



PRESS RELEASE

Reference : Former trustee of Liberty Medical Scheme to pay back R1.7 million
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Press release 11 of 2013: Former trustee of Liberty Medical Scheme to pay back R1.7 million

The North Gauteng High Court in Pretoria on Tuesday (28 May 2013) ordered a former trustee of Liberty Medical Scheme (Liberty) to pay back the R1.7 million he had received from the scheme in terms of an illegal settlement agreement which saw him prematurely resigning from the scheme's Board and agreeing not to assist any regulatory or other authority with any possible investigation into the scheme.

Advocate Boyce Mkhize and Liberty agreed to "a special arrangement" in May 2011 in terms of which Adv. Mkhize received R962 500 for resigning from the Board of the scheme one month before his term of office would have automatically come to an end, and a further R700 000 as a restraint of trade agreement for agreeing not to assist anyone with any possible action against the scheme.

The court set the settlement agreement aside, calling it illegal, the Board "supine", and Adv. Mkhize "blissfully unaware" of his fiduciary responsibilities as a trustee.

The judgement orders Adv. Mkhize to return the R1.7 million to the scheme and to cover the legal costs of all parties to this matter out of his own pocket, estimated to amount to additional hundreds of thousands of Rand.

"This is another big victory for the regulator as the custodian of the principles of good governance in the medical schemes industry," said Dr Monwabisi Gantsho, Chief Executive of the Council for Medical Schemes (CMS) and Registrar of Medical Schemes.

More detail

The CMS had instructed Liberty to recover the R1.7 million when the payment first came to its attention, and when the scheme refused to comply with its directive, the CMS approached Adv. Mkhize directly, but he also refused to return the money. The CMS then turned to the judiciary as a last resort in its efforts to protect the best interests of the beneficiaries of the scheme.

In its founding affidavit submitted to the High Court in June 2012, the CMS calls aspects of the settlement agreement "disturbing" and "puzzling", while the judgement that was handed down on Tuesday speaks about "the payment [having] all

the hallmarks of the conduct of a supine Board succumbing to the demands of a trustee who self-confessedly would have resigned only on the terms of the [settlement] agreement, or on better terms” despite the fact that he could have been voted out by the Board at any time in terms of the scheme’s rules. The judgement also calls Adv. Mkhize “blissfully unaware of his fiduciary obligations to the scheme and its beneficiaries”.

The court agreed with the CMS to set the settlement agreement aside, saying that it was:

- illegal and therefore null and void as a result of contravening the Medical Schemes Act and its Regulations;
- contravening the rules of Liberty; and
- in contravention of public policy.

The court also found that the Board of Liberty:

- did not have the powers to enter into the settlement agreement;
- had acted outside the law; and
- had breached its fiduciary responsibilities, which include the duty to avoid conflict of interest and always act in the best interests of the beneficiaries of the scheme.

The court agreed with the CMS that the trustees of Liberty had undermined the purpose of the Medical Schemes Act, which is to protect the interests of the scheme’s beneficiaries and look after the scheme’s funds on their behalf. The judgement further states that “it is highly undesirable, from a policy perspective, that trustees be induced by attractive restraint payments to be loyal and honest”.

The CMS is the regulator of the medical schemes industry, responsible for enforcing compliance with the Medical Schemes Act 131 of 1998 to ensure that the interests of beneficiaries are prioritised at all times.

Adv. Mkhize was the Chief Executive Officer of the National Nuclear Regulator (NNR) until November 2012, and the Registrar of the Health Professions Council of South Africa (HPCSA) until January 2010.

How it came to this

Liberty amalgamated with Medcover Medical Scheme on 1 January 2010.

At the time the respective Boards agreed that the new Board of the amalgamated medical scheme would initially consist of 10 trustees, five from each scheme, following which this number would be reduced to “a manageable size”, namely a maximum of eight in 2010 and a maximum of seven in 2011.

