

IN THE APPEAL BOARD OF THE COUNCIL FOR MEDICAL SCHEMES (CMS)

In the matter between:

The Registrar of the Council for Medical Schemes

Appellant

V

The Appeals Committee

1st Respondent

CK

2nd Respondent

LEGAL REPRESENTATION

For the Appellant - Mr Dali Mpofu SC with

For the 1st Respondent - none (not opposing)

For the 2nd Respondent - none - Mrs K.

DECISION

INTRODUCTION

[1] The Appellant is the Registrar of the Council for Medical Schemes. The First Respondent is the Appeals Committee constituted in terms of section 48(1). The Second Respondent is CK, a former trustee of Liberty Medical Scheme, (LMS) and the Complainant in the matter that culminated in this appeal.

[2] The appeal is against a Ruling of the Appeals Committee, handed down in May 2020 in favour of the second Respondent, and it is brought in terms of Section 50(3) of the Medical Schemes Act 131 of 1998 ("the MSA").

THE GROUNDS OF THE APPEAL

[3] The grounds of the Appeal are two-fold:

3.1 that the Appeals Committee lacked the requisite jurisdiction to entertain the merits of the matter.

3.2 that even if it were to be found that the Appeals Committee had the necessary jurisdiction to adjudicate the matter, it erred in law in granting relief in such a way that it acted ultra vires. The Notice of Appeal states that the “Appeals Committee further erred in granting orders falling beyond the scope of its mandate and competency.”

[4] The First Respondent is not opposing the appeal and will abide by the decision of the Appeal Board. Only the Second Respondent is opposing the appeal.

HISTORICAL BACKGROUND

[5] At this juncture, it is convenient to set out a brief background and circumstances that led to the present Appeal.

[6] Mrs K, the 2nd Respondent in this appeal, was a trustee of the Liberty Medical Scheme, (“LMS”). In 2013, when her tenure as a trustee came to an end, she made herself available for re-election. She was successful and thereafter elected as a Chairperson of the Board of Trustees (BoT).

[7] In December the LMS received a letter from the Council of Medical Schemes, (“CMS”). The letter was signed by one Mr Prema (“Prema”), in his capacity as Acting Registrar. At the time, the Registrar, Dr Gantsho (“Gantsho”), was reportedly on leave and had appointed Prema to act in his absence. Prema’s letter to LMS stated that:

7.1 The LMS’s 2013 BoT elections were irregular;

7.2 At that AGM suitable candidates were irregularly disqualified and the procedure for disqualifying candidates was irregular.

7.3 The 4 elected Trustees in the 2013 elections purportedly appointed other Trustees. As a result of the invalid composition of the BoT, there was a complete breakdown of the governance of the LMS.

7.4 LMS was directed by Prema, to, in terms of Section 6(2)(a)(iii) of the Financial Institutions (Protection of Funds) Act) of 2001, hold fresh elections as soon as possible. Such elections were to be called out by the LMS’s Principal Officer, and to be held under the supervision of the Registrar of CMS. The BoT was directed not to have any further involvement in the fresh elections, and that the Trustees elected in the 2013 elections must vacate their positions as Trustees.

7.5 Unless the LMS provided the CMS with an undertaking that it would adhere to the directive, it (the CMS), would approach the court to place the LMS under curatorship.

7.6 A timetable of the new elections had to be furnished to the CMS.

[8] The Board of Trustees heeded the directive from Prema and made arrangements to hold fresh elections in 2014. The elections were conducted by PWC and the same process used for 2013 elections was followed. All who stood for elections, including Mrs K, were subjected to the pre-election vetting process.

[9] On 12 June 2014, Mrs K received an email from PWC advising her that she had been provisionally disqualified from nomination as a Trustee on the basis that she was prima facie not a fit and proper person to be a Trustee, having contravened the Act in various ways. (I interpose to state that details of such contraventions are not important for purposes of this decision).

[10] Suffice it to say that although she responded when given an opportunity to do so, Mrs Kinsman was eventually disqualified and declared an unfit and proper person to serve as a Trustee.

[11] Aggrieved by the decision, Mrs K brought a two-pronged complaint namely: -

11.1 The complaint regarding her disqualification to stand for elections as a Trustee. This complaint was directed to the PWC which had conducted the elections.

11.2 The misconduct by certain employees of the CMS as role players in the elections. The allegations were that the employees had manipulated the elections in order to achieve an outcome desired by the Registrar, specifically the election of CMS favoured nominees. This complaint was directed to the chairperson of the CMS.

THE ISSUE TO BE DETERMINED

[12] To properly deal with the appeal before us, as the Appeal Board, it is important to identify the issue that eventually led to the present appeal. There is evidence that the issue was not the 2nd Respondent's disqualification. Instead, it was the perceived misconduct of certain employees of the CMS on the part of Mrs K. This is borne out by, amongst other things, the correspondence between the 2nd Respondent and the office of the CMS.

