or second respondent) opposed the review application on the sole ground that there was no error of law.

[124] 131 of 1998.

[125] *Registrar of Medical Schemes v Ledwaba NO* [2007] ZAGPHC 24.

[126] 3 of 2000. Section 6(2)(d) is quoted in [160] below.

[158] The High Court held that the Registrar's decision was materially influenced by an error of law in that *Omnihealth* had been wrongly decided and the Registrar had made his decision on the basis of *Omnihealth*.[127] It granted Genesis' review application and set aside the Registrar's decision.[128]

Supreme Court of Appeal

[159] Subsequently, the Supreme Court of Appeal upheld an appeal against the decision of the High Court and set it aside.[129] That, in effect, restored the Registrar's decision. This matter now comes before us by way of an application for leave to appeal against the decision of the Supreme Court of Appeal.

In this Court

The appeal

[160] I have indicated that the ground upon which Genesis sought to have the Registrar's decision reviewed and set aside was that his decision was materially influenced by an error of law. This is a ground of review for which provision is made in section 6(2)(d) of PAJA. This section provides:

> "(2) A court or tribunal has the power to judicially review an administrative action if—
>
> . . .
>
> (d) the action was materially influenced by an error of law . . . ."

[161] The second judgment concludes that Genesis has failed to show the section 6(2)(d) ground in this matter and that, therefore, the appeal falls to be dismissed. For this conclusion, the second judgment gives three reasons. The first is that there was no error of law here. The second is that, even if it could be said that

[127] *Genesis Medical Scheme v Registrar of Medical Schemes* [2014] ZAWCHC 206; 2015 (4) SA 91 (WCC) (High Court judgment) at para 42.

[128] Id at para 43.

[129] *Registrar of Medical Schemes v Genesis Medical Scheme* [2016] ZASCA 75; 2016 (6) SA 472 (SCA).

there was an error of law, that error of law was not material as required by section 6(2)(d). The third is in effect that, even if there was a material error of law, the appeal should still fail because Genesis did not seek to have Circulars 38 and 41 that were issued by the Registrar stipulating the form in which medical schemes were to submit their annual financial statements, set aside. The second judgment is to the effect that those Circulars are administrative actions and, as such, until they are set aside, they remain valid and binding upon medical schemes which would be required to comply with them even if there was an error of law. I deal with these topics in turn.

Was there an error of law?

[162] The second judgment expresses the view that the Registrar did not commit an error of law in rejecting Genesis' annual financial statements because, in doing so, he was giving effect to the High Court decision in *Omnihealth*. In other words, the second judgment says that it could not be an error of law for the Registrar to base his decision on a judgment of a court of law that governed the situation with which he had to deal.

[163] A reading of the affidavits filed by the parties in the High Court reveals that the parties approached the matter on the basis that the Registrar gave the relevant provisions of the legislation the same interpretation that Du Plessis J gave to the same provisions in the *Omnihealth* judgment. The approach was, therefore, that, if that interpretation is found to be wrong in law, the Registrar's decision to reject Genesis' annual financial statements and returns was materially influenced by an error of law as envisaged in section 6(2)(d). That is why, in taking the position in the answering affidavit that there was no error of law, the respondents focused their attention on whether the *Omnihealth* judgment was correct. They did so because they accepted that, if the *Omnihealth* judgment's interpretation of the relevant provisions of the legislation was wrong, that would mean that the Registrar's interpretation of the legislation was also wrong and his decision had been materially influenced by an error of law. That is why, in their answering affidavit, the respondents said:

> "It is instructive to note that Genesis states, in paragraph 27, that, if the Omnihealth judgment is correct then the Registrar's decision is justified. As submitted herein, the Registrar's decision is correct and was based on the applicable statutory framework as interpreted by the court in the Omnihealth judgment."

[164] If the respondents' approach or case was that, even if the *Omnihealth* judgment was wrong, the Registrar's decision was, for whatever reason, correct, they would have said so. They did not say so because that was not their approach to, or their case in, opposing the review application. The respondents' case was based on an acceptance that, if *Omnihealth* was wrongly decided, then the Registrar's decision was materially influenced by an error of law and his decision would fall to be reviewed and set aside.

