

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NUMBER: 12511/14

THE REGISTRAR OF MEDICAL SCHEMES

Applicant

and

MEDSHIELD MEDICAL SCHEME

First Respondent

TB LANGA N.O.

Second Respondent

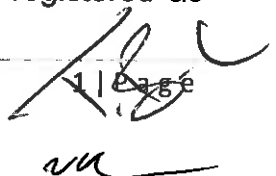
SECOND RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned,

THEMBA BENEDICT LANGA

Do hereby make oath and state that: -

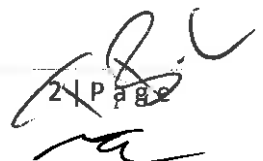
1. I am a major male Attorney practicing at Langa Attorneys, situated at 181 Jan Smuts Avenue, Rosebank Office Park, Block B – Ground Floor, Parktown North, Johannesburg. I am the Provisional Curator of Medshield Medical Scheme ("**the scheme**"), the First Respondent, which is duly registered as


11/08/14
va

such in terms of the provisions of Section 56(1) of the Medical Scheme Act 131 of 1998 ("the **MSA**"), having its principal place of business at 288 Kent Avenue, Randburg, Gauteng.

2. The facts contained herein fall within my personal knowledge and unless otherwise indicated, are both true and correct.
3. I have read the Founding affidavit deposed to by Monwabisi Sabatha McDonald Gantsho, the Registrar of Medical Schemes, and I respond thereto as set out hereinafter.
4. Before I reply to the Applicant's Founding Affidavit, I need to bring the following issues to the attention of the above Honourable Court:
 - 4.1. the applicant disputes my authority, as Provisional Curator, to acquire a trademark for the scheme, which trademark prior to the acquisition was owned by third parties other than the first respondent itself.
 - 4.2. in terms of the Court Order of the 2nd October 2012 that placed the first respondent under curatorship I have the authority to enter into the purchase of a trademark without deferring to the applicant as the Court Order states that the Second Respondent is:

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- 4.2.1. *authorised to take immediate control of, and in the place of the board of trustees, manage the business and operations of and concerning the Respondent, together with all assets and interests relating to the business of the Respondent, in accordance with the provisions of the MS Act and the Respondent's rules;*
- 4.2.2. *vested with all powers of control and management which would ordinarily be vested in and exercised by the board of trustees or principal officer of the Respondent, whether by law or in terms of the rules of the Respondent;*
- 4.2.3. *directed to give consideration to the best interests of the members of the Respondent; and*
- 4.2.4. *directed to exercise the powers vested in him with the view to conserving the business of the Respondent and not without the leave of the Applicant to alienate or dispose of any of the property of the Respondent, save to the extent and for the purposes set out hereunder.*

- 4.3. Therefore, the conclusion of the trademark purchase agreement is not a matter that falls with the authority of the applicant as it is purely a business decision to be made by me only.
- 4.4. The matter is not exigent at all. This type of business decision falls within the domain of the power of the Provisional Curator, who is occupying the role and responsibility of the defunct Board of Trustees ("BOT").
- 4.5. The power to monitor the performance of the Second Respondent does not rest with the Applicant as it rests with the Council for Medical Schemes (hereinafter referred to as the "Council"). To the extent to which the Applicant purports to allege that he has the authority to do so, the Applicant is obliged to provide this Court with the required delegation of authority from the Council, in this respect.
- 4.6. It is not urgent for the applicant to seek to remove me as I have already indicated that I intend to relinquish my role as the Provisional Curator on the 30th April 2014. The misplaced applicant's apprehension will invariably instil panic in the market and cause harm to the integrity of the first respondent that is doing well under curatorship.

41 Page 8

- 4.7. I have accordingly informed the applicant on the 4th of February 2014 of my intention to resign as provisional curator of the scheme as at 30 April 2014. Through this "urgent" application, the applicant is seeking to force the second respondent to submit a letter of resignation or be removed by force.
- 4.8. Therefore, I respectfully submit, it is neither urgent nor necessary for the applicant to compel me through a self-created application of urgency, for me to resign on any date other than the 30th April 2014.
- 4.9. I humbly submit that the applicant's motivation to cause me to relinquish his role on urgent basis is simply intended to benefit the applicant's personal commercial interest.
- 4.10. The applicant is motivated by greed and corrupt tendencies that imbues him to seek to appoint another Provisional Curator so that he could manipulate the resources of the First Respondent for the benefit of the applicant.
- 4.11. The applicant provided two accounts and instructed me to deposit money therein for his benefit. The applicant impressed it upon me that he has tax problems to settle. The following accounts were provided to me by the applicant:

4.11.1. Funda (Pty) Ltd; and

4.11.2. Ndinzo Charitable.

4.12. In the negotiations between the Second Respondent and the sellers of the trademark, the negotiations started from the sum of R30 000 000.00 (Thirty Million Rands) until I brought it down to the sum of R10 000 000.00 (Ten Million Rands) which was ultimately the purchase price for the trademark

5. I will now deal *ad seriatim* with the allegations contained in the Applicant's Founding Affidavit.

AD PARAGRAPH 1

6. The contents of this paragraph are noted.

AD PARAGRAPH 2-8

7. The contents of this paragraph are admitted.

AD PARAGRAPH 9

8. I deny that this application is urgent in that the circumstances upon which the applicant relies on for its alleged urgency are circumstances which could only ever have been in place as far back as the 17 October 2013, which being the

date upon which the purchase agreement of the trademark was signed and concluded as stated in annexure "FA11" of the applicant's founding affidavit.

AD PARAGRAPHS 9.1 TO 9.3

9. I deny that the applicant is entitled to the relief sought in this application.

AD PARAGRAPH 10

10. I deny the contents of this paragraph. I further deny that the applicant has shown good cause as required by the provisions of Section 5(1) and (9) of the Financial Institutions (Protection of Funds) Act No. 28 of 2001 ("the FI Act") for the cancellation of the appointment of myself as provisional curator of Medshield Medical Scheme ("the scheme").

11. My performance as provisional curator, I respectfully submit, has been of the highest standard in the fulfilment of the first respondent's business, and I submit that only the Court Order herein that established curatorship should be relied upon to establish whether I have discharged my duties, as ordered by the Court, or not.

12. I respectfully submit that the applicant intentionally avoids using the Court Order as the basis to establish whether I have discharged my duties or not.

AD PARAGRAPH 11

13. The contents of this paragraph are noted. However, given the propensity of the applicant, with respect, to commercially benefit himself from the funds of the first respondent and to ignore any law and regulation in this regard I have an apprehension that such a desired appointment of Tebogo Phaleng as the Provisional Curator of the Scheme , notwithstanding Mr Phaleng's unknown and upright credentials, there is a possibility that the applicant may place Mr Phaleng under difficult and compromising circumstances which may probably lead to circumstances which may be in contravention of Section 3(a) and 4(1)(a) of the Prevention and Combating of Corrupt Activities Act, No. 12 of 2004 ("PCCA").

AD PARAGRAPHS 12 TO 19

14. The contents of these paragraphs are noted.

AD PARAGRAPH 20

15. I deny the contents of these paragraphs as if specifically traversed.

16. I deny that the applicant's regulatory powers entitle him and/or his officials to make business decisions on behalf of the first respondent when a court of law has appointed a provisional curator to do so. I humbly submit that the applicant's contention does not prevail above what the court has ordered, as his powers in terms of the FI Act are only residual to the extent where there may be vacuum or a sudden state of emergency which may have been occasioned by unforeseen or unpredictable circumstances that may have engulfed the first respondent.
17. I humbly submit that the applicant's interpretation of the FI Act is untenable as it has the effect of usurping the powers bestowed on the second respondent by the Court Order.
18. I therefore submit that the applicant has failed to show good cause as to why the order of Murphy J of the 2nd October 2012, and the subsequent judgment of Murphy J on 30 May 2013, is subservient to the provisions of the FI Act that the applicant relies on, or should exist parallel to the Court Order by whatever operation of law that the applicant may seek to contend.
19. I deny that good cause has been established by the applicant as he has withheld from the court, I submit with respect, the deception that causes him to act in contravention of this legal duty and responsibility as Registrar.

20. The allegations of the applicant around the dissatisfaction of the conclusion of the trademark are not true as the officials of the applicant were informed of the developments in this regard soon after the trademark transaction was concluded.
21. There is conceivably no prospect that the applicant could have been satisfied with any explanation as to why the purchase of the trademark was concluded at R10 000 000.00 (Ten Million Rands) and not R30 000 000.00 (Thirty Million Rands), as he is conflicted in that he expected to receive payment of R3 000 000.00 (Three Million Rands) should the purchase price remained at R30 000 000.00 (Thirty Million Rands) and thus he is incapable of applying his mind in a fair and unbiased manner as required by law, I respectfully submit.

