IN THE COUNCIL FOR MEDICAL SCHEMES APPEALS COMMITTEE

HELD AT CENTURION

IN THE MATTER BETWEEN –

[redacted] **APPELLANT**

AND

REGISTRAR OF MEDICAL SCHEMES **FIRST RESPONDENT**

MEDSHIELD MEDICAL SCHEME **SECOND RESPONDENT**

RULING

INTRODUCTION

1. This is an appeal in terms of section 48 (1) of the Medical Schemes Act,1998 ("the Act") against a ruling of the office of the Registrar of Medical Schemes ("the registrar") dated 22 June 2017.

2. The appeal arises out of the registrar's ruling that The Elexions Agency ("the agency"), who had been appointed by Medshield Medical Scheme ("the scheme") to conduct the 2017 election of its Board of Trustees ("the board"), had acted fairly when disqualifying [redacted] ("the appellant") to stand for election as a trustee and had not fettered its discretion when handling the vetting process.

BACKGROUND

3. The appellant unsuccessfully stood for election as a member of the board in 2014. However, he was appointed a trustee in April 2017 in terms of rule 18.13 of the scheme's rules ("the rules") after two vacancies arose on the board. Rule 18.13 provides that in the event of a vacancy the person with the next highest number of votes must be appointed to fill the vacancy.

4. The scheme appointed the agency, which is an independent electoral body, to run the election in accordance with the rules. The scheme also pointed PricewaterhouseCoopers as the auditors to supervise the election process.

RELEVANT STATUTORY AND REGULATORY PROVISIONS

5. It is convenient at this stage to set out the relevant statutory and regulatory provisions governing this appeal.

6. Section 32 of the Act deals with the binding nature of a medical scheme's rules and provides that:

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

7. Section 57 of the Act deals with the governance of medical schemes. More specifically section 57 (1) provides that:

> *Every medical scheme shall have a board of trustees consisting of persons who are fit and proper to manage the business contemplated by the medical scheme in accordance with the applicable laws and the rules of such medical scheme.*

8. Rule 18.12 of the rules deals with nomination forms and the circulation of curriculum vitaes to members. More specifically, it provides that:

> *Completed nomination forms, together with the curriculum vitae ("CV") of the candidate must be received by the Scheme 90 days prior to the elections and the election must take place by ballot by the members present at the Annual General Meeting of the Scheme or through postal or electronic voting.*
>
> *The list of nominees and their CVs must be circulated to all members of the Scheme at least 30 (thirty) days before the holding of the Annual General Meeting.*

9. Rule 18.14 provides for an independent electoral body, supervised by the auditors appointed by the scheme, to oversee and manage the election process. More specifically, it provides that:

> *In cases where the Annual General Meeting or Special General Meeting is convened for purposes of holding elections of trustees, the Scheme shall appoint an independent electoral person/body, duly supervised by the auditors appointed by the Scheme, to oversee and manage the election process.*
>
> *The auditors shall certify the results and shall inform the Scheme. The Scheme shall then be obliged to inform the members of the outcome of the voting within 7 (seven) days of the date of receiving the results from the auditors.*

10. Rule 18.15 empowers the scheme to investigate the candidate's background to determine whether the candidate qualifies to act as a trustee of the scheme. More specifically, it provides that:

> *By agreeing to stand as a candidate to be elected as trustee, the candidate agrees that the Scheme may conduct investigations into his background, person or conduct, and may include, without limitation, credit checks, background checks, employment history, criminal records and the like, with a view to determining whether the candidate qualifies to act as a trustee of the scheme should the candidate be elected as such.*

MERITS OF THE APPEAL

Wide appeal

11. This appeal is a wide appeal. The appeals committee may consider the matter afresh and is not restricted to the record of proceedings that was before the registrar..

Analysis

12. In essence, the appellant's case is that the registrar took what he described as a decision in his absence. According to the appellant, he had previously been co-opted onto the board without having to produce a tax clearance certificate. On 26 April 2017, the appellant asked both the

scheme's principal officer, Dr Moloabi ("Moloabi") and board chairperson why a tax clearance certificate was required and did not receive an answer. However, the appellant received a telephone call from the agency's representative enquiring when he was going to provide his tax clearance certificate. He explained to the agency's representatives that he had family challenges because his wife was ill and that he would not be able to provide his tax clearance certificate. The appellant also lived in a rural area and it was difficult to travel to the South African Revenue Service ("SARS"). The appellant also sent the agency's representative a short message service. The appellant was therefore surprised to receive the letter disqualifying him as a candidate.

