IN THE APPEAL HEARING BEFORE THE CMS APPEAL BOARD ESTABLISHED IN TERMS OF SECTION 50 OF THE MEDICAL SCHEMES

In the matter between:

MT Raselo Incorporated obo SIGC (Pty) Ltd (Health Brokerage)	Appellant
and	
Discovery Health Medical Scheme	First Respondent

Case No: CMS 76114
Date of Hearing: 30 August 2023

LEGAL REPRESENTATION

The Appellant was represented by MT Raselo, an attorney.

The Second Respondent was represented by Ms Hofmeyer SC

DECISION

INTRODUCTION

[1] This is an appeal in terms of section 50(3) of the Medical Schemes Act 131 of 1998 ("MSA"/ "The Act").

[2] It is brought against the Ruling of the Appeals Committee of the Council for Medical Schemes ("Appeals Committee ") wherein the Appeals Committee dismissed an appeal against the decision of the Registrar.

[3] In that Ruling, the Appeals Committee agreed with the Registrar's decision that Discovery Health Medical Scheme was correct when it refused to accept the appointment of SIGC, as the preferred healthcare brokerage, by certain of its members.

THE PARTIES

[4] The Appellant is SIGC (Pty) Ltd, an authorised financial service provider and healthcare consultant duly accredited in terms of the Act.

[5] The First Respondent is the Appeals Committee of the Council for Medical Schemes, established in terms of the Act.

[6] The Second Respondent is Discovery Health Scheme ("Discovery"/"the Scheme"), registered as such in terms of section 24 of MSA.

[7] Only the Second Respondent is opposing the appeal.

FACTUAL BACKGROUND

[8] During July 2019, some members of Discovery Health Medical Scheme, who are employed at PepsiCo-Simba (Pty) Ltd ("The Employer"), appointed SIGC as their preferred healthcare brokerage. The aforesaid members are members of Agricultural, Food and Allied Democratic Workers Union ("AFADWU").

[9] On 15 July 2019, AFADWU confirmed the aforesaid appointment with the Employer.

[10] On 19 August 2019, SIGC duly notified Discovery of the appointment of SIGC as a healthcare brokerage in accordance with Regulation 28 of the Medical Schemes Act. Attached was an Intermediary Transfer Form and a request that Discovery process the brokerage change.

[11] On 21 August 2019, Discovery Health Medical Scheme addressed an email to SIGC to the effect that it required *"the company's contact person or listed director (must be on the company's letterhead) to authorise the attached Intermediary Appointments before we can process the broker change as requested".*

[12] On 12 November 2019, SIGC responded to the aforesaid email and once again requested Discovery to process the aforesaid brokerage appointment.

[13] On 14 November 2019, Discovery responded to the said email rejecting the appointment. The basis of the rejection was that the submitted Broker Appointments were not sufficient to enable the Scheme to process the brokerage change.

[14] Discovery insisted that it required a letter from the Employer confirming appointment of SIGC as a healthcare brokerage.

COMPLAINT LODGED IN TERMS OF SECTION 47 OF MSA

[15] Aggrieved by the decision of Discovery, SIGC lodged a complaint against the Scheme in terms of section 47 of the Medical Schemes Act 131 of 1998. SIGC's view was that the appointment was in accordance with Regulation 28 of the Medical Schemes Act and that the Scheme was wrong in rejecting the appointments.

[16] On the other hand, the Scheme was of the view that as the members belonged to a compulsory scheme, through their employer, an acknowledgment letter was required from the employer group.

[17] According to the Scheme, the acknowledgment letter should be signed either by the contact person or a director authorising the intermediary change. This was to include the broker appointments and the list of members to be transferred to the broker house.

THE ISSUE TO BE DETERMINED BY THE REGISTRAR

[18] The issue to be determined by the Registrar was whether the Scheme was correct in refusing to accept SIGC as the preferred health brokerage for the relevant members.

APPLICABLE LEGAL FRAMEWORK

[19] Chapter 7 in Part B: Regulations in Terms of the Medical Schemes Act, deals with the applicable Regulation 28 which provides:

"28(1) No person may be compensated by a medical scheme in terms of section 65 for acting as a broker unless such person enters into a prior written agreement with the medical scheme concerned."

"(7) A medical scheme shall immediately discontinue payment to a broker in respect of services rendered to a particular member if the medical scheme receives notice from that member (or the relevant employer in the case of an employer group), that the member or employer no longer requires the services of that broker."

"(8) A medical scheme may not compensate more than one broker at any time for broker services provided to a particular member."

[20] It is common cause that the employer as well as the member are permitted to appoint a healthcare broker. The fact that the employee, in his capacity as a member can appoint a broker of his choice is confirmed by Council for Medical Schemes' Circular 20 of 2010 which states the following:

"It is clear from the above regulation that a member may appoint a new broker in place of a broker previously appointed by a member, i.e. there must be an initial appointment prior to a subsequent broker substituting an earlier appointee."

