# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

## JUDGMENT

**Reportable**

Case no:396/2023

In the matter between:

**OPTIVEST HEALTH SERVICES (PTY) LTD** **APPELLANT**

and

**THE COUNCIL FOR MEDICAL SCHEMES** **FIRST RESPONDENT**

**THE REGISTRAR OF THE COUNCIL FOR MEDICAL SCHEMES** **SECOND RESPONDENT**

**OPEN WATER ADVANCED RISK SOLUTIONS (PTY) LTD** **THIRD RESPONDENT**

**Neutral citation:** *Optivest Health Services (Pty) Ltd v The Council for Medical Schemes and Others* (396/2023) [2024] ZASCA 64 (30 April 2024)

**Coram:** MOCUMIE ADP, WEINER and GOOSEN JJA and COPPIN and BLOEM AJJA

**Heard:** 5 March 2024

**Delivered:** This judgment was handed down electronically by circulation to the parties' representatives by email, published on the Supreme Court of Appeal

website, and released to SAFLII. The date and time for hand-down is deemed to be 11h00 on 30 April 2024.

**Summary:** Whether s 44(4) of the Medical Schemes Act 131 of 1998 (the Act) enables the Council and Registrar of Medical Schemes to investigate the conduct of a broker – whether the Council was obliged to utilise the mechanisms of s 47 of the Act – whether the Council's conduct was lawful, procedurally fair and rationally connected to the purpose of the Act.

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**ORDER**

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**On appeal from:** Gauteng Division of the High Court, Pretoria (Nyathi J, sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

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**JUDGMENT**

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**Weiner JA (Mocumie ADP, Coppin and Bloem AJJA concurring):**

**Introduction**

[1] The appellant is Optivest Health Services (Pty) Ltd (Optivest), which is accredited as a broker by the Council for Medical Schemes (the Council) in terms of s 1,[1] read with s 65[2] of the Medical Schemes Act 131 of 1998 (the Act) and the regulations made in terms of the Act (the regulations).

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[1] Section 1 of the Act defines a broker to mean 'a person whose business, or part thereof, entails providing broker services. . .'
'broker services' are defined as:
*'(a)* The provision of service or advice in respect of the introduction or admission of members to a medical scheme; or
*(b)* The ongoing provision of service or advice in respect of access to, or benefits or services offered by, a medical scheme.'

[2] Section 65 provides as follows:
'(1) No person may act or offer to act as a broker unless the Council has granted accreditation to such a person on payment of such fees as may be prescribed.
(2) The Minister may prescribe the amount of the compensation which, the category of brokers to whom, the conditions upon which, and any other circumstances under which, a medical scheme may compensate any broker.
(3) No broker shall be compensated for providing broker services unless the Council has granted accreditation to such broker in terms of subsection (1).
(4) An application for accreditation shall be made to the Council in the manner and be accompanied by such information as may be prescribed, and any other information as the Council may require.
(5) A medical scheme may not directly or indirectly compensate a broker other than in terms of this section.
(6) A broker may not be directly or indirectly compensated for providing broker services by any person other than —
(a) a medical scheme;
(b) a member or prospective member, or the employer of such member or prospective member, in respect of whom such broker services are provided; or
(c) a broker employing such broker.'

[2] The first respondent is the Council. Section 3 of the Act provides for the establishment of the Council. The second respondent is the Registrar of the Council appointed in terms of s 18 of the Act. In terms of s 18(3), the Registrar shall act in accordance with the provisions of this Act and the policy and directions of the Council. (The first and second respondents will either be referred to collectively as 'the respondents', or individually as 'the Registrar' or 'the Council' where appropriate).

[3] The third respondent, Open Water Advanced Risk Solutions (Pty) Ltd (Open Water), is the company which was appointed by the Registrar in terms of s 44(2) of the Act, read with s 134(1)*(a)* of the Financial Sector Regulation Act 9 of 2017 (the FSR Act), to undertake an inspection into Optivest after a tip-off was received from an anonymous former employee of Optivest regarding conduct that was alleged to be unlawful, which required further investigation.

[4] This appeal concerns the powers of the Council to investigate the alleged non-compliance with the provisions of the Act by a broker accredited by the Council in terms of s 65 of the Act, by way of an inspection in terms of s 44(4) of the Act, read with the relevant provisions of the FSR Act. The Gauteng Division of the High Court, Pretoria (the high court) held that it did have such power and dismissed an application by Optivest challenging the exercise of that power with costs. This is an appeal against that order with the leave of that court.

[5] The preamble of the Act sets out its purpose as follows:

'To consolidate the laws relating to registered medical schemes; to provide for the establishment of the Council for Medical Schemes as a juristic person; to provide for the appointment of the Registrar of Medical Schemes; to make provision for the registration and control of certain activities of medical schemes; *to protect the interests of members of medical schemes*; to provide for measures for the co-ordination of medical schemes; *and to provide for incidental matters*.' (Emphasis added.)

[6] The issues in this appeal are whether, upon a proper construction of *inter alia* ss 7 and 44(4) of the Act, the respondents have the power to investigate a complaint concerning a broker, in this case, Optivest. It also involves the question as to whether the respondents were obliged to utilise the mechanisms in s 47 of the Act, by giving Optivest the opportunity to respond to the complaint before embarking on the investigation of Optivest's activities. Related to these issues are the defences raised by Optivest that the decision by the Council to appoint Open Water to investigate Optivest was unlawful, procedurally unfair and lacked rationality.

**The legislative scheme**

[7] The functions of the Council are outlined in s 7 of the Act. Section 7*(a)* provides for the duty to protect the interests of beneficiaries at all times. Section 7*(h)* gives the Council the power to perform any other functions conferred on it by the Minister under the Act. Section 8*(h)* empowers the Council to take any appropriate steps which it deems necessary or expedient to perform its functions in accordance with the provisions of the Act. The Council is a financial sector regulator and the executive officer of the Council refers to the Registrar, whose functions include the management of the affairs of the Council (s 18(2)). The decision to investigate a Medical Scheme or 'any person' for non-compliance with the Act is exclusively within the powers of the Registrar in terms of the Act.

[8] Section 44(4) provides for inspections. In terms thereof:

'The Registrar may order an inspection in terms of this section—

(a) if he or she is of the opinion that such an inspection will provide evidence of any irregularity or of non-compliance with this Act by *any person*; or

(b) for purposes of routine monitoring of compliance with this Act by a medical scheme or *any other person*.' (Emphasis added.)

[9] Related to the powers referred to above, are those contained in ss 129(2) and (3), 134, 135, 136 and 137 of the FSR Act, which respectively provide as follows:

'129. Application and interpretation of Chapter. –

. . .

(2) The Council for Medical Schemes may exercise powers in terms of this Chapter in respect of powers and functions set out in the Medical Schemes Act, and powers and functions granted to it in this Act.

(3) In relation to the exercise of the powers in terms of this Chapter by the Council for Medical Schemes in respect of a medical scheme, a reference in this Chapter to –

*(a)* a financial sector regulator or the responsible authority must be read as including a reference to the Council for Medical Schemes;

*(b)* the head of a financial sector regulator must be read as including a reference to the Registrar of Medical Schemes appointed in terms of section 18 of the Medical Schemes Act;

*(c)* a financial sector law must be read as including a reference to regulatory instruments and to the Medical Schemes Act; and

*(d)* a licensed financial institution must be read as including a reference to a medical scheme registered in terms of the Medical Schemes Act or an administrator of a medical scheme approved in terms of the Medical Schemes Act.

. . .

134. Investigators. –

(1) A financial sector regulator may, in writing, appoint a person as an investigator and may appoint any person to assist the investigator in carrying out an investigation.

. . .

135. Powers to conduct investigations. –

(1) A financial sector regulator may instruct an investigator appointed by it to conduct an investigation in terms of this Part in respect of any person, if the financial sector regulator—

*(a)* reasonably suspects that a person may have contravened, may be contravening or may be about to contravene, a financial sector law for which the financial sector regulator is the responsible authority; or

*(b)* reasonably believes that an investigation is necessary to achieve the objects referred to in section 251(3)(e) pursuant to a request by a designated authority in terms of a bilateral or multilateral agreement or memorandum of understanding contemplated in that section.'

