



REPUBLIC OF NAMIBIA

SUPREME COURT OF NAMIBIA

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Enquiries: R Kandjella
Our ref: SA 48/2023
Your ref: Ms Hans-Kaumbi

Registrar of the Supreme Court
Rev. Michael Scott Street
Private Bag 13398
WINDHOEK
NAMIBIA

2 April 2026

Ueitele & Hans Inc
No. 28, Cnr Beethoven and Wagner Streets
Windhoek West
WINDHOEK

Dear Ms Hans-Kaumbi

SUPREME COURT APPEAL: REGISTRAR OF MEDICAL AID FUNDS v HERITAGE HEALTH MEDICAL AID FUND & ANOTHER

Attached please find the court order, dated 2 April 2026, made in the above-mentioned appeal case as well as a copy of the judgment, for your information.

Yours faithfully

REGISTRAR: SUPREME COURT

/yb



B. Van der Merwe-Greeff Inc
20 Bismarck Street
Windhoek-West
WINDHOEK

Dear Ms Weyand

Attached please find a copy of the court order, dated 2 April 2026, made in the above-mentioned appeal case as well as a copy of the judgment, for your information.

Yours faithfully


REGISTRAR: SUPREME COURT



C. The Government Attorney
2nd Floor, Sanlam Centre
Independence Avenue
WINDHOEK

ATT: MS F. MATSI

Attached please find a copy of the court order, dated 2 April 2026, made in the above-mentioned appeal case as well as a copy of the judgment, for your information.


REGISTRAR: SUPREME COURT



D. The Registrar
High Court
WINDHOEK

1. Attached please find a copy of the court order, dated 2 April 2026, made in the above-mentioned appeal case as well as a copy of the judgment, for your information.

2.  Your case no. HC-MD-CIV-MOT-GEN-2021/00258, refers.

REGISTRAR: SUPREME COURT
/yb



IN THE SUPREME COURT OF NAMIBIA

WINDHOEK, THURSDAY, 2 APRIL 2026

BEFORE THE HONOURABLE MR JUSTICE DAMASEB, DEPUTY CHIEF JUSTICE
THE HONOURABLE MR JUSTICE ANGULA JA *et*
THE HONOURABLE MR JUSTICE SMUTS AJA

In the matter between:

REGISTRAR OF MEDICAL AID FUNDS

APPELLANT

and

**HERITAGE HEALTH MEDICAL AID FUND
MINISTER OF FINANCE**

**FIRST RESPONDENT
SECOND RESPONDENT**

Having heard **Mr. A. W. Corbett**, for the appellant and **Mr. J. Jacobs**, for the first respondent on **2 March 2026** and having read the record of appeal and other documents filed herein:

THE COURT RESERVED JUDGMENT

Thereafter on this day

IT IS ORDERED THAT:

1. The application for condonation in respect of the record is granted with no order as to costs.
2. The application to adduce further evidence is dismissed with costs on the scale as between legal practitioner and client and to include the costs of one instructing and one instructed legal practitioner.
3. The appeal is dismissed with costs to include the costs of one instructing and one instructed legal practitioner.
4. The order of the High Court in respect of the counter application is to be replaced by the following order:
 - “2. The counter application is granted with costs, including the costs of one instructing and two instructed counsel, in the following terms:

- (a) The registrar is directed to consider the fund's proposals for contributions and benefits in respect of all such years from 2019 onwards as may be required, within 30 days of such proposals made to the registrar.
- (b) The fund is to make such application to the registrar within 30 days of the date of the order given on appeal herein.
- (c) In making his decision in respect of the application(s) contemplated in subparagraphs (a) and (b) above, the registrar is directed to:
- (i) take into account the cost to the fund in respect of removing the self-funding gap with effect from its removal in 2019 and to permit inflationary adjustments for subsequent years after taking into account such additional cost with effect from 2019 and adjusting for increases as have already been approved;
 - (ii) consider approving such further new or additional schemes to attract new members on the basis of sound business principles; and take into account the approach set out in this judgment in considering the fund's application(s) contemplated by sub paras (a) and (b) above."

BY ORDER OF THE COURT


REGISTRAR: SUPREME COURT
/yb



TO: UEITELE & HANS INC

VAN DER MERWE-GREEFF INC



REPORTABLE

CASE NO: SA 48/2023

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

REGISTRAR OF MEDICAL AID FUNDS

Appellant

and

HERITAGE HEALTH MEDICAL AID FUND

First Respondent

MINISTER OF FINANCE

Second Respondent

Coram: DAMASEB DCJ, ANGULA JA and SMUTS AJA

Heard: 2 March 2026

Delivered: 2 April 2026

Summary: The Registrar of Medical Aid Funds (the registrar) applied to the High Court for the winding-up of the Heritage Health Medical Aid Fund (the fund) in terms of ss 35 and 37 of the Medical Aid Funds Act 23 of 1995 (the Act). The application was brought on two main grounds, namely the fund's alleged repeated contraventions of the Act and that the fund was not in a sound financial position. The fund opposed the

application and brought a counter-application seeking, *inter alia*, an order directing the registrar to consider its proposed 2020 contributions and benefits structure.

At the time of the proceedings in the High Court, an appeal was pending before the Supreme Court against the registrar's refusal to approve the fund's 2019 contributions and benefits structure, which included the elimination of the self-funding gap, a mechanism previously approved by the registrar. In its judgment of 21 November 2022, the Supreme Court directed the registrar to reconsider the issue of the self-funding gap *de novo* and determine the modalities for its termination in accordance with its findings.

The High Court found that the Registrar's unreasonable directives and the administrative penalties imposed for non-compliance had adversely affected the fund's ability to operate on sound business principles and to recover financially. Having regard to s 35(4) of the Act, which requires consideration of the equitable interests of fund members, the High Court, in exercising its discretion, declined the winding-up application and granted the fund's counter application.

On appeal, the registrar contended that the High Court misdirected itself by failing to properly consider the evidence demonstrating that the fund was not operated on sound business principles and remained financially unsound.

In addition, the registrar sought leave to adduce further evidence on appeal in terms of s 19(a) of the Supreme Court Act 15 of 1990. The application was filed on 22 December 2025, more than two and a half years after noting the appeal and more than a month after notification of the hearing date. The fund opposed the application as an abuse of process, particularly in light of the timing and the registrar's refusal to grant the fund an extension to file its response to the application.

Application to adduce further evidence:

In considering the application to adduce further evidence, the Supreme Court rejected the premise that, once a notice of appeal is filed and the record lodged, parties are entitled to 'sit back and do nothing' until a hearing date is allocated, describing such

an approach as entirely fallacious, reckless and irresponsible. It emphasised that any responsible practitioner would apply to adduce further evidence as and when it becomes available, rather than delay until the allocation of a hearing date.

The Court *held that* the manner in which the application was brought, together with the refusal to agree to an extension for the filing of answering papers, was irresponsible and amounted to an abuse of process. It further found that most of the evidence sought to be introduced did not exist at the time of the High Court proceedings and was therefore not appropriate for consideration on appeal, as the Supreme Court is confined to determining the correctness or otherwise of the High Court's decision on the basis of what served before that court.

The application to adduce further evidence was dismissed with costs.

Findings on appeal:

Held that, the registrar is expressly enjoined to ensure that a fund operates upon sound business principles in accordance with s 28(a) of the Act. Plainly, where a fund is precluded by the registrar from adjusting its contribution rates to fund the benefits it provides to its members, as has occurred here, does violence to the basic premise of carrying on a business on sound business principles upon which the Act is based. The registrar's conduct in this regard not only conflicts with the approach of this Court and is thus unlawful, but demonstrates a fundamental failure to give effect to the statutory premise and purpose upon which funds are to operate and which he is charged to ensure. By preventing the fund from transitioning from utilising the self-funding gap to a costing basis without one, not only conflicts with his duty under s 28(a) of the Act, but also would on the most basic economic principles lead to a deteriorating financial position for the fund and would certainly not be in the interest of its members (given the unreasonable and fatally flawed approach of expecting the fund to absorb the extra cost of removing the self-funding gap which was not catered for in determining its contributions). This flawed approach of the registrar is highly relevant, as correctly understood by the court below, with regard to the fund's declining financial position but also when considering the terms of the order given in the counter application. That order would however require some adjustment, given the registrar's persistence with

his unreasonable refusal to properly take that into account in refusing to approve its contribution and benefit structures subsequently applied for.

Held further that; the High Court found that the unreasonable directives and decisions which had their origin in his approach to the 2019 proposals, directed at removing the self-funding gap and compensating for this, caused adverse financial consequences for the fund, compounded by the administrative penalties imposed. These, the court found, impeded the fund in its attempts to run its business on sound business principles and its ability to trade its way out of its difficult financial condition. Those findings and that approach cannot be faulted and are in fact strongly supported by the overwhelming thrust of the evidence. So too is the court's finding that the registrar had not established that a consideration of the equitable interests of members favoured a winding-up order.