[21] The Registrar's position was that *"where an employer has appointed a healthcare broker on behalf of its employees and the appointment is valid, an individual employee is unable to subsequently appoint an alternative healthcare broker without the consent of the employer."*

THE ISSUE TO BE DECIDED

[22] The question to be decided is, where both the employer and the employee have exercised their respective rights, which right supersedes the other.

SUBMISSIONS BY COUNSEL AND ANALYSIS

[23] On behalf of the Appellant, it was submitted that the employee/member of the scheme had an inherent right to appoint a preferred broker and that this right superseded the right of the employer to appoint a broker on behalf of the employee.

[24] The basis of this submission was that the MSA was for the benefit of the member as opposed to the medical scheme.
And since the objective of MSA was to ensure that the interests of the member were protected, it would make sense to allow the member to have a broker of his/her own choice.

[25] On the other hand, Counsel for the Respondent submitted that the employer's right superseded the member's right to appoint the healthcare broker. More so, in this particular instance, there was another broker in place, AON, which had been appointed by the employer and that relationship was still intact. Unless the relationship had been terminated, the scheme could not acknowledge the new appointments by the members as that would be in contravention of Regulation 28(8).

[26] Neither the Registrar's position nor the submission of Counsel for the Second Respondent is supported by the relevant law. In fact, the notion that the right of the employer supersedes that of the employee is inconsistent with the purpose of the Act which seeks to always protect the interests of the members.

[27] One can only imagine the injustice that could be caused, for example, by an unreasonable or unscrupulous employer who refuses to grant his consent to an employee to appoint an alternative healthcare broker of his/her choice.

[28] The two rights cannot be equal. The employer derives his authority to appoint a broker from the employee. In other words, the employer can appoint a broker only on behalf of the employee and to do so, the employer needs the co-operation of the employee concerned.

[29] In essence, the employer exercises its right as long as the employee is prepared to give the employer the mandate to do so. Once this mandate has expired or has been withdrawn, the employer is no longer entitled to exercise the right. Our view is that such withdrawal can be done expressly or it can be implied.

[30] On behalf of the Second Respondent, a concern was raised that Discovery was entitled to act the way it did to avoid contravening Regulation 28(8) which forbids a scheme to pay fees to more than one broker for services rendered to a particular member.

[31] In our view, the answer to this concern is to be found in Regulation 28(8) read with Regulation 28(7).

[32] Regulation 28(7) provides as follows:

"A medical scheme shall immediately discontinue payment to a broker in respect of services rendered to a particular member if the medical scheme receives notice from that member (or the relevant employer, in the case of an employer group), that the member or employer no longer requires the services of that broker."

[33] In the present matter, Discovery received notice from SIGC on behalf of the members concerned. The notice was to the effect that the members had appointed SIGC as their preferred broker. By implication, the members were informing Discovery that they no longer needed the services of AON, which their employer had previously appointed on their behalf.

CONCLUSION

[34] The Registrar seems to be of the view that Regulation 28(8) which states that:

"A medical scheme may not compensate more than one broker at any time for broker services provided to a particular member." is confirmation that if there is a broker on record for a member, the brokerage must be terminated first before another broker is appointed.

[35] We disagree. In the present case, the fact that the relationship with AON had not been terminated is unfortunate. But it is an issue between the employer and AON. It is a matter that probably, can be resolved, by the two parties, in another forum.

[36] In our view, the existing relationship between the employer and AON cannot adversely affect the right of the member to appoint a broker of his choice, which right was conferred on the member by legislation. In terms of the Regulation, the member is required to do no more than give notice to the scheme. In turn, the scheme is required to immediately stop paying fees to the previous broker.

[37] In the present case, in August 2019, Discovery received the necessary notice as contemplated in Regulation 28(7). It was, therefore, required to immediately discontinue payment to AON in respect of services rendered to the members who had appointed SIGC as their preferred broker.

[38] In our view, Discovery's refusal to acknowledge SIGC's appointment as the members' preferred healthcare broker, and Discovery's insistence on requesting authorisation from the employer has no legal basis and was unwarranted.

[39] Before granting the order it is necessary to deal with the issue raised by Counsel for the Appellant regarding payment of fees to SIGC. Counsel for the Appellant submitted that Discovery should be ordered to pay broker fees to SIGC, retrospectively, from the date of its appointment, on the basis that Discovery was wrong to refuse to acknowledge the appointment of SIGC by its members.

[40] We considered the matter and have not been persuaded that it would be competent for this Appeal Board to grant such an order. In any event, no details or evidence, which might assist in the determination of such an order, was placed before the Appeal Board. For that reason, we refrain from making an order in this regard.

ORDER

[41] Accordingly, the following order is granted:

41.1 The appeal is upheld.

41.2 The decision of the Appeals Committee is set aside and replaced with the following:

"Discovery Health Medical Scheme is directed to acknowledge the appointment of SIGC as the preferred healthcare broker in respect of the members listed in the Appointment Notification dated 19 August 2019 and to process the brokerage change."

_____

THE APPEAL BOARD

Judge Thokozile Masipa - Chairperson

Dr Dimakatso Ramagole - Member

Dr Loyiso Mpuntsha - Member