Section 136 deals with the powers of investigators to question and require production of documents or other items.[3] The powers of the investigator are set out in s 137 of the FSR Act.[4]

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[3] Section 136 provides as follows:
'136. Powers of investigators to question and require production of documents or other items.
(1)*(a)* An investigator may, for the purposes of conducting an investigation, do any of the following:
(i) By written notice, require any person who the investigator reasonably believes may be able to provide information relevant to the investigation to appear before the investigator, at a time and place specified in the notice, to be questioned by an investigator;
(ii) by written notice, require any person who the investigator reasonably believes may be able to produce a document or item relevant to the investigation, to—
(aa) produce the document or item to an investigator, at a time and place specified in the notice; or
(bb) produce the document or item to an investigator, at a time and place specified in the notice, to be questioned by an investigator about the document or item;
(iii) question a person who is complying with a notice in terms of subparagraph (i) or (ii)(bb);
(iv) require a person being questioned as mentioned in subparagraph (i) or (ii)(bb) to make an oath or affirmation, and administer such an oath or affirmation;
(v) examine, copy or make extracts from any document or item produced to an investigator as required in terms of this paragraph;
(vi) take possession of, and retain, any document or item produced to an investigator as required in terms of this paragraph; and
(vii) give a directive to a person present while the investigator is exercising powers in terms of this section, to facilitate the exercise of such powers.
*(b)* An investigator who takes a document or item in terms of paragraph (a)(vi) must give the person producing it a written receipt.
*(c)* Subject to paragraph (d), the investigator must ensure that a document or item taken in terms of paragraph *(a)*(vi) is returned to the person who produced it when—
(i) retention of the document or item is no longer necessary to achieve the object of the investigation; or
(ii) all proceedings arising out of the investigation have been finally disposed of.
*(d)* A document or item need not be returned to the person who produced it if —
(i) the document or item has been handed over to a designated authority; or
(ii) it is not in the best interest of the public or any member or members of the public for the document or item to be returned.
*(e)* A person otherwise entitled to possession of a document or item taken in terms of paragraph (a)(vi), or its authorised representative, may, during normal office hours and under the supervision of the financial sector regulator, examine, copy and make extracts from the document, or inspect the item.
(2) A person being questioned in terms of this section is entitled to have a legal practitioner present at the questioning to assist the person.'
Section 137 provides as follows:
'137. Powers of investigators to enter and search premises. –
(1) An investigator may, for the purposes of conducting an investigation, do any of the following
*(a)* Enter any premises
. . .
(ii) without prior consent and without prior notice to any person—
. . .
(bb) with the prior authority of the head of a financial sector regulator or a senior staff member of the financial sector regulator delegated to perform the function, if the head of a financial sector regulator or senior staff member on reasonable grounds believes that —
. . .
(CC) it is necessary to enter the premises to conduct the investigation and search the premises as referred to in paragraph *(b)* or *(c)*, and to do anything contemplated in subsection (6);
*(b)* if the investigation is one referred to in section 135(1)*(a)*, search the premises for evidence of a contravention of a financial sector law; or

[10] Insofar as the FSR Act refers to the Council as 'a financial sector regulator', as stated above, this must be understood as referring to the Council acting through the Registrar. That is so because the Registrar is its executive officer and has the responsibility, in terms of the Act, to manage the Council's affairs, and to initiate investigations or inspections as envisaged in the Act.

[11] Section 47 of the Act provides:

'(1) The Registrar shall, where a written complaint in relation to any matter provided for in this Act has been lodged with the Council, furnish the party complained against with full particulars of the complaint and request such party to furnish the Registrar with his or her written comments thereon within 30 days or such further period as the Registrar may allow.
(2) The Registrar shall, as soon as possible after receipt of any comments furnished to him or her as contemplated in subsection (1), either resolve the matter or submit the complaint together with such comments, if any, to the Council, and the Council shall thereupon take all such steps as it may deem necessary to resolve the complaint.'

[12] Section 65(1) of the Act deals with accreditation of brokers. It prohibits parties from acting or offering to act as brokers unless the Council has granted accreditation to such persons on payment of such fees as may be prescribed.

[13] Regulation 28B(1) provides that any person desiring to be accredited as a broker must apply in writing to the Council. The Council is responsible for the accreditation of brokers to provide broker services, which are defined to include the provision of services or advice in respect of: (a) the introduction or admission of members to a medical scheme; or (b) the ongoing provision of services or

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*(c)* if the investigation is one referred to in section 135(1)*(b)*, search the premises pursuant to the request, subject to section 251
(6)*(a)* While on the premises in terms of this section, an investigator, for the purpose of conducting the investigation, has the right of access to any part of the premises and to any document or item on the premises. . .'

advice in respect of access to, or benefits or services offered by, a medical scheme.

[14] Regulation 28C provides for the suspension or withdrawal of accreditation given to a broker (for example) under Regulation 28B, if the Council is satisfied on the basis of available information, that the relevant broker *inter alia* has, since the granting of such accreditation, conducted his or her business in a manner that is seriously prejudicial to clients or the public interest.

**Background**

[15] On 27 May 2019, an anonymous tip-off was made by a former employee of Optivest through the Deloitte tip-off line. The tip-off was in the form of an email which was brought to the attention of the Registrar on or about the 31 May 2019. The author of the email containing the anonymous tip-off requested that this issue be forwarded to the correct department for investigation. In the email, it was alleged that the author had been working for Optivest and could not approach anyone at the company. The author alleged that:

'Optivest Heath Services gives medical aid members an option to pay a service fee.
Many members opt to have it, and some don't even know that it was added.
Down the line, members resign from the medical scheme, not knowing they still paying a service fee to Optivest.
I have come across profiles of members paying service fees for years, without a medical aid profile.
When asked if we can inform members, I was told we are not allowed to inform members that they are still paying a service fee.
There are more than ten thousand "orphan" service fee profiles.'

[16] The Council's Compliance and Investigation Unit (the Investigation Unit) prepared a report to the Registrar on 29 July 2019. It had formed the view that the allegations, if true, indicated that there were irregularities and non-

compliance with the Act and its regulations by Optivest, which warranted further investigation in the form of an inspection in terms of s 44(4)*(a)* of the Act, read with the FSR Act.

[17] On 30 August 2019, Open Water was appointed in terms of s 44(2) of the Act[5] read with s 134(1), 129(2) and (3) of the FSR Act, to conduct an inspection, in terms of s 44(4)*(a)* of the Act, 'into the affairs of Optivest or any part of the affairs of the financial institutions and/or *any person* that directly or indirectly manages the affairs of Optivest. . .'. The purpose of the investigation was to-

'5.1 investigate Optivest's compliance with the MSA and its regulations regarding the receipt of and dealing with commissions/service fees received from medical schemes and/or medical scheme members; and

5.2 obtain and investigate all documentation relating to all broker commissions/ service fees paid to Optivest by medical schemes and or members of schemes as well as the circumstances surrounding such payments.'

[18] The appointment letters of the investigators set out detailed directions with clear parameters in respect of the issues to be inspected. The Registrar approved the recommendation from the Investigation Unit on 30 July 2019. On 21 October 2019, Open Water attended at the premises of Optivest to investigate Optivest's affairs as per the mandate granted to it in its appointment letter. No notice was given to Optivest of the investigation, considering that it was based on a tip-off from a former employee and involved alleged fraudulent conduct, which could be concealed if notice was given.

[5]Section (44)(2) stipulates that:

'The Registrar, or such other person authorised by him or her, shall in addition to the powers and duties conferred or imposed upon him or her by this Act, have all the powers and duties conferred or imposed upon an inspector appointed under section 2 of the Inspection of Financial Institutions Act, 1984 (Act No. 38 of 1984), as if he or she has been appointed an inspector under that Act.'

[19] The initial inspection took place at Optivest's premises on 21 and 22 October 2019. Optivest co-operated with Open Water on these occasions. The inspectors returned to the premises on 14 November 2019 to continue its inspection and interview Optivest officials. At this point, Optivest withdrew its co-operation and sought to challenge the Council's authority to conduct an inspection into its affairs. It refused to hand over certain documentation which Open Water required to complete its investigation. These included audited financial statements and its agreements with its affiliated entities. As a result, Open Water produced 'a second draft investigation report' dated the 29 November 2019 (the draft report), which contained certain preliminary findings against Optivest, which the respondents contend are 'damning'.

[20] On 10 December 2020, Optivest instituted review proceedings seeking to review and set aside the decisions taken by the Registrar, alternatively, the Council, to:

(a) initiate an investigation into Optivest's affairs;

(b) appoint Open Water to undertake the investigation on its behalf; and consequently,

(c) to review and set aside the second draft report.

Optivest also sought an order for the return of all information and documentation obtained in the course of the investigation.