Held further that; whilst the registrar unfortunately fell very short of performing his statutory mandate of due oversight and regulation of the fund, as would be expected of a reasonable registrar, it is however to be stressed that the fund's resort to self-help by implementing certain of its increases which had not been approved, is to be severely deprecated. The rule of law and the principle of legality which include the presumption of regularity of administrative acts of functionaries – even those later found to be invalid – attract legal consequences. They are to be adhered to until they are set aside. It was not open to the fund to implement contribution rates which the registrar had not approved, even though his conduct was demonstrably unreasonable and irrational and fell to be subsequently set aside if and when challenged. The fund's conduct in doing so is deserving of severe censure. It no doubt exacerbated the breakdown in the relationship between the registrar and the fund and led to a hardening of the registrar's already unreasonable stance towards the fund. But, as the High Court correctly found, a winding-up application is not in essence a punitive mechanism available to the registrar to secure compliance with his directives.

The appeal was accordingly dismissed with costs.

APPEAL JUDGMENT

SMUTS AJA (DAMASEB DCJ and ANGULA JA concurring):

Introduction

[1] The Registrar of Medical Aid Funds (the registrar) brought an application for the winding up of the Heritage Health Medical Aid Fund (the fund), the first respondent in this appeal. The High Court on 14 April 2023 dismissed the application with costs and granted a counter-application brought by the fund against the registrar.

[2] The registrar appeals against both orders.

[3] Shortly before the hearing of this appeal and on 22 December 2025, the registrar lodged an application to receive further evidence on appeal (served on the fund's practitioners on Friday, 19 December 2025). That application is opposed. The litigation history is first set out, including reference to earlier litigation which is relevant to certain issues raised in the winding-up application. The approach of the High Court is briefly set out. The application to adduce further evidence is then addressed before turning to the merits of this appeal.

The winding-up application and prior litigation

[4] The fund is a registered medical aid fund, under the Medical Aid Funds Act 23 of 1995 (the Act). It was registered in 2015 with the Namibia Financial Institutions Supervisory Authority (Namfisa) and has conducted business following registration in accordance with a business model which accompanied its registration application. Namfisa is a juristic person established under s 2 of its empowering legislation, Act 3 of 2001. In terms of s 3 of that Act, Namfisa's functions are:

- '(a) to exercise supervision, in terms of this Act or any other law, over the business of financial institutions and over financial services; and
- (b) to advise the Minister on matters related to financial institutions and financial services, whether of its own accord or at the request of the Minister.'

The Chief Executive Officer (CEO) of Namfisa, by virtue of that position, also acts as the appointed registrar pursuant to other legislation entailing supervision of the financial services sector such as the Act.

[5] Towards the end of 2018, the fund applied to the registrar to approve changes to its contribution and benefit structure for 2019. These proposed changes included an increase in contributions by members to compensate for the removal of what was called a self-payment gap and also included proposed annual inflationary increases to contributions. The registrar refused to approve the fund's 2019 proposed contributions and the changes to its benefit structure. The fund challenged that decision by way of review and sought interim relief on an urgent basis pending the review which was surprisingly struck from the roll by the High Court for a lack of urgency on 5 December 2019. The fund had simultaneously applied to review the registrar's decision-making in Part B of the application. The review application was subsequently dismissed on its merits by the High Court on 14 August 2020. The fund appealed against that dismissal to this Court.

[6] While that appeal was pending and some time before the appeal was heard on 5 October 2022, the registrar brought the application to wind up the fund on 24 June

2021. (It turned out that the fund was substantially successful in that appeal. The judgment of this Court was delivered on 21 November 2022, reported as *Heritage Health Medical Aid Fund v Registrar of Medical Aid Funds*.)¹

[7] The registrar's winding-up application (the application) sought a provisional order of liquidation of the fund in terms of s 35, read with s 37, of the Act read with the relevant provisions of the Companies Act 28 of 2004 relating to liquidations. The application sought a *rule nisi* calling upon interested parties to show cause why the fund should not be placed under a final order of liquidation. The application cited the Minister of Finance as a second respondent. Quite why, was not adequately explained to us. That clearly amounts to a misjoinder – a phenomenon we encounter all too often.

[8] In the application, the registrar seeks the winding-up of the fund on two main grounds. The first ground relied upon was the fund's alleged repeated contraventions of the Act. The second main ground enumerated by the registrar was that the fund was not in a sound financial position (although the heads of argument filed on behalf of the registrar seek to reverse that sequence).

[9] The first main ground for the winding-up of the fund (of repeated contraventions of the Act by the fund) is divided into five sub-categories of contraventions. The first is termed 'unilateral amendment of the contribution tables and benefit structures'. It relates to the fund's proposed 2019 contribution and benefit tables and structures which the registrar declined to approve. That decision-making was challenged by the fund in its review application and dismissed by the High Court and was on appeal at

¹ *Heritage Health Medical Aid Fund v Registrar of Medical Aid Funds & others* 2022 (4) NR 1127 (SC).

the time the winding-up application was brought. The fund took the view that it could proceed to implement its proposed 2019 changes. The registrar issued a directive that the fund must revert to its 2018 benefit and contribution structure and refund to its members their payments made in excess of the 2018 contributions. When the fund failed to do so, the registrar imposed administrative penalties upon the fund.

[10] The second in the category of contraventions referred to relates to the late submission of documentation to the registrar. These concerned the late submission of minutes of a meeting of the fund's trustees, the late submission of information and quarterly returns by the fund as directed by the registrar and the late submission of annual financial statements.

[11] In the fund's answering affidavit, it is acknowledged that there were shortcomings on the part of the fund in supplying the documentation referred to. These had occurred under the fund's previous management which had changed in December 2020. The new management said that, after taking over with effect from 1 December 2020, the shortcomings were attended to and rectified, except for the implementation of the 2019 contributions which was then the subject of the pending appeal to this Court. A new board had also been appointed as of 30 March 2021. The fund had also, with the sanction of the registrar, convened a meeting of members to seek a waiver from them in respect of a refund of excess payments made under the 2019 structure should its appeal not succeed. Over 80 per cent of the members at the meeting voted in favour of that waiver which, in accordance with its rules, would bind all members. The registrar however took a contrary view and required that potential refunds to

members for contributions in excess of those approved by him must be reflected as a liability in the form of a provision for those refunds in the fund's financial statements.

[12] The third sub-category of alleged contraventions of the Act is what is termed a failure on the part of the fund to obtain reinsurance. This ground had also formed part of the registrar's reasoning to decline the approval of the 2019 contributions and benefit structure.

[13] The registrar had issued a directive to the fund that its failure to acquire reinsurance contravened the Act because s 28(a) required the fund to conduct its business in accordance with sound business principles. According to the registrar, this required that reinsurance be obtained. This issue too was raised in the pending appeal and, according to the fund, could not be relied upon as a ground in the winding-up application. The fund also responded that reinsurance was unaffordable to it and that reinsurers displayed a lack of interest to reinsure the fund because the 2019 changes were declined by the registrar.

[14] The registrar's fourth alleged contravention on the part of the fund concerned what was termed the self-funding gap. The registrar referred to the fund's actuary's proposal to remove the self-funding gap because it had led to a loss of members and the additional cost by reason of its removal meant that an increase in contributions would be required to make up for this. The registrar took the view that the self-funding gap was an irregularity as it had not been approved by him. The registrar further ordered the fund to discontinue the self-funding gap with immediate effect.

[15] The registrar acknowledged that this issue was challenged in the review application which was dismissed and on appeal when his winding-up application was brought.

[16] The fifth alleged contravention concerned the resignation of the fund's administrator with effect from 31 August 2021. The registrar complained that he had not been informed of the reason and steps taken to secure a replacement at the time the winding-up application was brought in June 2021.

[17] The second main ground for bringing the application was the registrar's view that the fund was not in a sound financial condition. He raised four 'concerns' in support of his view. Firstly, he referred to the small and ageing membership of the fund. In support of this concern, the registrar referred to the decline in membership (of 11) from 668 in 2018 to 657 in 2020 and that the average age of members had increased. The registrar pointed out that a younger demographic should be targeted for membership. The registrar also raised the lack of reinsurance in support of this 'concern'.

[18] The registrar also referred to the lack of potential growth in fund membership with reference to the fund's growth record prior to the application. The registrar also asserted that the fund's projected administration and non-health care related expenditure was not commensurate with the fund's historic expenditure trends. The registrar also stated that the fund had implemented contribution and benefit changes for 2019 and 2020 without the requisite approvals from his office. This would, according to the registrar, result in refunds to members (in excess of N\$3m) and

penalties in excess of N\$1,7m for not complying with the Act as well as the liability to pay Namfisa's legal fees of N\$520 238 if unsuccessful in its appeal. That sum excluded the costs of the appeal.

