

APPEAL COMMITTEE OF THE COUNCIL FOR MEDICAL SCHEMES

In the matter between:

HOSMED MEDICAL SCHEME

Appellant

and

THE REGISTRAR OF MEDICAL SCHEMES

First Respondent

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Second Respondent

RULING

Introduction

- 1 This is an appeal by the scheme against a ruling of the Registrar in which it was directed to release all payments owing to the second respondent and which it had suspended.

The Registrar's Ruling

- 2 In issuing the direction, the Registrar had found that the scheme's suspension of those payments was in contravention of the Medical Schemes Act, 131 of

1998 ("the Act"), specifically section 59(2), as well as the rules of the scheme, specifically rule 15.6. The Registrar had also found that the manner in which the scheme had investigated alleged fraud against the second respondent was inconsistent with the Act, specifically section 59(3) and regulation 6(4). He found that the scheme had **"regrettably chosen not to disclose the forensic merits of its investigation on the basis that these might lead to a civil case"**.

The Scheme's Case

- 3 The scheme says the Registrar asked and answered a question that never formed the basis of the complaint he was called upon to adjudicate. It says the second respondent never complained about suspended payments.
- 4 In any event, it says, there was no suspension of payments to the second respondent. What had happened was that an amount owing by the second respondent to the scheme had been set off against monies payable to him. This was done pursuant to the provisions of section 59(3) of the Act.
- 5 It says rule 15.6 and regulation 6(4) of the Act find no application in the circumstances of this case because it was never the scheme's case that the second respondent's claims or accounts were "erroneous or unacceptable for payment". It says it accepted that there were benefits payable to the second respondent against which it set off the amount that was owing to it by reason of a settlement agreement freely and voluntarily signed by the second respondent.

- 6 It says it placed the second respondent's account on a withhold status after he signed the settlement agreement acknowledging indebtedness to the scheme. When he submitted claims in excess of the amount of his indebtedness, the latter amount was then set off against the amount of those claims.
- 7 The scheme says it has not withheld or suspended any payments to the second respondent. It also says the Registrar provides no basis in his ruling for the proposition that the scheme acted *ultra vires* the Act in the manner of its investigation of fraud against the second respondent.
- 8 For these reasons, it says the ruling falls to be set aside or, as it puts it, "withdrawn".

The Appeal Ruling

- 9 Before dealing with the merits of the appeal, the scheme has alluded to a procedural issue which we feel the need to touch upon. The scheme relates an unfortunate incident in which it says one of its representatives was accosted outside the offices of the Registrar while attending a meeting convened by the Registrar to discuss the matter between the scheme and the second respondent. As the scheme's representative was thereafter in no state to participate in the discussions, she left. When the scheme requested a postponement of the meeting this was refused and the meeting proceeded with the second respondent in the absence of the scheme's representative.

- 10 In our view this should not have happened and we are sympathetic to the representative's experience.

- 11 But the question is whether the conduct of a meeting with only one party in the circumstances of this case has had a material bearing on the outcome of the complaint. We do not believe that to be the case.

- 12 A party against whom a complaint has been lodged is not entitled to be afforded an opportunity to make oral representations to the Registrar prior to the Registrar making his ruling. The only representations to which the scheme was entitled are those for which section 47(1) of the Act makes provision, namely, written representations.

- 13 In any event, even if it could be argued that the holding of a meeting with only the second respondent was unfair and prejudiced the scheme (and this is not what the scheme contends), it is now established law that unfairness at the first stage of a multi-stage process can be cured by a fair appeal process.

- 14 In **Slagment (Pty) Limited v Building Construction and Allied Workers' Union and others 1995 (1) SA 742 (A)** Nicholas AJA, for the majority, observed at 757A in an employment law context that:

“There is no reason in principle why any unfairness at the stage of the dismissal should not have been cured by a full and fair hearing on appeal.”

