

APPEAL COMMITTEE OF THE COUNCIL FOR MEDICAL SCHEMES

In the matter between:

GENESIS MEDICAL SCHEME

Appellant

and

REGISTRAR OF MEDICAL SCHEMES

Respondent

RULING

Introduction

1 This is an appeal against a decision of the Office of the Registrar of Medical Schemes ("the Registrar")

1.1 refusing to register rule 3 of annexure C to the rules of the scheme, and

1.2 registering rule 13 of that annexure in the form considered by the office to be acceptable.

- 2 As regards the latter, the last correspondence from the office that effectively brought the debate on the registration of these rules to a close seems to suggest that neither rule has been registered. The concluding paragraph reads:

“Paragraphs 3 and 13 of Annexure C remain unregistered as previously communicated to you in our letter dated 30 July 2008. No further correspondence in this regard will be entertained as our position remains the same as before.”

- 3 But the “letter dated 30 July 2008” did not say both rules remain unregistered. To that letter was attached “a copy of the amendments approved and registered in terms of section 31(3) of the Act”. That copy of amendments shows that rule 3 was deleted in its entirety, while rule 13 was registered in an amended form which involved deletion by the office of the last sentence of that rule.
- 4 It is thus fair to say that the office refused to register rule 3 but in fact registered rule 13 in a form palatable to it. The question that then arises is
- 4.1 whether there is a lawful basis for refusing to register rule 3, and
- 4.2 whether the Office of the Registrar has the power to register a rule in a form as amended by it.
- 5 We deal with each of these in turn. But first, it is important to understand this ruling within the context of the background from which it springs. It is also important to bear in mind that the annexure C containing these rules deals

generally with expenses that are excluded by the scheme. There is, however, a *caveat* that reads:

"Nothing in this Annexure C shall have the effect of limiting the Statutory Prescribed Minimum Benefits beyond the limits prescribed by law."

A Brief Background

6 The proposed amendments to both rule 3 and rule 13 have undergone, to varying degrees, some measure of mutation since the scheme first presented them for registration in April 2006. In its original form, the proposed rule 3 amendment read as follows:

"Injuries sustained from motorised speed contests and speed trials. The Board may, in its sole discretion, grant exemption from the operation of this rule, in periods not exceeding twelve months, at a time, to any beneficiary after suitable motivation requesting such exemption."

7 The proposed rule 13 amendment in its original form read:

"In cases of illness of a protracted nature, the Trustees shall have the right to insist upon a member or dependant of a member consulting any particular specialist the trustees may nominate in consultation with the attending practitioner. In such cases, if the specialist's proposed treatment is not acted upon, no further benefits will be allowed for that particular illness."

8 In October 2006, the scheme resubmitted the rule amendments. Effectively, the scheme sought to include injuries sustained from the use of quad bikes in the exemption from the operation of rule 3. In other words, the scheme would

now, still in its sole discretion, cover injuries sustained from the use of quad bikes.

- 9 On that same date, the scheme resubmitted a proposed rule 13 amendment. The upshot of this new proposed rule 13 was the substitution of "the board" for "the trustees" and removing all reference to "savings and SMF facilities". An SMF facility was a "Self Managed Fund", a fund akin to a savings account used for day to day medical expenses. The idea, as we understand it, was that this fund was to be discontinued. Indeed, it was in 2007.
- 10 On 14 March 2008, following a High Court skirmish between the parties about the scheme's 2006 rules which need not detain us here, the Registrar registered both rules in their original form and not in the form as submitted in October 2006.
- 11 Four days later, on 18 March 2008, three things appear to have happened.
 - 11.1 The first is that the Registrar deleted rule 3 in its original form in its entirety, presumably reversing his decision of 14 March 2008 to register it.
 - 11.2 The second is that the Registrar deleted rule 3 in its amended form as proposed in October 2006 in its entirety, in other words, the version including reference to quad bikes.

- 11.3 The third is that the Registrar added a proviso to the October 2006 version of rule 13 and then registered it. That version now reads as follows:

“In cases of illness of a protracted nature, the Board shall have the right to insist upon a member or dependant of a member consulting any particular specialist the Board may nominate in consultation with the attending practitioner. In such cases, if the specialist’s proposed treatment is not acted upon, no further benefits will be allowed for that particular illness. *Subject to evidence-based managed-care protocols/formularies as provided for in regulation 15.*”

- 12 The italicised clause has been added by the Registrar.
- 13 On 30 July 2008, the Registrar deleted the October 2006 version of the proposed rule 3 amendment. He also deleted the last sentence of the October 2006 version of the proposed rule 13 amendment and proceeded to register it. It then read:

“In cases of illness of a protracted nature, the Board shall have the right to insist upon a member or dependant of a member consulting any particular specialist the Board may nominate in consultation with the attending practitioner.”