The respective Boards also agreed that the existing trustees would be encouraged to resign voluntarily and where they did not, the new Board would vote in secret on which trustees should resign.

Adv. Mkhize resigned on 19 May 2011 as a consequence of the amalgamation of the two medical schemes.

In a move described by the court as “astonishing”, he and Liberty came to their special arrangement on 20 May 2011, one day later – where his term of office was automatically expiring in June 2011, and where he could have been voted out of the Board at any time.

The court agreed with the CMS when the regulator argued that Adv. Mkhize had held the Liberty Board at ransom until he had received the golden handshake that he was after.

The court also described the scheme’s reasons for paying the money as “unconvincing”.

Complaint against Adv. Mkhize baseless

On 17 March 2011, the Vice-Chairperson of the Liberty Board, Christine Kinsman, lodged a complaint against Adv. Mkhize with the CMS.

On 20 May 2011, the day on which the settlement agreement was concluded, Ms Kinsman withdrew her complaint, saying that Liberty had resolved its differences with Adv. Mkhize. The settlement agreement was conditional upon Ms Kinsman withdrawing her complaint against Adv. Mkhize.

Despite the complaint having been withdrawn, the CMS investigated the allegations it contained and found them to be baseless.

Governance concerns at Liberty persist

The CMS has been addressing governance problems at Liberty since October 2010 when complaints were first lodged against the former Chairperson of the scheme Larry Jacques and trustee Daniel Pienaar. That same year the CMS instituted proceedings against both of them to pronounce on their fitness and propriety as trustees of a medical scheme. Mr Jacques resigned and Mr Pienaar became the Chairperson. Until his recent resignation from the Board, Mr Pienaar was still being investigated for his fitness and propriety to hold the office of trustee. The CMS will decide shortly on how to respond to this latest development.

Mr Pienaar has been opposing the proceedings against him since they were first instituted in December 2010. He approached the North Gauteng High Court in March 2012 to try and stop the CMS from continuing with its investigation, but the court dismissed his interdict application in January 2013 with costs.

His application for leave to appeal this judgement was dismissed with costs by the same court in April 2013.

All the while the scheme continued to foot his legal bills.

And the trustees of Liberty remain the highest-paid in the industry.

In 2010, the average remuneration package of a Liberty trustee was R412 000. This fee almost doubled in 2011, to an average of R703 000 per trustee.

The scheme is financially healthy

Its governance problems notwithstanding, Liberty remains one of the largest and healthiest medical schemes in the country.

It had almost 150 000 beneficiaries at the end of 2011, and its solvency (reserves expressed as a percentage of contributions) stood at 27.9% – above the 25.0% required by law.

The scheme remains financially stable and sustainable in the long run, and able to honour its claims-paying responsibility.

Advice to brokers

Brokers are advised to act with restraint.

Any advice they give must be based on a proper assessment of the situation and accord with the principles of best advice.

The best interests of their clients must be borne at heart at all times.

As financial advisors, brokers are also reminded of the Financial Services Board (FSB) legislation which clearly stipulates that consumers are entitled to best – meaning independent – advice at all times.

Where to find the judgement

The judgment is available from the court (case number 35254/12) and can also be downloaded from the CMS's website (<http://www.medicalschemes.com/files/Judgements%20on%20Appeals/MkhizeJudgment2013.pdf>).

What the law says

The Medical Schemes Act prescribes that medical schemes must be run by trustees “who are fit and proper” to do so, and lists their duties to include:

- protecting the interests of their beneficiaries at all times;
- acting with due care, diligence, and skill;
- acting in good faith; and
- avoiding conflicts of interest.

Both the Medical Schemes Act and the rules of Liberty clarify further that trustees are non-executives who serve on a voluntary basis and not as employees of medical schemes.

They are also not allowed to enrich themselves over and above the salary they receive for managing the affairs of their respective medical schemes.

Section 7 of the Medical Schemes Act lists the functions of the CMS, one of them being “to protect the interests of [...] beneficiaries at all times”.

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