[21] Optivest's review was based on three main grounds. It contended that:

(a) the Council was not empowered by the Act or the FSR Act to initiate an investigation into it because it is a broker and not a medical scheme (the lawfulness challenge);

(b) the investigation was allegedly initiated pursuant to a written tip-off. Accordingly, Optivest should have been afforded *audi alterem partem (audi)* in terms of s 47 of the Act (the procedural challenge); and

(c) the investigation was not rationally connected to the purpose sought to be achieved (the rationality challenge).

[22] The high court dismissed Optivest's application and found that:

(a) the Council acted *intra vires* the powers statutorily vested in them in initiating the investigation;

(b) Optivest, having applied for and been granted accreditation, is subject to the regulatory regime provided for by the Act; and

(c) the mischief which the Council was called upon to investigate also occurred within the ambit of Optivest's accreditation.

[23] In the appeal, Optivest contends that the high court's findings were incorrect and it seeks to challenge the decision on five grounds. These are encompassed in the three grounds raised in the high court. Optivest claims that the high court erred in the following respects:

(a) in finding that the Registrar and Council acted within their powers in investigating Optivest's affairs. This is rooted in the first three related grounds of appeal referred to above;

(b) in its construction of the Council's investigatory powers both under the Act and FSR Act in finding that the Council and the Registrar acted intra vires;

(c) in its construction of section 44(4) of the Act and the provisions of the FSR Act;

(d) in finding that the power to investigate brokers is reasonably incidental to the power to accredit brokers;

(e) by failing to consider properly Optivest's contention that the investigation was not rationally related to the complaint received; and

(f) in finding that the Council was not required to furnish Optivest with a copy of the complaint before pursuing the investigation.

[24] The challenges and basis for the review of the actions taken by the respondents must be seen in the light of what was said in this Court in *Bonitas Medical Fund v The Council for Medical Schemes (Bonitas),*[6] where it was held that:

'The MSA provides for the regulation of medical schemes in the public interest. Its long title indicates that its objects include the control of certain activities of medical schemes and the protection of members' interests. Section 7 of the MSA deals with the functions of the council. Section 7*(a)* states that it is a function of the council to protect the interests of the beneficiaries of medical schemes "at all times".

The power in terms of s 44(4)*(a)* is intended to promote these objects. The power is no doubt intended to be an effective regulatory mechanism. For it to be effective, the registrar ought to be able to act in terms of s 44(4)*(a)* with expedition and without notice. A medical scheme or person suspected of irregularities or non-compliance with the Act, should, in the public interest, not be provided with the opportunity to hide or destroy evidence. Without the element of surprise, the effectiveness of the power will in many instances be lost or severely undermined. I agree with counsel for the respondents that the right of medical schemes to privacy should, in the light of these considerations, be attenuated.'

[25] Significantly, this Court in *Bonitas*, in dealing with s 44(4)*(a)* stated that:

'An inspection in terms of s 44(4)*(a)* is purely investigative. The inspector merely gathers evidence. The inspection does not determine or affect any rights. It follows that there is no need to provide for the protection of substantive rights by way of an appeal against a decision to order an inspection in terms of s 44(4)*(a)*.

. . .

There is no material difference between the nature of an inspection in terms of s 44(4)*(a)* of the MSA and that of the investigation of a complaint by the Competition Commission in terms of the Competition Act 89 of 1998. Such investigation may culminate in a referral of the matter to the Competition Tribunal. In *Competition Commission of SA v Telkom SA Ltd & another* [2010] 2 All SA 433 (SCA) para 11, this court held that a decision to refer a matter to the Competition Tribunal and the referral itself, are of an investigative and not an

[6] *Bonitas Medical Fund v The Council for Medical Schemes* [2016] ZASCA 154; [2016] 4 All SA 684 (SCA) paras 8-9.

administrative nature and are not subject to review under the Promotion of Administrative Justice Act 3 of 2000. In my judgment the same applies to s 44(4)*(a)* of the MSA. Nevertheless, a decision to order an inspection in terms of the MSA, would be subject to review under the rule of law, on the ground that it was arbitrary or irrational. . . or offended against the principle of legality. . .'[7](Footnotes omitted.)

**The lawfulness challenge**

[26] Optivest submitted that the Council can only investigate or inspect the affairs of medical schemes, (or other persons related thereto), but not brokers despite them having been accredited by it under the Act. Optivest contends that the provisions of s 44 of the Act (save for ss (2), (3) and (4)) indicate that the powers stated therein are limited to medical schemes. Although s 44(4) refers to 'any person' or 'any other person', this reference, so Optivest contends, is to one upon whom the Act imposes a positive duty in relation to their duties to a medical scheme, for example, a trustee. It submits, as Goosen JA finds in the dissenting judgment, that the entire apparatus of s 44 is aimed at medical schemes.

[27] The respondents contend for a wider construction of s 44(4)*(a)*. They submit that the legislature, in including the words 'any person', as opposed to citing only a medical scheme or seeking to limit the list of persons which qualify as such in s 44(4) made a clear policy decision. Section 44(1) specifically contemplates an inspection into the affairs of a medical scheme,[8] but the provisions of s 44(4) must be read to mean something other than a medical scheme (whilst it may include it).

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[7] Ibid paras 14-15.

[8] S 44(1) of the Act provides:

'A medical scheme shall, at the written request of the Registrar, or during an inspection of the affairs of a medical scheme, by the Registrar or such other person authorised by him or her, produce at any place where it carries on business, its books, documents and annual financial statements in order to enable the Registrar or such other person authorised by him or her to obtain any information relating to the medical scheme required in connection with the administration of this Act.'

[28] The respondents also submit that the words in s 44(4)*(a)* must be given their ordinary grammatical meaning, unless it would result in absurdity or inconsistency.[9] As Wallis JA opined in the seminal case of *Natal Joint Municipal Pension Fund v Endumeni Municipality*:

'The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.

. . .

. . . "the exercise of construction is essentially one unitary exercise.".'[10](Footnotes omitted.)

[29] In *Cool Ideas 1186 CC v Hubbard*,[11] the Constitutional Court summarised the principles applicable to statutory interpretation as follows:

'A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

(a) that statutory provisions should always be interpreted purposively;

(b) the relevant statutory provision must be properly contextualised; and

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity.

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[9] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

[10] Ibid paras 18-19.

[11] *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) para 28.

This proviso to the general principle is closely related to the purposive approach referred to in (a).' (Footnotes omitted.)

[30] The Registrar's powers are set out in Chapter 9 of the Act and include the powers to, *inter alia*, require additional particulars, make inquiries and conduct inspections and produce reports. The respondents contend that the high court was correct in finding that their powers to conduct inspections appear from the Act, the regulations and the FSR Act, all of which should be read together.

[31] Optivest claims that the Council's additional powers under ss 129, 134 and 135 of the FSR Act only apply to the inspection of medical schemes. The respondents contend that this does not align with the express wording of the sections. The subsection expands upon and/or extends the Council's investigatory powers into others besides a medical scheme. The Financial Services Tribunal considered the proper construction of ss 134 and 135 in *MediHelp Medical Scheme v the Registrar for Medical Schemes and Another*[12] and stated thus:

'The appointment of investigators is regulated in the FSR Act by sections 134 and 135. Reading the provisions in the light of the definitions in sec 129, the Council [financial sector regulator] may, in writing, appoint a person as an investigator and may instruct the investigator appointed by it to conduct an investigation in terms of this Part in respect of any person, if the Council reasonably suspects that a person may have contravened, may be contravening or may be about to contravene, the Medical Schemes Act [a financial sector law] for which the Council [financial sector regulator] is the responsible authority.'

[32] The Act does not expressly provide for an inspection into the affairs of brokers, but it does use the words 'any person.' Optivest contends that it is a reference to one upon whom the Act imposes a positive duty in relation to their duties to a medical scheme, for example, a trustee. The respondents submit that,

[12] *Medihelp Medical Scheme v Registrar For Medical Schemes and Another* [2020] ZAFST 88 para 10.

Optivest does perform a positive duty as it is required in terms of the Act to provide services and advice to beneficiaries. And, in its affidavit, Optivest refers to those that perform a positive service by including '[t]he supplier of a service, which has rendered a service to a beneficiary, that is obliged, under s 59(1) of the Act to furnish that beneficiary with a statement reflecting the particulars of the service supplied'. It is clear that a broker falls into that category, as defined.[13]

[33] The respondents contend that Optivest's submissions are inconsistent with the express wording of ss 134 and 135 of the FSR Act, read with s 129. They submit that on a contextual and purposive interpretation of the Act, the only jurisdictional fact required for an inspection under s 44(4)*(a)* is that the Registrar must be of the opinion that such an inspection will provide evidence of any irregularity or non- compliance with the Act by 'any person'.