Immateriality of error of law

[165] The second reason advanced in the second judgment is that, even if it could be said that an error of law has been shown in this case, the error of law was not material. For convenience, I shall refer to this point as the "immateriality point". The relevance of this point is that the error of law contemplated in section 6(2)(d) is an error of law that "materially influenced" the administrative action. On the basis of this Court's decision in *Johannesburg Municipality*,[130] the second judgment says that an error of law is material if, without it, a different decision would have been reached. The second judgment points out that there are two bases upon which it can be said that, without the alleged error of law connected with *Omnihealth*, and, even applying the correct interpretation of the legislation, the Registrar would still have rejected Genesis' financial statements and returns. In other words, there are two grounds upon which the second judgment relies to say that, even, if there was an error of law, that error of law was not material. The first relates to Circulars 38 and 41 issued by the Registrar. The second relates to the auditor's assurance report.

[130] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC) (*Johannesburg Municipality*).

[166] The first is that in terms of section 37 of the MSA the Registrar has the power to determine the form in which medical schemes' annual financial statements were required to be submitted to him and the Registrar had determined that form in Circulars 38 and 41. The second judgment expresses the view that, even if *Omnihealth* was found to have been wrongly decided, the Registrar's decision would still stand because Genesis' financial statements would still be required to conform to the form determined by the Registrar in the Circulars. That Genesis' financial statements would still be required to comply with the Circulars is based on the proposition that Genesis did not seek the setting aside of the Circulars and, as long as they had not been set aside, they would still be valid and binding.

[167] The second ground is that the Registrar's decision was not based solely upon the interpretation of the MSA as given in the *Omnihealth* judgment. It says the Registrar's decision was also based on the ground that the auditor's assurance report did not include the "prescribed paragraphs 13, 14 and 15". The second judgment gets this ground from the letter that the Registrar sent to Genesis advising the latter of his decision and the reasons for that decision. The second judgment points out that this reason had nothing to do with the correctness or otherwise of the *Omnihealth* judgment. It goes on to say that, even if *Omnihealth* was wrongly decided, the Registrar's decision could still be justified on the basis that Genesis' financial statements omitted "the prescribed paragraphs 13, 14 and 15" which meant that they were still deficient.

[168] The second judgment's "immateriality point" was not one of the grounds upon which the Registrar opposed Genesis' review application. The respondents relied upon one ground only to oppose Genesis' review application. That was that there was no error of law. The deponent to the respondents' answering affidavit put it thus:

> "The respondents oppose this review application on the grounds that no error of law occurred and that, therefore, the Registrar's decision is not reviewable as contemplated in section 6(2)(d) of PAJA."

[169] A reading of the entire answering affidavit reveals that the respondents did not rely upon any other ground to oppose Genesis' review application. If the respondents had intended to also rely on the ground now advanced in the second judgment, they would have said in the answering affidavit that, even if there was an error of law, such error of law did not materially influence the Registrar's decision. There is no statement to that effect or along those lines in the respondents' answering affidavit. That, therefore, means that the ground upon which the second judgment now relies to decide this matter was not part of the respondents' case or defence in the papers. Accordingly, it is not permissible for the second judgment to use this ground to decide the matter. Except in certain limited situations none of which is present in this case, a court is required to decide matters on the basis of the issues between the parties.[131] This issue was not an issue between the parties. As the Appellate Division said in *Director of Hospital Services v Mistry*:

> "When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is."[132]

Obviously, when you want to establish in motion proceedings what the respondent's case or defence is or was, you look at the respondent's answering affidavit.

[170] Nowhere in the respondents' answering affidavit can one find the points made in paragraph [166] about Circulars 38 and 41 and in paragraph [167] about the auditor's assurance report. This means that these points were not and are not part of the respondents' case or defence on the papers. However, the point concerning the deficiency in the auditor's assurance report comes from the Registrar's letter which was an annexure to Genesis' founding affidavit. That was the letter in which the Registrar informed Genesis of his decision and the reasons for it.