[19] The registrar also voiced serious concerns about the fund's ability to continue operating as a going concern. If the fund were to lose the appeal, its net deficit would, according to him, exceed N\$3,3m and render the fund technically insolvent. If the fund were to succeed with its appeal, it would not render the fund insolvent but the registrar expressed the view that it would still have insufficient resources to cater for the fund's demographic imbalance and its exposure to a risk of 'open-ended' claims and generally for the fund to sustain itself in the long term.

[20] The application was opposed by the fund.

[21] In its answering affidavit, the fund pointed out that it provides affordable medical aid to people in advanced years 'who would otherwise probably be unable to obtain medical aid'. The fund pointed out that other registered medical aid funds have an age cut-off of 60 years, beyond which they would not admit new members except with special permission of their respective boards, rendering admission in the 55 – 60 year age bracket almost impossible for prospective new members of that age. Most of the fund's members are over 55 years old. The fund then had 367 principal members and 106 adult dependent members of whom 473 were older than 55 years. The fund contended that they would probably be unable to obtain medical aid elsewhere and the resultant effect of winding-up would not be in their best interest.

[22] It was also pointed out that the fund at the time of the application paid out claims with no co-payment from members whilst other funds pay claims to a limit prescribed in the Namibian Association of Medical Aid Funds (Namaf) tariffs with the excess being paid by members or a co-payment.

[23] In opposition to the application, the fund in essence, contended that the registrar is partly responsible for the circumstances relied upon in support of the winding-up application. The fund referred to the impasse between itself and the registrar which was caused by actions taken by the registrar (in respect of its application for the 2019 benefit and contribution proposal) and that those issues were largely the subject of the pending appeal in this Court. Yet the registrar had sought its winding-up prior to those issues being authoritatively determined (on appeal to this Court).

[24] The first such issue was the self-funding gap. When applying for approval to increase contributions or change benefits, a fund would need to justify those increases and/or changes with reference to an actuarial report explaining the need for such changes. When the fund applied for registration, it included a 30 per cent self-funding gap. Although it meant that the fund would ultimately pay 100 per cent of a member's benefit, this would occur if members would pay 30 per cent of their benefit after exhausting the first 60 per cent of benefits. If however further benefits are required thereafter, the member would be entitled to the remaining 40 per cent of the benefit. The purpose behind this mechanism was to deter members from utilising the full 100 per cent of benefits. It was an integral part of its business model and was fully explained in the actuarial report which accompanied its application for registration. The

registrar registered the fund with this self-funding gap as an integral part of its contribution and benefit structures. The fund operated on this basis until 2018 when it resolved to remove it. This, the fund said, was with the knowledge of the registrar.

[25] In reply, the registrar acknowledged that the self-funding gap mechanism was contained in the actuarial report (and thus part of the business model) yet claimed that it was not contained in the rules of the fund which were approved, asserting that the rules stood to be approved and not the actuarial report. The registrar asserted without amplification that the self-funding gap amounted to an unlawful practice and that he would not approve an increase in contributions aimed at correcting an unlawful practice, despite the fact that it was plainly an integral part of the fund's business model.

[26] The fund in turn contended that this approach was irrational as it ignored the existence of the self-funding gap and that its removal would need to be funded.

[27] As this issue was raised in the review and in the pending appeal, the fund contended that the High Court would be in a significantly better position to determine the winding-up application once the appeal against the dismissal of the review of the registrar's decision in this regard had been decided. The question of reinsurance was also raised in that appeal and the fund argued that the same consideration applied with regard to it.

[28] The fund also pointed out that the registrar persistently refused to consider approving any contribution increases and changes to the benefit structure pending the

finalisation of the appeal except a single small increase in contributions based upon the 2018 rates. This meant, according to the fund, that it was prevented by the registrar from removing the cause of his complaint concerning reinsurance and concerning the financial position of the fund.

[29] The fund acknowledged that the relationship between its previous management and the registrar had become 'severely strained' and that the new management had endeavoured to improve the relationship by addressing non-compliances.

[30] The fund contended that it was not in the interest of members for the fund to be wound up, as required by s 35 of the Act.

[31] The fund also contended that the application for winding-up would be misused if directed to penalise the fund for alleged non-compliances with the Act or the registrar's directives. Reference was made to the provisions of ss 39 and 44(2) of the Act read with reg 13A² and s 45 of the Act with regard to powers to secure and address compliance with the Act and directives. The registrar had imposed weighty administrative penalties upon the fund for what he considered to be non-compliances.

[32] As for the specific non-compliances raised, the fund pointed out that all of the late submissions of documentation complained of had occurred under the previous management and the new management had sought to rectify those non-compliances.

² General Regulations, GN 12 of 1997, GG 1496, 11 February 1997.

[33] As for the registrar's complaint that the administrator had resigned and that he had not been informed of the identity of a new administrator, the fund pointed out that this was not true. On 16 April 2021, the registrar had been provided with a board resolution appointing the new administrator and on 21 May 2021 his office had been provided with the signed service level agreement with the new administrator. The registrar in reply ineptly attempted to qualify his incorrect assertion about not being informed of 'steps (if any) taken by the fund to seek a replacement'.

[34] As to the second ground for the winding-up application (the registrar's view that it is not in a sound financial position), the fund dealt in detail with each of the assertions upon which this view was based.

[35] The fund acknowledged that the average age of its members was 56.9 years which is relatively old for the medical aid fund industry. But it was added that it was taking steps to mitigate that by seeking to attract new younger members.

[36] The fund also acknowledged that it had a deficit in its 2020 financial year and pointed out that this was caused by its legal expenses in the review application and administrative penalties. It was also engaged in negotiations with a very large employer to increase the fund's membership to its employees.

Counter-application

[37] After the exchange of affidavits, the fund brought a counter application on 10 June 2022, seeking an order that the registrar be ordered to consider its proposed 2020 contributions and benefits 'on merit and approve or reject it (*sic*)'. An order was

also sought directing the registrar 'not to give any negative considerations to the non-approval of the 2019 contributions and benefits or to the implementation thereof' by the fund.

[38] The fund had in 2021 mandated an actuarial review of its benefits and contributions for 2022 which then formed the basis of its applications made to the registrar on 15 July 2021 and 24 August 2021. In response, Ms G Mohamed of the registrar's office granted approval for a contribution increase on plans which had existed in 2018 and further that the increase was only to be applied to contribution rates which prevailed in 2018. Approval was granted to amend benefit conditions to be payable at the specified proportion set out in prevailing Namaf tariffs, rather than actual cost. The majority of other proposed benefit changes, including the introduction of new plans (aimed at younger potential members) and changes to limits and sub-limits on all plans were declined. The reason for declining was the registrar's concern relating to the current financial position of the fund and its lack of reinsurance.

[39] The fund pointed out that the primary causes of its financial position were the lack of membership growth, legal fees and penalties and the provision on its balance sheet for refunding members their contributions since 2018.

[40] As for the reinsurance, it was stated that the fund continued to seek reinsurance but due to its small membership size, which it attributed largely to its inability to amend benefits and contributions due to the registrar's refusal to grant such amendments, its endeavours to obtain reinsurance had not been successful. Other risk mitigating measures had been employed by the fund, such as capping benefits to Namaf tariff

rates. The fund asserted that, had it implemented its revised product set in full after 2018 and had it not endured penalties, legal expenses and provisions for liability for member contribution repayments, the financial position of the fund would be sound.

[41] The counter application was opposed. A large part of the registrar's opposing affidavit was removed from the record by his legal practitioners when required by this Court on 27 January 2026 to rectify the record to replace a further affidavit of Ms V Muchero and its annexures which were illegible. This occurred shortly after 27 January 2026 when volumes 10 and 11 of the record were uplifted by the registrar's legal practitioners. A lever-arch file was shortly afterwards provided with a legible text of Ms Muchero's affidavit and annexures. A few days before the hearing and on 26 February 2026 volumes 10 and 11 were returned which included the first 41 pages of the registrar's answering affidavit towards the end of volume 11.

[42] As a consequence of the failure to avail the full record of the counter application at the appropriate time, this Court was greatly inconvenienced in preparing for the hearing of this appeal. The cause for this rests squarely on the registrar's legal representative's failures with regard to the record and is to be deprecated. Given the importance in disposing of this appeal, this Court proceeded to prepare for this appeal despite being hampered by this inconvenience.

Further affidavit of Ms Muchero

[43] On 3 October 2022, and shortly before the hearing of the application *a quo*, the fund obtained leave to place further facts before the High Court. The facts concerned

the fund's application for approval for its proposed contribution tables and changed benefit structures for 2022.

[44] The affidavit by its principal officer, Ms Muchero, referred to correspondence exchanged between the fund and the registrar after filing its answering affidavit to the application on 16 August 2021. The correspondence showed that the registrar required the fund to limit high claims and obtain reinsurance but at the same time refused to consider the fund's 2022 proposed contribution tables and benefit structures which were geared to achieve those objectives (by limiting high claims by changing limitless benefits). Ms Muchero pointed out that the refusal to approve this limitation on high claims on the part of the registrar effectively prevented the fund from securing reinsurance because reinsurers do not, according to the fund (and not disputed by the registrar), have an appetite for limitless claims. Ms Muchero on behalf of the fund contended that by requiring reinsurance before allowing the fund to change from limitless benefits to benefits with upper limits, obstructed the fund from doing precisely what the registrar required.

