

**BEFORE THE APPEALS COMMITTEE OF THE COUNCIL FOR MEDICAL
SCHEMES**

HELD VIA MICROSOFT TEAMS VIDEO AND AUDIO CONFERENCING

(Instituted in terms of the Medical Schemes Act No.131 of 1998)

CMS REFERENCE NUMBER: CMS 75392

In the matter between:

DISCOVERY HEALTH MEDICAL SCHEME

APPELLANT

and

THE REGISTRAR FOR THE COUNCIL OF MEDICAL SCHEMES RESPONDENT

RULING AND REASONS

1. The Appellant is Discovery Health Medical Scheme (“DHMS”, the “Scheme” or the “Appellant”), registered and regulated under the Medical Schemes Act, Act 131 of 1998 (the “MSA”).
2. The Respondent is the Registrar for the Council of Medical Schemes (the “Registrar”).
3. This is an appeal under section 49(1) of the MSA, providing that –

“49. Appeal against decision of Registrar.—(1) Any person who is aggrieved by any decision of the Registrar under a power conferred or a duty imposed upon him or her by or under this Act, excluding a decision that has been made with the concurrence of the Council, may within 30 days after the date on which such decision was given, appeal against such decision to the Council and the Council may make such order on the appeal as it may deem just.”

4. Due to the COVID19 social distancing protocols, the Appeals Committee heard the Appeal on 14 April 2021, *via* audio and video conferencing link.
5. Mr. R Bhana SC And C Avidon instructed by Knowles Husain Lindsay INC Hussein appeared for the Appellant.
6. The hearing took place in the Respondent's absence, the Respondent has indicated that it will abide by the Appeals Committee's decision.

BACKGROUND

7. On 18 September 2020, the Appellant submitted several proposed amendments to its Rules 4.10; 4.67; and 19.9 in terms of section 31(3) of the MSA to the Registrar for registration.
8. The Registrar refused the application for the rule amendments on 2 November 2020 in respect of proposed rule amendments to Rules 4.10; 4.67 and 19.9 respectively.

THE PROPOSED RULES' AMENDMENTS

9. Rule 4.10:

- 9.1. The Scheme proposed an amendment to its rule 4.10 in the following respect/s, namely, to add the words "*including but not limited to the plans that are subject to the Delta Efficiency Discount Arrangement and the Shariah Compliant Arrangement*", such that the rule will provide for the definition of "Benefit Plan" as follows:

"the benefits which have been chosen by a Member in terms of these Rules, including but not limited to the plans that are subject to the Delta Efficiency Discount Arrangement and the Shariah Compliant Arrangement."

(Emphasis added)

10. Rule 4.67:

- 10.1. The Scheme proposed the addition of a new definition for “*Shariah Compliant Arrangement*”, as follows:

“Means the arrangement selected by a Member to apply to his/her Benefit Plan that conforms with the requirements of Shariah as determined by the Board in accordance with the process contemplated in Rule 19.9.”

(Emphasis added)

11. Rule 19.9:

- 11.1. The Scheme proposed an amendment to its rule 19.9 in the following respect/s, namely, to amend the Rule by adding the words “*in accordance with such policy that the Board may determine from time to time which policy shall include but not be limited to meeting the requirements of Members who have opted to have the Shariah Compliant Arrangement applicable to their Benefit Plan*”, such that the amended rule will read as follows:

“The Board has the power:

*“19.9 In respect of any monies not immediately required to meet current charges upon the Scheme and in the manner determined by the Board and in accordance with Section 35(5) of the Act and Section 30 of the Regulations to the Act, to invest or otherwise deal with such monies upon security and to realise, re-invest or otherwise deal with such monies and investments **in accordance with such policy that the Board may determine from time to time which policy shall include but not be limited to meeting the requirements of Members who have opted to have the Shariah Compliant Arrangement applicable to their Benefit Plan.**”*

(Emphasis added)

THE REGISTRAR'S DECISION

12. In its letter notifying the Scheme of the outcome of the application for the Rules' amendment the Registrar stated the bases for the rejection of the proposed amended rules as follows:

*“Section 57(6)(d) prescribes that the board of trustees shall act with impartiality in respect of all its members. **The proposed Shariah arrangement will create a special investment disposition for a certain group of beneficiaries, which will contravene the provisions of section 57(6)(d).***

*Similarly, in terms of the prescripts of Regulation (4)(4) (sic), **a medical scheme must not in its rules create a preferred dispensation for one or more specific groups of members.**”*

(Emphasis added)

13. The Appellant appeals the Registrar's decision rejecting the Scheme's application to amend its Rules in terms of section 49 of the Medical Schemes Act 131 of 1998 (the “MSA”).

