

THE COUNCIL FOR MEDICAL SCHEMES

APPEAL COMMITTEE

In the matter between:

C G O

Appellant

and

MUNIMED MEDICAL SCHEME

Respondent

APPEAL RULING

1. In the period between the 2 May 2002 and 19 April 2007 the Appellant, who was a member of the Board of Trustees of the Respondent, over-claimed on his traveling expenses incurred in relation to his duties as a trustee in an aggregate amount of R30 940.00. The overpayment consisted of approximately 87 claims in each of which an amount of R340.00 over and above that that was owing to the Appellant, was claimed.
2. The overpayments were made because the Appellant continued to claim payment in respect of the distance that he had previously traveled between his residence and the premises of the Respondent, notwithstanding the fact that he had moved residence in 2002 and ought to have claimed for a much lesser distance.

3. The Appellant claims that his error in this regard was *bona fide*. He claims that he thought that he was receiving the correct amount, and that the fact that there had been no notable decrease in the amount paid per trip was, in his view, as a result of the increase in the rate reimbursed per kilometer traveled.
4. The Respondent does not accept that the Appellant's error was *bona fide* and rejects the Appellant's explanation, relying on the fact that the increased rate had been implemented in February 2002 and that 3 payments had been made to the Appellant on his original distance at the higher rate before he moved in May 2002.
5. At a meeting of the Respondent's Board of Trustees held on 12 July 2007, the issue of the Appellant's over-claiming for his traveling expenses was considered, and the Board resolved that the Appellant had breached the Code of Conduct in a material respect, and that he should consequently be removed from the board of trustees.
6. The Appellant is dissatisfied with the decision of the Respondent's board of trustees in this regard, and it is against that decision that he appeals to this committee.
7. In considering the complaint against the Appellant, the Respondent's board of trustees purported to act in accordance with the provisions of the

Medical Schemes Act, 1998, the rules of the Respondent and a Code of Conduct applicable to members of the Board of Trustees.

8. The Respondent contends that, in terms of Section 29(1)(a) of the Act, its Rules must provide for a Board of Trustees consisting of persons who are fit and proper to manage the business of the Respondent.
9. The Respondent contends that when its chairperson became aware of the Appellant's alleged conduct he caused an investigation to be instituted as provided for by clause 9(i)(a) of the Code of Conduct referred to above. The Respondent contends, and provides correspondence in support thereof, that the procedural provisions of clause 9 of the Code of Conduct were observed and thereafter that the matter was reported to a meeting of the Board of Trustees.
10. That meeting, which took place on 12 July 2007, was attended by the Appellant and resulted in the decision referred to above being taken on a unanimous basis.
11. In his appeal to this committee the Appellant did not address the merits of the decision to dismiss him. His appeal documentation raised a variety of legal and procedural points, relying *inter alia* on the Medical Schemes Act, various provisions of the Constitution of the Republic of South Africa, various statutory and common law administrative law provisions,

and various challenges to the validity of the Respondent's Code of Conduct.

12. At the appeal hearing the Appellant, who represented himself, did not pursue any of his legal challenges to the Respondent's proceedings. He chose, instead, to address the merits of the decision to dismiss him, despite not having raised these complaints in his appeal notice.

13. With regard to the merits he contended, in essence:

13.1. that although he was guilty of the misconduct in question, the overpayment arose as a result of a *bona fide* mistake on his part that should have been detected by the Respondent;

13.2. that the Respondent's Chief Executive Officer had indicated that he, on behalf of the Respondent, would take full administrative responsibility for the error;

13.3. that he had informed the Respondent's administrator that he had moved, and it was therefore the Respondent's responsibility to ensure that the correct distance was claimed for;

13.4. that, had it been his intention to over-claim deliberately, he would not on any occasion have submitted accurate claims,

yet the record shows that 3 of his claims were indeed accurate;
and

- 13.5. that there were discrepancies between the version of the Code of Conduct given to him and that on which the Respondent relies (this latter point was not pursued when the Appellant was unable to identify such discrepancies).
14. For its part, the Respondent, represented at the appeal hearing by Mr Wagenaar, contended that both in terms of the statutory framework (Section 29 of the Act, Rule 18(2) of the Respondent's Rules and Section 32 of the Act) and in terms of the common law, the Respondent was bound to ensure that its trustees were fit and proper persons who behaved with the highest standards of probity and good faith.
15. This obligation bound not only the members of the Board of Trustees with regard to their individual conduct, but also governed the way in which the Board responded to misconduct by one of its members.
16. The Respondent referred to the Appellate Division decision in *Sackville West v Nourse & Another 1955 AD 516 at 535* and to *Phillips & Others v van den Heever NO & Another 2007 (4) SA 411 (W)*. Reference was also made to the decision in *Tijmstra NO v Blunt-MacKenzie NO & Others 2002 (1) SA 459 (T)*.

17. The three decisions referred to by the Respondent support its principal contention, which is that the nature of the duty owed by a trustee is of such nature that where instances of misconduct arise, concerning the misuse or misappropriation of trust property, it is not necessary for there to be *mala fides* on the part of the trustee before his removal as a trustee is justified. The essence of this contention is captured in the decision in ***Volkwyn NO v Clarke & Damani 1946 WLD 456*** where Murray J held as follows "*it is of course true that proof of dishonesty or mala fides is not essential for a case for the removal of executors or administrators*" and later "*... the essential test is whether such disharmony as exists imperils the trust estate and its proper administration.*"
18. According to the Respondent the Appellant's conduct endangered trust assets. His claim that he had been able and willing to repay the money takes this issue no further. Clearly if the overpayments had not been detected, the misconduct would have continued. The Respondent contends that the Appellants behaviour even if found not to have been *mala fides*, was at very least negligent, and was probably reckless.
19. The Appeal Committee agrees with the Respondent. The Appellant cannot excuse his conduct by pointing fingers at others whom he claims ought to have detected his mistake. His attempts to blame others, either fully or partly, for his misconduct, cannot excuse his own responsibility therefore, and demonstrates a disturbing unwillingness on his part to accept such responsibility and the consequences thereof.

20. The misconduct by the Appellant, and the subsequent prejudice suffered by the Respondent were by no means trivial. Had they not been detected, ongoing prejudice would have been suffered for an indefinite period. Whatever criticisms may be leveled at the Respondent's administrative systems, the ultimate responsibility for submitting accurate travel claims lay with the Appellant. There is no acceptable explanation for his failure to fulfill this responsibility.
21. In the circumstances the decision by the Respondent's Board of Trustees to remove the Appellant as one of its members cannot be faulted. The appeal is therefore dismissed and the removal of the Appellant as a trustee of the Respondent is confirmed.

DATED at JOHANNESBURG this 6th day of DECEMBER 2007

P R JAMMY
for: Appeal Committee