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[131] The most well-known exceptions relate to the jurisdiction of a court or tribunal, *locus standi* (standing), competence of an order of court or question of law that can be decided on the facts before the court without any party needing to lead new evidence.

[132] *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635H.

[171] The fact that the second judgment got the point about the auditor's assurance report from an annexure to one of the affidavits and not from the respondents' answering affidavit raises the question whether it is permissible in our law to decide a matter on the basis of a point contained in, or based on an annexure to an affidavit but which is not covered in the relevant affidavit. The answer is: No. In *Minister of Land Affairs and Agriculture v D & F Wevell Trust*[133] the Supreme Court of Appeal said:

> ". . . the case argued before this court was not properly made out in answering affidavits deposed to by Andreas. The case that was made out, was conclusively refuted in the replying affidavits as I pointed out in paras [18] to [20] above. *It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest — the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts. The position is worse where the arguments are advanced for the first time on appeal. In motion proceedings, the affidavits constitute both the pleadings and the evidence: Transnet Ltd v Rubenstein [2006 (1) SA 591 (SCA) at para 28], and the issues and averments in support of the parties' cases should appear clearly therefrom. A party cannot be expected to trawl through lengthy annexures to the opponent's affidavit and to speculate on the possible relevance of facts therein contained. Trial by ambush cannot be permitted.*"[134]

If a litigant is not permitted to engage in a trial by ambush, it follows that a court may also not do so.

[172] In my view, the second judgment errs in relying on this point to decide the appeal.

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[133] *Minister of Land Affairs and Agriculture v D & F Wevell Trust* [2007] ZASCA 153; 2008 (2) SA 184 (SCA).

[134] Id at para 43.

Is there a need to specifically set aside Circulars 38 and 41?

[173] The second judgment also expresses the view that, even if *Omnihealth* is found to have been wrongly decided and, therefore, there was an error of law, Circulars 38 and 41 issued by the Registrar would still stand as long as they have not been set aside. It points out that Genesis did not seek to have these Circulars set aside. The second judgment points out that, until they are set aside, they would be binding and would need to be complied with. The first judgment's answer to this is that those Circulars are so dependent upon the *Omnihealth* judgment that they only stand as long as the *Omnihealth* judgment stands with the result that, if the *Omnihealth* judgment falls, they, too, fall.

[174] I agree with the first judgment's view that, if *Omnihealth* falls, the two Circulars also fall. *Omnihealth* is to the Circulars what the walls are to the roof of a house. If the walls fall, the roof falls. Put differently, *Omnihealth* is to the Circulars what an Act of Parliament is to regulations promulgated under it. If the Act is declared invalid, the regulations cannot stand on their own. They fall with the Act, without having to be separately or specifically set aside. This occurs because their legal foundation is gone.

[175] Examples of cases where regulations promulgated under an Act were not separately or specifically declared invalid when the Act under which they were made was declared invalid are *NSPCA*[135] and *Premier, Limpopo Province.*[136] In *NSPCA* one of the sections that this Court declared invalid was section 2 of the Performing Animals Protection Act.[137] Under section 2 of that Act certain regulations had been promulgated.[138] These regulations were not separately or specifically declared invalid

[135] *NSPCA v Minister of Agriculture, Forestry and Fisheries* [2013] ZACC 26; 2013 (5) SA 571 (CC); 2013 (10) BCLR 1159 (CC).

[136] *Premier, Limpopo Province v Speaker of the Limpopo Provincial Legislature* [2012] ZACC 3; 2012 (4) SA 58 (CC); 2012 (6) BCLR 583 (CC).

[137] 24 of 1935.

[138] Regulations to the Performing Animals Protection Act 24 of 1935, published under GN R1672 in *GG* 15102, 1 September 1993.

when section 2 was declared invalid. In *Premier, Limpopo Province* this Court declared certain pieces of provincial legislation inconsistent with the Constitution and invalid. Although there were regulations[139] promulgated under one of the Provincial Acts, those regulations were not separately or specifically declared invalid. In either case no one could conceivably argue that, since those regulations were not separately or specifically declared invalid, they would remain valid and binding after the Act under which they had been promulgated had been declared invalid.

