

**IN THE APPEAL COMMITTEE OF THE COUNCIL FOR  
MEDICAL SCHEMES**

**Case Number: CMS 18639**

In the matter between:

**MA R**

Appellant

and

**REGISTRAR OF MEDICAL SCHEMES**

Respondent

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**RULING**

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Introduction

- 1 This appeal brings into sharp focus the tussle between the sacrosanctity of the rules of registered medical schemes on the one hand, and the application of such rules in the given circumstances of each case on the other. Rules are not there for their own sake. They are there with a view to addressing or averting a particular problem. Selfmed's managed

care provider, Medical Services Organisation South Africa (Pty) Ltd (“MSO”) says the rule with which we are here concerned serves as a mechanism “to ensure quality and cost-effective management of clinical conditions . . . [and to] empower patients . . . to make appropriate decisions regarding their treatment and care”. With that there can be no quarrel.

- 2 It is not the sacrosanctity of the “second opinion” rule that is at issue here. The appellant does not dispute the necessity for this rule. What is at issue is whether the application of the rule in the circumstances of this case meets the constitutional standard of reasonableness. In other words, is the decision taken by MSO and Selfmed (henceforth “the scheme”) one that a reasonable decision-maker could have taken in the circumstances (compare *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) at paragraph [110])?
- 3 Although this is a standard that has fairly recently been laid down by the Constitutional Court for the review of CCMA commissioners’ decisions, there can be no compelling reason why it can be said to find no application in the *sui generis* appeals of the kind we have here. At best it could be argued that this is no review. But then it is no appeal in the ordinary sense either. So there we are. In any event, both the appellant’s complaint of 25 April 2008 and his appeal against the

registrar's ruling complain of the scheme's unreasonableness in the circumstances.

#### The Parties' Respective Cases

- 4 The facts are known to both parties and will not be repeated in detail here except those in respect of which there is disagreement between them.
- 5 The appellant, a pensioner, complained that the scheme required that he make a trip with his then 63-year old wife from Polokwane to Pretoria on 17 hours' notice for a second opinion on whether or not she required spinal operations. This was, according to the appellant, communicated to him at 15h50 on 6 March 2008 and he was to present his wife at Pretoria the following morning at 09h00.
- 6 He says he was not given an opportunity to explain that this would be impossible since his wife was in severe pain, that an operation had already been arranged with a pre-eminent Orthopaedic Surgeon for 10 March 2008, and that he could not drive long distances at night because of his poor eyesight.

- 7 He also says he was led to believe that pre-authorisation had been approved because he was told by a certain “Thobeka” earlier on that day (6 March 2008 at about 09h00) that all that remained was a letter regarding the prosthesis limit. He says he faxed this immediately and then proceeded, together with his wife, pre-operatively to donate blood in anticipation of the surgical procedure on his wife.
- 8 He says in any event Doctor Louw’s was a second opinion to that of Doctors Van Zyl and Viljoen.
- 9 The scheme maintains that it “discussed” the issue of the appellant’s travelling to Pretoria with him. It says the appellant was given every opportunity to discuss the matter but was determined that a second opinion had already been obtained from Doctor Louw. It says the appellant was aware of the requirement for pre-authorisation for the procedure but decided nevertheless to go ahead with his wife’s procedure without the pre-authorisation. It says had the appellant explained his difficulty with travelling to Pretoria at short notice the scheduled appointment could have been postponed. In the result, it says its rules provide that in such circumstances the scheme is not liable to fund the procedure.
- 10 Rule 5.8 of the scheme’s rules provides as the scheme alleges.

### The Registrar's Ruling

- 11 The registrar took the view that because the rules of the scheme are binding on the scheme, its members and any person claiming a benefit under the rules, the scheme was correct in refusing to fund the procedure.

### The Appeal Committee's Finding

- 12 We are of the view that the scheme acted unreasonably in the circumstances of this case, and that the registrar failed to apply his mind to certain material facts in reaching the conclusion that he did. That is not to say the rules of the scheme are not binding. Section 32 of the Medical Schemes Act, 131 of 1998 ("the Act") is clear in this regard. But rules are there for a specific purpose and are not to be invoked *in vacuo* or for a purpose for which they were not designed. As earlier indicated, the scheme correctly set out the purpose for the "second opinion" rule which is a corollary of the pre-authorisation rule. That was in a letter dated 13 June 2008 from MSO to the scheme.
- 13 On 28 March 2008 the scheme's principal officer addressed a letter to the appellant in which he said, among other things

"The Board of Trustees have [sic] to be able to demonstrate that they took all reasonable measures to ensure all alternative

approaches had been explored before agreeing to allow members' contributions to be used for a complex and expensive procedure."

- 14 But on 25 February 2008, after examining the appellant's wife, a pre-eminent Orthopaedic Surgeon that even the scheme at the hearing of this appeal acknowledged as such gave an opinion in which he said:

"The patient has severe pain and cannot live with the pain any longer. Conservative measures failed to resolve the problem. Under these circumstances surgical treatment is proposed . . . ."

and then proceeded to suggest a specific treatment programme that was to accompany the surgical treatment.

- 15 Two days later on 27 February 2008, this pre-eminent Orthopaedic Surgeon, Dr Koos Louw (J.A.), forwarded to the scheme a motivation for the surgical procedure together with his full medical report on the appellant's wife and no less than three radiology reports. The motivation indicated clearly that Mrs M was to be admitted on 10 March 2008 and the surgical procedure done on 11 March 2008.