AD PARAGRAPH 21

22. I note the contents of this paragraph

AD PARAGRAPH 22

23. Save to admit that the court order the remainder of the allegations are denied.

AD PARAGRAPHS 23 TO 27

24. The contents of these paragraphs are noted.

AD PARAGRAPHS 28 TO 29

25. It is correct that Burton –Durham raised his concern but such concern was addressed when I told him that the Scheme's business interests do not enjoy unfettered common law right on areas of business which fall outside the Medical Aid Sphere. A Senior Counsel's opinion further corroborated my view. See annexure attached herein marked "TBL1"
26. As at this time the trademark agreement was concluded and signed, and this was the first opportunity I had in the November monthly meeting to inform CMS about the development.
27. It is not true that i have agreed to obtain the approval of the applicant's office as the agreement was already concluded and signed. The truth is that the applicant and its officials were unhappy about the conclusion of the trademark agreement at the sum of R10 000 000.00 (Ten Million) instead of R30 000 000.00 (Thirty Million Rands), as i later came to learn about their interest to benefit from the sale of the trademark if the purchase would have remained at R30 000 000.00 ((Thirty Million Rands).

28. I have repeatedly disputed the alleged recordal of what transpired in the November meeting and I have requested the applicant and its officials to provide me with a recording of the proceedings/transcriptions of the proceedings thereof, and to date I have not been furnished with any true recordal of the proceedings of the meeting.

AD PARAGRAPHS 30

29. The issue of obtaining a legal opinion only was agreed in order to prove/disprove my view that the First Respondent's common law rights do not extend beyond the Medical Aid Scheme Sphere. However, it was common cause at all times that the trademark agreement had been concluded and the applicant and its officials were hoping that legal opinion will disprove my view which was unfortunately not the case.

AD PARAGRAPH 31 - 32

30. Contents of these paragraphs are noted.

AD PARAGRAPH 32.1 – 32.2

31. The contents thereof are admitted as such information was submitted to the applicant by the First Respondent.

AD PARAGRAPH 33

32. The applicant and its officials still refuse, to date, to submit the recordal of the proceedings that occurred on the 6th of November 2013. Thus they continue to perpetuate the falsehood that the agreement that was entered into the 17th of October 2013 by the Second Respondent was allegedly not entered into on the 17th of October 2013. Secondly, the applicant and its officials still refuse to accept that the discussion on the 6th of November 2013 entailed the disclosure of the conclusion of the agreement concluded on the 17th of October 2013. Instead they create a misleading impression that on the 6th of November 2013 only salient aspects that pertained to such an agreement, e.g. the selling price and the extend of the common law operation were disclosed except, according to their version, the disclosure of the signature of the same agreement. It is inconceivably false that their version of events could have happened as it is impossible to discuss everything about such an agreement, including its existence, but not its signature.

AD PARAGRAPH 33.3

33. There is no conflict of interest in utilising the services of a law firm that is closely associated with me on a single occasion, when it was absolutely necessary and paramount to protect the first respondent's business interests as the first respondent's lawyers at the time were not available to assist. If this intervention

would not have been made, the business interests of the first respondent would have been prejudiced as essential business contracts which are critical for the first respondent's 2014 Benefit Option would not have been catered for.

34. The First Respondent's interests would have been severely prejudiced if the intervention was not made as essential secretarial work which buttressed the introduction and the launch of the first respondent's 2014 Benefit Option had to be done before the end of December 2013. Most importantly money's were in fact paid into the trust account not business account of Langa attorneys.

35. It is important to point out that the applicant is, with respect, being deceitful and disingenuous as he has never approached the second respondent to request any of the information pertaining to any work done by Langa Attorneys. I place on record that the R250 000.00 (Two Hundred and Fifty Rand) that is referred to was transferred into the Langa Attorneys trust account and the firm has to date not been requested to account for the work done.

AD PARAGRAPH 33.4

36. The contents of this paragraph are denied.

AD PARAGRAPH 35

37. The contents of this paragraph are admitted.

AD PARAGRAPH 36

38. The contents of this paragraph and its sub-paragraphs are denied as if specifically traversed

AD PARAGRAPHS 37 TO 38

39. It is false and misleading that I have refused to carry out or neglected to carry out my duties. I did respond to the correspondence of the 17 January 2014 and once again the applicant and its officials act in a biased manner against a particular Medshield broker and the Scheme. Briefly another broker complaint to the applicant and its officials that the particular Medshield broker has taken up to 70% (Seventy Percent) of the complainant's broker's business. The complainant broker ran to the applicant and its officials for protection. Instead of the applicant and its officials not to interfere with member's right to choose a broker that serves their interest. The applicant and its officials summarily, without the First Respondent and the broker being heard took a drastic decision to review the status of the broker as a fit and proper person to be accredited as a broker. Unfortunately the applicants and its officials are using their regulatory power without restraint and prudence as they forever feel compelled to pick up fights on each and everything. My response to the applicant's correspondence of the 17 January 2014 is enclosed herein marked "TBL2".

