

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

In the matter between:

M [REDACTED]

Appellant

and

**REGISTRAR OF MEDICAL SCHEMES**

First Respondent

**BESTMED**

Second Respondent

---

**RULING**

---

- 1 This is an appeal by the member against a ruling of the Registrar in which he found that the scheme had acted properly in terms of its rules and the Medical Schemes Act, 131 of 1998 ("the Act"), in refusing to fund the growth hormone treatment or therapy.
- 2 The facts are known to both parties and will not be repeated here.

- 3 The condition in issue (growth hormone deficiency) is clearly not a prescribed minimum benefit condition. It is neither an emergency medical condition nor one of the 270 medical conditions listed in the annexure to the regulations. It is not one of the 26 listed chronic conditions either. There is ~~no~~ dispute between the parties about any of this.
- 4 Mr P [REDACTED] for the appellant contended that since growth hormone deficiency can later result in psychological problems if not treated, the condition is an emergency medical condition. This is not a sound proposition. In any event no medical or clinical evidence has been submitted for it.
- 5 The scheme says the treatment is excluded by its rules because it is a biological substance. This is not in dispute.
- 6 What is at issue is whether the member's daughter's case is special enough to warrant ex gratia funding. In its letter of 19 January 2009 the scheme acknowledged that it has a policy "*to thoroughly investigate special cases in order to make an informed decision, instead of just denying benefits*". The consideration of "*special cases*" always calls for the proper exercise of discretion.
- 7 It is common cause that the treatment runs over a period of 10 years at R1 000 per month. The appellant says the treatment can be effected for a

trial period of 6 months to see whether the member's daughter will respond satisfactorily to it.

8 But Mr G [REDACTED] for the scheme points to a number of difficulties with the ex gratia option, including

8.1 that the appellant is no longer a member of the scheme, and

8.2 that there is a difference of opinion among experts as regards the efficacy of the treatment.

9 Ordinarily, the membership point would have been a complete answer to this appeal. But the appellant's resignation from the scheme was brought about by the scheme's apparent refusal to exercise a discretion it says it has. In refusing to exercise its discretion it points to at least 5 factors, namely,

9.1 the treatment is excluded by the rules,

9.2 the likelihood is high that the treatment will not work,

9.3 the treatment is risky,

9.4 the treatment is unaffordable to the scheme, and

9.5 this is a pre-existing condition which the appellant failed to disclose.

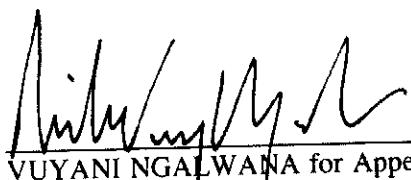
10 While the first point is totally irrelevant to the exercise of discretion for ex gratia funding (because funding is made ex gratia precisely because the rules do not provide for it), the others are totally unsubstantiated. Thus, the

scheme cannot benefit from its own wrongdoing in failing to exercise its discretion. The principle is usually expressed in the maxim *nemo ex suo delicto meliorem suam condicionem facere potest*. (See **Ulpian: Dig. 50.17.134.1; Principal Immigration Officer v Bhula 1931 AD 323 at 330; Parity Insurance Co Ltd v Marescia and Others 1965 (3) SA 430 (A) at 433 and 435**). There is thus no reason why the scheme should not in these circumstances apply its mind properly (and without fetter) to the special circumstances of this case on its merits and then convey its decision to the appellant with reasons therefor. The fact that the appellant is not currently a member should not enter the equation at all. Neither should considerations of whether or not the treatment is covered by the rules. This is countenanced by the need for the exercise of discretion in any event.

- 11 If the scheme should in the exercise of its discretion decide that the appellant's daughter's case is deserving of special funding, then *caedit questio*. But if the scheme should dismiss the request and the appellant takes the view that she has been discriminated against, or that the reasons given for a negative response are not justified by the material considered by the scheme, then she will have a remedy in administrative law either by taking the scheme'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 scheme could be instituted in this appeals committee.

- 12 In the result, the scheme is directed to apply its mind to the special circumstances of this case in the exercise of its discretion with a view to an ex gratia funding of the treatment. Regard must be had to all relevant factors, including managed health care considerations as defined in the Act.

  
VUYANI NGALWANA for Appeal Committee

19 April 2010

*For the Appellant:* Mr P 

*For the 2<sup>nd</sup> respondent:* Mr G 

*Date of hearing:* 31 March 2010  
*Date of Ruling:* 12 April 2010