

COUNCIL FOR MEDICAL SCHEMES APPEALS COMMITTEE
(CENTURION)

In the matter between

DISCOVERY HEALTH MEDICAL SCHEME

Appellant

and

REGISTRAR OF MEDICAL SCHEMES

Respondent

RULING

A. INTRODUCTION

1. This is an appeal in terms of section 49 of the Medical Schemes Act, 131 of 1998 (*"the MSA"*) against the ruling of the Registrar of Medical Schemes (*"the Registrar"*) dated 15 August 2015. The appeal was lodged on 08 October 2015. The date of the appeal immediately draws attention to whether it was lodged within the 30-day period prescribed by section 49.

B. IS THE APPEAL ON TIME?

2. The appeal is self-evidently out of time by some two weeks. The Cape High Court, in *Genesis v Chairperson of the Appeal Board of the CMS and Others* [2015] 1 All SA 672 (WCC), has now made it quite clear that appeals against decisions of the Registrar by which he does not seek to resolve a dispute involving a third party fall to be lodged under section 49 of the MSA.¹
3. The scheme has not sought condonation for the late filing of the appeal and so we have no explanation for it.

C. THE MERITS

4. That notwithstanding, the scheme identifies as “*the crisp issue*” the question “*whether it is lawful for the rules of a scheme to provide that, in circumstances where the scheme cancels a member’s membership on grounds of fraud or non-disclosure of material information, the scheme may decline an application to re-establish*

¹ See para [24]

such membership for a certain period of time or in relevant circumstances, in perpetuity".

5. The contentious rules that the scheme seeks to have registered as a package are rule 8.9, rule 11.5 and rule 11.6.

- 5.1 Rule 8.9 says the scheme must re-enrol a former member in terms of rule 11. In other words, in order properly to fulfil its purpose this rule cannot be registered on its own without rule 11 to which it is partnered.

- 5.2 Rule 11.5 seeks to convey a discretion on the scheme to suspend or terminate membership (among other things) where the member has abused benefits or privileges, submitted false claims or otherwise committed a fraud against the scheme or assisted another to do so, and/or committed an offence as envisaged by section 66 of the MSA.

- 5.3 Rule 11.6 seeks to confer on the scheme the discretion to re-enrol a former member whose membership was terminated on the grounds listed in rule 11.5 after 3 years or such shorter period as the scheme may determine, provided that the

scheme will re-enrol the former member immediately if s/he should on re-application satisfy the scheme that there was no intention to commit the act for which s/he was terminated.

6. The registrar says these rules are

6.1 inconsistent with the MSA as they *“extend grounds for cancellation beyond what is intended by Section 29(2)”*;

6.2 *“unfair and inconsistent with the [MSA]”* inasmuch as they *“extend beyond”* the scope of waiting periods in section 29A;

6.3 *“fall foul of the principle of open enrolment envisaged by Section 29(3) and therefore unfair”*; and

6.4 *“arbitrarily discriminating against members directly or indirectly”*.

7. The scheme urges us to adopt in our construction of the proposed rules in question the process of interpretation that the courts follow in respect of statutory interpretation. There is no harm in that. The import of the judgments to which we have been directed is that a

meaning that is sensible, purposive, business-like and does not result in absurdity must be preferred. Its thesis is that *"terminating a membership, only to have such membership re-instated possibly the following day upon re-application, is in effect no sanction at all, and would serve no purpose as a mechanism to disincentivize errant behaviour"*. It draws an analogy with the disqualification of directors of companies who cannot be re-appointed the following day to serve again on the board.

8. The analogy is misplaced. But let us start at the beginning. There are only two grounds on either of which the registrar may decline to register a rule amendment.
 - 8.1 The one is if he is satisfied that the rule amendment will not be unfair to members.
 - 8.2 The other is if he is satisfied that the rule amendment will not be inconsistent with the MSA.
9. The registrar appears to conflate the two. Only one of them need be satisfied. The unfairness to members ground is not triggered here in our view because at the time of re-application the applicant is not a

member. Thus, can be no talk of unfairness to him or her as a member.

10. It is the second ground that requires closer scrutiny. We can also quickly dispose of the "*arbitrary discrimination*" objection by the registrar. The provision of the MSA that prohibits unfair discrimination on numerous grounds is section 24(2)(e). It is triggered at the stage when the scheme applies for registration, not at the rule amendment stage after registration. In any event, the basis contended for by the scheme for "*discriminating*" against the member envisaged by the proposed rules can hardly be described as "*arbitrary*". It is calculated. It is well-considered. But is it consistent with the MSA?
11. Section 29(2) of the MSA lists five grounds on which membership may be suspended or terminated. Abuse of benefits and privileges on the one hand, and contravention of section 66 on the other, are not among those grounds. Under the proposed rule 11.5, membership could conceivably be suspended or terminated on grounds of alleged "*abuse*" of benefits or privileges just because the scheme takes the view that a member submitted a claim for payment in full in circumstances where s/he, in the scheme's view,

used the services of a non-DSP voluntarily for treatment of a PMB condition. As matters currently stand under the MSA, the scheme would not be liable to pay such claim in full. Now the scheme wants more; a sanction of termination or suspension for what may be a mere difference of opinion between it and the member or the member's treating physician as regards whether the condition was an emergency. This would be egregious, and the discretion that the scheme reserves for itself to re-enrol such a member without fuss upon the member proving to the scheme that s/he had no intention to abuse benefits or privileges is cold comfort and, in any event, equally egregious for placing the burden of proof on the member in such circumstances.

