IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 725/2017

In the matter between:

THE SWAZILAND MEDICAL AID FUND **Applicant**

And

MEDSCHEME ADMINISTRATORS SWAZILAND (PTY) LTD **1st Respondent**

MABANDLA MANZINI N.O. **2nd Respondent**

Neutral citation: ***The Swaziland Medical Aid Fund v Medscheme Administrators Swaziland (Pty) Limited (725 /2017) [2017] SZHC 151 (28th July 2017)***

Coram: **M. Dlamini J.**

Heard: **16th June 2017**

Delivered: **28th July 2017**

Recusal application – "*The test for recusal on the grounds that a reasonable person would reasonably have apprehended that the trial judge would not be impartial in his adjudication of the case is not a factual determination. The application of this test is different from the process by which a court decides whether a case has been proved beyond reasonable doubt. In that case, the relevant facts are found only if they are proved beyond a reasonable doubt. The standard of proof, which is undisputed, is applicable to the fact funding process. In recusal cases, the facts are first established by the application of the standard of proof (which is the question of fact) only after that has been done are the facts measured against the objective legal standard of the reasonable person".* (as per case of Bason 2004 (1) SCA**) paras 21 - 22 (words in brackets my own)

Time for recusal application –

- **in recusal application, the time upon which such an application is taken up is essential in the enquiry on whether the application is made *bona fide* or merely to frustrate the proceedings. By no means, however, is the enquiry on the time contrary to the position of the law both under common law and section 11 of the Arbitration Act No. 24 of 1904 which are to the effect that an application for recusal can be made at anytime before final judgment or award.**

Competition Commission – function –

- **In brief, the Commission commonly referred to as the board members adjudicate upon matters before the Commission. Section 18 clarifies that the Secretariat "*shall be the investigative arm of the Commission.*"**

- **the demarcation between the Board and the Secretariat exist for purposes of internal administration. In fact in as much as the Act**

refers to the Secretariat as seized with investigative authority it does not mention the board. The Act refers to the Commission and sets out a number of personnel who are to form the Commission. Its Act provides that it is the Commission that is charged with the power to ensure that the Act is implemented effectively. In other words, the Hon. Arbitrator, as a Commission, must answer where the Secretariat acts contrary to the provisions of the Act. In the eyes of an ordinary by-stander therefore, the buck ends with the Commission and not the Secretariat.

Review - reviewable in interlocutory orders:

- **As previous decisions of this Court indicate, there are still sound grounds for a basic approach which avoids the piecemeal appellate disposal of the issues in litigation. It is unnecessarily expensive and generally it is desirable, for obvious reasons, that such issues be resolved by the same Court and at one and the same time. Where this approach has been relaxed it has been because the judicial decisions in question, whether referred to as judgments, orders, rulings or declarations, had three attributes. First, they were final in effect and not susceptible of alteration by the court of first instance. Secondly, they were definitive of the rights of the parties, for example, because they granted definite and distinct relief. Thirdly, they had the effect of disposing of at least a substantial portion of the relief claimed.**

Summary: An urgent application is serving before me for two main prayers, *viz*. recusal of the arbitrator and setting aside of the arbitrator's interim award. Respondent is resisting the prayers on a number of grounds and has filed a counter-application for an order turning the arbitrator's award into an order of court.

The parties

[1] The applicant (SwaziMed) is a non-profit making association duly registered in terms of the company laws of Swaziland with its principal place of business at First Floor, Nedbank Building, Swazi Plaza, Mbabane, region of Hhohho. Its core business is to provide medical aid cover to its members.

[2] The first respondent (Medscheme) is a company duly registered as such as per the company laws of Swaziland with its principal place of business at Suite 103, First Floor, Development House, Swazi Plaza, Mbabane, region of Hhohho. Its main function was to discharge the day to day administrative duties of applicant and therefore it is the sole administrator of applicant.

[3] The second respondent (the Hon. Arbitrator) is an adult male Swazi, an admitted attorney of this court and duly appointed to be an arbitrator in the matter between applicant and first respondent.

The synopsis

[4] It is common cause that SwaziMed and Medscheme entered into a contract where SwaziMed engaged Medscheme to administer SwaziMed. In defining the administrative functions of Medscheme, it was deposed on behalf of SwaziMed:

> *"11.4 As the administrator of the scheme, Medscheme acted as a public officer for SwaziMed for tax purposes. It was responsible for the custody and safe keeping of records of SwaziMed. Medscheme was also responsible for SwaziMed's funds, collection of contributions, paying claims and preparation of the schemes financials. SwaziMed's role was limited to*

approval of what was presented to it by Medscheme. In other words, SwaziMed was not involved in the day to day management of the scheme." [1]

[5] The contract between the parties commenced in 1980. As evident by the copy of the contract attached in the pleadings, the parties renewed their agreement on 22nd March, 2007. [2]

[6] Between the period 2014–2015, the Board of Directors of SwaziMed embarked on a research on ways to reduce costs and maximize benefit for its members. A decision was taken that the contract with Medscheme should not be renewed. The clause on renewal of the contract between the parties reads:

> *"5. DURATION/TERM*
>
> *5.1 Subject to the termination clause herein below, the duration of this Agreement shall be for a period of 5 (Five) Years commencing on the date of signature hereof or such other period mutually agreed to by the Parties confirmed in writing and duly signed by both Parties and annexed hereto.*
>
> *5.2 At the end of the period referred to in Clause 5.1 or any renewal in terms hereof (unless notice of termination has been given as required in terms of Clause 5.3) the parties shall enter into negotiations six months prior to the expiry date determined in terms of clause 5.1 to renegotiate the term of any renewal of this agreement save for the renegotiation of fees, failing which this agreement shall automatically renew with effect of January of each year, for a further fixed period of 5 years.*
>
> *5.3 Notice of termination of this agreement shall be in writing by either the Medscheme or Holdings to the other, and must be given on not less than 180 (one hundred and eighty) days' notice prior to the termination of the agreement referred to in clause 5.1 or any extension thereof in terms of clause 5.2."* [3]

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[1] see page 12 paragraph 11.4 of book of pleadings
[2] see page 94 of book of pleadings - bundle 1
[3] see pages 69 - 70 of book of pleadings bundle- bundle 1
[3]

[7] In effecting its resolution, SwaziMed addressed a correspondence on 24th May 2016 to Medscheme which reads: [4]

> "*RE: NOTICE OF TERMINATION OF MANAGEMENT AGREEMENT BETWEEN THE SWAZILAND MEDICAL AID FUND AND MEDSCHEME ADMINISTRATORS SWAZILAND (PTY) LTD*
>
> 1. *The Swaziland Medical Aid Fund (Swazi Med) hereby gives notice of Termination of the Management Agreement it has with you, in terms of Clause 5.3 of the aforesaid Agreement.*
>
> 2. *In terms of Clause 5.3 you will serve notice until the expiry date of the Agreement on 21st March 2017.*
>
> 3. *SwaziMed requests to continue utilizing Medscheme's Computer System on such terms and conditions as may be agreed. This is not only convenient but will facilitate the provisions by Medscheme of Managed Care Services to Swazi med and the other services set out below, in accordance with the terms of their respective agreements:*
>
>   - *Hospital Pre-authorization Management Programme*
>   - *Medicine Management Programme*
>   - *Oncology Management*
>   - *Chronic Benefit Management Programme*
>   - *Beneficiary Risk Management Programme*
>   - *Actuarial Services*
>   - *AFA Programme.*
>
> 4. *The long standing relationship between Swazi Med and Medscheme will continue in respect of all other services save for the Management. As indicated, Swazi Med would like to negotiate with Medscheme for the continued utilization of Medscheme's Computer System.*
>
> 5. *Swazi Med requests a meeting before the end of May 2016 or during the first week of June to discuss the proposed new arrangement that will take effect after 21 March 2017.*
>
> 6. *The Board of Swazi Med takes this opportunity to thank Medscheme for the good working relationship we have had as managers of the scheme and trust that the continuation of the relationship in respect of other services will go from strength to strength."*

The main dispute

[4] see page 107 of the book of pleadings

[8] The main bone of contention arises from the letter of termination. Medscheme alleges that:

> "*11.3 I deny that the management agreement terminated in March 2017. Medscheme has all along maintained that the management agreement terminates on 31st December 2017 at the earliest*."