The Registrar’s Case

- 14 The Registrar’s concern seems to be that the proposed rule 3 amendment “could be applied in a discriminatory manner”, and that emergency cases arising from injuries sustained from the use of quad bikes, motorised speed

contests and speed trials cannot be excluded because those are prescribed minimum benefits ("PMBs").

- 15 As regards the proposed rule 13 amendment his concern seems to be that it is inconsistent with other rules elsewhere in the scheme's set of rules (see Registrar's letter of 4 September 2008).

The Scheme's Case

- 16 The scheme says there is no legal basis for the Registrar's refusal to register both proposed rule amendments in the form presented by the scheme to the Registrar.

- 17 In relation to rule 3 it says injuries sustained from the use of quad bikes which require emergency medical treatment cannot, in law, be excluded from cover because the Medical Schemes Act, 131 of 1998 ("the Act") will not countenance it. So it matters not what the scheme rules say to the contrary because they cannot trump the provisions of the Act as regards PMBs. It says further that an exemption from rule 3 cannot conceptually result in unfairness because "there can be no unfairness if no-one qualifies for exemption".

- 18 As regards the proposed rule 13 amendment the scheme says the rule has two parts to it.

18.1 The first is that the scheme has the right to require a member or dependant to consult with a specialist nominated by the board in consultation with the member's or dependant's attending medical practitioner. It says the Registrar does not seem to have difficulty with this.

18.2 The second, with which the Registrar seems to have difficulty, is that if the member or dependant does not follow the course of treatment proposed by the specialist, then no further benefits will be allowed for the illness in question.

19 It says the first part of the rule is standard practice and is in line with what is said in the Registrar's own website. Moreover, it says, this requirement was upheld on appeal in August 2006 in a matter between HS and Discovery Health Medical Scheme.

20 As regards the second part, it says without it, the first part would effectively be otiose.

The Appeal Ruling

21 There is merit in the scheme's submissions.

22 We deal with each rule separately.

Rule 3

- 23 The Registrar's grounds for refusing to register this rule seem premised on the belief that the discretion of the board to exempt members who sustain injuries from the use of quad bikes from the exclusion could be exercised arbitrarily so that some of those members benefit from the discretion while other in the same position do not. We can find no such indication in the proposed formulation of the rule.
- 24 In simple terms, the rule seeks to cover injuries sustained from the use of quad bikes. As a point of departure, it is thus important to consider that such injuries are excluded from cover by the rule. This should come as no surprise since schemes must always guard against abuse. But in order to benefit members, discretion is conferred on the board to allow cover for these injuries. The introduction of this discretion can be seen as yet another tool in the quest to provide "managed health care" as defined in regulation 15, in addition to the use of formularies and protocols. The alternative is not to cover quad bike injuries at all and this was arguably the position before October 2006 when quad bikes were added to the list of injuries exempted from the exclusion. We have no reason to believe that this is what the Registrar would want.
- 25 If a member, whose claim is rejected after the exercise by the board of its discretion, takes the view that he has been discriminated against, then he has a remedy in administrative law either by taking the board's decision on review to the High Court on ordinary review grounds, including the over-arching

constitutional standard now propounded by the Constitutional Court in **Sidumo and Another v Rustenburg Platinum Mines Ltd and Others 2008 (2) SA 24 (CC) at par [110]**. Alternatively, an appeal against the decision of the board could be instituted in this appeals committee. What one cannot validly do in our view, is prejudge the exercise of discretion as harbouring discriminatory intent, and then on that basis seek to avoid a pre-conceived outcome by refusing to register and otherwise perfectly legitimate rule.

26 The Registrar's concern that the proposed rule may offend against PMB provisions is mistaken for at least two reasons.

26.1 The first is that PMBs cannot by law be excluded from cover, except to a limited extent in the circumstances prescribed by regulation 8. But this rule does not purport to exclude PMBs.

26.2 The second is that Annexure C is subject to the *caveat*: "Nothing in this Annexure C shall have the effect of limiting the Statutory Prescribed Minimum Benefits beyond the limits prescribed by law". The Registrar's counsel did not dispute this or its import.

27 In the result, we can find no legal basis upon which the rule should not be registered in the form in which it was presented in October 2006. There are two bases on which a rule amendment can be refused by the Registrar. The one is that it is inconsistent with the Act. The other is that it will be unfair to

members (section 31(3)(a) of the Act). We are not satisfied that the Registrar has proved either ground.