- 16 Only on the afternoon of 6 March 2008 at 15h50 did the scheme require Mrs M to submit herself for a second opinion the following morning in Pretoria, expecting a pensioner immediately to ready himself and his 63-

year old wife for a trip overnight or at dawn from Polokwane to Pretoria for an appointment at 09h00, evidently without any care for the patient's "severe pain" with which, according to the pre-eminent Orthopaedic Surgeon, she could not live any longer.

17 The scheme's unreasonableness lies not in requiring a second opinion but in the circumstances and the devil-may-care manner in which it sought such second opinion. It could have dealt with the matter with greater urgency and empathy in light of the "severe pain" to which Dr Koos Louw referred. It did not. It could have discussed the appellant's circumstances and those of his wife with him and even arrange that his wife sees a doctor around Polokwane. It did not. It could have discussed the possibility of postponing the surgical procedure pending the second opinion not only with the appellant and his wife but also with Dr Koos Louw who held the view that Mrs M had severe pain with which she could not live any longer. It did not. Instead it railroaded the appellant and his wife into an impossible situation virtually on the eve of the surgical procedure.

18 On a *conspectus* of all the facts and the parties' oral submissions at the hearing of this appeal, it is clear that the scheme invoked the rule not for the purpose for which it was intended (which purpose is articulated by it as set out earlier in this ruling) but rather with a view to creating a

situation that would make it legally possible for it to repudiate the appellant's claim. Such practice must be discouraged in the strongest terms possible lest it becomes endemic among medical schemes.

19 The registrar, with respect, seems to have taken a simplistic view of the matter. There is a rule. It was not followed. Therefore, the scheme was entitled not to pay. In the tussle between the sacrosanctity of the rules on the one hand, and the application of such rules as the circumstances demand on the other, the registrar has elected to place sacrosanctity above the demands of the circumstances. This is eminently unreasonable and could lead to all manner of unintended injustices as this case clearly demonstrates.

20 A rule unreasonably invoked is being abused. Abuse of the rules should never be condoned simply on the basis that they are binding. The High Court has uniform rules that govern its processes and these rules are binding on all persons who litigate in the High Court. But the fact that these rules are binding does not mean that they are to be doggedly enforced even when being abused by a litigant. The South African law reports are replete with instances where the courts have intervened where its rules have been abused, not by setting aside the rule in question but by setting aside the result to which its abuse has given rise. We are here faced with an analogous situation.

21 The registrar also appears to have taken the scheme's version of events at face value and, on the basis thereof, found in the scheme's favour. In accepting at face value the scheme's allegation

20.1 that it had a "discussion" with the appellant about an appointment for a second opinion,

20.2 that it afforded the appellant an opportunity to discuss his concerns about travelling to Pretoria on short notice, and

20.3 that it "would also have agreed" to the postponement of the surgery scheduled by Dr Koos Louw to take place on 11 March 2008,

the registrar lost sight of the appellant's complaint that

20.4 he was not consulted but was merely informed of the appointment that had been arranged by the scheme for the next morning in Pretoria,

20.5 he was not given any alternative options such as visiting a doctor near Polokwane where he lives,

20.6 the scheme's consultant flatly refused his request to explain and discuss the matter with a senior person but undertook to have a supervisor call him back (which did not happen),

- 20.7 when he called at 08h45 on the day of the scheduled second opinion appointment he was informed that the medical advisor who had sought the second opinion would not be available until 10h00,
- 20.8 when he called again at 10h10 he was informed that only another doctor (not a private individual member of the scheme) could speak directly to the medical advisor, and
- 20.9 only at about 14h00 on the day of the scheduled second opinion appointment (Friday 7 March 2008) was he eventually told by one “Madeleine” that the surgical procedure scheduled for 11 March 2008 (and for which Mrs M was to be admitted on Monday 10 March 2008) would have to be postponed.
- 21 The registrar does not deal with these submissions at all in his ruling, focussing only on the sacrosanctity of the second opinion rule and dismissing the appellant’s suggestion that Dr Louw’s was a second opinion. But this case raises wider issues than those with which the registrar deals in his ruling. The scheme nowhere denies the chronology of events as alleged by the appellant. That alone should have triggered at least some curiosity in the mind of the registrar as regards the correctness of the scheme’s version. As regards his acceptance at face value of the scheme’s allegation that it would have agreed to the postponement of the surgery, the registrar appears to have paid scant, if

any, regard to Dr Louw's expert opinion that Mrs M was in severe pain and that she could not live with that pain any longer.

22 It must also be borne in mind that MSO has only relatively recently been appointed by the scheme as it was quick to remind this committee at every turn when references were made to previous instances when second opinion opinions were not sought. Thus, the process of second opinions was new and foreign to the Ms. Mrs M has had spinal surgery on two previous occasions and those operations were authorised by the scheme without question. In light of that, the appellant's submission that he was led to believe (by "Thobeka" when she said only a prosthesis limit letter was outstanding for approval) that pre-authorisation had been granted, becomes more plausible than the schemes bare denial of that fact. The registrar erred, and the scheme acted unreasonably, in not having regard to this. It is not an answer to say (as MSO said at the hearing) that the two previous operations occurred before its appointment.

23 By its conduct, the scheme is effectively not only questioning the need for the operation under discussion but also the need for the two previous operations.

## Conclusion

24 In these circumstances, the registrar's ruling falls to be set aside as being unreasonable in circumstances and failing to take into account numerous facts that are material in the determination of this case.

25 The scheme is ordered to fund the expenses incurred by the appellant for the surgical procedure on his dependent wife.

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VUYANI NGALWANA for Appeal Committee

*For the Appellant:*                      *Mr A R M*  
*For the Respondent:*                *Dr T Kruger, C Garner, Solomon*

*Date of hearing:*                        *15 December 2008*  
*Date of Ruling:*                         *16 January 2009*