Arbitration

[9] Following the above highlighted dispute, Medscheme referred the matter to arbitration on 27th September 2016. By correspondence dated 6th October 2016, the Arbitration Foundation of Southern Africa (AFSA) requested SwaziMed to, among others, pay the arbitration fee of E22,800. Medscheme then contended:[5]

> *"36. SwaziMed failed to pay the administration fees despite two reminders from AFSA on 27 October and 3 November 2016.*
>
> *37. In the absence of any co-operation from SwaziMed AFSA consequently appointed the first arbitrator, Mr. Andre Gautschi SC (**Gautschi**) a practicing advocate from Johannesburg Society of Advocates who has acted as High Court judge in an acting capacity over many years. His appointment was made on 21 November 2016."*

[10] Subsequent to the above appointment, SwaziMed applied before this Court for removal of Mr. Gautschi SC as arbitrator. That application was successful.

Second Respondent as arbitrator

[5] see page 123 para 36 and 37 of book of pleadings – bundle 1

[11] Subsequent to SwaziMed's application to successfully remove Mr. Gautschi SC, the Hon. Arbitrator was appointed. This was on the 14th March 2017.

Events culminating to present dispute

[12] On 21st March 2017, Medscheme brought an urgent application before the Hon. Arbitrator. The learned Arbitrator points out in this regard:[6]

> *"7. However, on the 21st March 2017 at about 2:00 pm I was served with an Urgent Interlocutory application by the Claimant seeking an order in the following terms:*
>
> *7.2 Pending finalization of the arbitration proceedings between the applicant and the respondent, the respondent be interdicted and restrained from cancelling the management agreement attached hereto ...".*

[13] He also highlighted:[7]

> "*1.5 The parties shall maintain the **status quo** pending the hearing and determination of the interlocutory application on the date aforesaid*."

[14] It appears from the record of proceedings further that the parties had to make submissions before the Hon. Arbitrator for the orders in paragraph 12 above. The Hon. Arbitrator delivered reasons for granting Medscheme its interlocutory prayers on 3rd April 2017 as follows:

> "*17. In my view a case for the preservation of the **status quo** in the contractual engagements of the parties until the filing and exchange of affidavits between the parties; and the hearing and determination of the application for an interdict pending finalization of the arbitration proceedings, has been made out."*[8]

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[6] see page 252 para 7 of book of pleadings – bundle 1
[7] see page 251 para 1 of book of pleadings – bundle 1
[8] page 252 para17 of book of pleadings - bundle 1

[15] It is common cause that on the return date, 23rd March 2017, the parties agreed to have the matter heard on 27th March 2017. On 23rd March 2017 however, the parties concluded an arbitration agreement which was recorded by the Hon. Arbitrator. Medscheme's interlocutory application was eventually argued on 27th March 2017. On the 3rd April, 2017, the Hon. Arbitrator issued the interim award in favour of Medscheme. I shall revert to it later herein.

The parties' contentions and determination

SwaziMed's case

[16] SwaziMed has prayed mainly as follows:

> *"3. The 2nd Respondent be and is hereby removed as Arbitrator in the arbitration between the Applicant and the 1st Respondent;*
>
> *4. The interim order issued by the 2nd Respondent dated 3rd April 2017 be and is hereby set aside."* [9]

[17] SwaziMed raises two grounds in support of its prayer under its paragraph 3 above, namely;

1. Recusal on the basis that the Hon. Arbitrator is a board member of the Competition Commission.

[18] SwaziMed deposed that on the 3rd April 2017 it instructed its Counsel to move an application for recusal. The application was moved on the 4th April 2017. The learned Arbitrator ordered that SwaziMed file a full blown application. This application was served upon Medscheme and the Hon. Arbitrator on 6th April 2017. The Hon. Arbitrator dismissed the application for recusal on 21st April 2017.

[9] see page 4 paragraphs 3 and 4 of book of pleadings (bundle 1)

[19] In support of its application for review of the Hon. Arbitrator's refusal to recuse himself it was deposed before me on behalf of SwaziMed:

> *"42. On 3 April 2017, SwaziMed instructed its Attorneys to move an application for recusal of the Arbitrator. This follows SwaziMed learning that the Arbitrator is a member of the Board of Commissioners of the Swaziland Competition Commission which is presently seized with a complaint against SwaziMed for alleged anti-competitive conduct. The Competition Commission has been seized with a complaint since 2011. The complaint is against SwaziMed and another party. The accusation is that SwaziMed and that party are guilty of collusive conduct in violation of the Competition Act."* [10]

[20] It further highlighted:

> *45. To put in context SwaziMed's discomfort with the Arbitrator, it is important to highlight the fact that the Competition Commission Board performs supervisory and adjudicatory functions. They are a governing body that supervises the Secretariat. The Board also performs adjudicatory functions in respect of complaints of anti-competitive conduct and approves mergers and acquisitions.*
>
> *The SwaziMed complaint can be dealt with by the board of the Competition Commission either in this supervisory capacity, i.e. reporting by the secretariat on pending complaints or in its adjudicatory capacity i.e. adjudicating on the complainant.*
>
> *46. SwaziMed was unaware that the Arbitrator was a member of the board of Commissioners of the Competition Commission. If it was aware, SwaziMed would not have agreed to his appointment as arbitrator because of the risk posed by his having access to potentially damaging information about SwaziMed from his capacity as a Board member of the Commission. This would have the potential of polluting the mind of the arbitrator."* [11]

[21] SwaziMed had deposed before the Hon. Arbitrator:

[10] see page 30 para 42 of book of pleadings - bundle 1
[11] see page para 45& 46 of 1 (ibid) -

"5.8 On Friday 31 March 2017 whilst discussing the matter with colleagues, I leant from one colleague, Mr. Sicelo Mkhonta that the Arbitrator is a Board Member of the Competition Commission. I was concerned about this because this is a material fact which had not been disclosed." [12]

[22] It also attested:

"5.11 I am aware from my interactions with officials of the Commission that the matter has been to the Board on several occasions and it is one of the matters that the Secretariat of the Commission reports to the Board about;

5.12 As a Board Member, the Arbitrator would deal with the matter at the level of reporting by the Secretariat of the Commission in its supervisory function or adjudicating on the complaint in its adjudicatory function;

5.13 I was unaware that the Arbitrator is a Board Member of the Competition Commission which is seized with the complaint against the Respondent. The complaint is of a serious nature.[13]

2. Reasons stated by the Hon. Arbitrator for granting interlocutory application in favour of Medscheme.

[23] The second ground for the application by SwaziMed to have the Hon. Arbitrator to recuse himself is, according to SwaziMed, found in the ruling on the interlocutory application filed by Medscheme. SwaziMed alleges:

"9.3 The Arbitrator also exhibited bias against SwaziMed and a predilection towards Medscheme. The Arbitrator has made findings against SwaziMed which disposes of the central issue for determination by the Arbitration, namely, the expiry of the Management Agreement between SwaziMed and Medscheme."