Rule 13

- 28 The Registrar's ground for refusing to register this rule in its October 2006 form seems to be that it is inconsistent with other rules in the scheme's set of rules, namely, rules 1.3.2; 2.4.2 and 3.4.2 of Annexure B to the scheme's rules (see letter dated 4 September 2008 addressed to the scheme's principal officer). The argument seems to be that if the offending sentence was deleted in those rules, there is no reason why it should not be deleted in this rule, too.
- 29 But consistency of one rule with another within the same set of rules is not the applicable standard. The correct standard is set out in section 31(3)(a) of the Act, namely, inconsistency with the Act or unfairness to members.
- 30 In any event, the argument seems to us legally unsustainable for at least two reasons. For one thing, the scheme did not agree that the basis for deletion of the sentence in those rules was sound and did so "for the sake of clarity". For another, the context of Annexure C (dealing with exclusions) is vastly different from the context of Annexure B (dealing with a benefit option). Rule 13 deals with the discretionary inclusion of a benefit that is otherwise expressly excluded. Annexure B deals with benefits to which a member is entitled. The two are chalk and cheese and so what is done in relation to the one may not be appropriate in relation to the other.

- 31 The Registrar first added a proviso to the proposed rule amendment and proceeded to register it as amended by him. Then he deleted the last sentence from the October 2006 version and proceeded to register the rule as amended by him. This the Registrar does not have the power to do. In our reading of the Act, amendments are proposed by schemes and the Registrar either effects those amendments or rejects them.
- 32 What the Registrar has done in relation to rule 13 is in our view different from the power that is conferred on him by section 31(4). The section enables the Registrar to draw the scheme's attention to any rule which in his opinion is applied in a manner that is inconsistent with the Act, and "indicate" to the scheme the manner in which that particular rule should be amended. The scheme then has 30 days to effect the amendment (section 31(4)(a)).
- 33 The section also gives the Registrar the power to order the scheme to apply a particular rule (which in his opinion is being applied in a manner that is inconsistent with the Act) in a manner indicated by him, presumably with a view to bringing application of the rule within the compass of the Act (section 31(4)(b)).
- 34 Presumably, in both instances, the scheme is at liberty to make representations to the Registrar if it should disagree either with his formulation of the rule (for purposes of his section 31(4)(a) power) or his understanding of the manner in which the rule is being applied (for purposes of his section 31(4)(b) power). If

the scheme cannot find common ground with the Registrar on these issues, then presumably that issue could be referred to this appeals committee by way of a stated case. What we do not believe the Registrar can do is willy-nilly register a rule of his own formulation ignoring the scheme's entreaties to the contrary. We do not believe that is the import of section 31(4) of the Act. (This finding is not to be confused with the power conferred on the Registrar by section 33(5) read together with section 33(4) of the Act in the context of benefit options.)

- 35 But that seems to be what has happened in this case. We do not believe that this is the correct approach. It also does not seem on the papers that the Registrar relies on the powers conferred on him by section 31(4). If that is so, then that places him squarely in section 31(3) territory. That being so, we believe he has acted *ultra vires* the powers conferred on him by that section. Even if he had invoked section 31(4) for registering rule 13 in the manner that he did, we believe that he would have fallen foul of that provision, too.

New Matter

- 36 At the hearing, Ms Steinberg submitted that both proposed rule amendments are in conflict with regulation 10(6) and regulation 8. Regulation 10(6) provides that the funds in a member's savings account may not be used to pay for PMBs. Regulation 8 deals with PMBs and limits to which their funding is subject.

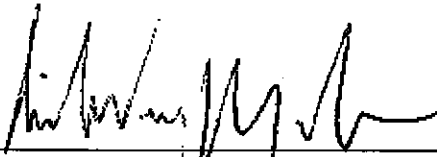
37 Unsurprisingly, Mr Fagan objected to the raising of new matter not foreshadowed in the papers. He submitted that the scheme came to the appeals committee to meet one case. It cannot now be expected to meet another about which it had not been forewarned. This, of course, is trite. Surprising your opponent with a seemingly unanswerable legal point may make for a good Hollywood script. But in the real world of legal practice a couple of time zones away from Tinseltown, it is inappropriate.

38 In any event, for reasons already advanced, it is not clear to us how the proposed rule amendments can be said to offend against PMB provisions, when the proviso to the annexure expressly says PMBs are not affected beyond the limits prescribed by law.

39 As regards regulation 10(6), there is no suggestion in either rule that a savings account would be used for funding PMBs. Surely Ms Steinberg cannot be suggesting that injuries sustained from the use of quad bikes on the one hand, and illnesses of a protracted nature on the other, will always be of a PMB nature.

Finding

40 In the result, as there is no legal basis for refusing registration of the rule amendments proposed by the scheme in October 2006, they should both be registered.



VUYANI NGALWANA for Appeal Committee

For the Appellant: *Mr E Fagan*
Instructed by: *Webber Wentzel Inc*

For the Registrar: *Ms Steinberg*
Instructed by:

Date of hearing: *11 August 2009*
Date of Ruling: *18 September 2009*