AD PARAGRAPHS 39 TO 42

40. The contents of this paragraph are denied

41. It is false and misleading to suggest that I have not attended to my duties and that I have refused/neglected to carry out my duties. Before I assumed control of the first respondent in October 2012, the first respondent was losing about 2 000 (Two Thousand) to 3 000 (Three Thousand) members per month, particularly when one takes into account that during the period of 2010 to September 2012 the first respondent lost about 40 000 (Forty Thousand) members.

42. Ever since I assumed control of the first respondent, the first respondent has grown and has lost around only 100 to 200 members per month. The first respondent presently has over R2 billion (Two billion rands) in reserves and its solvency rate is over 40% (forty percent) which is exceedingly above the 25% (twenty five percent) statutory rate.

AD PARAGRAPH 43 – 59

43. These allegations are disputed as the alleged urgency is self-inflicted and self-created as the issues dealt with in this application have purportedly been in existence since October 2013.

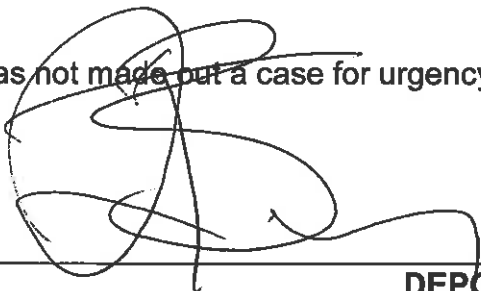
44. As stated above, I have responsibly notified members and stakeholders of the first respondent about my intention to resign and depart on the 30th of April 2014, as indicated in my letter annexed hereto marked annexure "TBL3". Therefore, it does not constitute urgency for the applicant to launch an application on the 25th of February 2014 to deal with a matter wherein I have already given my intention to resign, as indicated above.
45. The applicant, I respectfully submit, is misleading the Court in that he withholds the true motive of seeking to remove me on the 25th of February 2014. The real reason why the applicant cannot wait for my departure date of the 30th April 2014 is that the applicant intends to deny me the opportunity to hold elections on the 11th of April 2014.
46. The applicant has forced me to hold the Special General Election to elect a new Board of Trustees ("BOT") notwithstanding the fact that the appeal of former BOT Members is still to be heard by the Supreme Court of Appeal.
47. The applicant intends to remove me at this stage so that the election to be held on the 11th of April 2014 could probably be subverted in one of the following ways, namely;

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- 47.1. The applicant intends to cancel or to cause the election to be cancelled as the Provisional Curator, being myself, does not presently have the power to hold elections in terms of the Court Order;
- 47.2. The applicant deliberately compelled me to hold elections on the 11th of April 2014 with the intention to self create the alleged urgency and the alleged good cause so that the applicant can deny me the opportunity to approach court to consider to grant it the power to hold elections;
- 47.3. The applicant intends to influence in the anticipated absence of myself, the outcome of the elections to be held on the 11th of April 2014 in order to secure financial/commercial gain for himself;
- 47.4. The applicant intends to usurp the powers and the authority of the Provisional Curator and run the affairs of the first respondent and the elections instead of same being conducted by the Provisional Curator.
48. I humbly submit that the first respondent is stable and growing, members and stakeholders would be harmed by this frantic application which is neither lawful nor required by law as my resignation will only happen in April 2014.

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49. Therefore I submit that the applicant has not made out a case for urgency.



DEPONENT

18th
THUS DONE AND AFFIRMED TO AT JOHANNESBURG ON THISDAY
OF FEBRUARY 2014 BY THE DEPONENT WHO ACKNOWLEDGES AND
DECLARES THAT HE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS
AFFIDAVIT AND HAS NO OBJECTION TO TAKING THE PRESCRIBED OATH
AND CONSIDERS IT BINDING ON HIS CONSCIENCE



*COMMISSIONER OF OATHS

FULL NAMES:

CAPACITY:

DATE:

NKOSINATHI TITUS MCHUNDU
PRACTISING ATTORNEY
EX OFFICIO COMMISSIONER OF OATHS
2ND FLOOR, SOUTH WING
180 JAN SMUTS AVENUE, ROSEBANK
JOHANNESBURG, 2196, DOCEX 458
TEL 011 778 4060
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TBL1

Ex parte

MEDSHIELD MEDICAL SCHEME

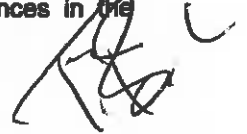
In re

ASSIGNMENT OF TRADE MARKS

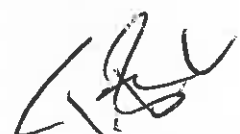
OPINION

1. My consultant is Medshield Medical Scheme ("the Medical Scheme"), a medical aid scheme registered in terms of the Medical Schemes Act 131 of 1998 ("the MS Act").
2. On 17 October 2013 the Medical Scheme concluded a written "*Deed of Assignment Memorandum of Agreement*" ("the assignment") with Alumni Trading 264 (Pty) Limited ("Alumni").
3. In terms of the assignment:
 - 3.1. Alumni conveyed and assigned to the Medical Scheme, and the Medical Scheme accepted from Alumni, all of Alumni's right, title and interest in and to the Marks,¹ together with the goodwill of the business symbolized by the Marks (clause 2.1.1);