"Having decided this issue in the manner he did in the interlocutory proceedings, the Arbitrator has prejudged important issues for determination by the arbitration hearing i.e. factors that influence whether to grant specific performance or award damages, expiry date of the Agreement."

[12] see page 283 para 5.8 of book of pleadings – bundle 2
[13] see paragraphs 5.10 to 5.13 page 283 of bundle 2

[24] SwaziMed further expatiates:

> "*74. The Arbitrator also made serious findings which clearly exhibit his bias. He states that SwaziMed acknowledged that it is an unfavourable financial position. This is totally incorrect and cannot be found anywhere in the pleadings or was not a submission made before him. It is part of the Arbitrator's justification of his unjustifiable order which was a complete over reach.*
>
> *77. The Arbitrator made a finding that the balance of convenience favoured Medscheme. This finding was not based on facts because Medscheme had not established a case at all that the balance of convenience favoured it. The findings were gratuitous and shows a clear predilection in favour of Medsheme and against SwaziMed. Quite clearly, the Arbitrator is not unbiased. Section 21 of the Constitution guarantees a hearing before an independent and impartial adjudicator. Anything short of this is clearly not consistent with the Constitution. In other words, an arbitration hearing must also comply with Constitutional requirements.*
>
> *83. The interim order is occasioning grave injustice to SwaziMed and is affecting its business operations and ability to provide services for its members. It would also affect the rights of third parties. The Arbitrator was biased and fixated with granting an order for specific performance even though the facts and circumstances did not warrant the grant of the order.*
>
> *85. Apart from the obvious bias, the Arbitrator has descended into the arena so to say because he is now involved in a factual dispute with SwaziMed on whether the investigation by the Competition Commission is ongoing. This is central to whether he should have recused himself. As it is, the Arbitrator's version is completely wrong and not borne by the facts. I have explained extensively that the investigation is still ongoing and that a party in SwaziMed's position would be justified in fearing that the Arbitrator who is a member of the governing body of Competition Commission may not bring an undiluted and independent mind in deciding the issues before him."*

[25] In support of its prayer to have the interim award reviewed and set aside, SwaziMed deposed:

> "*71. The Arbitrator had already made up his mind that Medscheme had strong prospects of success even though there were no reasons for his conclusion.*

He rejected and made a definite conclusion on SwaziMed's interpretation of the Agreement stating that it "seems to lack substance". Even though the Arbitrator stated that he had not made a final decision in the issue, it was clear that he had made up his mind that the Notice of Termination given by SwaziMed was a repudiation of the Agreement entitling Medscheme to specific performance."

72. I submit that SwaziMed has a right to a fair hearing. The Arbitrator has already decided conclusively on a key issue being the interpretation of the Agreement. A hearing under him would not be fair as he can no longer bring an independent mind on the issue. The right to a fair hearing is guaranteed in terms of Section 21 of the Constitution. It is also one of the most fundamental rights and foundational pillars of our justice system. I am advised that a court of law will intervene as a matter of course where the basic right is violated.

83. The interim order is occasioning grave injustice to SwaziMed and is affecting its business operations and ability to provide services for its members. It would also affect the rights of third parties. The Arbitrator was biased and fixated with granting an order for specific performance even though the facts and circumstances did not warrant the grant of the order."

[26] It further states:

73. The ruling of the Arbitrator shows that he focused his attention on trying the SwaziMed's defence and seeking to disprove it rather than doing what he was supposed to do which is to determine whether a case had been made for the grant of the interim relief sought. This was a clear misdirection and irregularity. The arbitrator made a finding that Medscheme had strong prospects of success in the arbitration. He did this without interrogating the clearly untenable interpretation of the Agreement. Medscheme enjoyed the free ride so to say. There is no cogent reasoning to support the contention that the Agreement would have expired on 30 April 2017. In any event, that date has come and passed.

75. Not withstanding the fact that Medscheme had failed to deal with the issue of the balance of convenience in its founding papers, the Arbitrator ignored this and sated that this was not fatal to Medscheme's case. In this regard, his views are stated as follows in the ruling: "In my view, an applicant's failure to deal expressly with the balance of inconvenience in its founding papers is not fatal, it merely runs the risk of the application being turned down." On the facts of this case, the balance of inconvenience was supposed to be decisive. The arbitrator chose to disregard it because Medscheme had not pleaded it.

> *76. SwaziMed had set out in detail the prejudice that it would suffer if the interim order was granted. The Arbitrator's views on this was that "This is a matter of choice" for SwaziMed, meaning that it brought the prejudice upon itself."*

Medscheme's rebuttal

[27] In opposition to SwaziMed's prayers, Medscheme has raised a number of grounds upon which SwaziMed's application for review should be dismissed. I highlight them below:

(a) Refusal by SwaziMed to submit to arbitration:

[28] Medscheme submits that Swazimed has since the inception of the dispute refused to submit to arbitration despite clause 21 of their agreement calling upon the parties to resolve their dispute through arbitration. It asserts that Gautschi SC was appointed without SwaziMed's participation because SwaziMed refused to nominate the name of an arbitrator despite numerous requests to do so. This arbitrator was rejected by SwaziMed on the eleventh hour without any justification. On the 6th December 2016, a date set by Gautschi SC as a hearing date for the main dispute, SwaziMed filed an urgent application before this court calling for the stay of the arbitration proceedings and removal of Gautshi SC as arbitrator.

[29] During the hearing of this urgent application, SwaziMed on realizing that the ruling by this court might not favour it, called for the recusal of the presiding judge, Annandale J, as he then was.

[30] With the court having ruled in Swazimed's favour in respect of the removal of Gautshi SC and recusal of Annandale J, SwaziMed consented to the appointment of the present Hon. Arbitrator. In fact, the name of the Hon.

Arbitrator had been suggested before the appointment of Gautschi SC but SwaziMed preferred not to respond. Medscheme then deposed.

> "*53. I pause her to point out that SwaziMed refused to sign the arbitration agreement for no apparent reason other than to frustrate the process. It furthermore failed to discover documents requested by Medscheme (TR31) and has failed to date to file its statement of defence which was due on 31 March 2017 as per the arbitration agreement. This demonstrates that SwaziMed was all along intent on derailing the arbitration proceedings for as long as possible*."

[31] It had attested prior:

> *"46. This is nothing short of a desperate attempt to avoid the arbitration proceedings as despite undertakings to file its statement of defence by the 31st March 2017, it has failed to do so and has brought this application with the objective of delaying the arbitration proceedings for as long as possible."*

[32] SwaziMed's position is exacerbated by the fact that it only raised the application for recusal after the ruling on the interlocutory application. The ruling was against SwaziMed. Medscheme deposed in this regard:

> "*45. SwaziMed's current attitude is therefore surprising as when the shoe previously pinched and it wished to extricate itself from the arbitration proceedings due to commence before Gautschi SC, it had no difficulty in suggesting the name of the learned arbitrator who it now seeks to have removed in circumstances not dissimilar to the application brought to have Gautschi SC removed."*

[33] It then concludes:

> *22. The application is accordingly not brought to vindicate matters of high principle, but to frustrate the continuation of the main arbitration proceedings before the arbitrator. The application is only brought as a consequence of the arbitrator having made an interim award in favour of Medscheme that does not carry the approval of SwazeMed.*

23. Had the arbitrator ruled in its favour, SwaziMed would not have thought it necessary to bring an application for his recusal. The grounds relied upon in support of the application are as a result contrived since it does not follow that because the arbitrator ruled against SwaziMed at a preliminary stage of the proceedings, that such a finding was demonstrative of a lack of impartiality in the main arbitration proceedings."