[34] The respondents submit that a broker must be certified in terms of s 65 of the Act and that regulation 28C empowers the Council to suspend or withdraw accreditation given to a broker if the Council is satisfied that the broker has, since the granting of such accreditation, conducted their business in a manner that is seriously prejudicial to clients or the public interest. These powers, the respondents submit, give rise to an implied primary power or, at the very least, an ancillary power in s 44(4)*(a)* and *(b)* that an inspection can be commissioned into the affairs of a broker of a medical scheme to ensure compliance with the Act. This, the respondents argue, is consistent with the maxim of construction encapsulated in the phrase *ex accessorio aius, de quo verba loquuntur*[14],which the Constitutional Court has held to be a useful tool of interpretation.[15]

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[13] Op cit fn 1.

[14]Which translates to:
'if the principal thing is prohibited or permitted, the accessory thing is likewise prohibited or permitted'.

[15] *AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC and Others* [2021] ZACC 3; 2021 (4) BCLR 349 (CC); 2021 (3) SA 246 (CC). (*Amabhungane*).

[35] Where legislation grants certain powers, whatever is reasonably incidental to the proper carrying out of an authorised power is considered as impliedly authorised. This principle finds application in this context. This question of an implied primary power as opposed to an ancillary power was dealt with in the Constitutional Court as follows:

'A primary power is a power to do something required to be done in terms of an Act and which does not owe its existence to, or whose existence is not pegged on, some other power; it exists all on its own. That is what makes it primary, and not ancillary. If it owed its existence to another primary power, then it would be an ancillary power.'[16]

[36] The Constitutional Court, in *AmaBhungane*, stated the following regarding the difference between an implied primary and an ancillary power as follows:

'A distinction must be drawn between an implied primary power and an ancillary implied power. I consider it necessary to draw this distinction because quite often discussions of implied powers entail ancillary implied powers, and not primary implied powers. The distinction will be better understood if I first discuss the well-known concept, the ancillary implied power. An ancillary implied power arises where a primary power – whether express or implied – conferred by an Act cannot be exercised if the ancillary implied power does not also exist. For example, in *Masetlha* Moseneke DCJ, considering the President's power to dismiss a head of an intelligence agency under section 209(2) of the Constitution, held:

"The power to dismiss is necessary in order to exercise the power to appoint. . . Without the competence to dismiss, the President would not be able to remove the head of the Agency without his or her consent before the end of the term of office, whatever the circumstances might be. That would indeed lead to an absurdity and severely undermine the constitutional pursuit of the security of this country and its people. That is why the power to dismiss is an essential corollary of the power to appoint. . ."[17]

There, the power to dismiss was found to be an *essential corollary* of the power to appoint, and this Court thus interpreted the power in section 209(2) of the Constitution to appoint the

[16] Ibid para 69.
[17] Ibid paras 63-67.

head of the NIA to include a power to dismiss. The power to dismiss was an ancillary implied power, ancillary because it flowed from the power to appoint. In *Matatiele Municipality* Ngcobo J wrote:

"It was . . . inevitable that the alteration of provincial boundaries would impact on municipal boundaries. This is implicit in the power to alter provincial boundaries. It is trite that the power to do that which is expressly authorised includes the power to do that which is necessary to give effect to the power expressly given. The power of Parliament to redraw provincial boundaries therefore includes the power that is reasonably necessary for the exercise of its power to alter provincial boundaries."

What I refer to as an ancillary power arises in the context of one power being *necessary* in order for an unquestionably existing power to be exercised.

Examples of implied powers that I have picked up from academic writings have also been about implied ancillary powers. Hoexter says:

"As a general rule, express powers are needed for the actions and decisions of administrators. Implied powers may, however, be ancillary to the express powers, or exist either as a necessary or reasonable consequence of the express powers. Thus 'what is reasonably incidental to the proper carrying out of an authorised act must be considered as impliedly authorised'."

According to De Ville—

"[w]hen powers are granted to a public authority, those granted expressly are not the only powers such public authority will have. The powers will include those which are reasonably necessary or required to give effect to and which are reasonably or properly ancillary or incidental to the express powers that are granted.' [18]

[37] Although the Act does not define the meaning of the phrase 'any person' in s 44(4)*(a)* or *(b)*, a contextual and purposive interpretation is required in order to determine whether there is an implied ancillary power to investigate a broker under the Act. The following indicators are, the respondents submit, relevant:

[18] Ibid.

(a) Section 135 of the FSR Act also provides that a financial sector regulator may instruct an investigator appointed by it to conduct an investigation in respect of 'any person', if the financial sector regulator 'reasonably suspects that a person may have contravened, may be contravening or may be about to contravene, a financial sector law for which the financial sector regulator is the responsible authority.'

(b) The Council's functions (as set out in s 7) include the protection of the interests of beneficiaries[19] and the performance of ***any*** other function conferred on it by the Act.[20] The Act, therefore, provides the Council and Registrar with a wide scope of functions to ensure that the interests of beneficiaries are protected from practices that do not comply with the Act. No limitation is indicated in relation to this function. The power in s 44(4)*(a)* exists to promote the object of the Council's functions.[21]

(c) The Council's' powers (as set out in s 8 of the Act) entitles it to take any appropriate steps which it deems necessary or expedient to perform its functions in accordance with the Act.[22] No limitation applies in respect of this power and the Council could take any steps necessary to fulfil its functions which, are outlined in ss 7*(a)* and *(h)*.

(d) In relation to accreditation of brokers, Regulation 28C empowers the Council to suspend or withdraw accreditation given to a broker if the Council is satisfied that the broker has, since the granting of such accreditation, conducted their business in a manner that is seriously prejudicial to clients or the public interest.

(e) Section 65 of the Act regulates broker services and commission as well as accreditation by the Council. Regulation 28 of the Act regulates the fees payable to brokers.

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[19] Section 7*(a)* of the Act.
[20] Section 7*(h)* of the Act.
[21] Op cit fn 6 and 7.
[22] Section 8*(k)* of the Act.

(f) Regulation 28 (9) of the Act provides that any person who has paid a broker compensation where there has been a material misrepresentation, or where the payment is made consequent to unlawful conduct by the broker, is entitled to the full return of all the money paid in consequence of such material misrepresentation or unlawful conduct. The Council is thus empowered to direct a broker to refund a beneficiary in respect of payments which fall foul of regulation 28(9). The implied (ancillary) power to investigate such a breach, must be included in the Council's functions. Without such power, the remedy is ineffectual.

[38] Section 135 of the FSR Act must be read together with ss 8 and 44(4)*(a)* of the Act. These sections encompass not only an express power to conduct an inspection, but the implied power to rely upon the relevant regulations, which provide some of the remedies which may be utilised to deal with a non-compliant broker. The Act regulates the accreditation, de-accreditation, remuneration and refunds to members as result of a misrepresentation or unlawful conduct of a broker. The regulations provide the remedies which the respondents can utilise to deal with such non-compliance. Thus, on a contextual and purposive interpretation, taking into account the inter-relationship between the Act and the regulations, the phrase 'any person' must be interpreted to include a broker and the Council must have the implied auxiliary power to investigate a broker.

[39] The interpretation, proffered by Optivest, which would exclude or limit this power to investigate brokers in the context of the Act and regulation 28, is untenable. It means that the Council would not be entitled to conduct an inspection in order to perform its functions of monitoring or investigating any non-compliance with the Act and regulations, or determining whether a broker has received payment from beneficiaries as a result of a misrepresentation or unlawful conduct under any applicable legislation. A court must construe the

language in a statute against the background of the perceived mischief which the statute aims to address.[23] The interpretation proffered by Optivest would fly in the face of this.

[40] The Council and its duly appointed inspectors may exercise powers in terms of ss 129, 134, 135, 136 and, 137 of the FSR Act, which encompasses the powers set out in the Act. Section 129(2) provides that the Council may exercise powers in terms of Chapter 9 of the FSR Act in respect of its powers and functions in the Act and the FSR Act. The contention by the respondents that the Act, the regulations, and the FSR Act point to an implied power for the Council to inspect brokers on the grounds that it is reasonably incidental to the proper carrying out of its authorised powers under ss 44(4) and 65 of the Act and ss 134 and 135 (read with s 129) of the FSR Act, read with Regulations 28 B and C of the Act, has merit.

