Opinion Piece

Mr Mfana Maswanganyi - Executive: Regulation

In the interests of beneficiaries – Discovery Health versus RAF

Mfana Maswanganyi is Executive Manager: Regulations at the Council for Medical Schemes. His division oversees the benefits management, financial supervision, compliance and investigation, and the accreditation and registration of medical schemes. He is an admitted attorney of the High Court of South Africa with over 7 years working for the regulator. Mr Maswanganyi holds two LLMs namely: Master of Law in International Law and Master of Law in Constitutional and Administrative Law. The author writes in his own personal capacity.

What will be the consequences that may befall medical schemes (aids) and its members if medical schemes are prohibited from claiming past medical expenses from the Road Accident Fund (RAF)? Furthermore, can medical schemes be financially viable without recouping from RAF? Mfana Maswanganyi, identified the seven errors of the Mlambo judgement and provided legal analysis of the potential implications the judgement may have to the medical scheme's environment. This is a summarized version of the lengthy analysis.

The intersection of the RAF and medical scheme benefit entitlements in the context of **Motor Vehicle Accidents** ("MVAs") highlights key challenges in South Africa's fragmented social security system . The Road Accident Fund Act 56 of 1996 establishes the RAF ("the RAF Act") as a statutory social security fund providing compensation for personal injuries or death arising from road accidents. Medical schemes are not-for-profit and are member-funded risk pools that provide pre-funded healthcare coverage based on contributions and regulated in terms of the Medical Schemes Act 131 of 1998 ("the Medical Schemes Act").

The key feature of medical schemes includes Prescribed Minimum Benefits ("PMBs"), requiring that emergency medical conditions must be covered regardless of the cause. Regulation 8 of the Medical Schemes Act provides that any benefit option that is offered by a medical scheme must be paid full, without co-payment or the use of deducible, the diagnosis, treatment and care costs of prescribed minimum benefit conditions.

An injury resulting from MVAs is regarded as an emergency medical condition and, therefore, qualifies to be reimbursed by medical schemes in line with PMB provisions in the Medical Schemes Act. Delays in RAF payouts would result in members injured in MVAs first using their medical scheme or out-of-pocket payments. Some medical schemes invoke exclusion clauses, requiring members to sign an undertaking to reimburse the scheme once RAF pays. In some cases, the scheme, in terms of its rules, may institute a claim against the RAF in the name of the member for the recovery of amounts paid in respect of injuries for which the RAF is liable to the member.

Therefore, the proper enquiry is to determine who has the primary responsibility to pay claims. The RAF would have the primary responsibility to pay as the law does not exclude members of medical schemes in paying the levy and claiming benefits from RAF. On the other hand, membership in medical schemes is voluntary and constitutes a private arrangement.

If prohibiting medical schemes from recovering funds from RAF results in price hikes for medical scheme members - rendering medical schemes unaffordable to many people who are currently enjoying cover or if it renders some medical schemes not to be financially sustainable, will the court appreciate the likely impact of that on public health service?

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One is aware of the argument raised by Professor Hennie Klopper in the De Rebus December issue: "Mr Letsoalo's media statement" that the RAF is a sui generis statutory insurer and the fact that the Mlambo judgement concluded that the RAF is not an insurer, see para 86 but for the purpose of this article this is neither here no there.