[45] The fund also sought to address a 'concern' of the registrar by seeking to introduce affordable entry level plans. These plans were, according to Ms Muchero, then in demand because of prevailing strained economic conditions. These plans were aimed at attracting new members, particularly outside its existing demographic, and also aimed at existing members seeking to downgrade their benefit plan because of budgetary constraints. But the introduction of entry level plans was declined by the registrar. By refusing to permit this, Ms Muchero contended that the registrar effectively prevented the fund from addressing his requirement that the fund grow its

membership and diversify its age demographic. Not only would it be difficult for the fund to attract new lower income members, but existing members whose financial circumstances had deteriorated would be unable to downgrade to a more affordable option within the fund's structures and would then need to resign from the fund.

[46] Ms Muchero pointed out that, without a growth in membership, the fund would not be able to obtain reinsurance and was thus being prevented by the registrar from being able to do so.

[47] Ms Muchero further referred to the delay on the part of the registrar to deal with the 2022 application. It had been submitted in July 2021 and again in October 2021. The registrar said he would not consider it until April 2022 because it was incomplete. Ms Muchero pointed out that it was materially the same as the fund's 2021 benefit and contribution application. Yet by June 2022, the registrar was still considering it. Given this inexplicable delay, Ms Muchero stated that the fund resolved to implement certain changes such as benefit caps and a four per cent premium on all products with effect from 1 May 2022 pending approval by the registrar. The registrar however ordered the fund to revert to the 2018 contributions in 2022, despite relevant market factors pointed out by Ms Muchero reflecting considerable increases in the cost of medical services and related costs which way exceeded that percentage in the intervening years. Ms Muchero stated that the fund had implemented those changes in order to survive and not in defiance of the registrar.

[48] The registrar's persistent position is that any increases would be based upon and applied to the 2018 rates, while the appeal was pending. He refused the fund's increases in 2019 and approved a nominal increase in 2021 but based on the 2018

rates. Ms Muchero pointed out that, as a result, the 2021 contributions lagged considerably behind those in the industry and contended that his actions were calculated to drive the fund into financial distress.

[49] Ms Muchero also produced correspondence from ageing members to the effect that, without the fund, they would be without medical aid. Ms Muchero also adduced further waivers from members to refunds because of the non-approval of the 2019 rates, bringing the total to over 65 per cent of members who have waived that right.

[50] Ms Muchero also complained about the registrar's negative public notices which caused reputational damage in respect of negotiations with large employers aimed at securing the provision of medical aid to their employees (by joining the fund) and that the notices were also detrimental to and compromising the fund's ability to obtain reinsurance.

[51] The fund accordingly submitted that the registrar's conduct was unreasonable and irrational.

[52] The fund's actuary deposed to an affidavit in support of the counter-application. He explained the basis to the 2021 proposed changes to benefits and contributions and referred to the registrar's refusal to approve changes to limits and sub-limits. The reason proffered by the registrar was his concern relating to the financial position of the fund and its lack of reinsurance. The actuary pointed out that the primary contributors to the fund's financial position are the lack of membership growth, legal fees, penalties and the accounting provision for refunding current and former members' contributions since 2018 (required by the registrar). Had it not been for the

legal fees, penalties and the provision for refunds, the actuary expressed the view that the fund's financial position would have improved to show positive accumulated funds of N\$6m with reserves at about 17 per cent. The actuary concluded that the fund's position would thus be sound in the absence of those charges and provisions.

[53] The actuary's assessment in this respect was not disputed by the registrar.

[54] The registrar's affidavit in response to Ms Muchero's affidavit was discursive, contesting certain of the assertions but stating that his office was engaging other funds with the view to accommodate the fund's ageing members. There was however no mention of any progress on this score in the further affidavits sought to be filed by him. The registrar pointed out that there was a further deterioration in the fund's financial position after filing his prior affidavits and also referred to a growing number of complaints received by his office from members of the fund.

The High Court hearing, its approach and the outcome of the appeal against the dismissal of the earlier review

[55] The fund's earlier review application was brought and dismissed by the High Court on 14 August 2020. The fund's appeal was heard in this Court on 5 October 2022 and decided shortly afterwards on 21 November 2022. The Registrar's application to wind-up the fund, brought in June 2021, was argued in the High Court on 18 October 2022, while the appeal judgment was pending.

[56] At the hearing of the application, the High Court raised the pending appeal to be heard shortly after the hearing with the parties, as indicated in its judgment. The

registrar's position was that, should this Court's judgment on appeal be delivered prior to the High Court giving judgment, the High Court should take note of it and factor the approach of the Supreme Court into its discretion. Notably the parties did not seek to further address the High Court concerning the impact of this Court's judgment and reasoning upon the winding-up application, as was confirmed by counsel at the hearing of this appeal.

[57] Prominent in the reasoning of the High Court was a detailed reference to the approach of this Court in the review application, given the relevance of certain of the issues raised in the review to the grounds raised by the registrar in the winding-up application. These included in particular the fund's 2019 proposals including with regard to doing away with the self-funding gap.

[58] The fund was in essence substantially successful in the appeal against the refusal of its review application.

[59] The High Court referred in detail to the reasoning of this Court which included a finding that the registrar's direction to the fund to cease immediately with the self-funding gap (which the registrar deemed to be irregular) without granting a concomitant increase in contributions (to fund that) was unreasonable and probably irrational and, that if it had been challenged, it would in all likelihood have been set aside. This Court had further directed the registrar to consider the self-funding gap afresh and determine the modalities (inclusive of the consequent cost to the fund involved) in respect of the termination of that gap, and in doing so, the registrar was directed to take cognisance of the approach of this Court as set out in paras 49 to 57

of its judgment. This Court had also found that the registrar had permitted the self-funding gap when registering the fund.

[60] In the course of its reasoning, this Court also found that the registrar's decision (to direct that the self-funding gap must cease without permitting a concomitant increase in contributions) was 'neither in the interest of the fund nor its members with potentially serious consequences to both', reasoning (with reference to that decision):

[53] The decision was thus neither in the interest of the Fund nor its members with potentially serious adverse consequences to both. To blame this on the unsound business decisions of the Fund is also not correct. What was unsound was the assumption that the members would understand the self-funding gap principle (with the benefit of hindsight it seems even the registrar did not understand it) and not the effect thereof in the costing of the benefit which was provided for. Further it seeks to ignore the role played by the registrar when this principle was in effect approved by him. To, essentially, choose to remedy the perceived irregularity and unlawful conduct in a manner that was potentially devastating to the Fund and its members where it could have been done without such effect did not, in the circumstances of this case, grant a reasonable registrar the option to act in the manner he did.

[54] As the registrar had all the information as to how the self-funding gap worked, one would have expected of a reasonable registrar to have established that it was not correct that members were only entitled to 70 per cent of the stated maximum rate. As explained above, the self-funding gap made the situation a bit complicated but members whose medical costs exceeded 130 per cent of the stipulated maximum benefit were entitled to such stipulated maximum. With this as a starting point a reasonable registrar would have taken much less severe steps to phase out the self-funding gap or to look at the amendment of the Fund rules or a combination of these two approaches.

[55] In any event, in the circumstances of this case, to place an unnecessary financial burden on the Fund that might lead to its demise, which would obviously not be to the benefit of its members, when the matter could have been approached on a

basis where neither the members nor the Fund were adversely affected nor one where the Fund was to face potential economic ruin was, in my view, unreasonable in the sense described above.

[56] I thus agree with the submission on behalf of the Fund that the directive of the registrar in relation to the removal of the self-funding gap - without addressing the additional costs this would entail to the Fund - was unreasonable. The directive of the registrar in this regard amounts not only to a refusal of an increase to contributions but also to a decision to grant more generous benefits to members without addressing the additional costs thereof to the Fund. It follows that the directive must be set aside to this extent so that the issue can be revisited by the registrar.

[57] As the Fund itself intended to abolish the self-funding rule with the costs thereof passed on to their members it did not take issue with the directive to abolish the rule. It only took issue with the fact that the registrar did not address the concomitant costs of such abolition appropriately. It follows that in theory, it is only this costs aspect that will need to be revisited by the registrar. From a practical perspective however the directive and the costs go together. If the directive does not refer to costs at all and thus by implication compels the Fund to carry the costs, it follows that if the directive stands pending a reconsideration of the costs aspect by the registrar, that pending such determination the Fund will have to bear the costs. This I have found to be unreasonable and such a result should, obviously, not ensue. The only solution, in my view, is to allow the registrar to revisit the whole matter afresh and to determine the modalities (inclusive of the costs) of how the self-funding gap should be abolished simultaneously. In this manner no lacuna will exist during which the Fund will have the sole responsibility of bearing the costs of the abolition of the self-funding gap.' (Emphasis supplied).