12. Thus, the proposed rule 11.5 is in our view inconsistent with section 29(2) of the MSA for adding to the grounds on which a scheme may in terms of the section suspend or terminate membership.
13. The proposed rule 11.6, by which the scheme seeks to confer upon itself the discretion to make an applicant former member jump through a 3-year loop if terminated under rule 11.5, effectively seeks to introduce a new category of waiting period for which section 29A does not provide. If the scheme were to have its way,

all applicants for membership who had previously been members or beneficiaries and terminated for allegedly abusing their privileges or benefits would have to serve a 3-year waiting period or cooling-off period from the date of the alleged abuse before they can be allowed back into membership of the scheme, unless they can satisfy the scheme that they had not deliberately abused their privileges or benefits. It is in our view an unconscionable proposition and inconsistent with section 29A of the MSA.

14. The scheme is right about at least one thing. Open-enrolment is not triggered here. It talks to "*exclusion*" and there is no exclusion here. Section 29(3) of the MSA thus does not come into it.
15. The full bench judgment in *Govender NO v Profmed and Another* is also not on point. That case concerned the scheme's repudiation of a claim in circumstances where a membership applicant had knowingly failed to disclose a medical condition with which he had been diagnosed before joining the scheme but fraudulently back-dated the application form so that it would appear as if the diagnosis was done after membership application had been submitted. The open-enrolment argument was given short shrift. The case had nothing to do with sanctioning a former member on re-application

whose membership had been terminated for fraudulent conduct. While the court pronounced on "*honesty of the communication made to the medical fund [being] the touchstone of the application form properly completed*", it does not follow that it countenanced a sanction of the sort now sought to be introduced by the scheme.

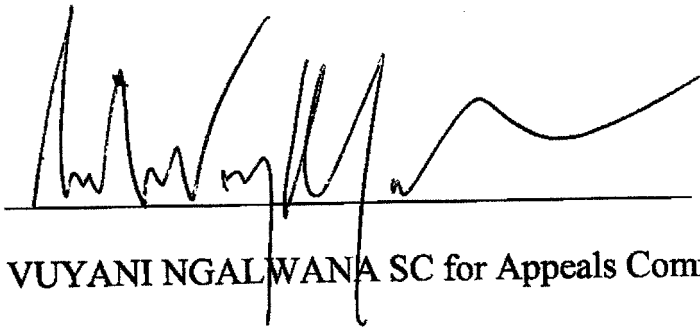
16. As we have said above, these rules were submitted as a package for registration. It is not open to the registrar to register the proposed rule 8.9 and not the other rules of which rule 8.9 forms a composite package. What is more, the registrar does not have the power to register a rule that has not been (1) certified by the scheme's principal officer, chairman of the board of trustees and one other member of the board of trustees and (2) adopted by the board of trustees. In the circumstances, the registrar's decision in this regard cannot stand.

17. What the registrar is entitled to do, however, is order the scheme to amend the rule within 30 days in the manner indicated by him. But the trigger for that order is the registrar's opinion that the rule is "*being applied in a manner which is inconsistent with the provisions of [the MSA]*". In other words, the trigger under section 31(4) is not the inconsistency of the rule with the MSA; it is the

inconsistency of the application with the MSA provisions. There is no suggestion in this case that rule 8.9 has been applied inconsistently with provisions of the MSA. The suggestion is that the rule is inconsistent in its wording with provisions of the MSA.

18. Rule 11.4 seems uncontentious but, since the scheme baulks at a piece-meal registration, it cannot be registered on its own.

19. In the result, the appeal succeeds in part in that the registrar's registration of rule 8.9 cannot stand and must be set aside. Otherwise, the decision of the registrar in relation to registration of rules 11.4, 11.5 and 11.6 stands.

A handwritten signature in black ink, appearing to be 'Vuyani Ngalwana', is written over a horizontal line. The signature is stylized with several loops and a long horizontal stroke at the end.

VUYANI NGALWANA SC for Appeals Committee

For the scheme: R Bhana SC; D Smith

For the registrar: L Makau; Mr Bhikha

Date of hearing: 18 February 2016

Date of Ruling: 09 April 2016