[41] This approach is apposite to the interpretation of statutes which requires them to be read alongside each other so as to make sense of their provisions together. The 'mischief rule' directs a Court to construe the language in a statute against the background of the perceived mischief that the statute addresses. It is clear that the 'mischief' addressed by the Act is the non-compliance with the provisions of the Act and the regulations.

[42] I therefore find that the Council, in terms of s 44*(a)*, read with the relevant regulations and provisions of the FSR Act, has the power to inspect and investigate the conduct of brokers, such as Optivest.

**The procedural challenge**

[23] Op cit fn 11 above.

[43] Section 47 deals with written complaints against a party and stipulates the timelines for the representations from the person/s against whom a complaint has been laid. This complaint may or may not, lead to an inspection, but the respondents submit, it is not peremptory or a jurisdictional requirement for s 44*(a)* to be triggered. Section 44 operates independently of the complaints procedure set out in s 47 of the MSA. Section 44 gives the Registrar the power to appoint an investigator, whilst s 47 regulates the complaints process. The respondents contend that the purpose of s 44(4) would be defeated if the right of *audi* was required, in all circumstances. Section 44(4) provides for a regulatory mechanism,[24] and the power under s 44(4), read with the relevant provisions of the FSR Act must enable the Registrar to act in terms of s 44(4)*(a)* with expedition and without notice, in order to be effective.

[44] It is in the public interest for a medical scheme or 'any other person' suspected of non-compliance with the Act or improper conduct not to be provided with the opportunity to hide or destroy evidence. Without the element of surprise, the effectiveness would be lost. The right to *audi* is properly provided for by a response to the draft report, which Optivest chose not to deal with. Optivest had the opportunity to exercise its rights provided for in s 47, after it received the draft report, which sets out the details of the complaint. It chose not to do so.

**The rationality challenge**

[45] The purpose of the power contained in s 44(4) of the Act, as the respondents correctly submit, is rationally connected to achieving the purpose of the Act and the rationale behind the power provided for in the sub-section. The Council is empowered to monitor and investigate non-compliance with the Act

[24] *Bonitas* para 7.

in order to protect the interests of beneficiaries. The Council is then empowered to take any appropriate steps which it deems necessary or expedient to perform its functions in accordance with the provisions of the Act. The power in terms of s 44(4) of the Act were entrusted to it to achieve such purpose.

[46] Open Water's report was based upon an examination of the following information and documents: (a) documentation describing Optivest's business processes; (b) Optivest's marketing and business framework; (c) the operation of the Optivest's call centre; (d) documentation in respect of refunded service fees; (e) statistics on the collection, rejection and refunding of service fees; and (f) data in respect of service fees raised for Optivest's clients. The further documentation obtained from Optivest (including publicly available information) was also referred to in the draft report. Optivest refused to provide Open Waters with any further documentation.

[47] Based upon the limited information available to it, Open Water was able to make certain preliminary and critical findings in the draft report based upon the fact that Optivest, in charging its clients a service fee, contravened the Act and regulation 28 in that:

(a) Open Water found no agreement setting out the terms of the service fee agreement between the parties;

(b) call centre staff did not explicitly explain the purpose of the service fee or that it was optional;

(c) call centre staff were instructed by management not to discuss the service fee with clients and was only to respond when clients enquired;

(d) the services offered to clients as justification for the service fee are the same as the services expected to be provided by brokers;

(e) Optivest charges a service fee which is recovered from its clients per debit order, separate from the commissions received from medical aid schemes, and

the debit forms do not appear to meet the requirements of a legal contract which would be required to debit such fee;

(f) the services provided by Optivest and its related entities constitutes both 'advice' as well as 'intermediary services' and is, therefore, subject to both the Act and the FSR Act; and

(g) debit orders are made without consent or agreement and are therefore, unenforceable. Thus, all the fees derived therefrom constitute irregular transactions under the Act and the Regulations.

[48] Open Water accordingly recommended that:

(a) 'due to the compliance deficiency on the part of [Optivest] and/or its related parties, the Council should consider implementing the remedies contained in regulation 28(9) of the [Act], particularly what the Act sought to achieve regarding payment of fees in that:

'Any person who has paid a broker compensation where there has been "material misrepresentation" or where the payment is made consequent to unlawful conduct by the broker, is entitled to the full return of all of the money paid in consequent [sic] of such material misrepresentation or unlawful conduct'; and

(b) the service fees collected from clients under the above misrepresentation should be retrospectively quantified and reimbursed to the respective clients; as such funds would be proceeds of an unlawful transaction.'

[49] Accordingly, and keeping in mind the limited test for review set out in *Bonitas*, I hold that the conduct of the Council and the Registrar was lawful and in accordance with the rule of law, was not procedurally unfair, or arbitrary, was rationally connected to the purpose sought to be achieved by the Act and did not offend against the principle of legality .[25]

[25] *Bonitas* para 15.

[50] In the result the following order is granted.

The appeal is dismissed with costs, including the costs of two counsel.

S E WEINER
JUDGE OF APPEAL

**Goosen JA (dissenting):**

[51] I have had the privilege of reading the judgment prepared by my colleague Weiner JA (the main judgment). Regrettably, I do not agree with the outcome and the reasoning employed to sustain it. I would uphold the appeal with costs and set aside the order of the high court. I would replace the high court order with one granting the relief sought by the appellant in its notice of motion, save that I would only award costs of the application on an ordinary scale.

[52] The main judgment holds that s 44(4)*(a)* of the Act applies and therefore authorises the Registrar to conduct an inspection of the business activities of a broker accredited in terms of the Act. It also holds that, as far as there may be a complaint which is subject to s 47 of the Act, the existence of the complaint does not preclude the use of the powers conferred by s 44.

[53] The central issue is one of interpretation. The principles applicable to the interpretation of a statutory provision are clear. What is required is a unitary exercise to assign meaning in which text, context and purpose are considered. This Court, with reference to the oft cited passage from *Endumeni*,[26] explained in *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* that:

[26] *Endumeni* fn 9 above.

'It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined.'[27]

[54] The legislative context consists of the provisions of the Act read as a whole. The history of the particular enactment may also serve as context. As noted in *Nissan SA (Pty) Limited v Commissioner for Inland Revenue*:

'Whatever the permissible scope for, and the limitations upon, the use of the legislative history of a particular provision as an aid to interpretation may be, I think it is obvious that where a provision has been amended and the amendment is deemed to have taken effect while the provision in its unamended state was operative, one is entitled to examine the implications of that in order to see whether they throw any light upon the interpretation which should be accorded to the amendment.' [28]

[55] In this instance, ss 44(2) and (3) of the Act refer to the Inspection of Financial Institutions Act, 34 of 1984. That Act was repealed by the Inspection of Financial Institutions Act, 80 of 1998 (the 1998 Inspection Act) which was, in turn, repealed by the FSR Act.[29] The Act has yet to be amended to reflect the current state of affairs. In light of this, s 12(1) of the Interpretation Act 33 of 1957, applies. It reads as follows:

'Where a law repeals and re-enacts, with or without modifications, any provision of a former law, references in any other law to the provision so repealed shall, unless the contrary intention appears, be construed to refer to the provision so re-enacted.'

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[27] *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 94 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) para 25.
[28] *Nissan SA (Pty) Limited v Commissioner for Inland Revenue* [1998] ZASCA 59; [1998] 4 All SA 269 (SCA); 1998 (4) SA 860 (SCA) at 870H-I; see also *Joosub Ltd v Ismail* 1953 (2) SA 461 (A) at 466.
[29] The FSR Act came into operation on 1 April 2018.

[56] In the circumstances, an examination of both the repealed provisions and the re-enacting provisions, is required to come to a proper understanding of the legislative context within which meaning is to be assigned to the language of s 44 of the Act. One further relevant aspect is that s 44(4) was introduced by way of the Medical Schemes Amendment Act, 55 of 2001.[30] The long title of the Amendment Act describes its purpose, inter alia, 'to determine the circumstances under which inspections may occur'. At the time that s 44(4) was introduced, the provisions of the 1998 Inspection Act applied. The consequence, as will be demonstrated, was to circumscribe the ambit of the authority to conduct inspections in unequivocal terms, at least until the subsequent repeal of the 1998 Inspection Act.