[61] The High Court quoted paras 54 - 57 of this Court's judgment. The preceding paragraph is included to provide further context.

[62] The High Court found that the unreasonable directives and decisions of the registrar concerning the 2019 proposals and the administrative penalties imposed

upon the fund by the registrar for transgressing his unreasonable directives had caused adverse consequences for the fund in its attempts to run its business on sound business principles and its ability to trade out of its unsound financial condition.

[63] The High Court referred to s 35(4) of the Act which obliges a court in a winding-up application to consider the equitable interests of members of the fund in exercising its discretion. The court referred to the fact that more than 40 per cent of the fund's members are pensioners who would not be able to secure alternative medical aid. The court referred to the registrar's repeated refusals to grant approval for changes to the benefit structures and introduce entry level plans and only to grant increases in contributions with reference to the 2018 rates and his response of administrative penalties and cautionary public notices. The High Court further stated: 'I trust that the registrar shall revoke the penalties and the direction to repay the contingent member contributions by the fund'.

[64] The court further stated:

[19] The Registrar's regulation of the future affairs of the Fund should be done with the purpose of creating circumstances wherein the Fund is given the opportunity to improve its financial condition and to trade out of its financial constraints. In doing so the Registrar will promote the Fund and serve the public interest by assisting numerous pensioners to remain covered under their chosen medical aid plans and alleviating pressure on the public health care system.'

[65] The High Court further found that if the approach set out in this Court's judgment concerning the removal of the self-funding gap, if implemented, would 'go a long way

in remedying the wrongs of the past and contribute to the financial stability of the fund and its ability to obtain insurance'.³

[66] The High Court further found that winding-up the fund in present circumstances would be punitive for a lack of regulatory compliance which is not intended by s 35. The court, in exercising its discretion, declined the winding-up application and granted the fund's counter-application.

Application to adduce further evidence

[67] The High Court's judgment was delivered on 14 April 2023. The registrar noted an appeal on 16 May 2023.

[68] On 13 November 2025 the registrar of this Court informed the parties of the date of hearing of this appeal - set down for 2 March 2026.

[69] On 22 December 2025 the registrar filed a notice of application to adduce further evidence on appeal by way of a supplementary affidavit attached to the notice. The affidavit of the registrar's deputy runs into 25 pages and the annexures to it exceed 90 pages. The application was served on the fund's lawyers on Friday, 19 December 2025. The fund had ten court days (until 7 January 2026) to file its opposing affidavit. The fund's legal practitioners sought an extension of seven court days to do so from the registrar's legal practitioners. That extension was inexplicably refused. An answering affidavit would ordinarily be required on 7 January 2026. It is a well-established practice that most legal practitioners' practices are closed for most of that period – if not the whole period. The refusal to grant a reasonable extension of seven

³ Para 21 of the High Court judgment.

court days from 7 January 2026 was, to say the very least, grossly unreasonable in the circumstances.

[70] The fund filed an opposing affidavit on 7 January 2026. For the large part, it is argumentative and seeks the dismissal of the application to receive the further evidence. The point is understandably taken that the application constitutes an abuse of practice. In view of the grossly unreasonable refusal of the extension, the fund sought a reasonable opportunity from this Court to respond to the new evidence sought to be tendered, given the fact that not only were the lawyers on leave, but also the actuary and employees of the fund. In a replying affidavit with over 100 pages of annexures, the registrar states that the application to adduce further evidence was considered only after being advised of the date of hearing on 13 November 2025. It inexplicably took until 5 December 2025 to provide an instruction to bring the application and another two weeks for the affidavits to be drafted and filed.

[71] The underlying premise of the approach of the registrar's practitioner would appear to be that, once a notice of appeal is filed and the record is lodged, the parties are entitled to go into hibernation and sit back and do nothing until a date of hearing is provided. That is an entirely fallacious premise and is indeed reckless and irresponsible. The lawyers would be well aware of the established practice of this Court to provide dates of hearing during and often towards the end of the preceding court term, as occurred in this instance.

[72] Any responsible practitioner would have been aware of the need to apply for the receipt of further evidence as and when that evidence manifests itself and not wait two and a half years until the allocation of a date of hearing to first consider obtaining

an instruction to do so or not. The instruction to provide such evidence should have been sought and provided well in advance of the notice of the hearing date and the application should have been prepared in advance of that date and merely updated if need be and finalised immediately after that notice.

[73] The manner in which this application has been brought is in my view irresponsible and, when considered with the grossly unreasonable refusal to agree to an extension to provide an answering affidavit, in my view furthermore amounts to an abuse of process.

[74] Moreover most of the new evidence sought to be adduced did not exist when the application was argued in the High Court. It is largely related to the financial position of the fund. This Court is one of appeal to determine the correctness or otherwise of the High Court's decision on the basis of what served before that court. This is not a court of first instance determining what would almost amount to a fresh winding-up application.

[75] The court's power to receive further evidence is set out in s 19(a) of the Supreme Court Act 15 of 1990. It provides:

'The Supreme Court shall have the power –

- (a) on the hearing of any appeal to receive further evidence, either orally or by deposition before a person appointed by the court, or to remit the case to the court of first instance, or to the court whose judgment is the subject of the appeal, for further hearing, with such instructions relating to the taking of further evidence or any other matter as the Supreme Court may deem necessary; . . .'

[76] This Court has held that this is a power 'which the Court would exercise sparingly and only where certain prerequisites are complied with'.⁴

[77] The prerequisites listed by this Court in that matter were firstly that a reasonable and acceptable explanation is to be given why the evidence was not tendered at the trial (or application, in this case). In the second place, the evidence must be essential for the case on hand. Thirdly, it must be of such a nature as to probably have the effect of influencing the result of the case.⁵

[78] More recently, this Court has again emphasised the exceptional nature of permitting further evidence on appeal.⁶ In doing so, this Court also stressed that the evidence should be 'materially relevant to the outcome of the initial proceedings'.⁷

[79] Quite apart from the entirely unsatisfactory manner in which this application has been brought, there is also the failure to meet the requisites of s 19(a) as interpreted by this Court, given the fact that the further evidence could not be materially relevant to the outcome of the initial proceedings at it did then not exist. It is accordingly not apposite to deal with the contents of the affidavit seeing that it is not to be admitted. Despite this, a brief reference should be made to a distinctly unsatisfactory feature of the application. It sets out to show the fund's deteriorating financial position following the closure of pleadings in the application. What is however a cause for grave concern is the approach of the registrar which emerges in refusing to consider the fund's proposals to amend its contributions and benefits in accordance with this Court's

⁴ *JCL Civils Namibia (Pty) Ltd v Steenkamp* 2007 (1) NR 1 (SC) para 27.

⁵ *Ibid* para 27.

⁶ *Prosecutor-General v Kennedy* 2019 (3) NR 631 (SC) para 13.

⁷ *Ibid* para 13.

judgment in November 2022. There is disturbingly no reference in the affidavits⁸ to this Court's approach and the fundamental finding of this Court concerning the need to permit the fund to address the cost of foregoing the self-funding gap by permitting a commensurate increase in contributions to pay for that. The failure to implement this Court's earlier order by the registrar is severely deprecated.

[80] This reflects very poorly upon the registrar and his ability to regulate funds in accordance with the letter and spirit of the Act and in accordance with the judgment of this Court. This is exemplified by his response in reply to the fund's principal officer's statement under oath confirming an offer contained in a letter addressed by the fund's lawyers of 29 December 2025 to the registrar – from the Prosperity Group to move 2000 of its members to the fund. Instead of engaging with the fund to establish more details and investigate whether winding-up would still be necessary in the light of this development, and thus taking into account in the interest of members, the terse response in his otherwise unduly discursive replying affidavit is firstly to refer to it as an 'alleged offer' despite its confirmation under oath by the fund's principal officer and then incorrectly add: 'The offer is referred to in the vaguest of terms. No written confirmation from the Prosperity Group is attached, nor has the fund filed an affidavit confirming this offer'. This is of course unfortunately false as the principal officer herself confirms the offer under oath in her answering affidavit.

[81] This response, premised upon an untrue statement on his part, is incompatible with the proper exercise of the registrar's functions and oversight contemplated by the Act.

⁸ Except for only an oblique reference in a single letter pointed out to us in oral argument.

[82] A further compelling reason to refuse the application is the need to afford the fund a reasonable opportunity to deal with the further allegations, having been refused that opportunity on behalf of the registrar.

[83] The application to adduce further evidence is accordingly unmeritworthy and is to be dismissed with costs. Given the abusive nature in which it had been brought and prosecuted, a special order of costs on legal practitioner and client scale is warranted in refusing it.