¹ The assignment does not define "Marks". Clause 1.3, however, defines "*The Trade Marks*" as "*the words 'MEDSHIELD' in the various classes as registered in favour of the assignor in accordance with the Act;*" For purposes of this opinion I will therefore assume that all references in the assignment to "Marks" refers to "*The Trade Marks*".



- 3.2. **"the Trade Marks" mean the word marks "MEDSHIELD" in the various classes as registered in favour of Alumni in accordance with the Trade Marks Act 194 of 1993 ("the TM Act");**
- 3.3. **the consideration which the Medical Scheme shall pay to Alumni for the assignment of the Trade Marks shall be the amount of R10 million excluding VAT, it being agreed by the parties that the aforesaid consideration constitutes fair and sufficient consideration in respect thereof (clause 2.2);**
- 3.4. **Alumni shall assign unto the Medical Scheme all its right, title and interest in and to the said Trade Marks on the effective date, being 15 November 2013 (clause 2.4 read with clause 1.5);**
- 3.5. **the assignment is subject to the suspensive condition that the Medical Scheme makes payment of the consideration, in full, on or before the effective date, being 15 November 2013 (clause 3 read with clause 1.5);**
- 3.6. **the word mark "Medshield" has been registered and entered in the Register of Trade Marks as follows (clause 5.1):**
- 3.6.1. **2010/00522 in class 35 (advertising, business management, business administration, office functions, offering for sale and the sale of goods in the retail and whole-sale trade);**
- 3.6.2. **2010/00523 in class 36 (insurance, financial affairs, monetary affairs, real estate affairs);**
- 3.6.3. **2010/00524 in class 41 (education, providing of training,**



entertainment, sporting and cultural activities);

3.7. the Trade Marks were granted on 13 October 2011, with effect from 13 January 2010, and have been registered for a period of ten years, upon the expiry of which same may be renewed every ten years thereafter (clause 5.3 read with annexures "A1", "A2", and "A3" to the assignment).

4. I have been advised that:

4.1. the suspensive condition was timeously fulfilled, the Medical Scheme duly paid the consideration of R10 million to Alumni, and Alumni in turn assigned all of its right, title and interest in and to the Trade Marks to the Medical Scheme;

4.2. prior to the registration of the Trade Marks, and the use of the Trade Marks by Alumni, the word mark "*Medshield*" was used by the Medical Scheme;

4.3. the Medical Scheme has formed associated entities (the legal nature of which has not been provided to me) under the name and style of Medshield Loyalty, Medshield Marketing, Medshield Managed Health Care and Medshield Administration ("the associated companies");

4.4. the Council for Medical Schemes ("CMS"), being the statutory body that regulates medical schemes by administering the MS Act and ensuring compliance with its provisions, has raised a query as to why it was, in the circumstances, necessary for the Medical Scheme to have taken assignment of the Trade Marks for a consideration of R10 million (or at all).

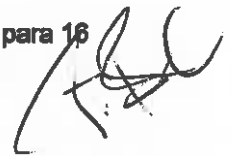
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5. In view of the aforesaid, I have been briefed to furnish an opinion on an urgent basis on what the Medical Scheme's common law rights were to use the unregistered mark "*Medshield*" and whether it was necessary for it to have taken assignment of the Trade Marks.
6. In furnishing this opinion I have been briefed with the following documents: a letter from the Medical Scheme to my instructing attorneys dated 2 December 2013; and the assignment.
7. At common law, an unregistered mark may be protected by the principles relating to passing-off. A passing-off action protects the goodwill or reputation of a trader's business, merchandise or services against a false representation by a competitor that the business, merchandise or service of the competitor is that of or associated with the trader.²
8. In order to succeed with a passing off action against a competitor, the Medical Scheme would thus have to allege and prove a misrepresentation by a competitor. The test is whether there is a reasonable likelihood that members of the public may be confused into believing that the business of the competitor is, or is connected with, that of the Medical Scheme.³
9. In establishing the misrepresentation, the Medical Scheme would have to prove that the unregistered mark was known in the market and that the Medical Scheme's goods, business or service acquired a public reputation or became distinctive from other similar goods, businesses or services.⁴
10. One object of registering a trade mark, or in the present case of acquiring the Trade Marks by way of an assignment, would thus be to dispense with the proof