SUBMISSIONS AND ARGUMENTS BY THE APPELLANT SCHEME

14. The Scheme submitted that –

14.1. The purpose of amending the Rules, namely Rules 4.10, 4.67, and 19.9, is to signal to its members that the scheme has a Shari'ah Compliant Arrangement in place concerning the bank account which holds contributions and concerning the investment of the surplus funds which DHMS holds in reserve (“the Shari'ah Compliant Arrangement”), to give members, Muslim and non-Muslim members, peace of mind that their contributions will be dealt with under the ethical, moral and/or religious principles of Shari'ah law.

- 14.2. The Shari’ah Compliant Arrangement involves moving the contribution received (from members who have selected the Shari’ah Compliant Arrangement) into a Shari’ah-compliant bank account and investing a portion of the reserve funds held by DHMS in a Shari’ah-compliant manner, essentially, by avoiding investment in companies that derive their profits from what some regard as objectionable activities such as gambling and alcohol sales and usurious interest. The Shari’ah Compliant Arrangement will therefore accommodate members who are seeking access to Shari’ah-compliant medical schemes, thereby broadening access to healthcare and respecting religious and cultural rights which are constitutionally guaranteed.
- 14.3. The Shari’ah Compliant Arrangement **will not impact the member’s contribution, nor will it result in any changes to the members’ benefits or entitlement.** On the other side of the coin, there is no undue benefit for a member who elects to be involved in the Arrangement.
- 14.4. The only advantage to members of the Shari’ah Compliant Arrangement is the knowledge that their contribution to the reserve funds is being dealt with in a manner that is consistent with Shari’ah law.
- 14.5. DHMS will be the first medical scheme to make the ability to have the medical cover that is Shari’ah-compliant available to its members
- 14.6. The Registrar rejected the proposed amendments **to rules 4.67 and 19.9, citing** section 57(6)(d) of the MSA and regulation 4(4) of the Regulations promulgated under the MSA (“the Regulations”) as its reasons for rejecting the Scheme’s proposed rule amendments.
15. The Registrar is misguided in its view that the Shari’ah Compliant Arrangement will create special advantages for a distinct group of beneficiaries.

- 15.1. The Shari'ah Compliant Arrangement creates neither any special advantage for beneficiaries nor does it differentiate between beneficiaries (let alone differentiate improperly) between them.
- 15.2. . "... the suggestion of a contravention of the duty to act impartiality is all the more without foundation because the Shari'ah Compliant Arrangement will not result in any differentiation in contributions to be paid or benefits which are claimable by members."
- 15.3. This is particularly so because the Shari'ah Compliant Arrangement affects the investment of reserve funds, and these are completely distinct from the question of benefit entitlements under the medical scheme and its various benefit options.
- 15.4. Although the Shari'ah Compliant Arrangement is designed to comply with the principles of Shari'ah law, it is not limited to members of the Muslim faith.
16. The Scheme argued that the duty on a Scheme in terms of section 57(6)(d) should not be construed as an obligation on the scheme to achieve formal equality.
 - 16.1. Rather, the duty to act impartially does permit a measure of inequality where the discretion is exercised rationally and legitimately; and
 - 16.2. That "*... a differentiation, provided that it is legitimately and rationally considered, does not result in a breach of the obligation to act impartially that is imposed on trustees.*"
17. The duty to act impartially must be interpreted in line with the Bill of Rights, which applies to all laws. Thus, the Scheme argues, to the extent possible the duty to act impartially must be interpreted in a manner that does not preclude the reasonable accommodation of religious beliefs, where doing so causes no prejudice or favourable treatment to any group of beneficiaries. In this regard, when interpreting the duty to act impartially, an interpretation that focuses on the obligation to act rationally and

legitimately is to be preferred, rather than an interpretation that focuses on formal equality and therefore fails to accommodate religious and cultural beliefs.