(b) Absence of legal ground to justify recusal

[34] Medscheme refuted any ground for the Hon. Arbitrator to recuse himself. It points out that the Hon. Arbitrator was under no duty in law to disclose as he did not have any interest in the arbitration proceedings brought before him. It articulated as follows:

"18. The duty of disclosure which SwaziMed complains the learned arbitrator to have breached only arises where the presiding officer (Judge or arbitrator) has an interest in the proceedings ordinary represented by an interest in one of the litigants by shareholding, ownership, family relations or attachment to the case. In such a case the question he must subjectively ask is whether, having regard to his share, ownership or other interest in one of the litigants in proceedings, he can bring the necessary judicial dispassion to the issues in the case. If the answer to this question is in the negative, the presiding officer must of his own accord, recuse himself."

[35] It also expatiated:

"*If on the other hand, the answer to the question is in the affirmative, the second question to ask is whether there is any basis for a reasonable apprehension of bias on the part of the parties. If the answer to this question is in the affirmative, the presiding officer must disclose his interest in the case."*

[36] Medscheme points out that Swazimed failed to adduce any evidence that the Hon. Arbitrator had a real interest in the case. The Hon. Arbitrator was

therefore under no duty to disclose. Although the Hon. Arbitrator is a board member of the Competition Commission vested with the power to investigate anti competition practices, the duty to investigate lies with the secretariat and not the members of the board, according to Medscheme.

Issues

[37] Two issues face me in the application at hand. The first question for determination is whether the Hon. Arbitrator was obliged to recuse himself upon application by SwaziMed. The second issue is whether the interlocutory award is of a final nature, as it is so often stated in our legal expression.

Legal principle

Recusal

[38] In **S v Basson,**[14] the court held that the question of recusal is a constitutional one. Their Lordships quoting from **South African Commercial Catering and Allied Union & Others** (**SACCAWU) v Irvin and Johnson Ltd** articulated:

> "*Recusal is a constitutional matter because the impartial adjudication of disputes in both criminal and civil cases is a cornerstone of any fair and just legal system.*"

[39] The above holds true in adjudication by arbitrators and administrative bodies. The test for recusal was well summed up in **S v Shackell**[15] as follows:

> "*The ultimate test is whether having regard to (all the relevant facts and considerations) the reasonable man would reasonably have apprehended that the trial Judge would not be impartial in his adjudication of the case. The norm of a reasonable man is of course, a legal standard*."

[14] **2004 (1) SCA** at paragraphs 21 – 22
[15] **2001(1) SACR 185 (SCA)** at paragraph 25

[40] In **Basson'**s case[16], the court commented:

> *"The test for recusal on the grounds that a reasonable person would reasonably have apprehended that the trial judge would not be impartial in his adjudication of the case is not a factual determination. The application of this test is different from the process by which a court decides whether a case has been proved beyond reasonable doubt. In that case, the relevant facts are found only if they are proved beyond a reasonable doubt. The standard of proof, which is undisputed, is applicable to the fact funding process. In recusal cases, the facts are first established by the application of the standard of proof (*which is the question of law) *only after that has been done are the facts measured against the objective legal standard of the reasonable person. (*words in brackets my own*)*

[41] The court proceeded to state of a reasonable man:

> "*A reasonable man in the embodiment of the social judgment of the court, which applies common morality and common sense to the activities of the common man.*[17]

[42] It then concluded:

> "*It must follow that a recusal challenge also involves a virtually identical enquiry, namely "the social judgment of the court applying common morality and common sense" in deciding whether the reasonable person, in possession of all the relevant facts, would reasonably have apprehended that the trial judge would not be impartial in his adjudication of the case*."

[43] Following the above *ratio decidendi*, I intend to now embark on the two process enquiry, *viz*., question of fact and question of law.

Question of fact.

[44] The circumstance of the matter before me on recusal are outlined by both SwaziMed and MedScheme. It is common cause that although the Hon. Arbitrator was nominated by Medscheme, SwaziMed consented to his

[16] *ibid*
[17] in S v Bochris Investments (Pty) Ltd and Another *1988 (1) S.A. 861 (A) at 865 G."*

appointment. Although SwaziMed did not sign the arbitration agreement, it is without reasonable doubt that SwaziMed was content with the Hon. Arbitrator. This is evident from the fact that SwaziMed submitted to his jurisdiction as it appeared before him on 21st March 2017, 24th March 2017, 27th March 2017 and 3rd April 2017, the period upon which the interlocutory application was prosecuted. In fact, during this period, SwaziMed was willing to have the main arbitration matter adjudicated by the Hon. Arbitrator. This is evident by both parties consenting to the date of hearing of the main arbitration matter.[18]

[45] From the above sets of circumstances, Medscheme calls upon the court to draw the inference that SwaziMed changed perception about the Hon. Arbitrator because the Hon. Arbitrator ruled against it in the interlocutory application. Swazimed disputes this assertion and points out at follows:

> *"5.8 On Friday 31 March 2017 whilst discussing the matter with colleagues, I leant from one colleague, Mr. Sicelo Mkhonta that the Arbitrator is a Board Member of the Competition Commission. I was concerned about this because this is a material fact which had not been disclosed."*

[46] The court enquired from Counsel on behalf of SwaziMed on why it then waited until 4th April to file its recusal. Counsel pointed out that the 31st March 2017 was a Friday. It only received instructions on the matter on Monday 3rd of April. It duly wrote a letter and appeared before the Hon. Arbitrator on the same day calling upon the recusal of the arbitrator who ordered that a fully blown application be filed. It duly complied and the application was filed the following day, 6th April 2017.

[47] I must pause at this juncture to point out that in recusal application, the time upon which such an application is taken up is essential in the enquiry on

[18] see page 24 of bundle 3 (record of proceedings)

whether the application is made *bona fide* or merely to frustrate the proceedings. By no means however, is the enquiry on the time contrary to the position of the law both under common law and section 11 of the Arbitration Act No. 24 of 1904 which are to the effect that an application for recusal can be made at anytime before final judgment or award. The section reads:

> *"11. The Court may at any time upon motion remove any arbitrator or umpire against whom a just ground of recusation is found to exist or who has misbehaved himself in connection with the matters referred to him for arbitration*."

[48] Medscheme fortified its submission on SwaziMed's intent to frustrate the arbitration by referring this court to the record of proceedings which reads:

> *"MR. MOTSA: Whatever intentions we have of finishing the hearing next week Friday will be ... I am just saying if the documents can be discovered perhaps subject to confidentiality, like what happens in your Competition Commission. If they don't want our clients to hear them we can.*
>
> *MR. MAGAGULA: This is not the Competition Commission we are dealing with a legal matter here, I mean so this is what we are dealing with."*(underlined my emphasis)

[49] Following the above, it was contended on behalf of Medscheme that during the deliberation of the arbitration agreement, it was pointed out that the Hon. Arbitrator was a member of the Competition Commission as gleaned from the words "y*our Competition Commission.*" When these words were uttered, the deponent on behalf of SwaziMed was present in court. If he wished to raise a recusal, he ought to have done so at that point in time, so went the submission on behalf of Medscheme.