[57] Before turning to this, the following provisions of the Act provide the immediate legislative context within which s 44 must be read. The Council's functions are set out in s 7. They include the obligation to protect the interests of beneficiaries of medical schemes;[31] to control and co-ordinate the functioning of medical schemes;[32] and to investigate complaints and settle disputes 'in relation to the affairs of medical schemes' as provided by the MSA.[33] The Council's powers are spelt out in s 8. Its regulatory authority is expressed as the power to approve the registration, suspension, and cancellation of registration of medical schemes.[34] To facilitate the performance of its functions, it is granted the power to take all steps necessary or expedient in accordance with the Act.[35]

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[30] The Medical Schemes Amendment Act, 55 of 2001 came into operation on 1 March 2002. It is noteworthy that this Amendment Act did not amend s 44(2) and (3) to refer to the 1998 Inspection Act.
[31] Section 7*(a)* of the Act.
[32] Section 7*(b)* of the Act.
[33] Section 7*(d)* of the Act.
[34] Section 8*(f)* of the Act.
[35] Section 8*(k)* of the Act.

[58] Section 24 of the MSA requires the registration of a medical scheme. The effect of such registration is addressed in s 26. This section sets out an array of requirements regulating the conduct of the business of a medical scheme. Section 35 provides for the financial arrangements of a medical scheme and the prudential requirements for the conduct of the business of a medical scheme.[36] These provisions bear emphasis because they encapsulate the affairs of a medical scheme which are subject to supervisory control by the Council, in the interests of members of medical schemes.

[59] Chapter 9 of the Act deals with the powers of the Registrar. In terms of s 42, the Registrar has the right to request information additional to that disclosed in an application for registration or in a return submitted by a medical scheme. Section 43 permits the Registrar to address enquiries to a medical scheme 'in relation to any matter connected with the business or transactions of a medical scheme.'[37] Section 44 which deals with the power to conduct inspections reads as follows:

'(1) A medical scheme shall, at the written request of the Registrar, *or during an inspection of the affairs of a medical scheme,* by the Registrar or such other person authorised by him or her, produce at any place where it carries on business, its books, documents and annual financial statements in order to enable the Registrar or such other person authorised by him or her to obtain any information relating to the medical scheme required in connection with the administration of this Act.

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[36] The 'business of a medical scheme' is defined in s 1 of the Act to mean:
'the business of undertaking, in return for a premium or contribution, the liability associated with one or more of the following activities:
(*a*) Providing for the obtaining of any relevant health service;
(*b*) granting assistance in defraying expenditure incurred in connection with the rendering of any relevant health service; or
(*c*) rendering a relevant health service, either by the medical scheme itself, or by any supplier or group of suppliers of a relevant health service or by any person, in association with or in terms of an agreement with a medical scheme.'

[37] Section 43 provides that:
'The Registrar may address enquiries to a medical scheme in relation to any matter connected with the business or transactions of the medical scheme, and the medical scheme shall reply in writing thereto within a period of 30 days as from the date on which the Registrar addressed the enquiry to it, or within such other period as the Registrar may specify.'

(2) The Registrar, or such other person authorised by him or her, shall in addition to the powers and duties conferred or imposed upon him or her by this Act, have all the powers and duties conferred or imposed upon an inspector appointed under section 2 of the Inspection of Financial Institutions Act, 1984 (Act No. 38 of 1984), as if he or she has been appointed an inspector under that Act.

(3) Any reference in this Act to *an inspection* made under this section *shall also be construed as a reference to an inspection* made under the Inspection of Financial Institutions Act, 1984.

(4) The Registrar may order an inspection in terms of this section—
(*a*) if he or she is of the opinion that such *an inspection* will provide evidence of any irregularity or of *non-compliance* with this Act *by any person*; or
(*b*) for purposes of *routine monitoring* of compliance with this Act *by a medical scheme or any other person*.
(5) The Registrar may, at any time by notice in writing, direct a medical scheme to furnish to him or her within a period specified in that notice, or within such further period as the Registrar may allow—
(*a*) a statement of its assets and liabilities, including contingent liabilities; and
(*b*) any other document or information specified in the notice, relating to the financial or other affairs of the medical scheme over a period likewise specified.'[38] (Emphasis added.)

[60] In *Bonitas*,[39] this Court described the nature and purpose of s 44 as 'purely investigative'. In that matter, a registered medical scheme lodged an appeal against a decision by the Registrar to conduct an inspection of its affairs in terms of s 44(4)*(a)* of the Act. This Court held that no appeal lay against the decision to invoke the power. The Court did not deal with the reach of the power to conduct an inspection.

[61] Section 44(1) uses the word 'inspection' to convey an examination of records, documents, and other material at the place of business of a medical scheme. It also qualifies the subject matter of the inspection by specifying that it

[38] I have emphasised certain phrases which appear in the section for purposes of the discussion to follow.
[39] *Bonitas* para 14.

is an inspection *of the affairs of a medical scheme*. This qualification accords with the defined ambit of the powers and functions of the Council. It also accords with the purpose of the regulatory scheme, namely to place the conduct of the business of a medical scheme under the supervisory control of the Council.

[62] It is important to note that the Act does not specify or define the powers of an inspector. It does so with reference to the now repealed 1998 Inspection Act. This latter Act contained provisions which specifically limited the powers of inspection to *the affairs of the financial institution*.[40] The 1998 Inspection Act also specifically defined the powers of an inspector in relation to 'any other person'. Section 5(1) provided that:

'*In order to carry out an inspection of the affairs of an institution under section 3* or 3A an inspector may—

(*a*)(i) summon any person, if the inspector has reason to believe that such person may be able to provide *information relating to the affairs of the institution* or whom the inspector reasonably believes is in possession of, or has under control, any document relating to the affairs of the institution, to lodge such document with the inspector or to appear at a time and place specified in the summons to be examined or to produce such document and to examine, or against the issue of a receipt, to retain any such document for as long as it may be required for purposes of the inspection or any legal or regulatory proceedings;

(ii) administer an oath or affirmation or otherwise examine any person referred to in subparagraph (i);

(*b*) on the authority of a warrant, at any time without prior notice—

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[40] Section 3 of the 1998 Inspection Act dealt with the power to inspect institutions (for which read medical scheme in light of the definition of a financial institution contained in the Act). It reads:

'3(1) The registrar may at any time instruct an inspector to carry out *an inspection of the affairs*, or any part of the affairs, of a financial institution or associated institution.

(2) If the registrar has reason to believe that a person, partnership, company or trust which is not registered or approved as a financial institution, is carrying on the business of a financial institution, he or she may instruct an inspector *to inspect the affairs, or any part of the affairs,* of such a person, partnership, company or trust.'

Section 4 provided for the powers of the inspector in relation to institutions. Subsection (1) qualified the exercise of the powers as follows:

'(1) In carrying out *an inspection of the affairs of an institution* under section 3 or 3A an inspector may—. . .'

(i) enter any premises and require the production of any *document relating to the affairs of the institution;*
(ii) enter and search any premises for *any documents relating to the affairs of the institution*;
(iii) open any strong-room, safe or other container which he or she suspects contains any *document relating to the affairs of the institution*;
(iv) examine, make extracts from and copy any document relating to the affairs of the institution or, against the issue of a receipt, remove such document temporarily for that purpose;
. . .
but an inspector may proceed without a warrant, if the person in control of any premises consents to the actions contemplated in this paragraph.' (Emphasis added).

[63] These provisions demonstrate, unequivocally, that an investigative inspection carried out in terms of s 44 of the Act, as read with the 1998 Inspection Act, was plainly intended to relate only to the affairs of a medical scheme. That was the case both prior to, and after s 44(4) was introduced.[41] The purpose of s 44(4) was, as the long title of the Amendment Act indicated, to provide for the circumstances in which inspections could be conducted. It provided for two scenarios, namely routine inspections (s 44(4)*(b)*) and 'investigative' inspections (s 44(4)*(a)*) where some impropriety was under investigation. At the stage that s 44(4) was introduced, there was no amendment of the 1998 Inspection Act to expand the powers of the Registrar or inspector to undertake an investigation of the affairs of 'any other person' or entity. Section 5 of the 1998 Inspection Act remained extant. At that stage, therefore, and until the subsequent repeal of the 1998 Inspection Act, s 44(4) did not entitle the Registrar to conduct an inspection of 'any other person', except in the context of an inspection of the affairs of a medical scheme.

[41] See para 57 and fn 30 above.

[64] The question that arises is whether the repeal of the 1998 Inspection Act, without amendment of the Act, brought about an extension of the powers of investigation or inspection beyond that which was contemplated prior to the repeal and the enactment of the FSR Act.

