

BEFORE THE APPEALS COMMITTEE OF THE COUNCIL FOR MEDICAL SCHEMES
HELD IN CENTURION, PRETORIA

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

In the matter between:

THE SOUTH AFRICAN POLICE SERVICE MEDICAL
SCHEME (POLMED)

APPELLANT

and

THE REGISTRAR FOR MEDICAL SCHEMES

RESPONDENT

RULING AND REASONS

INTRODUCTION

1. The Appellant is THE SOUTH AFRICAN POLICE SERVICE MEDICAL SCHEME (POLMED or THE SCHEME), registered and regulated under the Medical Schemes Act, Act 131 of 1998 (the MSA).
2. The Respondent is the Registrar of Medical Schemes (the Registrar).

This is an appeal under section 49(1) of the MSA, providing that –

“(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.”

3. The Appeals Committee heard the Appeal on 30 April 2021 *via* audio and video conferencing link.
4. Adv Moultrie appeared for the Appellant. The Respondent did not appear but indicated that the Registrar will abide by the Appeals Committee's decision.

BACKGROUND

5. The Appeal relates to a particular Polmed rule the Registrar deleted after the Registrar had previously approved and registered the rule in question.
6. On 18 March 2018, the Appellant Scheme's Board of Trustees (BoT) certified rule amendments for submission to the Registrar of Medical Schemes for approval in terms of section 31(3) of the MSA. Amongst others, the amendment of the rules included the addition of a new rule 27. 4.
7. On 30 March 2018, the Registrar sent a letter to the Scheme informing the Scheme that the Registrar approved the rule amendments as certified by the Scheme's BoT. Page 3 of the paginated bundle (PB) bears evidence by way of the Registrar's stamp and initialling of the relevant page of the Scheme's rules, of the approval of, amongst others, rule 27.4.
8. According to the Scheme "*Rule 27.4, duly adopted by Polmed's Board of Trustees **and registered by the Registrar on 20 March 2018**, reads as follows:*

27.4 Disruptions of meetings of members

27.4.1 No motion shall be passed by a meeting of members, whether general or special, that is inconsistent or in contravention with the objectives of the Scheme, the Act or the Rules.

27.4.2 In the event that proceedings at the Annual General Meeting are disrupted by members present at the meeting, or if the prevailing circumstances at the Annual General Meeting render it impossible for the meeting to continue at the Chairperson's discretion, then the Board shall be entitled to assume the meeting to have taken place and all the agenda items of the Annual General Meeting would be deemed to have been approved by members present."

(Emphasis added)

9. On 25 February 2019, the Appellant Scheme's Board of Trustees (BoT) certified rule amendments approved on 15 and 16 November 2018 for submission to the Registrar of Medical Schemes for approval in terms of section 31(3) of the MSA. Rule 27.4 did not appear in the list of proposed rule amendments.

10. In a letter dated 28 March 2019, the Registrar notified the Scheme that it deleted Rule 27.4.2 from the Scheme's rules under section 31(3)(a) of the MSA. The Registrar stated that -

7. Rule 27.4.2

This rule has been reviewed and found to infringe of members' right to a valid protest. The rule is therefore *fall accompil* and unfair in terms of Section 31(3)(a). The rule is deleted on this basis.

Kindly note all other amendments made on the face of the documents and submit replacement pages for registration in this regard within 30 days of receipt. Should the scheme have any objections to any of the changes made or on issues raised in this letter, your written response hereto will be appreciated within 30 days of receipt hereof.

11. Section 31(3)(a) of the MSA provides that –

*“(3) On receipt of a written notice from a medical scheme **setting out the particulars of any amendment or rescission of its rules**, certified by the principal officer, the chairperson and one other member of the board of trustees as having been adopted in accordance with the provisions of the rules of the medical scheme, the Registrar shall— (a) if he or she is satisfied that **the amendment or rescission of the rules** will not be unfair to members or will not render the rules of the medical scheme inconsistent with this Act, register the amendment or the rescission of the rules and return it to the medical scheme with the date of registration endorsed thereon; or (b) if he or she is not so satisfied, in writing advise the medical scheme accordingly and indicate the reasons for his or her rejection of the amendment or rescission.”*