13. The appeals committee is not as sanguine as the appellant concerning the developments that led to his disqualification. On 6 April 2017 the agency sent an email to all the nominees, including the appellant, informing them that the vetting process had been extended to include each nominee's tax compliance with SARS and it was therefore necessary for each nominee to provide the agency with their electronic access PIN, or a copy of their tax clearance certificate obtained from the new SARS TCS system by Monday, 10 April 2017. The appellant did not do so and the agency addressed a further email to the appellant on 11 April 2017 requesting the appellant to urgently send his tax clearance certificate to the agency by the following day. Once again, the appellant did not do so. There followed further email communications and on 12 April 2017 the appellant informed the agency that he would have to travel 200 kilometres to a SARS office and that he could only provide his reference number.

14. The appellant subsequently provided his pin number to the agency and on 17 April 2017 the agency's representative requested the appellant to urgently send his tax number to the agency to enable it to access the SARS website. The appellant then raised the issue at a board meeting on 26 April 2017 and appears to have done nothing further. Instead, after having received an email from the agency dated 7 May 2017 that was addressed to all the nominees informing them that they were being given "the last and Final opportunity" to submit their tax clearance certificates by the end of business on 8 May 2017, the appellant sent an email on 9 May 2017 to Moloabi, in which he requests an update concerning the concerns he had raised with Moloabi and the chairperson on 26 April 2017 regarding the provision of a tax clearance certificate. The appellant specifically points out in that email that the provision of a tax clearance certificate was not a requirement in terms of the rules when trustees were elected in 2014. On 10 May 2017, Moloabi advised the appellant to urgently resolve the matter with the agency. On 12 May 2017 the agency addressed a letter to the appellant informing him that his nomination to stand for election as a trustee had been unsuccessful. The agency specifically recorded that despite numerous

requests and communications to submit his tax clearance certificate the appellant had failed to comply, which had impacted negatively on his fit and proper status. The appellant eventually produced his tax clearance certificate on 15 May 2017 and in an email to the agency, in which he attached the certificate, apologised for any inconvenience.

15. In the appeals committee's view, by agreeing to stand as a candidate to be elected as a trustee, the appellant agreed in terms of rule 18.15 of the rules that the scheme may conduct any investigations to determine whether the appellant qualifies to act as a trustee. Rule 18.15 must be read with section 57 (1) of the Act, which requires the board to consist of persons who are fit and proper to manage the business contemplated by the medical scheme. This means that the appellant must be fit and proper to serve as a trustee. The investigations contemplated in rule 18.15 are aimed at determining whether the appellant is fit and proper to serve as a trustee. Rule 18.15 is sufficiently widely framed to include the provision of a tax clearance certificate. This is so whether or not a tax clearance certificate formed part of the investigations for the 2014 election of trustees. The appellant appeared to concede as much because he ultimately produced his tax clearance certificate after having been informed that his nomination had been unsuccessful because he had failed to produce his tax clearance certificate.

16. It also does not help the appellant to argue that he lived in a rural area and would have to travel 200 kilometres to a SARS office. The appellant was informed as far back as 6 April 2017 that he was required to produce his tax clearance certificate and was able to travel to a trustees meeting held on 26 April 2017 when he personally explained his concerns with Moloabi and the chairperson of the board at having to provide the tax certificate. The appellant later proffered that family matters, and more particularly his wife's illness, had prevented him from producing his tax clearance certificate. Not only are the appellant's family matters not referred to in the numerous correspondence prior to his disqualification but the appellant was able to ultimately produce his tax clearance certificate within one working day after having been notified that he had been disqualified.

17. The appeals committee is satisfied that the agency did all that could reasonably have been expected of it to assist the appellant to timeously produce his tax clearance certificate. This assistance included requesting the appellant to provide the agency with his reference number and pin for the agency to obtain a copy of his tax clearance certificate and extending the date to submit it. The appellant, who was a trustee at the time, would have been aware of the importance of protecting the integrity of the election process and cannot seek to place himself in

a better position than the other 34 nominees, who were also required to meet the deadline. The integrity of the election process required the scheme to comply with rule 18.12 of the rules by circulating the list of all nominees and their curriculum vitaes to all members of the scheme at least 30 days before the Annual General Meeting was held.

18. Moreover, the detailed final independent report of PricewaterhouseCoopers, which reviewed the processes, including the candidate nomination process, adopted by the agency in terms of the rules, concluded that the election and the related voting process were carried out in accordance with the rules.

19. Consequently, the appeals committee is satisfied that the scheme did not contravene the rules when disqualifying the appellant as a candidate for election as a trustee to the board.

RULING

20. Accordingly, the appeal is dismissed.

TREVOR BAILEY
FOR THE APPEALS COMMITTEE
Date of hearing: 15 February 2018
Date of ruling : 1 June 2018
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