[65] The FSR Act is a comprehensive omnibus legislative instrument enacted with the stated purpose of establishing a system of regulation of the financial services sector.[42] It provided for the establishment of two principal regulatory authorities to supervise financial product providers, namely a Prudential Authority and the Financial Sector Conduct Authority (the FSCA).[43] Chapter 9 of the FSR Act is headed 'Information gathering, Supervisory on-site inspections and investigations'. It deals with matters which were previously regulated by the 1998 Inspection Act.

[66] In *Ex parte Glavonic*, it was held, with reference to the application of s 12(1) of the Interpretation Act, that:

'To ascertain whether there is a re-enactment, with or without modifications, it is necessary to examine the object of the new legislation, and the scheme and pattern of it, and then to see whether this does not show an intention to put on the statute book what previously existed, with or without modification. *D.* v. *The Minister of the Interior*, 1962 (1) S.A. 655 (T) at p. 658H.'[44]

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[42] The Long Title states, *inter alia*, that it seeks:
'. . . to establish a system of financial regulation by establishing the Prudential Authority and the Financial Sector Conduct Authority, and conferring powers on these entities; . . . to regulate and supervise financial product providers and financial services providers; . . . to make comprehensive provision for powers to gather information and to conduct supervisory on-site inspections and investigations; [and] to provide for information sharing arrangements. . .'.

[43] Sections 32 and 56 of the FSR Act.

[44] *Ex parte Glavonic* 1967 (4) SA 141 (N) at 142H.

[67] This Court, in *Berman Brothers (Pty) Ltd v Sodastream (Pty) Ltd and Another*,[45] explained the nature of modifications contemplated by s 12(1) of the Interpretation Act as follows:

'The question then is whether or not, bearing in mind these aforementioned differences, there has been a re-enactment with modifications of the relevant provisions of the 1916 Act. In *D v Minister of the Interior* 1962 (1) SA 655 (T), at p 659 D, the Full Bench of the Transvaal Provincial Division, approving the finding of WILLIAMSON J in the same case (see 1960 (4) SA 905, at 909) held that in this context the word "modifications":

"is not limited to the action of limiting or qualifying or toning down or restricting any statement; it can mean to make partial changes or to make changes in respect of certain qualities or to alter or vary without radical transformation. Insofar as the meaning of the word 'modifications' in sec. 12 (1) of the Interpretation Act is concerned it seems to me that WILLIAMSON J was correct when he held that it must mean any alteration which does not change the essential nature or character of the repealed provisions."

This interpretation and the test adopted were followed in *Nkomo and Others* v *Minister of Justice and Others* 1965 (1) SA 498 (SR, AD), at p 505 D-G; *Ex parte Glavonic* 1967 (4) SA 141 (N), at pp 142 H – 143 A and *S* v *Msitshana* 1978 (1) SA 386 (W), at pp 388 H – 389 C; and it seems to me that they should be followed by this Court. Applying the test in the present case, *the question is whether or not the relevant provisions* of the 1963 Act, in repealing and re-enacting with alterations the corresponding provisions of the 1916 Act, *changed "the essential nature or character" of the repealed provisions*.' (My emphasis.)

[68] Section 129 of the FSR Act concerns the application and interpretation of the chapter. It provides, in relevant part, as follows:

'(2) The Council for Medical Schemes may exercise powers in terms of this Chapter in respect of powers and functions set out in the Medical Schemes Act, and powers and functions granted to it in this Act.

(3) In relation to the exercise of the powers in terms of this Chapter by the Council for Medical Schemes in respect of a medical scheme, a reference in this Chapter to ─

[45] *Berman Brothers (Pty) Ltd v Sodastream (Pty) Ltd* [1986] ZASCA 27; [1986] 2 All SA 252 (A); 1986 (3) SA 209 (A) at 240.

*(a)* a financial sector regulator or the responsible authority must be read as including a reference to the Council for Medical Schemes;
*(b)* the head of a financial sector regulator must be read as including a reference to the Registrar of Medical Schemes appointed in terms of section 18 of the Medical Schemes Act;
*(c)* a financial sector law must be read as including a reference to regulatory instruments and to the Medical Schemes Act; and
*(d)* a licensed financial institution must be read as including a reference to a medical scheme registered in terms of the Medical Schemes Act or an administrator of a medical scheme approved in terms of the Medical Schemes Act.'

[69] The balance of the chapter contains provisions relating to information gathering (s 131); powers to conduct supervisory on-site inspections (s 132); the appointment of an investigator (s 134); the power to conduct investigations (s 135) and the powers that may be exercised by investigators (ss 136 and 137). I shall touch upon these where necessary. Chapter 9 therefore re-enacts the 1998 Inspection Act with modifications. The most obvious modification is that the FSR Act no longer provides for the appointment of 'inspectors'. It now provides for the appointment of 'investigators'. In light of the investigative nature of an inspection envisaged by s 44(4) of the Act, nothing turns on this. It does not alter the essential character of the repealed provisions authorising an investigative investigation of the affairs of a medical scheme.

[70] The second modification concerns the distinction between supervisory inspections and 'investigations'. Section 132 provides that a financial sector regulator (for which read the Council of a Medical Scheme)[46] may, upon notice, conduct a supervisory on-site inspection at the business premises of 'a supervised entity'. The FSR Act defines a 'supervised entity' to include a 'licenced financial institution'. Section 129(3)*(d)* specifies that for the purposes of the exercise of the powers conferred by the chapter, a licence financial

[46] Section 129(3)*(a)* of the FSR Act.

institution must be taken to include a medical scheme registered in terms of the Act. The purpose of a supervisory inspection is to check compliance with a financial sector law (read with the Act)[47] for which the regulator 'is the responsible authority'.[48]

[71] Upon a careful reading of s 44(4)*(b),* which concerns routine inspections, the Registrar's power to conduct a supervisory on-site inspection can only relate to the supervised entity under its regulatory or supervisory control. In this instance, it concerns a registered medical scheme. As concerns such inspection, the repeal of the 1998 Inspection Act and re-enactment of its provisions in the FSR Act, did not bring about an extension of the powers to inspect entities which are not supervised entities in terms of the Act.

[72] The same applies in relation to s 44(4)*(a)*. The qualification, however, is not expressed with reference to 'supervised entity'. Section 135, which confers the power to investigate, is framed in broad terms. It states, in relevant part, that: '(1) A financial sector regulator may instruct an investigator appointed by it to conduct an investigation in terms of this Part in respect of any person, if the financial sector regulator— (*a*) reasonably suspects that a person may have contravened, may be contravening or may be about to contravene, a financial sector law for which the financial sector regulator is the responsible authority; or . . .'

[73] The main judgment places reliance upon this broad formulation to support the conclusion that Optivest is subject to the exercise of the Registrar's investigatory powers because it is a licenced financial services provider accredited by the Council. In my view, there are two respects in which the conclusion is incorrect. First, the broad ambit of the powers of investigation are qualified by s 129 of the FSR Act. Subsection (3) refers to the exercise of Chapter

[47] Section 129(3)*(c)* of the FSR Act.
[48] Section 132(2)*(a)* of the FSR Act.

9 powers by the Council 'in respect of a medical scheme'. When this qualification is applied to the substitution of terms as explained in sub-paragraphs (*a*) to (*d*), it is clear that the Chapter 9 powers can only be applied in relation to a medical scheme which falls under the supervisory control of the Council. Furthermore, the qualification is entirely consonant with the overall qualification of the Council's supervisory powers as expressed in the provisions of the Act read as a whole. Secondly, the qualifying phrase 'in respect of a medical scheme' expressly ensures that the modifications effected by the FSR Act do not alter the essential character of the powers conferred by the 1998 Inspection Act.

[74] Counsel for the respondents argued that the FSR Act had, in effect, broadened the regulatory powers of the Council. The argument did not, however, account for the legislative mechanism by which these changes were said to have been introduced. If it had been intended to broaden the ambit and scope of the powers which may be exercised by the Council, then an amendment of the provisions of the Act and s 44(4), in particular, could have been expected. In this regard, this Court's approach to the limitations of reliance upon the provisions of the Interpretation Act to support such alteration are instructive. In *Spinnaker Investments (Pty) Ltd v Tongaat Group Limited*, it was observed that:

'I deem it unlikely that the Legislature would depend solely on the provisions of the Interpretation Act if there were an intention to legislate with such far reaching consequences. The words of Lord MORRIS of Borth-Y-Gest (reported in *Blue Metal Industries* v *R.W. Dilley* (1969) 3 AER 437 at 442) are apposite:

"The Interpretation Act is a drafting convenience. It is not to be expected that it would be used so as to change the character of legislation."