15 The same principle was observed in **Minister of Environmental Affairs and Tourism and Another v Scenematic Fourteen (Pty) Limited 2005 (6) SA 182 (SCA)** at pars [33]-[35] where Scott JA said the following when delivering the court's unanimous judgment:

"[33] Finally, it is necessary to revert to an issue to which reference has been made previously in passing, ie the consequence of a procedurally fair appeal in the event of it being found that the DDG had failed to exercise his discretionary power himself ('the delegation issue'). In *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) at 658A-G this Court accepted as a general rule Megarry J's dictum in *Leary v National Union of Vehicle Builders* [1971] Ch 34 at 49F ([1970] 2 All ER 713 (Ch) at 720h) that

'a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body'.

More recently, however, in *Slagment (Pty) Ltd v Building, Construction and Allied Workers' Union and Others* 1995 (1) SA 742 (A) ((1994) 15 ILJ 979) at 756D - 757A (SA), this Court expressed the view that such a general rule was unjustified. In coming to that conclusion it relied on the statement of Lord Wilberforce in *Calvin v Carr and Others* [1980] AC 574 (PC) at 592C ([1979] 2 All ER 440 (PC) at 447h) that no clear and absolute rule could be laid down as the situations in which the issue arises are too diverse and the rules by which they are governed so various. This approach has similarly been accepted by the House of Lords. See *Lloyd and Others v McMahon* [1987] AC 625 (HL) at 716C-D ([1987] 1 All ER 1118 (HL) at 1171g).

[34] Quite clearly, if the effect of whatever it was that vitiated the initial decision is perpetuated so as to taint the appeal process, there can be no question of the latter serving to cure the former. If in the present case, for example, the process of streaming had been procedurally unfair, the decision on appeal would be equally affected. On the other hand, even if the appeal process were not intrinsically tainted by the earlier proceedings, the circumstances may be such that considerations of fairness demand that both the initial administrative decision and the appeal process, judged separately, be lawful and procedurally fair. No purpose would be served by attempting to formulate some all-embracing rule. Each case will depend on its own facts.

[35] To return to the present case, once it is accepted that the Minister properly applied his mind to the respondent's appeal and

that the process was both lawful and procedurally fair, I can think of no reason why any shortcoming in relation to the delegation issue (which, in my view, was not established) should not have been cured by the appeal. There can be no question of the former tainting the latter. The respondent was one of a large number of applicants for a limited resource. Had it been clear that the DDG had personally examined the respondent's application the latter would have had no cause for complaint. In the event, the application, as supplemented by the respondent on appeal, was considered by the Minister who was the actual repository of the power conferred in terms of s 18(1) of the Act. It follows that the decision to reject the respondent's appeal would have rendered irrelevant any complaint the respondent might have had with regard to the delegation issue."

- 16 Thus, even if the scheme had sought to make something material of the meeting at the Registrar's office that excluded it but included the second respondent, we do not believe that either the process culminating in the Registrar's ruling, or the process in this appeal, has been permeated by unfairness of the sort that could vitiate the entire process. It cannot be plausibly argued in our view that the meeting with only the second respondent has had the effect of vitiating this appeal process. We stress that we do not understand the scheme as suggesting that this is the effect of its "exclusion" from the meeting.

- 17 Regulations 6(2), 6(3) and 6(4) of the Act provide as follows:

"(2) If a medical scheme is of the opinion that an account, statement or claim is erroneous or unacceptable for payment, it must inform both the member and the relevant health care provider within 30 days after receipt of such account, statement or claim that it is erroneous or unacceptable for payment and state the reasons for such an opinion.

(3) After the member and the relevant health care provider have been informed as referred to in subregulation (2), such member and provider must be afforded an opportunity to correct and

resubmit such account or statement within a period of sixty days following the date from which it was returned for correction.

(4) If a medical scheme fails to notify the member and the relevant health care provider within 30 days that an account, statement or claim is erroneous or unacceptable for payment in terms of subregulation (2) or fails to provide an opportunity for correction and resubmission in terms of subregulation (3), the medical scheme shall bear the onus of proving that such account, statement or claim is in fact erroneous or unacceptable for payment in the event of a dispute."

18 Rule 15.6 of the scheme rules is essentially to similar effect as regulations 6(2) and 6(3). The scheme says neither the rule (or in effect regulations 6(2) and 6(3)) nor regulation 6(4) applies in this case because it says it does not suggest that the second respondent's claims are "erroneous or unacceptable for payment".