Submissions on appeal

[84] Counsel for the registrar in his written argument asserted that the first ground for the winding-up is that the fund was 'unable to pay its debts and commercially insolvent', and in any event was not in a sound financial condition as envisaged by s 35(1) of the Act and in the second place due to repeated contraventions of the Act by the fund. But that is incorrect. As already said, the first ground clearly set out in the application is that of alleged repeated contraventions. The second ground asserted was that the fund is not in a sound financial position and not that the fund is unable to pay its debts which is now asserted. It is in fact stated by the registrar in the founding affidavit that only in the event of the fund losing its appeal, would it be rendered 'technically insolvent' and that a ruling on appeal in the fund's favour would not render it insolvent. That is the case the fund was required to meet and the court below was to determine.

[85] Much of the written argument on behalf of the registrar is devoted to contend that the registrar's opinion required by s 35(1) that the fund is not in a sound financial

position is well founded. It is argued under the heading ‘the duty not to usurp the functions of the registrar’ that the winding-up under s 35 is no ordinary winding-up. That is because, so the argument runs, the Act ‘accords the registrar a wide discretion to determine whether a medical aid fund is in a sound position or not or that it should be wound up for any other reason’. The contention is then advanced with reference to this Court’s decision in *Wal-Mart*⁹ that the registrar’s exercise of discretion in forming the view that a fund is not in a sound financial position is a decision entailing ‘balancing competing interests which is not a task where a court has any special competence’ and not a task assigned to the court under the Act and thus should not be usurped by the Court. There was a retreat from this stance in oral argument and rightly so. Counsel instead referred in detail to the considerations raised in support of the registrar’s opinion, such as the small and ageing membership of the fund and the deterioration of its solvency, that it was desirable to wind-up the fund on the basis that it was not in a sound financial position and that it was the registrar’s duty to prevent the collapse of a fund with the deleterious consequences which would follow.

[86] Counsel for the registrar also advanced argument in support of the other main ground for winding-up contained in the application, namely the alleged repeated contraventions by the fund of the Act. These include the complaint of unilateral amendment of contribution tables and benefit structures, late submissions of documentation and the failure to obtain reinsurance.

[87] The registrar’s counsel argued that a case had been made out for winding-up of the fund and the consequential orders sought. As for the counter application,

⁹ *Namibia Competition Commission & another v Wal-Mart Stores Incorporated* 2012 (1) NR 69 (SC) paras 52 – 53.

counsel correctly contended that if the appeal succeeded and a winding-up order were to be granted, it would be rendered academic and fall away. Counsel further accepted that if the appeal against the refusal of the winding-up order were to be dismissed, then the order given in respect of the counter application should stand.

[88] The fund in its submissions supported the finding of the High Court that winding-up the fund would not be in the best interests of its members and argued that the approach was sound. Counsel argued that the conclusion was underpinned by two considerations. Firstly, the factual finding that the majority of fund members were pensioners whose advanced years precluded them from securing membership with other funds. Counsel for the fund referred to his opponent's reliance upon the registrar's statement in 2022 that the registrar was engaged in ongoing talks with other funds to take over the fund's members. Counsel for the fund pointed out that the application to place further evidence before court was tellingly silent on this issue that the court's finding on this issue was sound.

[89] In the second instance, counsel for the fund referred to the actuarial evidence to the effect that, if the fund's proposed contributions for 2023 were approved, the fund would be able to trade successfully again.

[90] Counsel contended that if the registrar were to implement this Court's earlier order properly, this would remedy past wrongs and contribute to the fund's financial stability, as was considered by the court below.

[91] The fund's counsel also argued that it is the court which is vested with a discretion in applications to wind-up funds and not the registrar.

[92] Counsel further submitted that there is a narrow ambit of an appeal against the exercise by the High Court of its discretion in refusing the application and that this Court would only interfere with it where this Court considered that the High Court had not exercised its discretion judicially or had made 'a demonstrable blunder'.¹⁰

[93] Counsel for the fund further argued that the unsoundness of the fund's financial position was primarily caused by the unfair and irrational manner in which the registrar treated it and that it would not be in the interests of the fund's members for it to be wound up.

Statutory context

[94] The power of the registrar to bring an application to wind-up a fund is derived from s 35 of the Act. It reads:

(1) The Registrar may, in regard to any registered fund, apply to the court for an order under paragraph (c), (d) or (e) of subsection (3), and a registered fund may, in regard to itself, apply to the court for an order under paragraph (b), (d) or (e) of that subsection, if the Registrar or the fund is of the opinion that it is desirable, because the fund is not in a sound financial condition or for any other reason, that such an order be made in regard to the fund: Provided that a fund shall not make such an application except by leave of the court, and the court shall not grant such leave unless the fund has given security to an amount specified by the court for the payment of the costs of the application and of any opposition thereto, and has established prima facie the desirability of the order for which it wishes to apply.

(2) Any creditor of a registered fund who is unable to obtain payment of his or her claim after recourse to the ordinary process of law may, in regard to such fund, make

¹⁰ *Standard Bank Namibia Ltd & others v Maletzky & others* 2015 (3) NR 753 (SC) para 51 following *Northbank Diamonds Ltd v FTK Holland BV & others* 2002 NR 284 (SC).

an application to the court for an order under paragraph (b), (d) or (e) of subsection (3), and the proviso to subsection (1) shall apply *mutatis mutandis* in regard to such application.

(3) Upon any application in terms of either of the preceding subsections, the court may –

- (a) refuse the application;
- (b) order that an investigation be made and may issue such directions regarding such investigation as the court may deem desirable;
- (c) order that the rules of the fund relating to the appointment, powers, remuneration and removal from office of the trustees of the fund, or relating to such other matter as the court may regard appropriate, be altered in a manner to be specified in such order;
- (d) order that the fund be placed under judicial management under section 36;
- (e) order that the whole or any part of the business of the fund be wound up under section 37.

(4) In exercising its discretion under subsection (3), the court shall consider the equitable interests of the members of the fund and of any other person who has rendered or who intends to render financial assistance to the fund, and shall make such order as it deems most advantageous to the members of the fund.

(5) ...

(6) ...

(7)'

[95] This section is to be read with s 37. The portions of s 37 which are relevant for present purposes are sub-sections (1) and (2) which provide:

- '(1) An order of the court under paragraph (e) of subsection (3) of section 35, or an order under subsection (9) of section 36 for the winding-up of a scheme, shall be subject to the provisions of this section.

- (2) Sections 337 to 426, inclusive, of the said Companies Act, 1973, shall apply *mutatis mutandis* to a winding-up under this section in so far as those sections relate to a winding-up by the court in terms of the said Act, and in so far as those sections are applicable and not inconsistent with any provision of this Act or with any direction issued by the court under this section.'

[96] The registrar is thus empowered to apply to the High Court under s 35(1) when he or she is of the opinion that it is desirable to wind up a fund either because it is not in a sound financial position or for any other reason. The jurisdictional fact which must thus be present to enable the registrar to invoke this power (apart from establishing his or her appointment as such) is that he or she holds an opinion that it is desirable to wind up a fund either because it is not in a sound financial position or for any other reason which would then be specified. In bringing such an application, the registrar would thus need to establish an opinion that it is desirable to wind up a fund on either basis, based upon objectively justiciable facts, to support such an opinion. If the registrar establishes either basis a court, in determining the application, is bound in the exercise of its discretion to 'consider the equitable interests of the members of the fund' and the court is then enjoined to make an order which it deems 'most advantageous to the members' of the fund.

[97] The provisions setting out the power on the part of the registrar to apply to wind up a fund and for the exercise of the court's discretion are to be interpreted in the context of the particular nature of medical aid funds as contemplated by the Act.

[98] This Court,¹¹ in interpreting the Act – albeit in a different context in determining whether medical aid funds are businesses carried on for ‘gain’ or ‘reward’ for the purpose of competition legislation¹² - stated:

[56] In the MAF Act, a fund is defined as a business carrying on a scheme with the object of providing financial assistance to members in defraying expenditure incurred for medical services.

....

[59] The registrar is precluded from registering a fund unless satisfied that its establishment will be in the public interest. The registrar is also to be satisfied that the applicant will be able to establish the proposed fund successfully as a fund, its business will be carried on in a prudent manner and that its organisation and management is appropriate for the carrying on of the fund in accordance with its rules and the MAF Act.’

[99] This Court further found that the regulatory and supervisory provisions contained in the Act accentuate the statutory purpose behind the Act of providing protection for members of funds in the public interest in pursuit of the purpose of a fund.¹³

[100] This Court stressed that the purpose of funds is to provide financial or other assistance to members in defraying expenditure for medical services by means of the members making contributions to a fund’s collective pot, explaining:

¹¹ *Namibian Association of Medical Aid Funds & others v Namibia Competition Commission & another* 2017 (3) NR 853 (SC).

¹² Competition Act 2 of 2003.

¹³ *Namibia Competition Commission* para 61.