See too *Floor* v *Davis* (1979) 2 AER 677 at 681 (H.L.). I do not think that the Interpretation Act 1957 can be used to extend the ambit of the definition of "take-over scheme" so as to

fortify and lend weight to the meaning for which plaintiff contends. If that meaning had been intended, the draftsman would surely have said so.'[49]

[75] In addition, the accreditation of Optivest as a broker who is entitled to offer specific broker services in terms of the Act does not render it subject to the supervisory control of the Council in terms of the Act. 'Broker services' is defined by the Act to include '(*a*) the provision of service or advice in respect of the introduction or admission of members to a medical scheme; or (*b*) the ongoing provision of service or advice in respect of access to, or benefits or services offered by, a medical scheme'. These services are plainly advisory or intermediary services rendered in relation to a financial product.[50] Optivest was obliged to be, and was in fact, licenced as a financial services provider in terms of the FAIS Act.[51] As a matter of fact, therefore, Optivest's conduct as a licenced financial services provider rendering advisory services, was subject to the conduct codes issued under the FAIS Act,[52] and fell under the supervisory authority of the Financial Sector Conduct Authority (the FSCA).[53]

[76] These provisions establish that the regulatory and supervisory power of the FSCA is based upon the nature of the service, and not upon the content of the service. Thus, the fact that a broker service is provided in relation to a particular type of financial product, namely the benefits offered by a medical scheme, is of no significance insofar as the control of the service is concerned. Nor, in my view, does it matter that s 65 of the Act imposes upon an accredited broker, restrictions as to fees or any other obligations. A failure to comply with

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[49] *Spinnaker Investments (Pty) Ltd v Tongaat Group Limited* 1982 (1) SA 65 (A) at 75G-H.
[50] See the definition of the terms 'advice', 'financial product' and 'intermediary services' as set out in s 1 of the Financial Advisory and Intermediary Services Act 37 of 2002 (the FAIS Act).
[51] See ss 7 and 8 of the FAIS Act.
[52] See s 15 of the FAIS Act. Section 16, significantly, provides that the published codes must comply with certain principles. One of those is to encapsulate the requirement that the service provider 'comply with all applicable statutory or common law requirements applicable to the conduct of business' (s 16(1)*(e)*).
[53] See s 58(1)*(a)*, read with s 5 and Schedule 2 of the FAIS Act. The effect is that the FSCA is the regulatory authority responsible for supervisory control of supervised entities which fall under the ambit of the FAIS Act.

such statutory obligations would render the broker concerned in breach of the conduct requirements imposed by the FAIS Act and that, in turn, would render the broker subject to regulatory sanction at the instance of the FSCA.

[77] 'Accreditation' in terms of the Act is not the equivalent of licencing. It serves, as the term suggests, to permit or authorise the provision of advice in relation a particular product, and no more. Accreditation does not, in my view, place the broker concerned under the supervisory control of the Council and, upon such basis, subject to investigation by the Registrar utilising the power conferred by s 44 of the Act. To hold that accreditation places a broker under the supervisory control of the Council, even if only in relation to compliance with s 65 of the Act, as the main judgment does, would give rise to considerable regulatory conflict and inefficiency. This can be illustrated as follows. Assume that an accredited broker, in breach of s 65 is paid fees in excess of those which are prescribed and also receives indirect benefits for advising clients to become members of a particular medical scheme. Such conduct would entitle the Council to suspend or cancel the accreditation of the broker. The conduct would also constitute a breach of prescribed conduct rules in terms of the FAIS Act and a breach of the conditions of the licence issued to the broker. Yet, the Council would have no authority to take any action against the broker in terms of the FAIS Act. That authority rests with the FSCA. For such action to be taken, the Council would have to report the matter to the FSCA so that it, as the regulatory authority responsible for the supervision of the conduct of brokers, might act. The converse situation poses no such problems. The FSCA is entitled to investigate any conduct on the part of a broker, including possible non-compliance with the Act. The FSCA could act upon its findings. So too could the Council since the accreditation of a broker is subject to the fit and proper requirements established and regulated by the FAIS Act.

[78] The main judgment places some reliance upon the judgment of the Constitutional Court in *AmaBhungane*,[54] which concerned circumstances in which the existence of authority or power to act may be implied in a statute. As I understand the main judgment, it calls in aid the potential for an implied authority to investigate the conduct of a broker as an interpretative tool. It is, however, not clear upon what basis the authority is to be implied. The Constitutional Court drew a careful distinction between ancillary powers and primary powers. Both forms may be implied in consequence of the interpretive exercise of determining meaning and giving effect to statutory provisions. It is, however, necessary to determine whether the implied power derives from and is therefore ancillary to an existing conferred power, or if it is implied as a primary power by virtue of a reading of the statute as a whole.

[79] In the latter instance, the power is implied in order to render the statutory instrument effective. That was the situation in *AmaBhungane* where it was implied that the Minister was empowered to appoint a 'designated judge' despite the absence of an express provision to that effect.

[80] In this instance, the power to conduct an investigative inspection of the affairs of an accredited broker does not meet the requirements for implying it as a primary power. The absence of an express authorisation to conduct such investigative inspection does not render the Act inoperative nor, for the reasons proffered above, does it exempt a broker from proper regulatory control and supervision.

[81] Is the power to be implied as ancillary to some other expressly conferred power? The main judgment appears to accept that it must be on the basis of the existence of the power to accredit a broker and to enforce compliance with

[54] *AmaBhungane* para 65.

regulation 28 of the regulations. In light of the reasoning adopted by the main judgment this issue does not arise, since the judgment accepts that the use of the phrase 'by any other person' in s 44(4)*(a)* of the Act is broad enough to *expressly* cover application of the section to brokers. There is therefore no need for an implied ancillary power.

[82] In any event, I am unable to agree that such power is to be implied as ancillary to the power to accredit for the reasons I have already set out. Furthermore, reliance upon regulation 28 is misplaced. In *Moodley and Another v Minister of Education and Others*,[55] this Court held, unequivocally, that:

'It is not permissible to treat the Act and the regulations made thereunder as a single piece of legislation; and to use the latter as an aid to the interpretation of the former.'

[83] Still less may one use the regulations promulgated under an act as a source of primary power from which one might imply that an ancillary power has been conferred by the act. The main judgment suggests that this course is appropriate insofar as it suggests that the remedy provided by regulation 28(9) would be ineffective unless the power to conduct an investigative inspection of a broker is implied.[56] Regulation 28(9), in any event, does not confer any remedial power upon the Council. It merely provides that a broker is liable to repay fees received in consequence of unlawful conduct.[57]

[84] This brings me to the procedural challenge based upon s 47 of the Act. The language of s 47 indicates that the Council is entitled to adjudicate complaints in relation to both registered entities (medical schemes) and

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[55] *Moodley and Others v Minister of Education and Culture, House of Delegates and Another* [1989] ZASCA 45; 1989 (3) SA 221 (AD) at 233E.

[56] See paras 38(e) and 40 of the main judgment.

[57] Regulation 28 (9) reads as follows:

'Any person who has paid a broker compensation where there has been a material misrepresentation, or where the payment is made consequent to unlawful conduct by the broker, is entitled to the full return of all the money paid in consequence of such material misrepresentation or unlawful conduct.'

accredited persons (in this case Optivest as an accredited broker). The section requires that if a written complaint is received, a copy of the complaint must be furnished to the party concerned to afford it the opportunity to respond to the complaint.

[85] The main judgment holds that the Registrar is entitled to proceed to employ the machinery of s 44(4)*(a)* notwithstanding the existence of s 47 and the peremptory language used in the latter section. It therefore concludes that the complaint procedure does not serve as a bar to an investigative inspection as contemplated by s 44(4)*(a)*. In light of my conclusion that the Registrar does not have the authority or power to conduct an investigative inspection of the business or affairs of a broker, the interplay between ss 44 and 47 does not arise. I accordingly express no view on whether the existence of a s 47 complaint precludes the employment of s 44(4) to parties to whom it applies.

[86] For these reasons I would uphold the appeal on the terms indicated at the outset.

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G GOOSEN

JUDGE OF APPEAL

Appearances

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| Instructed by: | Von Lieres Cooper and Barlow, Cape Town<br>Hendre Conradie Inc, Bloemfontein |
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