[50] Medscheme put a further point on time for the application. It pointed out that at all material times, Mr. M. Magagula who appeared in the arbitration

proceedings on behalf of SwaziMed, was also the attorney representing SwaziMed before the Competitions Commission when SwaziMed was investigated for the unfair competition complaint. If, therefore, the objection to the Hon. Arbitrator was *bona fide*, it ought to have been raised when Medscheme proposed the name of the Hon. Arbitrator.

[51] Mr. Magagula points out that the words "*like what happens in your Competition Commission*" did not dawn on Swzimed's deponent and that he was SwaziMed's legal representative in 2014 to 2015. He could not be expected to assume that the Hon. Arbitrator was still the board member in 2017. At any rate, he had not received any instructions against the Hon. Arbitrator when the arbitration agreement was discussed.

Determination on factual aspect

[52] It is unnecessary for me to enter into the fray on whether the attention of SwaziMed's deponent ought to have been drawn by the words "*your Competition Commission*" and therefore jump into action or that Mr. Magagula should have objected to the appointment of the Hon. Arbitrator from the onset by virtue of being SwaziMed's Counsel at the Competition Commission. This is because it is common cause that the Hon. Arbitrator is still a board member of the Competition Commission. In terms of Section 8 of reads:

> *"8. (1) The Commission shall consist of –*
> *(a) a representative of the Ministry responsible for enterprise;*
>
> *(b) a representative of the Ministry responsible for finance;*
>
> *(c) a representative of the Ministry responsible for economic planning and development;*

(d) a member nominated by the Swaziland Chamber of Commerce and Industry;

(e) a member nominated by the Economics Association of Swaziland;

(f) a member nominated by the Swaziland Consumers Association;

(g) a member nominated by the Swaziland Institute of Accountants;

(h) a member nominated by the Law Society of Swaziland;

(i) a member nominated by the Minister by virtue of the person's knowledge of or experience in economics, industry, law, consumer affairs or the conduct of public affairs;" (underlined, my emphasis)

[53] The functions of the Commission are highlighted under sections 11 and 13. Section 13 reads:

Power of the Commission

"13. (1) For the purposes of carrying out its functions under this Act, the Commission shall have power to:-

(a) summon and examine witnesses;
(b) call for and examine documents;
(c) administer oaths;
(d) require that any document submitted to the Commission be verified by affidavit; and
(e) adjourn any investigation from time to time.

(2) The Commission may hear oral submissions from any person who, in its opinion, will be affected by an investigation under this Act, and shall so hear the person if the person has made a written request for a hearing, showing that the person is an interested party likely to be affected by the result of the investigation or that there are particular reasons why that person should be heard orally.

(3) The Commission may require a person engaged in business or a trade or such other person as the Commission considers appropriate, to state such facts concerning good manufactured, produced or supplied by the person as the Commission may think necessary to determine whether the conduct of the

business in relation to the goods or services constitutes an anti-competitive practice.

(4) If the information specified in subsection (3) is not furnished to the satisfaction of the Commission, it may make a finding on the basis of the information available before it."

[54] In brief, the Commission commonly referred to as the board members adjudicate upon matters before the Commission. Section 18 clarifies that the Secretariat "*shall be the investigative arm of the Commission."*

[55] SwaziMed argues that the complaint before the Competition Commission was still pending. However, it only learnt on 31st March 2017, after the interlocutory application by Medscheme was argued to the end that the Hon. Arbitrator was still a member of the Competition Commission.

[56] It was common cause during the hearing of the application for recusal before the Hon. Arbitration that the Hon. Arbitrator was still a member of the Competition Commission. What was raised as an issue, was whether the complaint against Swazimed was still pending before the Competition Commission. SwaziMed asserted that the complaint was still pending and investigations against it were on-going. The Hon. Arbitrator's position was contrary. He expressed the status of the complaint and the investigation as follows:

> *"46. In the course of his oral submissions I indicated to Mr. Magagula that I was appointed to the Board of Commissioners by virtue of Legal Notice No.8 of 2015 with effect from the 1st September 2014, and that the last meeting which I attended wherein SwaziMed was on the agenda was held on the 23rd February 2015. At that meeting the Board of Commissioners adopted a report by the Secretariat clearing SwaziMed of anti-competitive practices. Further, that since then, no report of any new investigations concerning SwaziMed or Medscheme had been tabled for discussion by the Board of Commissioners. It was on this basis that I formulated the view that there was nothing to disclose to the parties. As far as I was aware, at the time of my appointment SwaziMed been cleared of allegations of anticompetitive*

practices some two years ago. Thus, this is not a fact which would affect my independence or impartiality."

[57] Earlier, he had stated:

"ARBITRATOR: *Gentlemen before we commence today's proceedings, I would like to raise a concern and subject to what the parties think of what I am going to raise we shall then decide a way forward. Now my concern basically stems from the fact that serious allegations have been made by the applicant in this matter that is the application for recusal and my view is that these allegations are based on factual inaccuracies and being the person who is being challenged based on factual inaccuracies I am concerned by the concern that I want to clear up those factual inaccuracies."*

[58] The record also reads:

"*ARBITRATOR:* *Okay. Now secondly another issue that I would like to raise with you is that in my tenure as a board member there has been 2 meetings at which the issue around the investigation of the medical aid sector was involved and the last meeting was on the 23rd February 2015, that is the last meeting that the issue of Swazimed and other participants in the medical aid sector was mentioned in the board meeting.*

MR. MAGAGULA: *Mr. Arbitrator I don't know what is the significance of that because like its ... I think the client is saying is that look by virtue of you being a board member and now we are saying that now that the matter has come to you that involves this and this, that is what we are saying that look the discomfort is there it is a fact that is a disclosable fact. I would want to because we must be careful about when dealing with this because this is a matter that may then affect their capacities because if we understand what the complaint is here.*

ARBITRATOR: *Yes we understand Mr. Magagula.*

MR. MAGAGULA: *I think we need to keep it at ... I understand you have had two other meetings about this ...*

ARBITRATOR: *Look Mr. Magagula, you see I am raising this because you had specifically said that I had a duty to disclose, so I*

cannot disclose what I do not know, so that is the direction that I am taking you. I am saying the last meeting at which the Swazimed issue was on the 23rd February 2015 and can I tell you what happened in that meeting."

[59] From the above, it is clear that the Hon. Arbitrator was of the view that SwaziMed having been investigated, the matter came before the Commission where they as members of the board of the Commission discharged SwaziMed. In so asserting, the Hon. Arbitrator relied on a report by the Secretariat which was presented to the Board on 23rd February 2015.

[60] From the above, it is my understanding that, had the Hon. Arbitrator been aware that the investigation against SwaziMed by "*his Commission*" (to use Counsel's words) was still pending, he would have easily recused himself. In other words, it remains for me to ascertain whether the investigation by the Competition Commission were on-going against Swazimed or were closed.

[61] The question on whether at the time of arbitration, the investigation by the Competition Commission had closed is easily answered in two-folds. Firstly, the Hon. Arbitrator read the contents of the report upon which he relied for the conclusion that:

"*ARBITRATOR: And I am saying it was on that basis that I decided that there is nothing to disclose because the board had cleared SwaziMed of any anticompetitive practice*."