19 We find this submission difficult to comprehend. After all, the scheme in its written submissions to this appeal committee talks of a "forensic investigation" that it says it carried out on the second respondent's claims. It says:

"As a result of a forensic investigation carried out by Hosmed it was established that amounts totalling R96 000.00 which had been paid *bona fide* by Hosmed to [the second respondent] in accordance with the provisions of the Act and which pertained to drugs allegedly prescribed and sold by [the second respondent] could not be substantiated by invoices. [The second respondent] did not produce invoices or clinical notes pertaining to such drugs. It was further apparent that Hosmed has sustained a loss of R96 000.00 as contemplated in section 59(3) of the Act."

20 It was presumably the outcome of this "forensic investigation" that resulted in the settlement agreement. The second respondent says he was coerced. The

scheme puts up two affidavits saying he was not. It is unnecessary for us to make a finding on that issue for purposes of this ruling.

21 Mr Heher for the scheme says we are not at liberty to trawl behind the settlement agreement. We are urged to accept it as evidence of its content, namely, the second respondent's indebtedness to the scheme in the amount of R96 000.00. How that came about, he says, is no business of ours but that of an appropriate forum if the second respondent should be desirous of disputing its validity. He is right, of course.

22 But the scheme clearly disputes the second respondent's claim in relation to the R96 000.00 it says he owes it. In the language of regulations 6(2), 6(3) and 6(4) the scheme has expressed the opinion, following its forensic investigation, that the second respondent's accounts in relation to the R96 000.00 are "erroneous or unacceptable for payment" since he has failed (according to the scheme) to produce the invoices or clinical notes relating to those claims or accounts.

23 Having expressed that opinion, the scheme must satisfy this appeals committee that this is indeed so. The settlement agreement tells us nothing about the reason for the second respondent's indebtedness to the scheme. All it says is he owes the scheme R96 000.00. But what precisely has he done that he should owe the scheme? Mr Heher says, well, trust the settlement agreement. But we have and yet we are still nowhere near the basis of the

indebtedness. Without that, the scheme has woefully failed to discharge the onus that regulation 6(4) imposes on it.

24 Since the scheme's case is that it does not consider the second respondent's accounts to be "erroneous or unacceptable for payment", it could not then have notified him of that fact (as regulation 6(2) requires) and given him an opportunity to make amends and resubmit the accounts (as regulation 6(3) requires). Having thus failed to do either, the scheme bears the onus to prove that fact. All it does is refer us to a settlement agreement. That proves nothing because it does not show in what respects the accounts in question (and which accounts precisely) are "erroneous or unacceptable for payment". It also says nothing of the basis of the indebtedness.

25 We have not even been afforded the benefit of the "forensic investigation" report referred to in the written submissions. The registrar says this was refused on the ground that the matter might be the subject of civil litigation. The scheme did not dispute this. Instead it points us to a totally unsatisfactory piece of evidence.

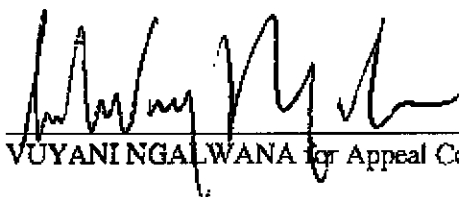
26 The point that seems lost to the scheme is that the settlement agreement (such as it is) can never constitute conclusive proof of the second respondent's indebtedness in these circumstances. It constitutes only prima facie proof. That is not enough for purposes of discharging the onus imposed on the scheme by regulation 6(4).

27 For these reasons, the scheme has no basis for effecting a set-off of R96 000.00 or any amount against the second respondent's claims.

28 Because of the finding we make, it is not necessary to deal with the other arguments advanced by the parties.

Finding

29 The scheme is directed to repay the R96 000.00 forthwith to the second respondent.


VUYANINGALWANA for Appeal Committee

For the Appellant: Mr J Heher

For the 2nd respondent: Mr TA Mogale

Date of hearing: 11 August 2009

Date of Ruling: 17 September 2009