'In any given year a member may claim less benefits than his or her contributions while other members may recover more than they contributed. At the commencement of that year members would not know into which category they could fall. But by being a member they throw in their lot with other members. The purpose of the fund and its characteristics determined by the MAF Act accord with the social solidarity principle emphasised by the ECJ as a crucial factor in determining whether an entity is an undertaking for the purpose of the provisions in the Treaty regulating competition. These features accentuate the social purpose of funds as part of social security facilitated by the MAF Act'.¹⁴

[101] Furthermore, this Court stressed that funds are accordingly

'... highly regulated in the public interest to protect their members and ensure that the business of a fund is conducted within the confines of the Act. The legislature has provided this protective framework in the interest of members. This is no doubt because of the statutorily endorsed social function funds perform where members subsidise each others' medical costs on a principle of social solidarity thus rendering access to expensive medical services as widely as possible. It is plainly in the public interest that as many people as possible enjoy the benefits of fund members (to receive assistance in defraying medical expenses) to relieve the public purse from providing those medical services to those members. The purpose of the MAF Act is not only for control to be exercised over funds but is also, according to its long title, to promote funds because of the useful societal function they perform.'¹⁵
(Emphasis supplied).

[102] A fund is thus a non-profit making concern whose purpose is to provide that useful social function.¹⁶ But medical aid funds are statutorily enjoined by s 28(a) of the Act to carry on business 'in accordance with sound business principles'. This would in practical terms require them to ensure that the contributions obtained by members are sufficient, taking into account reasonable risk mitigating measures, to cover the

¹⁴ Para 62.

¹⁵ Para 63.

¹⁶ Paras 64 and 67.

benefits those members are entitled to under the benefit scheme which those members sign up to in order to defray their medical costs or a portion of them and for the registrar to ensure that this is the case.

Ambit of this appeal

[103] Having set out the statutory context of an application to wind-up a fund under the Act, the question arises as to whether the discretion to be exercised by the High Court in determining such an application is in a strict or narrow sense by acting within its powers to exercise its discretion to select an option open to it or is a discretion in a wider sense. Counsel for the fund contends that it is the former, by arguing that this Court would only interfere with the High Court's discretion if it had not been exercised judicially or had made 'a demonstrable blunder', relying upon the approach of this Court in *Maletzky*¹⁷ and *Northbank Diamonds*¹⁸. *Maletzky* concerned a discretion to set aside an irregular step in proceedings under the erstwhile (High Court) rule 30 and *Northbank Diamonds* concerned an application for security for costs brought under the erstwhile s 13 of the Companies Act 61 of 1973.

[104] In the context of a similar contention advanced in *TransNamib Holdings Limited v Stocks & Stocks Leisure (Namibia) (Pty) Ltd & others*,¹⁹ this Court stated:

[58] This court in *Rally for Democracy and Progress & others v Electoral Commission of Namibia & others*²⁰ referred to the narrow ambit of an appeal where a discretion is exercised by a court in regulating its own procedures - in

¹⁷ *Standard Bank Namibia Ltd & others v Maletzky & others* 2015 (3) NR 753 (SC).

¹⁸ *Northbank Diamonds Ltd v FTK Holland BV & others* 2002 NR 284 (SC).

¹⁹ *TransNamib Holdings Ltd v Stocks & Stocks Leisure (Namibia) (Pty) Ltd & others* 2021 (2) NR 497 (SC) para 58.

²⁰ *Rally for Democracy and Progress & others v Electoral Commission of Namibia & others* 2013 (3) NR 664 (SC).

that instance concerning whether a proper and satisfactory explanation was given to supplement papers.²¹ In matters of that kind, this court found that, where there was the exercise of a discretion in this “strict or narrow” sense, the power to interfere on appeal would be strictly circumscribed – and only where “the court below had exercised its discretion capriciously or upon a wrong principle, or has not brought its unbiased judgment to bear on the question, or has not acted for substantial reasons, or materially misdirected itself”.²² In the course of its reasoning this court approved the principle underpinning a narrow discretion as one where “the court of first instance is in a better position than an appeal court to decide a question which involves the exercise of a value judgment, especially on a question of procedure” where an appeal court would be reluctant to interfere.²³ Apart from discretionary powers of a presiding judge in controlling the conduct of proceedings (such as granting postponements, amendments and leave to adduce further evidence), other instances within this category include making orders for costs, imposing sentence and authorising the alienation of immovable property in which a minor child has an interest.²⁴

[105] The nature of a narrow discretion exercised in those matters essentially related to the discretionary power of a court to control the conduct of proceedings.

[106] It would rather seem to me that the discretion in the court posited by s 35(4) is a wide discretion. It cannot be said that the court of first instance is in a better position than this Court in determining whether a winding up is warranted after considering the equitable interest of members and in making an order deemed most advantageous to members of a fund.

²¹ Para 105.

²² Para 106.

²³ *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council & another* 1999 (4) SA 799 (W) at 805G.

²⁴ *TransNamib Holdings Ltd v Stocks & Stocks Leisure (Namibia) (Pty) Ltd & others* 2021 (3) NR 510 (SC) para 58.

[107] The nature of the discretion is more akin to determining whether it would be just and equitable to grant relief under s 260 of the Companies Act 28 of 2004 as arose in *TransNamib Holdings* where this Court held that such a determination 'entails a broad conclusion of law, justice and equity and is a judgment on the facts found by a court to be relevant and not merely a discretion between different options'.²⁵ In reaching that conclusion this Court relied upon *Tjopsomie Boerdery (Pty) Ltd v Drakensberg Botteliers (Pty) Ltd & another*²⁶ which entailed an application to wind up a company on grounds that it was just and equitable under s 344(f) of the erstwhile 1973 Companies Act.

[108] It follows that the fund's contention of a narrow ambit to this appeal is misplaced.

Was the exercise of the High Court's discretion well-founded?

[109] When the fund was registered to the satisfaction of the registrar in 2015, its business plan included costing the contributions for benefits with reference to a self-funding gap by way of a complicated formula to discourage excessive claims and thereby reduce the cost of providing those benefits. Because that element (the self-funding gap) had understandably caused some confusion, the fund decided in 2018 to remove it from their proposed contribution and benefit structure for 2019. That step would, of its own, (and quite apart from inflationary pressures), increase the costs of cover and require additional contributions from members to compensate for the additional cost of benefits as a consequence of removing that cost saving mechanism. The registrar, as this Court emphatically found, was unreasonable in refusing an

²⁵ Para 62.

²⁶ *Tjopsomie Boerdery (Pty) Ltd v Drakensberg Botteliers (Pty) Ltd & another* 1989 (4) SA 31 (T).

increase to cater for that. This Court also held that by registering the fund in 2015 on the basis of a business model which expressly included and was premised upon that mechanism meant that he had approved it and that his denial to that effect was untenable, as was his persistent refusal to permit the fund to appropriately address that removal.

[110] The registrar's persistence in considering that mechanism as unlawful (on the false premise he had not approve it, as found by this Court), and thus, according to him, was incapable of being duly factored into future contributions with reference to its cost, is palpably unreasonable and irrational and in direct conflict with this Court's approach, as was also made plain by the court below. Yet the registrar has persisted in that approach in direct contravention of this Court's order. This manifests itself in the refusal to permit the cost of its removal to be factored into the 2019 and subsequent rates, as should have been the case, on the basis of sound business principles. This is quite apart from the unreasonable refusal to take into account the full impact of inflation and instead applying smaller increases with reference to the 2018 rates, without being adjusted for the extra cost to compensate for the removal of the self-funding gap.

[111] The registrar is expressly enjoined to ensure that a fund operates upon sound business principles in accordance with s 28(a) of the Act. Plainly, where a fund is precluded by the registrar from adjusting its contribution rates to fund the benefits it provides to its members, as has occurred here, does violence to the basic premise of carrying on a business on sound business principles upon which the Act is based. The registrar's conduct in this regard not only conflicts with the approach of this Court and

is thus unlawful, but demonstrates a fundamental failure to give effect to the statutory premise and purpose upon which funds are to operate and which he is charged to ensure. By preventing the fund from transitioning from utilising the self-funding gap to a costing basis without one, not only conflicts with his duty under s 28(a) of the Act but also would on the most basic economic principles lead to a deteriorating financial position for the fund and would certainly not be in the interest of its members (given the unreasonable and fatally flawed approach of expecting the fund to absorb the extra cost of removing the self-funding gap, not catered for in determining its contributions). This flawed approach of the registrar is highly relevant, as correctly understood by the court below, with regard to the fund's declining financial position but also when considering the terms of the order given in the counter application, which would require some adjustment, given the registrar's persistence with his unreasonable refusal to properly take that into account in refusing to approve its contribution and benefit structures subsequently applied for.

[112] The financial impact of the registrar's conduct on the fund was compounded by the imposition of administrative penalties, some of which were the consequence of his conduct.

[113] The High Court found that the unreasonable directives and decisions which had their origin in his approach to the 2019 proposals, directed at removing the self-funding gap and compensating for this, caused adverse financial consequences for the fund, compounded by the administrative penalties imposed. These, the court found, impeded the fund in its attempts to run its business on sound business principles and its ability to trade its way out of its difficult financial condition. Those findings and that

approach cannot be faulted and are in fact strongly supported by the overwhelming thrust of the evidence. So too is the court's finding that the registrar had not established that a consideration of the equitable interests of members favoured a winding-up order.