[62] He reads from the report as follows:

" '*However, after careful consideration of this clause management decided to request SFRA to investigate the cause based on the aforementioned management requested the meeting to take a decision to clear SwaziMed so that a new investigation could be initiated against Swaziland Dental Council. Upon considering management's report the meeting resolved that there was no need for a board resolution clearing SwaziMed'."*

[63] He then concludes:

> *"So we are talking about a meeting which the board resolved that the investigation, the result thereof were to clear SwaziMed and that is the last I heard of any issue, of any matter relating to SwaziMed.*"

[64] From the above excerpt of the Commission's report it is clear that the Hon. Arbitrator erroneously misinterpreted the content of the report as read by him. It appears from the report that the "*meeting*" presumably the Commission declined to pass a resolution clearing SwaziMed as it was so requested on the basis that there was no need to do so.

[65] As pointed out under section 13 of the Act, the duty of the Commission is to adjudicate upon investigations by the Secretariat. Now that the Board refused to clear SwaziMed when so requested, begs for the answer "*what of the investigations that had commenced against SwaziMed?*" Whether one chooses to say the investigations were held in abeyance, the fact of the matter is that until such time that Swazimed receives a correspondence from the Commission disclosing that it has been cleared or investigations against it have been closed, the investigations in the eyes of SwaziMed are pending. It is worth noting that the Hon. Arbitrator did not rely on a correspondence by the Commissioner to SwaziMed advising it of the otherwise status of the investigation. He relied on a document that was privileged and this was raised by SwaziMed. Had he relied on such correspondence, the mere fact that the Hon. Arbitrator was the member of the Commission would not be sufficient for recusal. I guess such a correspondence was not available.

[66] It is not surprising therefore that on the 8th May 2017, *albeit* a date after the ruling on recusal, the Commission authored and dispatched to SwaziMed a correspondence which reads:

> ***"RE: REQUEST FOR INFORMATION INTO THE ALLEGED ANTI-COMPETITIVE BEHAVIOR BY SWAZILAND MEDICAL AID FUND (SWAZIMED) AND SWAZILAND MEDICAL AID AND DENTAL ASSOCIATION – CASE EC/001/2011***
>
> *1. Reference is made to the above mentioned.*
>
> *2. In the bid to bring the above investigation to a successful conclusion, the Commission hereby request you to kindly furnish it with the organizational structure of SwaziMed.*
>
> *3. This request is made in terms of section 13 (1) (b) read with regulation 12 (3) (b) of the Competition Act 2007.*
>
> *4. Kindly submit the information on or before the close of business on 17 May 2017. Should you need further details or clarifications on this matter, please do not hesitate to contact our Louis Marx on e-mail louism@compco.co.sz or the undersigned."*

[67] From the above, it is clear that the Hon. Arbitrator reached an erroneous conclusion that the investigations had been completed and SwaziMed "*cleared*" of the complaint. This error was caused by reliance on a wrong document. The best document under the circumstances would have been a correspondence by the Commission addressed to SwaziMed advising it of the same. The Hon. Arbitrator ought to have simply called the Chief Executive Officer of the Commission to ascertain the status of the investigation against SwaziMed. From the letter of 8th May 2017 quoted above, it is obvious that the answer would have been that the investigation against SwaziMed were ongoing, as so attested by SwaziMed.

Legal aspect

[68] The next enquiry is the legal question. It is whether in the circumstance where a member of the commission seized with investigating a party in arbitration may raise the apprehension that he might be biased in presiding over arbitration where one of the parties is the same person who is facing an investigation by the commission. This question must be answered in accordance with the perception of an ordinary reasonable by-stander. I have already pointed out that but for the erroneous conclusion of the Hon. Arbitrator that the investigations against SwaziMed were closed as SwaziMed was cleared, the Hon. Arbitrator would have recused himself if he was aware that in fact investigations were pending and on-going. This would concur with the views of a reasonable man.

Other reasons for recusal

[69] The Hon. Arbitrator also noted:

> "*41. The first point to be noted is that SwaziMed's contentions are based on hearsay evidence, and are speculative. Simelane has no personal knowledge as to whether a report has been made by the Secretariat of the Commission to the Board of Commissioners. All that he says is that his knowledge come "from interactions with officials of the Commission", which he does not name. There is no detail as to when these interactions took place, or as to when the Secretariat reported to the Board of Commissioners on the investigation. Simelane has failed to produce a single document which indicates that the Secretariat has reported to the Board of Commissioners at all about the complaint and/or investigation into SwaziMed, even when challenged by Medscheme to do so."*

[70] The above conclusion by the Hon. Arbitrator were unfortunate in the light of his own version that the complaint against SwaziMed was presented to the Commission on two occasions and the last date being 23rd February 2015 where SwaziMed was cleared. It ought to have been common cause therefore, that the board did receive a report from the Secretariat about a complaint against SwaziMed and the board actually deliberated on it.

[71] The Hon. Arbitrator further held:

> *"45. The second point is the separation of functions between the Secretariat of the Commission, on the one hand, and the Board of Commissioners, on the other, which Simelane is clearly aware of as appears from his affidavits. This is a relevant consideration as far as this matter is concerned. The Secretariat investigates complaints of anti-competitive practices, and the Board of Commissioners adjudicates the complaints. It follows that the Board of Commissioners cannot investigate and adjudicate a complaint at the same time. Simply put, the Board of Commissioners does not investigate allegations of anti-competitive practices. In particular, the Board of Commissioners is not seized with an investigation into SwaziMed."*

[72] I must point out firstly that the demarcation between the Board and the Secretariat exist for purposes of internal administration. In fact in as much as the Act refers to the Secretariat as seized with investigative authority, it does not mention the board. The Act refers to the Commission and sets out a number of personnel who are to form the Commission. Its enactment provides that it is the Commission that is charged with the power to ensure that the Act is implemented effectively. In other words, the Hon. Arbitrator, as a Commission, must answer where the Secretariat acts contrary to the provisions of the Act. In the eyes of an ordinary by-stander therefore, the buck ends with the Commission and not the Secretariat. It is for this reason that the words uttered by learned Counsel for Medscheme that "*your Commission*" referring to the Hon. Arbitrator were very apposite. It is for this reason again that the Secretariat presented a report to the Commission to request a clearance of SwaziMed although that request was rejected. In other words, if the Secretariat was completely independent of the Commission, it would not seek permission to close its investigation. In summary the demarcation is very thin, if at all it exist. In the eyes of a reasonable man, it is to borrow from the words of learned Counsel Mr. Motsa, "*the Hon. Arbitrator's Commission*" that is investigating. The letter-head upon which

the 8th May 2017's correspondence is authored attests to this position as it reflects the Commission and not the Secretariat as its source despite its contents which reflects the mandate of the Secretariat.

[73] In the totality of the aforegoing, it is my considered view that the Hon. Arbitrator ought to have recused himself for failure to disclose that he was a member of the Commission seized with a continuing investigation against SwaziMed who is the respondent in the arbitration proceeding.

[74] It is unnecessary for me to embark on the question on whether the Hon. Arbitrator displayed actual bias when the interlocutory application was heard as evidence from his interim award. This is because such a ground was not raised before him despite that the interim award reasons had been furnished by the time the recusal application was filed.