² Premier Trading Co (Pty) Ltd v Sporttopia (Pty) Ltd 2000 (3) SA 259 (SCA); Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd 1998 (3) SA 938 (SCA)

³ Capital Estate & General Agencies (Pty) Ltd v Holiday Inns Inc 1977 (2) SA 916 (A)

⁴ Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd 1998 (3) SA 938 (SCA) at para 16



of reputation of a mark. The holder of the trade mark could merely institute proceedings based on trade mark infringement. The registration of a mark under the TM Act is, however, required before proceedings can be instituted for trade-mark infringement. The TM Act does not affect the rights of any person at common law to bring an action based on passing-off.

11. The distinction between trade mark infringement and passing off can be summarised as follows:⁵

11.1. infringement proceedings under the TM Act are directed at a comparison between the registered trade mark as such and the allegedly offending mark as such, whereas in a passing off action the comparison is between the whole get-up of the goods as marketed by the Medical Scheme and the whole get-up of the competitor's goods;

11.2. as I have stated above, in the case of passing off, the Medical Scheme must prove a reputation in the mark or get-up, whereas in proceedings for trade mark infringement the Medical Scheme's reputation is irrelevant.⁶

12. With these principles in mind, the question is thus whether there was any benefit in the Medical Scheme acquiring the Trade Marks by way of an assignment. For the reasons set out below, I am of the view that there was.

13. Firstly, the class 36 Trade Mark includes mainly services rendered in financial and monetary affairs and services rendered in relation to insurance contracts of all kinds. This would include in particular health insurance underwriting.

⁵ Blue Lion Manufacturing (Pty) Ltd v National Brands Ltd 2001 (3) SA 884 (SCA);

⁶ Mettenheimer v Zonquasdrif Vineyards CC (965/12) [2013] ZASCA 152 (19 November 2013) at para 9



14. In terms of section 1 of the MS Act "*business of a medical scheme*" means:

"the business of undertaking liability in return for a premium or contribution –

(a) to make provision for the obtaining of any relevant health service;

(b) to grant assistance in defraying expenditure incurred in connection with the rendering of any relevant health service; and

(c) where applicable, to render 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."

15. In my view, it would thus seem that the business of a medical scheme as carried on by the Medical Scheme would fall under class 36. If that is so, then the benefits flowing from the Medical Scheme having acquired the Trade Mark relating to class 36 are the following:

15.1. the class 36 Trade Mark can be used by the Medical Scheme as a sword against competitors who use the word "*Medshield*", without the evidentiary difficulties of having to prove a reputation in the case of a passing off action; and

15.2. unless some other trade mark has been registered in respect of the word "*Medshield*" the Medical Scheme would have acquired exclusivity in its use.

16. Furthermore, the classes 35 and 41 Trade Marks afford the Medical Scheme with broader rights, than those it had under common law, pertaining to *inter alia* advertising, business management and business administration. Although section 28(11) of the MS Act prohibits the Medical Scheme from carrying on any



business other than the business of a medical scheme, the Trade Marks relating to classes 35 and 41 could presumably be used by the Medical Scheme's associated entities, such as Medshield Marketing, Medshield Managed Health Care and Medshield Administration.

17. I turn now to section 36 of the TM Act which deals with the saving of vested rights. It provides as follows:

"Nothing in this Act shall allow the proprietor of a registered trade mark to interfere with or restrain the use by any person of a trade mark identical with or nearly resembling it in respect of goods or services in relation to which that person or a predecessor in title of his has made continuous and bona fide use of that trade mark from a date anterior --

(a) to the use of the first-mentioned trade mark in relation to those goods or services by the proprietor or a predecessor in title of his; or

(b) to the registration of the first-mentioned trade mark in respect of those goods or services in the name of the proprietor or a predecessor in title of his,

whichever is the earlier, or to object (on such use being proved) to the trade mark of that person being registered in respect of those goods or services under s 14."

18. It follows from this that had the Trade Marks not been acquired by the Medical Scheme, Alumni would not have been able to interfere with or restrain the use by the Medical Scheme of the mark "Medshield", provided that the Medical Scheme had made continuous and *bona fide* use of the unregistered mark from a date anterior to the earlier of the use of the mark by Alumni or its predecessor in title or the registration of the Trade Marks.

19. Although section 36 would thus have provided a defence to the Medical Scheme if Alumni instituted trade mark infringement proceedings against it, section 36



would not have afforded the associated entities with a defence (assuming of course that, unlike the Medical Scheme, they did not have any vested rights in terms of section 36).