[114] The High Court further correctly relied upon the fund's actuary's evidence that in the absence of unreasonable directives on the part of the registrar, the fund would be in a sound position.

[115] The fact that many, if not most, members of the fund could not be accommodated in other funds, which was established upon the approach to disputed facts in motion proceedings, correctly weighed heavily with the High Court. Indeed, this position would ultimately not appear to be in issue as the registrar did not properly dispute it and instead stated that his office would enter into discussions with other funds to address that consequence. No further facts are placed before the court below to address that. Nor did the inept attempt to place further factual matter on appeal relate to this important factor, relevant to the equitable interest of the majority of members.

[116] Given these well-founded conclusions, it would follow that the court below cannot be faulted in deeming a dismissal of the application to wind up as the most advantageous outcome for the members of the fund. Indeed, Oosthuizen J's conclusion to dismiss the application is very well-founded.

[117] It follows that the appeal against the dismissal of the winding-up application must fail.

[118] The High Court further found that the regulation of the future affairs of the fund (after the dismissal of the winding-up application) should be directed at ensuring the fund is provided with the opportunity of trading its way into a more financially secure position, supported by the fund's actuary's evidence. That approach too cannot be faulted and accords with the purpose of the Act and proper regulation and oversight under the Act, unfortunately lacking in this instance. Due and proper regulation would then require, as the court *a quo* correctly found, that the contribution and benefit structure must be duly revisited by the registrar to approve changes which would enable the fund to factor in the additional costs to it consequent upon removing the self-funding gap and having established that, reasonable inflationary adjustments since 2018 to equate with the rising costs of medical services. The increases arrived at would need to be adjusted by the limited increases permitted by the registrar since then.

[119] Whether the total percentage increase is implemented at once or over a specified period in which event, taking into account the cost of such graduation, would be a matter for due and reasonable consideration by the registrar after further proposals by the fund with the assistance of its actuary, have been put before the registrar. Furthermore, due consideration should be given to approve reasonable entry level plans directed at the lower end of the market so as to enable the fund to attract new members and address the concerns relating to the fund's demographic and also to position itself to offer a downgraded option for existing members to opt for if they

are no longer able to afford more higher priced options of the fund. The fund should also be permitted reasonable means to limit claims to mitigate its exposure to high claims, particularly pending its ability to reinsure itself. This all requires that the registrar is to afford the fund a reasonable opportunity to trade its way out of its current financial position.

[120] Whilst the registrar unfortunately fell very short of performing his statutory mandate of due oversight and regulation of the fund, as would be expected of a reasonable registrar, it is however to be stressed that the fund's resort to self-help by implementing certain of its increases which had not been approved, is to be severely deprecated. The rule of law and the principle of legality which include the presumption of regularity of administrative acts of functionaries – even those later found to be invalid – attract legal consequences. They are to be adhered to until they are set aside.²⁷ It was not open to the fund to implement contribution rates which the registrar had not approved, even though his conduct was demonstrably unreasonable and irrational and fell to be subsequently set aside if and when challenged. The fund's conduct in doing so is deserving of severe censure. It no doubt exacerbated the breakdown in the relationship between the registrar and the fund and led to a hardening of the registrar's already unreasonable stance towards the fund. But, as the High Court correctly found, a winding-up application is not in essence a punitive mechanism available to the registrar to secure compliance with his directives.

[121] The question remains as to the future of the fund in its current difficult financial circumstances. Both the High Court and this Court earlier have stressed that it is the

²⁷ *Black Range Mining (Pty) Ltd v Minister of Mines and Energy & others* NNO 2014 (2) NR 320 para 18.

registrar's duty to ensure that the fund be conducted on sound business principles. As both courts have stressed, and as reiterated in this judgment, this requires that the registrar approves reasonable market related changes to the fund's benefit and contribution structure to enable the fund to make up the cost caused by the removal of the self-funding gap. That cost can be estimated by an actuary as well as adequate subsequent inflationary adjustments which would need to be applied for existing schemes and also reasonable pricing set for new entry level schemes.

[122] In the course of oral argument, counsel for the registrar was invited to make submissions concerning the formulation of an apposite order to address these issues in the event of the appeal not being upheld. Counsel correctly accepted that the earlier fund proposals would need to be reconsidered afresh by the registrar. This exercise may need to go back to the 2019 proposals. Counsel later also indicated in reply that, in that event, that a nuanced judgment by this Court would need to take into account the regulatory context. That too is correct and is what is attempted in this judgment, taking into account the social and public interest purpose of medical aid funds and their need to be sustainable by reason of the statutory injunction to be run on sound business principles.

[123] As was put to counsel and their submissions duly invited on this score, it would seem that the optimal way to achieve this would be with regard to the less than specific formulation of the order sought and granted in the counter application.

[124] The orders sought and granted in the counterclaim were in the following terms:

- '1. The [registrar] shall consider the [fund's] proposed 2022 contributions and benefits, on merit, and approve or reject it (*sic*).

2. In considering the first respondent's proposed 2022 contributions and benefits, the [registrar] shall not give any negative consideration to the non-approval of the 2019 contributions and benefits or to the implementation thereof by [the fund].'

[125] In view of all the circumstances ventilated in these proceedings and in particular the need for the fund to trade its way out of its currently challenging financial position and to be conducted on sound business principles in the interests of its members, the registrar is enjoined to facilitate this process by duly applying his mind to the fund's proposals to achieve this, while complying with his duties under the Act. As indicated, the fund, assisted by its actuary, is to make proposals for contributions and benefits, if need be retrospectively to the extent required to obviate at least the need for refunds where members have not waived their rights to claim contributions not previously authorised and possibly for other members who benefited from such increased contributions. In support of the fund's proposals, the fund is to provide detailed, duly motivated calculations, including to address the removal of the self-funding gap with effect from 2019 and increases determined after taking into account such costing and calculation and if need be in respect of the ensuing years. The fund's proposals may include the introduction of entry level schemes to attract new members. The registrar is further enjoined to reconsider the extent to which administrative penalties should be cancelled where they relate to the fund's increments which arise from the failure to take into account factoring the increase to the fund of the removal of the self-funding

gap. Penalties for reasons unrelated to this factor such as the late filing of returns or documents would not in my view arise for reconsideration.

[126] The fund is to make its fresh proposals in accordance with the approach outlined in this judgment without undue delay and within 30 days of this Court's order. The registrar is required to make his decision in respect of those proposals within 30 days after being lodged with him. It is plainly in the equitable interest of members of the fund for the registrar to afford the fund a reasonable period for the operation of new and revised contribution and benefit structures to take their effect before any future winding-up application may be considered.

Costs

[127] The fund is substantially successful and is to be awarded its costs. As already said, a special order is warranted in respect of the application to adduce further evidence. The application for condonation for rectifying the record was not opposed and no cost order need be made in that respect. The fund sought costs against the registrar on the punitive scale as between legal practitioner and own client. Given the fund's conduct in resorting to self-help, I am disinclined to make such an order in respect of the dismissal of the appeal, notwithstanding the unreasonable conduct of the registrar. In the absence of the resort to self-help, the position may well have been different. Both sides made use of instructed counsel and the cost orders should reflect this.

Order

[128] In the result, the following order is made:

1. The application for condonation in respect of the record is granted with no order as to costs.
2. The application to adduce further evidence is dismissed with costs on the scale as between legal practitioner and client and to include the costs of one instructing and one instructed legal practitioner.
3. The appeal is dismissed with costs to include the costs of one instructing and one instructed legal practitioner.
4. The order of the High Court in respect of the counter application is to be replaced by the following order:
 - '2. The counter application is granted with costs, including the costs of one instructing and two instructed counsel, in the following terms:
 - (a) The registrar is directed to consider the fund's proposals for contributions and benefits in respect of all such years from 2019 onwards as may be required, within 30 days of such proposals made to the registrar.
 - (b) The fund is to make such application to the registrar within 30 days of the date of the order given on appeal herein.
 - (c) In making his decision in respect of the application(s) contemplated in subparagraphs (a) and (b) above, the registrar is directed to:

- (i) take into account the cost to the fund in respect of removing the self-funding gap with effect from its removal in 2019 and to permit inflationary adjustments for subsequent years after taking into account such additional cost with effect from 2019 and adjusting for increases as have already been approved;
- (ii) consider approving such further new or additional schemes to attract new members on the basis of sound business principles; and take into account the approach set out in this judgment in considering the fund's application(s) contemplated by sub paras (a) and (b) above.'



SMUTS AJA



DAMASEB DCJ



ANGULA JA

APPEARANCES

APPELLANT:

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Instructed by Ueitele & Hans Inc.

FIRST RESPONDENT:

S J Jacobs

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[Faint signature]

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ANDIMA INC.