18. Regarding regulation 4.4 the Scheme argues that regulation 4(4) does not apply to this situation.

18.1. Having an arrangement for reserve funds to be invested in a certain manner, which is Shari'ah-compliant, can never amount to the structuring of a benefit option at all, as *“However, the reserve funds have nothing to do with the benefit plan and so regulation 4(4) is simply not applicable.”*

18.2. *“In addition, the Shari'ah Compliant Arrangement does not contravene the second leg of regulation 4(4) as there is no ring-fencing of net assets.”* and

18.3. *“The third leg of regulation 4(4) is also not applicable, as there is simply no transfer of new assets arising from the Shari'ah Compliant Arrangement.”*

DISCUSSION AND ANALYSIS

19. This appeal is wide. The Appeals Committee may consider the matter afresh and can go beyond the record of proceedings that was before the Registrar.

20. The Appeals Committee considered the submissions and arguments the Scheme made and the authorities the Scheme relied on for its arguments. Regrettably, the Appeals Committee has nothing before it from the Registrar save for the part of the decision quoted above.

21. The Appeals Committee agrees with the Scheme that the interpretation of section 57(6)(d) has to be interpreted in the context of the Bill of Rights; and accordingly *“... a differentiation, provided that it is legitimately and rationally considered, does not result in a breach of the obligation to act impartially that is imposed on trustees.”*

22. The Appeals Committee agrees with the Scheme’s submissions and argument regarding the applicability of Regulation 4.4. to the matter in question.
23. From the endorsed pages of the Rules placed before the Appeals Committee, though the Registrar did not clearly state in the letter that the rule change to rule 4.10 is also rejected, it appears that the amendment to rule 4.10 had also been rejected.
24. Regarding the text of the proposed amendments –
 - 24.1. The Appeals Committee noted that on the face of the proposed text, what the Scheme submitted, namely that the rule amendment will not impact members’ benefit plans, is contradicted by the actual text of the proposed amendment to rule 4.10. The members’ benefit plans are made subject also to “...*the Shari’ah Compliant Arrangement.*” The tables of all Benefit Plans respectively are set out in the rules of Scheme 1.4.1, and 1.4.3 of the paginated bundle page 50 *et sequitur.*
 - 24.2. Regarding the new proposed definition of “Sharia Compliant Arrangement” (Rule 4.67), the definition includes a phrase that states that it (the “Sharia Compliant Arrangement”) is “...*to apply to his/her Benefit Plan that conforms with the requirements of Shari’ah...*” as determined by the Board under the newly proposed amendment to rule 19.9. Again here the reference to “Benefit Plan” on the face of it, is contrary to the Scheme’s assertion that the Shari’ah Compliant Arrangement will not affect members’ benefits.
 - 24.3. As is the case with the two above detailed proposed rule amendments, in the proposed amendment to rule 19.9, the amended text also refers to “... *Shariah Compliant Arrangement applicable to their Benefit Plan.*” (Emphasis added)
25. The text highlighted above, though the Scheme asserts that the Shari’ah Compliant arrangement will not affect members’ benefits plans, the texts of the amendments subject members’, who chose the Shari’ah complaint arrangement, benefit plans to the Shari'ah-compliant arrangements as determined by the Board.

26. The Scheme explained in detail the flow of funds for payment of members' claims and the management of funds to and from the reserves. The Appeals Committee accepts the explanations.

FINDINGS

27. The Appeals Committee carefully considered the Appellant's submissions that the Shariah Compliant Arrangement will not affect members' benefit plans. The Appeals Committee is not persuaded that the Shari'ah Compliant Arrangement will not have an impact on the members' benefit plans in the light of –
- 27.1. The definition of benefit plans proposed in the new rule 4.10 being made subject to, amongst others, **"... the Shariah Compliant Arrangement."**
- 27.2. The lack of clarity of exactly what the 'Shariah Compliant Arrangement' might look like vis-a-vis members' benefit plans, as the 'Shariah Compliant Arrangement' is subject to determination by the Board in terms of the proposed amendment to rule 19.9.
28. The Appellant has failed to prove that the proposed Shari'ah Compliant Arrangement will not result in the Board acting *"... with impartiality in respect of all its members"* in contravention of section 57(6)(d) of the MSA.

ORDER

29. The Appeals Committee:
- 29.1. Dismisses the Appeal; and
- 29.2. Makes no costs order.

DATED AT CENTURION ON THIS 27th DAY OF SEPTEMBER 2021.

Ms. D. Terblanche

For: THE APPEAL COMMITTEE (CENTURION)

WITH –

Mr. N Raheman

Dr. S Naidoo

Dr. T Mabeba

Dr. Mukhari

Concurring, it is so ruled.