20. By acquiring the Trade Marks the Medical Scheme therefore probably also avoided litigation with Alumni pertaining to passing-off and/or trade mark infringement.

21. Furthermore, Alumni would have been entitled to continue using the Trade Marks, which could be detrimental to the Medical Scheme as the similarity between the word "*Medshield Medical Scheme*" and "*Medshield*" could give rise to the likelihood of members of the public being confused into believing that the business of Alumni is, or is connected with, that of the Medical Scheme.

22. The next aspect that needs to be considered is section 14 of the TM Act. In terms of section 14, the Medical Scheme could, instead of having acquired the Trade Marks for R10 million, have applied for the registration of the mark "*Medshield*" in relation to those services in class 36 relating to financing services and health insurance underwriting, on the basis of honest concurrent use since the Medical Scheme had been using the mark prior to its use, and registration by Alumni. Although this would have been a much cheaper option, it would not have afforded the Medical Scheme the exclusivity which acquiring the Trade Marks from Alumni did, and it would not have been of assistance to the associated entities (again assuming that section 36 does not apply to them).

23. What is, however, of concern, and which may dilute the benefit of acquiring the Trade Marks from Alumni, is the fact that according to the register of trade marks Alumni still owns three trade marks in respect of the words "*Yourmedshield*" under classes 35, 36 and 41. The similarity between the words "*Medshield*" and "*Yourmedshield*" could give rise to the likelihood of confusion amongst members



of the public. To prevent this risk from materialising, the assignment ought, in my view, to have also included the trade mark "*Yourmedshield*".

24. Lastly, I mention that this opinion does not relate to:

24.1. the value attaching to the Trade Marks and whether they were in fact worth a consideration of R10 million;

24.2. whether Alumni was entitled to register the Trade Marks in the first place. If, for example, it had no *bona fide* intention of using them as trade marks, either itself or any person permitted by it, then they would have been liable to being removed from the register in terms of section 10 of the TM Act.

25. I advise accordingly.

MTA COSTA
CHAMBERS, SANDTON
6 DECEMBER 2013





11 February 2014

Mr. Stephen Mmatli
Council of Medical Schemes
Block A, Eco Glades 2 Office Park
420 Witch- Hazel Avenue
Eco Park, Centurion

By email: s.mmati@medicalschemes.com

Cc email: j.lubbe@medicalschemes.com

Dear Mr. Mmatli

Section 43: AVOIR HEALTHCARE CONSULTANTS AND MEDSHIELD MARKETING

1. We refer to your letter dated 17 January 2014 addressed to Mrs. LA Modiba, Avoir Healthcare Consultants (Avoir), which letter has also been referred to the Curator, for reply.
2. Although the enquiry is not directly addressed to the Scheme (Medshield), in terms of section 43 of the Act, I would at the outset like to point that the contents of Mr. Mboniso's letter dated 13 January 2014, addressed to Miss Lebo Modiba, copying, inter alia, the Council of Medical Schemes is based on hearsay evidence, inaccurate and misleading.
3. We deny the complaint raised by Platinum Health with regard to our consultant (Mrs. Maria Kganane who was based at the Plant Shaft, claiming that she was giving members wrongful information about Medshield Loyalty Program (which consist of: Funeral Cover benefit, Money back retail outlets, and R50 monthly airtime).
4. Medshield would also like to take this opportunity to address concerns raised in the letter under reply and to place the following on record:
 - 4.1 Medshield More (loyalty program) is a new offering introduced for 2014.



- 4.2 Medshield partnered with Nissi Networks (Pty) Ltd (Nissi) to provide Medshield's members with a loyalty program called Medshield More, akin to Discovery Medical Scheme's Vitality. Medshield More is a voluntary loyalty program which Medshield members have the option of joining at an additional fee of R75.00, per member, per month.
- 4.3 Members who join the Medshield More program are entitled to certain benefits by virtue of their belonging to the program and payment of the subscription fee. Among those benefits is the R50.00 airtime as well as the funeral benefits referred to in the aforementioned letter by Mr. Mboniso. These benefits are provided solely to members of Medshield More by Nissi and the Scheme is well aware that it may not offer such benefits itself.
- 4.4 Medshield More is administered by Nissi in partnership with NBC Holdings (Pty) Ltd (NBC) and its finances are entirely separated from the Scheme's finances.
- 4.5 All contributions are collected and benefits paid through the joint venture between Nissi and NBC.
- 4.6 The loyalty program was presented to both Management and the Unions on 10 October 2013 in medical aid presentations, and it was well received.
- 4.7 It is important to note that the Loyalty Program is optional, and it is separate to the medical aid, and this was informed to the employees by Medshield representatives during their presentations and before employee joined.
- 4.8 Not everyone who joined Medshield also joined the Loyalty Program. Employees had to fill-in and sign a separate form for the program.