[13] In an email addressed to Khayaletu Mvulo and dated 24 February 2015 12.13 Mrs K writes in part:

"Thank you for the forwarded responses.

I regret, however, that both the Acting Registrar and the Chairman of Council for Medical Schemes have failed to understand that my complaint was not in respect of my disqualification, but in respect of the behaviour of 3 CMS employees. The clue is in the subject line of your email. The disqualification merely provides the required context for the complaint and my request in respect of redress was only that reasons be provided for the outcome of your employees actions.

I intend to appeal - in terms of section 48 of the MSA - the decision that there is no merit in the allegations made in my complaint."

[14] It is common cause, therefore, that the issue was not Mrs K's disqualification as a trustee. Rather, it was the alleged misconduct on the part of certain employees of the CMS. This then is the starting point for this Appeal Board.

SUBMISSIONS

[15] Counsel for the Appellant submitted that the Appeals Committee lacked the requisite jurisdiction to entertain the merits of this matter for a number of reasons namely—

15.1 The purported complaint lodged by the Second Respondent did not constitute "a complaint" as defined in section 1 of the MSA, read with section 47 thereof. The Appellant contended that the Second Respondent's complaint could not be adjudicated in terms of section 48 of MSA as such an appeal is limited to a section 47 complaint or dispute which can only be made against any person required to be registered or accredited in terms of the MSA.

15.2 The Second Respondent's complaint was effectively against Price Waterhouse Coopers ("PWC") for disqualifying her candidature to stand for the elections to be a member of a Board of Trustees of Liberty Medical Scheme ("LMS"). She requested the Council for Medical Schemes ("CMS" or "the Council") to intervene on her behalf by asking the Council to give her the reasons for disqualification and/or rescind the decision. PWC, being an auditing firm, was not regulated by the Council in accordance with the provisions of the MSA. This was so because, among others, section 1 of the MSA confers authority on the Council on

"any person whose professional activities are regulated by the MSA."

The answer to the above submission is that I have already stated above that it is common cause that the complaint that led to the appeal was the complaint to the Council concerning the alleged misconduct of some CMS employees. The complaint against PwC is, therefore, not relevant at this stage.

15.3 Insofar as the Ruling of the First Respondent purports to "require that PwC rescind its decision to so find her and instruct PwC to provide such rescission to her in writing," the First Respondent strayed outside its jurisdiction.

15.4 At all material times hereto, PwC was acting on behalf of LMS and not CMS.

15.5 It was procedurally incompetent for the Appeals Committee to entertain the matter taking into account that the reading of the MSA says that the section 48 appeal has to be lodged by a person who is aggrieved by the decision of the Registrar relating to "the settlement of a complaint or a dispute ". The present dispute does not fall within the definition of a qualifying dispute in that it does not relate to "the settlement of a complaint or dispute."

15.6 The impugned decision of the Registrar was taken and thereafter communicated to and endorsed by the Chairperson of the Council. Accordingly, it was "a decision of the Registrar acting with the concurrence of the Council", as contemplated in section 50(3) of the Act. Accordingly, the body which had the jurisdiction to hear the appeal was the Appeal Board and not the Appeals Committee.

[16] There is merit in this submission for reasons that shall be elaborated later.

[17] It was further submitted, on behalf of the Appellant, that such a decision, if it was appealable at all, could not technically be appealed against through the section 48 route. Accordingly, the Appeals Committee erred in entertaining an appeal in terms of section 48. In addition, it went beyond its powers in granting the Ruling appealed against. This was because the orders that can be made by the Appeals Committee in terms of the MSA are detailed in section 48(8). These are limited to the power to “confirm or vary the decision concerned or rescind it and give such other decision concerned or rescind it and give such other decision as it may seem just.”

THE LEGAL FRAMEWORK

[18] The Appeal Board, the Appeals Committee and the Council for Medical Schemes are creatures of statute whose powers are stated clearly in and limited by the Medical Schemes Act No. 131 of 1998, (“MSA”). To arrive at a proper decision, it is necessary to examine the relevant sections of MSA.

[19] The Complaints and Appeals procedures are set out in Chapter 10 of the MSA, in sections 47, 48, 49 and 50 respectively. I shall deal with each in turn.

The Complaint

[20] Section 47 provides as follows:

“(1) The Registrar shall, where a written complaint in relation to any matter provided for in this Act, has been lodged with the Council, furnish the party complained against with full particulars of the complaint and request such party to furnish the Registrar with his/her written comments thereon within 30 days or such further period as the Council may allow.