Circulars 38 and 41 were dependent upon Omnihealth

[176] How Circular 38 was dependent on *Omnihealth* is to be gathered from certain passages at the beginning of the circular. Those passages read:

> "In January 2007 the High Court of South Africa, in the case of Registrar of Medical Schemes vs. The liquidators of Omnihealth and others (case no 18545/06) (the Omnihealth case), ruled that funds standing to the credit of the personal medical savings accounts of the members constitute trust money as defined in section 1 of the Financial Institutions (Protection of Funds) Act 28 of 2001. It also ordered that interest accrued on these amounts must be paid to the members and if any members cannot be located, the balance pertaining to such members must be paid into the Guardians Fund to be administered there under.
>
> Medical Schemes were advised of the outcome of this case in May 2007, Press release 4/2007.
>
> . . .
>
> A survey of schemes and administrators conducted by an independent party on behalf of Council determined that many schemes are not dealing correctly with PMSA balances in terms of the Act, the Regulations and the Omnihealth case. During the survey, suggestions were obtained on how best to implement the changes and what systems, procedures and operational changes would be required to comply with the requirements of the Act."

[139] Regulations in terms of the Financial Management of the Free State Provincial Legislature Act 6 of 2009, published in *GG* 58 of 2010, 2 July 2010.

[177] When, subsequently, the Registrar had to clarify Circular 38, he did so with reference to the *Omnihealth* judgment. In the clarification of Circular 38, it was, *inter alia*, said:

> "**Legal status of Omnihealth judgment and Circular 38 of 2011**
>
> Schemes were advised of the decision of the Omnihealth judgment via Press release no 1 of 2007. Schemes have therefore had five years to comply with the requirements of the judgment and Regulation 10 of the Medical Schemes Act 131 of 1998 (the MSA).
>
> The background to the judgment is that the intention of the Regulations was always to ring-fence the savings balances and to protect them from creditors of the scheme. The Registrar applied for the declaratory order to confirm this interpretation of the MSA. The judgment confirmed the Registrar's interpretation of the Act and Regulations.
>
> The legal position is clear and therefore no useful purpose will be served in engaging in further discussions on the implications of the judgment. The nature of the savings accounts as trust monies that do not belong to the scheme is confirmed by the Omnihealth judgment and the requirements as set out in Circular 38 of 2011 are requirements of the MSA and the FI Act.
>
> It is important to note that the Registrar is tasked with ensuring compliance with the law regarding medical schemes. It is to ensure such compliance that Circular 38 and this clarification have been issued."

[178] That Circular 41 is also dependent upon the *Omnihealth* judgment and that it cannot survive that judgment's "fall" is to be gathered from not only the fact that four of the seven paragraphs that make up that circular are about the *Omnihealth* judgment but also from what is said in that circular about the *Omnihealth* judgment. The second to fifth paragraphs of Circular 41 read:

> "In January 2007 the High Court of South Africa, in the case of Registrar of Medical Schemes vs. The liquidators of Omnihealth and others (case no 18545/06) (the Omnihealth judgment), ruled that funds standing to the credit of the Personal Medical Savings Accounts (PMSA) of the members constitute trust money as defined in

> section 1 of the Financial Institutions (Protection of Funds) Act 28 of 2001. Medical Schemes were advised of the outcome of this case in May 2007, Press release 4/2007.
>
> Circular 38 of 2011 and Circular 5 of 2012 provided clarity to medical schemes on how these PMSA balances should be dealt with, including prescribing certain disclosure notes deemed necessary to provide members with sufficient information on how these monies are managed on their behalf.
>
> 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 A to this Circular contains the updated prescribed format of the statement of comprehensive income. Any other material line items than those in the prescribed format are to be disclosed separately on the face of the statement of comprehensive income, following the same 'by function' classification. When a specific line item in the prescribed format is not relevant to a scheme, that specific line item may be omitted."

[179] For these additional reasons, I agree with the conclusion of the first judgment that the appeal should be upheld and with the order it proposes.

For the Applicant:	S Burger SC and G Cooper instructed by Clyde & Co
For the First and Second Respondents:	J J Brett SC instructed by Savage Jooste & Adams