

APPEAL COMMITTEE OF THE COUNCIL FOR MEDICAL SCHEMES

In the matter between:

P Appellant

and

REGISTRAR FOR MEDICAL SCHEMES First Respondent

POLMED MEDIAL SCHEME Second Respondent

RULING

- 1 This is an appeal against a decision of the office of the registrar in which it found that the scheme had correctly refused to fund the cost of both a manual and a motorised wheelchair for the appellant.
- 2 The registrar's office says the rules of the scheme stipulate that only quadriplegics and tetraplegics qualify for a funded motorised wheelchair.
- 3 The appellant is by her own admission a paraplegic and neither a quadriplegic nor a tetraplegic. She accepts that the rules do not countenance the funding of both the motorised and manual wheelchairs at once. Nevertheless, she says the

scheme created a legitimate expectation when it funded both in relation to her on two previous occasions. She wants the scheme to continue funding the motorised and manual wheelchairs for her and says she will keep making the request to be funded from the ex gratia account as has been done on two previous occasions.

- 4 She maintains that the application of the rule excluding the funding of two chairs for her at this stage when this has been done on two previous occasions is unreasonable. For this submission she relies on a previous ruling of this committee in which it was said that the application of a rule in circumstances that give rise to an unjust, unfair and unreasonable result cannot be countenanced in a constitutional dispensation in which we live today.
- 5 The jurisprudence in relation to contract law has advanced somewhat since Smalberger JA, writing for the majority, said in **Sasfin v Beukes 1989 (1) SA 1 (A)** at 9B-C:

“One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one’s individual sense of propriety and fairness.”

(my emphasis)

- 6 Fairly recently, this approach appears to have been echoed by the Supreme Court of Appeal (per Cameron JA as he then was) in **Napier v Barkhuizen 2006 (4) SA 1 (SCA)** at pars [12] and [13] in these terms:

“[12] Nor does the fact that a term is unfair or may operate harshly by itself lead to the conclusion that it offends against constitutional principle.... [T]he Constitution prizes dignity and autonomy, and in appropriate circumstances these standards find expression in the liberty to regulate one’s life by freely engaged contractual arrangements....

[13] [I]ntruding on apparently voluntarily concluded arrangements is a step that Judges should countenance with care, particularly when it requires them to impose their individual conceptions of fairness and justice on parties’ individual arrangements.”

7 However, to the extent that the Supreme Court of Appeal may have taken the view that reasonableness and fairness are not standards by which a Court should decline to enforce a contractual term, the Constitutional Court has said that such a *dictum* “cannot be supported”.¹

8 Thus, the proper approach to constitutional challenges in relation to the implementation of contractual terms, and rules governing parties that have voluntarily subscribed to those rules, is to weigh up the fairness and reasonableness of the result of the implementation on the one hand, against the freedom of the parties to regulate their own affairs in accordance with the rules to which they voluntarily subscribe on the other.

9 In **Barkhuizen** the Constitutional Court refused to enforce a contractual term that had an unfair, unjust and unreasonable result.

10 This appeal is somewhat different. The appellant relies on what she terms “precedent” created by the scheme. She says the scheme must be held to the

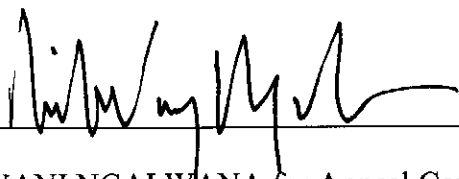
¹ See **Barkhuizen v Napier 2007 (5) SA 323 (CC) at 344F, par [72]**

“example or guide” that it has created even if the rules do not permit it to do so. Thus, this is not a case for weighing up the fairness or otherwise of the implementation of an existing rule. It is rather a case of weighing up the fairness or otherwise of flouting the registered rules of the scheme. This is not what the Constitutional Court was dealing with in **Barkhuizen** and this committee cannot validly compel a scheme on the facts of this case to flout its own registered rules.

11 On the facts of this case there is no discernible injustice, unfairness or unreasonableness to the appellant. She says her rehabilitation programme was tailored around her access to the two wheelchairs. This is not enough reason to compel a scheme to act contrary to registered rules. The appellant advanced no basis why she could not change her rehabilitation programme.

12 It must be emphasised that this committee does not say there can never arise a situation where a legitimate expectation can never countenance conduct by the scheme that is contrary to registered rules. What this committee says is that the facts of this case do not justify such a drastic measure. It is not necessary for purposes of this ruling to give examples of instances where a legitimate expectation could give rise to a finding in favour of the appellant.

13 On these facts, the appeal cannot succeed.



VUYANI NGALWANA for Appeal Committee

For the Appellant: Mr and Mrs P

For the 2nd respondent: Mr S Tshabalala; S Maphalane

Date of hearing: 29 June 2010

Date of Ruling: 26 July 2010