(Emphasis added)

12. Polmed responded to the Registrar on the decision of the deletion as follows regarding its rule 27.4, as follows -

59	27.4	Delete the entire Rule. The comment is "faith accompli and therefore unfair"	It should be noted that, since 2016, Polmed had to hold multiple AGMs which did not achieve their intended outcomes. It is in the interest of members' funds to hold one AGM and it is also in the interest of the Scheme to protect members' funds against the few members who are deliberately disrupting the AGM. CMS has full report on all Polmed endeavours which were aimed at ensuring fruitful AGM. In addition, there is no complaint or legal action that has been brought about by any member / group of members / Registrar / Council or any other interested party, challenging the legality /
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			constitutionality or fairness of the Rule, even after the Rule was invoked in the holding of the 12 July 2018 AGM. It is our humble submission that the Rule is most fair as it does not take away the right of members to consider, deliberate and vote but in fact obliges members to take their role seriously by ensuring that they apply their minds, deliberate and vote on the issues prescribed to be their domain. If anything is unfair, it is the dereliction of duty by members which the Registrar would seek to promote by allowing members to avoid discharging their duty.
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13. It is this decision of the Registrar to delete the scheme rule 27.4 that forms the subject of this appeal.

SUBMISSIONS BY APPELLANT

14. Adv Moultrie, on behalf of the Appellant, put forward a layered and nuanced argument in support of the Scheme's appeal –
- 14.1. Firstly, that the Registrar does not have the power to delete the rule.
 - 14.2. Secondly, the MSA does not recognise the process the Registrar used to amend the POLMED rule.
 - 14.3. Thirdly, on the basis that Rule 27.4 is not unfair in the context that the rule was brought in. As for a reason for deleting the rule on the basis that the rule infringes on member's right to valid protest; there is no such right in the MSA. 'valid protest' does not extend to a point where a Scheme cannot conduct its business.
15. Adv. Moultrie further submitted that the Registrar is not empowered to delete a schemes rule in the way it did. The Registrar in his evidence before Section 59 Inquiry, set out three options open to the Registrar when Schemes' rules are offensive. These options are to -
- 15.1. Persuade the Schemes to change their rule/s.
 - 15.2. Approach the Courts under section 51 (1)(5)(c) of the MSA.

15.3. Reject such rule when the Scheme approaches the Registrar for the first time with an application to register such rule under section 31 of the MSA.

16. As a result the Scheme request the Appeals Committee to set aside the Registrar's deletion of its Rule 27.4.

LEGAL FRAMEWORK

17. Section 31 of the MSA deals with rule amendments. The section provides for Schemes to amend or rescind their rules; for those rules to be valid if the Registrar approved and registered them; and gives the Registrar an option to accept or reject the proposed rule/s or amendment/s or engage with the Scheme to amend the rules within 30 days.

18. The full text of section 31 of the MSA follows immediately below:

“(1) A medical scheme may, in the manner provided for in its rules, amend or rescind any of such rules or make any additional rule.

(2) No amendment, rescission or addition of any rule referred to in subsection (1) shall be valid unless it has been approved by the Registrar in accordance with any directive given by the Council and registered as contemplated in subsection (3).

*(3) On receipt of a **written notice from a medical scheme setting out the particulars of any amendment or rescission of its rules**, certified by the principal officer, the chairperson and one other member of the board of trustees as having been adopted in accordance with the provisions of the rules of the medical scheme, the **Registrar shall—***

*(a) **if he or she is satisfied** that the amendment or rescission of the rules will not be unfair to members or will not render the rules of the medical scheme inconsistent with this Act, **register the amendment or the rescission of the rules and return it to the medical scheme with the date of registration endorsed thereon; or***

*(b) **if he or she is not so satisfied**, in writing advise the medical scheme accordingly and indicate the **reasons for his or her rejection of the amendment or rescission.***

(4) The Registrar may order a medical scheme to—

(a) within a period of 30 days as from the date on which he or she addressed the request to the medical scheme concerned, amend the rules in the manner indicated by him or her; or

- (b) *apply in the manner indicated by him or her, any rule of such medical scheme which is, in his or her opinion, being applied in a manner which is inconsistent with the provisions of this Act.*”