Order to review and set aside the interim award

[75] It is common cause that the award sought to be reviewed by SwaziMed flows from an interlocutory application. The first port of call therefore is to ascertain whether the interim award so granted is reviewable for the reason that it was issued in the course of an interlocutory application. The direct question arising from this enquiry is whether the interim order sought to be reviewed is as per **Corbett JA**[19]:

> *"(i) those which have a final and definite effect on the main action and (ii) those known as 'simple' (or purely) interlocutory orders ..."*

[76] The learned Judge made reference to **Schreiner JA**'s[20] majority judgment on the litmus paper on the difference between orders that are simple or pure interlocutory and those which are final and of definite effect:

[19] in South Cape Corporation v Engineering Management Services 1977 (3) SA 534 (a) at 549
[20] in Pretoria Garison Institute v Danish Variety Products (Pty) Limited 1948 (1) SA 839 [AD] at 870

> *"... a preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to 'dispose of any issue or any portion of the issue in the main action or suit' or, which amounts, I think, to the same thing, unless it is 'irreparably anticipates or precludes some of the relief which would or might be given at the hearing'."* (my emphasis)

[77] **Myhardt J**[21] stated the reason for enquiring on the difference by quoting from **Howie JA**[22]:

> *"As previous decisions of this Court indicate, there are still sound grounds for a basic approach which avoids the piecemeal appellate disposal of the issues in litigation. It is unnecessarily expensive and generally it is desirable, for obvious reasons, that such issues be resolved by the same Court and at one and the same time. Where this approach has been relaxed it has been because the judicial decisions in question, whether referred to as judgments, orders, rulings or declarations, had three attributes. First, they were final in effect and not susceptible of alteration by the court of first instance. Secondly, they were definitive of the rights of the parties, for example, because they granted definite and distinct relief. Thirdly, they had the effect of disposing of at least a substantial portion of the relief claimed ..."* (my emphasis)

[78] All the above cited judgments dealt with the question of appeal. **Myhardt J**[23] observed:

> "*Although what was said by Howie JA in the Searle case applies, first and foremost, to ordinary civil litigation, the remarks of the learned Judge of Appeal apply, in my view, with equal force to s 151 of the Act in the context of s 151thereof." (*i.e. review proceedings*) (*words in brackets my own)

Issue on interim award

[79] From the above enunciated principle of our law, the question for determination is whether the award issued by the Hon. Arbitrator on 3rd April 2017 following the interlocutory application by Medscheme can be classified

[21] in Straness and Others v the Master and Others NNO 2001 (1) SA 649 at 659
[22] in Guardian National Insurance Co Ltd v Searle NO 1999 (3) SA 296 (SCA) at 301 B-D
[23] (*supra)*

as interlocutory award proper or not. If the answer is that it is pure interlocutory award, it is as per Medscheme not reviewable. If not, the enquiry proceeds to whether the Hon. Arbitrator did take into consideration relevant issues in considering whether the balance of convenience favoured the granting of the interim award.

Determination on interim award

[80] Medscheme initiated the arbitration proceedings by filing an application where it sought mainly for a declaratory award on the date of the termination of the Management Agreement. This declaratory order called for the arbitrator to interpret the management agreement more specifically Clause 5.2 and 5.3. SwaziMed asserts that the Management Agreement terminated upon notice dated 24th May 2016 on 21st March 2017. Medscheme on the other hand is adamant that the Management Agreement shall terminate on 31st December 2017 or at the earliest 30th April 2017. This is the issue in the main arbitration agreement.

[81] On 21st March 2017, Medscheme moved an interlocutory application seeking that the *status quo* be maintained. The Hon. Arbitrator put the parties in terms on filing period. He then *mero motu* ordered that the *status quo* be maintained.

[82] When the matter appeared before me, I enquired from the parties as to what the *status quo* was on 21st March 2017 when the Hon. Arbitrator so ordered. Both Counsel on behalf of the parties were in unison that the *status quo* was as defined under correspondence dated 29th December 2016 written by SwaziMed. It reads as follows:

> "*Administration functions*

You are hereby advised that with effect from 1st January 2017 the following administration functions and/or services will be performed by SwaziMed at their own offices:

- *Membership services (application, additions and deletion) including printing of new membership cards;*
- *Contribution collection for 2017;*
- *Bank deposits for 2017;*
- *Reconciliation for 2017;*
- *Walk-in and call centre services;*
- *Processing of 2017 claims;*
- *All payments to 3rd parties;*
- *Distribution of the Benefit guide for 2017;*

In view of the foregoing, you are also requested to remove all SwaziMed branding from your walk-in centre and to remove all reference to SwaziMed in your website with immediate effect.

Contractual Obligations
SwaziMed will continue to remunerate Medscheme Swaziland until the end of the contract in March 2017.
During this period you are required to undertake the following activities:

- *To continue processing and paying 2016 claims and related queries routed via SwaziMed;*
- *wind up and prepare to hand over to SwaziMed all materials under your custody and care;*
- *Prepare December 2016 Management Accounts and all relevant reports for the next board meeting (date to be confirmed);*
- *Arrange for the Fund to be audited and draft financial statements by 10th March 2017.*

Your cooperation will be highly appreciated."

[83] The duties highlighted on behalf of Medscheme could be summed up as winding up and making a handover to SwaziMed. The interlocutory application by Medscheme was to maintain the *status quo.* Which *status quo* in the light of correspondence dated 29th December 2016 above?

[84] In its interlocutory application, Medscheme prayed mainly:

"2. Pending finalization of the arbitration proceedings between the applicant and the respondent, the respondent be interdicted and restrained from

cancelling the management agreement attached hereto marked annexure "x".

[85] In support of its prayer it averred:

> *"20. As it appears above, both AFSA and the Arbitrator have set the 22nd and the 23rd of March 2017 as dates of payment of the fees and the pre-arbitration meeting which dates will be after the date of the supposed termination (being the 21st of March 2017). In the circumstances the applicant has a clear right to have the cancellation interdicted pending the hearing of the matter.*
>
> *21. The cancellation before the arbitration will cause irreparable harm to the applicant as it will not be in a position to fulfill its contract as the respondent will not pay it after the 21st of March 2017 in circumstances where the cancellation is being contested.*
>
> *22. The balance of convenience favours the grant of the interim order pending the payment by the respondent of the fees as well as the pre-arbitration meeting.*"

[86] SwaziMed answered by alleging a number of instances showing that the relationship between the parties has irretrievably broken down and there were no prospects of restoration. It challenged the wording of the prayer on the basis that the Management Agreement terminated in terms of Clause 5.3 following a notice. It was not cancelled by it. Further, if Medscheme felt that SwaziMed unlawfully cancelled the contract, its remedy lay under Clause 7 which did not provide for specific performance as prayed for by Medscheme. SwaziMed alleged that Medscheme did not make a case on balance of convenience as it dismally failed to state any grounds upon which the court could make a determination. SwaziMed proceeded to canvas a host of instances reflecting that the granting of prayer by Medscheme would not favour the balance of convenience. In reply Medscheme denied and challenged SwaziMed's averments.