(2) The Registrar shall, as soon as possible, after receipt of any comments furnished to him or her as contemplated in subsection (1), either resolve the matter or submit the complaint together with such comments, if any, to the Council, and the Council shall thereupon take all such steps as it may deem necessary to resolve the complaint.” (My emphasis)

The Appeal

[21] The MSA provides for three categories of appeals namely — in terms of sections 48, 49 and 50. Each of the sections shall briefly be discussed hereunder.

Section 48

[22] The relevant portion of Section 48 provides:

“(1) Any person who may be aggrieved by any decision relating to the settlement of a complaint or dispute may appeal such decision to the Council.

(2)...

(3) An appeal contemplated in subsection (1) shall be in the form of an affidavit directed to the Council and shall be furnished to the Registrar not later than three months, or such further period as the Council may, for good cause shown, allow after the date on which the decision concerned was made.”

Section 49

[23] Section 49 provides for an appeal against the Registrar’s decision. It reads —

“(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.”

Section 50

[24] Section 50 deals with, amongst other things, the establishment of the Appeal Board as well as the appointment of the members by the Minister. For purposes of this appeal the relevant portion which warrants our attention, as the Appeal Board, is subsection (3) which reads thus:

“(3) Any person aggrieved by a decision of the Registrar acting with the concurrence of the Council or by a decision of the Council under a power conferred or a duty imposed upon it by or under this Act, may within a period of 60 days after the date on which such decision was given and upon payment to the Registrar of the prescribed fee, appeal against such decision to the Appeal Board.”

DISCUSSION

[25] From the above it is clear that each of the three categories of appeals caters for a specific scenario. In terms of section 48(1), a person aggrieved by “any decision relating to the settlement of a complaint or dispute” may appeal against such decision to the Council.

[26] Section 49 is specifically for cases where the appeal is against the decision of the Registrar acting alone and not with the concurrency of the Council.

[27] Where the decision sought to be appealed against is the decision of the Registrar with the concurrency of the Council, the appeal should be in terms of section 50(3).

[28] In the present case Mrs K appealed against the decision of the Registrar who was clearly acting with the agreement of the Council. On 29 October 2014, Mrs K submitted a complaint to the Chairman of the Council for Medical Schemes. This is the complaint that dealt with the improper action of the Registrar and a CMS employee in the election as well as the improper conduct of PwC. (See Appendix 5).

[29] On receipt of the complaint, the Chairman of Council for Medical Schemes, passed it on to the Acting Registrar, Mr Daniel Lehutjo. Mr Lehutjo found that the Council for Medical Schemes employees had not acted improperly. Professor Veraiva, the Chairman of the Council for Medical Schemes, validated the decision by the Acting Registrar that the complaint had no merit. (See Appendix 6).

[30] Counsel for the Appellant submitted, correctly in our view, that the Appeals Committee had no jurisdiction to adjudicate the appeal that was brought before it. The basis of this submission was that in taking the decision, the Acting Registrar, Mr Lehutjo, acted with the concurrence of the Council for Medical Schemes. Mrs K on the other hand, seemed to be of a different view. This view, however, is not supported by her own version on the papers. In her email dated 24 February 2015, she wrote.

“I regret however that both the Acting Registrar and the Chairperson of the Council for Medical Schemes, have failed to understand that my complaint was not in respect of my disqualification ...”

[31] The above alone supports the submission, on behalf of the Appellant, that the appeal should have been brought not in terms of section 48, but in terms of section 50(3).

CONCLUSION

[32] In conclusion it is important to emphasize that the issue to be decided by this Appeal Board was not whether Mrs K’s complaint had merit. The complaint may or may not have had merit but that was not relevant for purposes of this appeal as the question to be decided was whether the Appeals Committee had jurisdiction to entertain the appeal.

FINDING

[33] For reasons already stated above, the Appeal Board finds that the Appeals Committee lacked the requisite jurisdiction to entertain the merits of the appeal. As stated earlier, the appeal should have been brought in terms of section 50(3) and not in terms of section 48 of the MSA. This was because what was appealed against was the decision of the Registrar acting in concurrence with the Council for Medical Schemes.

In view of this finding, it is not necessary to deal with the second leg of the appeal.

ORDER

[34] Accordingly, the appeal, against the Ruling of the Appeals Committee, in favour of the Second Respondent, handed down in May 2020, is upheld.

34.1 The Ruling of the Appeals Committee is set aside and is replaced with the following:

“The Appeal is dismissed on the basis that the Appeals Committee has no jurisdiction to hear the appeal.”

THE APPEAL BOARD

Judge Thokozile Masipa - Chairperson

Dr Dimakatso Ramagole - Member

Dr Loyiso Mpuntsha - Member

Date: 24 March 2022