(Empahasis added)

DISCUSSION AND ANALYSIS

19. The Scheme introduced rule Rule 27.4 for the first time into its rules in March 2018, after the Registrar approved and registered the rule under section 31(3) of the MSA.
20. The Registrar has, in the view of the Appeals Committee become *functus officio* in relation to rule 27.4 .
21. R Henrico¹ explains the *functus officio* principle:
- “A decision once made by an administrator, which is final, cannot be revisited in the absence of statutory authority, save in instances of fraud. Having exhausted his powers under the enabling legislation he cannot lawfully re-visit such powers unless statutorily permitted to do so. He could however, approach a court of law to set aside his own decision. In this sense the principle of legality is maintained in ensuring that functionaries do not exercise more power than they have. **Final decisions, how erroneously flawed they may be, have legal consequences binding in law** until set aside by a court of law. Knowing a decision to be final and binding until set aside gives expression to certainty (finality). Principles of legality and finality are both inexorable aspects of the rule of law.”*
22. The Registrar could not act under section 31(3) of the MSA in 2019 when the Scheme had not forward rule 27.4 for amendment.
23. The decisions and the actions the Registrar may take under section 31 are limited to "*particulars of an amendment or a rescission of its rules*" a medical scheme set out in terms of section 31(3), nothing

¹ The *Functus Officio* Doctrine and Invalid Administrative Action in South African Administrative Law: A Flexible Approach R Henrico, Associate Professor, Faculty of Law, University of the Western Cape ; See also Retail Motor Industry Organisation and Another v Minister of Water & Environmental Affairs and Another (145/13) [2013] ZASCA 70; [2013] 3 All SA 435 (SCA); 2014 (3) SA 251 (SCA) (23 May 2013) paragraph 24.

beyond that, and certainly not about a rule that is not put forward for amendment or rescission. On 25 February 2019, the Scheme's BoT certified amendments and additions of its rules with no mention of rule 27.4.

24. The wording of section 31 is specific to "*a medical scheme setting out ... the Registrar shall—(a) if he or she is satisfied... or (b) if he or she is not so satisfied,*" make decisions and take specific actions prescribed in the section. The Registrar may not consider, give direction, or decide on an amendment or a rescission of rules the Scheme had not put forward.
25. In final analysis: The Scheme did not place rule 27.4 before the Registrar in 2019. Therefore, the Registrar had no authority to consider rule 27.4 under section 31 of the MSA.
26. Furthermore, the Registrar approved and registered the new rule 27.4 in 2018. Before a rule's approval and registration, the Registrar could and should have challenged the new rule if he had concerns about it.
27. That does not mean that the Registrar is without regulatory options regarding rules he deems offensive and contrary to the words and the spirit of the MSA and the regulations promulgated under the MSA.
28. But, the Registrar cannot use section 31 as a means to engage in enforcement action.
29. It appears to the Appeals Committee, as submitted by Adv. Moultrie, that the Registrar is indeed alive to his regulatory options. The Registrar laid them out in his evidence before the section 59 Inquiry Panel. The Registrar's options to deal with rule 27.4 and the challenges it poses to him, as it appears to the Appeals Committee (without the Appeals Committee presuming to step into the Registrar's shoes) are either to –
 - 29.1. Persuade the Schemes to change the rule; or
 - 29.2. Approach the Courts under section 5 (1)(5)(c) of the MSA.

FINDING

30. For the reasons above, the Appeals Committee finds that the Registrar did not have the statutory authority to delete rule 27.4 under section 31(3) of the MSA.

ORDER

31. Having considered the matter and heard the parties, the Appeals Committee rules that:

31.1. The appeal succeeds.

31.2. The respondent's decision to delete Rule 27.4 of the appellant's rules is set aside.

DATED AT THIS CENTURION ON 14 JUNE 2021.

MS D TERBLANCHE

For: THE APPEAL COMMITTEE (CENTURION)

WITH –

MR N RAHEMAN

DR T MABEBA

DR H MUKHARI

DR S NAIDOO

MR L MKANSI

CONCURRING, IT SO BE RULED.