- 4.9 Avoir did not sign any contract with Medshield for the loyalty program nor did it receive any commission from Medshield.
- 4.10 Medshield More is simply a white labelled loyalty program and its administration is not connected to the business of Medshield.
- 4.11 We categorically state that no advice or presentation was given to TRP employees regarding the loyalty program. The loyalty program was only presented by Medshield Medical Scheme representatives.
- 4.12 Platinum health employee (Lillian) went to Maria to find out more information as to how the program works, and our consultant verbally told her how it works, and this was only based on the brochure which was made at her disposal by the Medshield representatives.
- 4.13 The role of Maria including all Avoir representatives who were stationed at the three shafts (Main Portal, Plant & North Decline) was to assist Medshield representatives with their administration work only, and all our consultants were accompanied by Medshield employees.
5. We bring your attention to section 43 of the Medshield Scheme Act which provides that "The Registrar may address enquiries to a medical scheme in relation to...." (Our underling). We request you to withdraw the letter sent to Avoir as it is clearly not a medical scheme but a broker. Kindly further send us confirmation that your letter under reply was authorised and/ or addressed by the Registrar.
6. Furthermore, Platinum Health failed to consult with us before sending any complaint to TRP Management and Council for Medical Schemes. We had two meetings with TRP Management (one with Avoir CEO & the other with Medshield Executive – Mr Malema), of which we answered the allegations labelled against Avoir, and they were very happy with our response.



7. We trust you find the above explanation over the concerns raised by Mr. Mboniso sufficient and in order. Although this letter may not be exhaustive of all the issues raised and may not have addressed them and *seriatum*. Should you, in the circumstances, require further details regarding the loyalty program and Medshield More, please feel free to engage me.

Yours faithfully

THEMBA LANGA
PROVISIONAL CURATOR
MEDSHIELD MEDICAL SCHEME



06 February 2014

Dear Valued Medshield Stakeholder,

RE: GOOD NEWS - MEDSHIELD PREPARES TO EXIT CURATORSHIP

I have informed the Council for Medical Schemes of my intention to submit my resignation with effect from the 28 February 2014. However, I will continue to serve notice until 30th April 2014, so that I can usher in the new Trustees who will be elected at the Special General Meeting scheduled for 11th April 2014. Medshield Medical Scheme was placed under curatorship by the High Court in October 2012 due to governance irregularities, and those governance issues have been resolved by the Curator.

The purpose of this correspondence is to allow members and the market to be informed, well in advance, about the intended departure of the Curator to protect the integrity of the Scheme and to safeguard the gains that have been made by the Scheme.

A communication has already been issued to members about the 11th April 2014 elections which will be overseen by an independent electoral officer. Medshield is in a financially strong position with a solvency ratio of 53.9% which is exceedingly above the legislated requirement. During my tenure the Scheme has stabilised and grown immensely given the exceptional loss of membership experienced prior to my arrival in 2012.

Medshield has made significant progress. The Scheme also received the coveted AA- Global Credit Rating for the seventh consecutive year. As at December 2013, our solvency ratio is 53.9% which is well above the legislated requirement – proving our strong financial position and claims paying ability.

We held our 44th Annual General Meeting in July 2013, and addressed all membership concerns before launching our turnaround strategy, with the introduction of a new corporate identity and our unique and competitive 2014 product offering – which included the introduction of a low cost option, an unsurpassed loyalty program and soon the unveiling of Medshield insurance.

As a forerunner in the Medical Scheme industry, Medshield prides itself on becoming more communicative and interactive with our members and partners, ensuring that we grow from strength to strength!



The year 2014 will bring its own mix of challenges and successes for the Scheme, but I'm pleased to say that the direction is clear and I'm confident that the Management team is well resourced and experienced to carry the Scheme forward.

The year 2013 was a memorable one for all of us at Medshield. We are proud of our accomplishments, excited about our future, and grateful to you, our Members, Brokers and Partners. On that note, I hereby confirm my departure from the Scheme will be effective 30th April 2014.

I humbly thank you for your support and commitment during my stay as Curator. Continue building on the partnership with Medshield during 2014 and beyond.

Kind regards

Themba Langa
Curator: Medshield Medical Scheme

GOOD NEWS - MEDSHIELD PREPARES TO EXIT CURATORSHIP

Open letter to Medshield Medical Scheme Stakeholders...

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I humbly thank you for your support and commitment during my stay as Curator. Continue building on the partnership with Medshield during 2014 and beyond.

Kind regards



Themba Langa

Curator: Medshield Medical Scheme



MEDSHIELD

your kind of care