[87] It would be folly of me to make a determination on whether the interim award was final and definite in effect without visiting the reasons for the interim award. The learned Arbitrator pointed out:

> "*22. It is further contended by Medscheme that SwaziMed has based its argument that it is entitled to terminate the Management Agreement on a wrong interpretation of Clause 5. It is submitted that at best for SwaziMed the Management Agreement expires or terminates on the 30th April, 2017. Medscheme's interpretation is that the Management Agreement expires or terminates on the 31st December 2017, and this is the case that it is advancing in the arbitration. Medscheme seeks to hold SwaziMed to the Management Agreement up until 31st December, 2017.*
>
> *23. Medscheme further argues that the notice of termination of the Management Agreement issued by SwaziMed amounts to a repudiation of the contract, and which entitled it to elect whether to accept the repudiation or seek to specific performance. It is argued that Medscheme has elected to seek specific performance, and that this cause of action is contemplated by Clause 19.2 of the Management Agreement. It is on this basis that Medscheme wants to hold SwaziMed to the Management Agreement up to the 31st December 2017."*

[88] He then proceeded:

> *"40. In assessing whether Medscheme has established prima facie right it is essential to take into account the fact that SwaziMed has not disputed the existence of the Management Agreement and its terms and conditions.*
>
> *41. SwaziMed agrees that Clause 5 of the Management Agreement can be interpreted in such a manner that the initial 5-year term of the agreement commenced on the 30th April 2007 and endured until the 30th April 2012. And that the 5-year term renewal period commenced on that date and endures until 30th April 2017 (the first interpretation). On this interpretation the Management Agreement is extant.*
>
> *42. However, SwaziMed contends that this interpretation must not be adopted. Instead, it contends for the second interpretation, according to which the 5-*

year renewal period should be reckoned with effect from the 1st January 2012, notwithstanding the fact that the initial 5-year term would, on the first interpretation, not have expired.

44. Without making a final decision on the point, the second interpretation seems to lack substance. There is no clear and proper explanation why the commencement date of the 5-year renewal period should be computed in this manner.

*46. In the absence of a clear and proper explanation as to why the commencement date should be computed in this manner, I am inclined, prima facie, to hold the view that at worst for Medscheme, the Management Agreement is extant and will expire on the 30th April, 2017. This being the case, the purported notice of termination would constitute a repudiation of the Management Agreement entitling Medscheme to seek specific performance. However, I do not make any final finding in this respect."(*my emphasis*)*

[89] On the question that specific performance was not provided in the management agreement but a claim for damages as per Clause 17, the Hon. Arbitrator held:

"49. In my opinion, it is clear from the above that: (a) specific performance is a right entrenched in the common law; (b) a defaulting party to a contract cannot compel his counterparty to claim damages in lieu of specific performance; and (c) it is the trial court which must finally exercise a judicial discretion whether to grant or refuse a decree of specific performance, after a consideration of all the circumstances of each case. As regards (c) a final determination of whether an order for specific performance will be made after consideration of all evidence and submissions made at the main arbitration hearing."

[90] He concluded:

"54. My prima facie view is that Clauses 17 and 19.2 cannot be interpreted so as to restrict Medscheme to a claim for damages, for the reasons stated above." (my emphasis)

[91] On balance of convenience he held:

> *"76. It seems to me that Medscheme has established a strong prima facie case on the construction that at worst for it, the Management Agreement expires on the 30th April 2017, at the least. By that time the arbitration proceedings would have come to an end. On this score, and based on the authorities referred to above, there is less need for Medscheme to prove that the balance of convenience is in its favour.*
>
> *77. SwaziMed has unequivocally stated that it has no money to pay Medscheme, while claiming that money is available to pay 2CANA Solutions. In other words, SwaziMed would rather pay another service provider than Medscheme. This is a matter of choice.*
>
> *78. Medscheme has stated that if the interim order is granted pending finalization of the arbitration proceedings, it will not disrupt the operations of SwaziMed in anyway. Further, that it will not go about brandishing the Order. This, to me, puts paid to most of the issues raised by SwaziMed. However, this does not mean that they cannot be raised in the arbitration hearing."*

[92] Although the Hon. Arbitrator used the words, *prima facie*, *strong prima facie* and that the matter is still to be argued in the main arbitration, it is my considered view that the Hon. Arbitrator has made a definite finding on the interpretation as well as the subsistence of the Management Agreement. The interim order although so framed as interim is definite of the parties' rights and therefore final in nature. It cannot therefore be classified as pure interlocutory. For this reason it is reviewable.

Should it be set aside?

[93] I have pointed out above that when the matter appeared before I enquired from the parties as to what was the *status quo* on 21st March 2017 as ordered by the Hon. Arbitrator. Both parties advanced that SwaziMed had taken most of the administrative functions under the Management Agreement and Medscheme was left with the functions mentioned in the letter dated 29th December 2016.

[94] SwaziMed had in place another software (Cana 11) and Medscheme was no longer dealing with SwaziMed's clients except for payments of 2016 outstanding bills. Bulk of the administrative work was done by SwaziMed. Had the Hon. Arbitrator considered the *status quo* as so ordered by him on 21st March 2017 he would have reached the conclusion that the balance of convenience favours that the *status quo* pronounced by him on 21st March 2017 ought to have been maintained. The effect of the interim order changed the *status quo* and therefore it was erroneous to so order.

[95] I am fortified in so finding as learned Counsel for Medscheme submitted before me that when they lodged the interlocutory application, it was to maintain the *status quo* defined in the letter dated 29th December 2016. I agree. It would be too costly to reverse the *status quo* by calling upon Medscheme to take over the administration work of SwaziMed when SwaziMed has been doing so prior 3rd April 2017. Further, this by no means does it suggests that the Management Agreement has terminated. That is a question pending determination under the main arbitration proceedings.

Counter application

[96] Medscheme has filed a counter-application. It correctly points out that for an arbitrator's award to be binding, it must be made an order of court. However, Medscheme does not in its counter-application pray that the interim award of 3rd April, 2017 be made an order of court. It asks for the award pronounced on 21st March 2017 whereby the arbitrator *mero motu* ordered that the *status quo* maintains. It fortifies its prayer by pointing out that SwaziMed deposed under the hand of Mr. Simelane that it was willing to pay it for the period January to March 2017, the period of handing over.

[97] It is my considered view that the prayer to compel SwaziMed to pay the sum of E10,085,736-00 for the services rendered by Medscheme since January to March 2017 ought to have been raised first before the arbitrator. It is as per their terms of the arbitration clause in the Management Agreement where it would have been made clear by the Arbitrator as to what he meant by the *status quo* maintaining. Did he mean that where there were arrear payments (January and February) and future (end of March) payments due, then the defaulting party was obliged to pay. Did he also mean that where there were obligations pending, the other party had to fulfill its side of the bargain, as it were? Or did he mean that things as they were on 21st March 2017 ought to be kept that way without calling on either party to take further step? To me all these issues are appropriate for ventilation in the arbitration.

Costs

[98] From the historical background of this matter which is common cause and highlighted under sypnosis herein, it is clear that the parties have been in a fierce and convoluted litigation since then and yet the main bone of contention is still pending. They have been in and out of court on preliminary matters. All this litigation entails exorbitant costs digging deep in each party's pockets. For the above, I am not inclined to grant costs now but would order that costs shall be costs in the main arbitration cause.

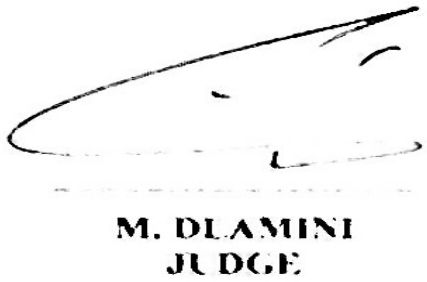
[99] In the final analysis, I enter the following orders:

1. The second respondent is hereby removed as Arbitrator in the arbitration between the applicant and the first respondent;

2. The interim order issued by the second respondent dated 3rd April 2017 is hereby set aside;

3. The counter-application is declined;

4. Costs to be costs in the main arbitration cause.



M. DLAMINI
JUDGE

For Applicant: **M. Magagula of Magagula & Hlophe Attorneys**

For Respondent: **K. Motsa of Robinson Bertram**