

APPEAL COMMITTEE OF THE COUNCIL FOR MEDICAL SCHEMES

In the matter between:

SIZWE MEDICAL FUND

Appellant

and

REGISTRAR FOR MEDICAL SCHEMES

Respondent

RULING

- 1 This is an appeal against a decision of the office of the registrar in which it imposed a penalty of R300 000 on the scheme for operating an unregistered benefit option (called the Primary Network Option) for the 2009 year despite the registrar's express direction that the option remains unregistered and must not be operated in the 2009 year.

- 2 The grounds upon which the registrar's office declined to register the option included the financial performance of the option, membership size, proposed contribution increase and the effect that these would have on the scheme. In short, the registrar's office was concerned about the financial soundness of the

benefit option and the effect that this might have on the financial soundness of the scheme in general.

- 3 The scheme nonetheless advertised the benefit option and appears to have operated it in the 2009 year. Mr Baloyi for the scheme submitted at the hearing that the benefit option was not operated in the 2009 year. But this submission is inconsistent with the apology conveyed by him in his letter of 14 December 2009 to the registrar for doing precisely that which he says has not been done. It is also inconsistent with Ms Gabela's submission in the notice of appeal that the scheme was "not in wilful contravention of the Act".

- 4 The scheme seems to blame its contravention of the Act on the office of the registrar. It says it dispatched a letter to the registrar in which it set out the grounds on which the benefit option should be registered. It says it conveyed to the registrar that
 - 4.1 it had found a new managed care partner "with [un]impeachable track record";¹
 - 4.2 it had submitted a reasonably good marketing plan; and
 - 4.3 it had undertaken to the registrar to change the fortunes of the benefit option within a reasonable period of time.

- 5 It says the registrar did not respond to these representations. When no response came, the scheme then assumed that the registrar had "listened to our pleas and

¹ The registrar was blamed for not providing financial position of the previous managed care partner which, Ms Gabela says, had caused the scheme reputational damage, loss of membership and therefore loss of revenue.

registered the option". It says the scheme was entitled to draw this inference from the registrar's silence and for this proposition reliance is placed on the decision of the Appellate Division (as it then was) in **McWilliams v First Consolidated Holdings (Pty) Ltd 1982 (2) SA 1 (A)**.

6 But not only is that case not authority for the proposition advanced here; it is also wholly distinguishable from this case on the facts. That case concerned the confirmation of an oral agreement (for the sale of shares) by way of a letter and later a written contract that was never signed. The appellant denied the existence of the oral agreement and the Appellate Division rejected his denial on the ground, among others, that he had acquiesced in the oral agreement not only by his failure to gainsay the terms recorded in a letter confirming the terms of the agreement (in circumstances where he would reasonably have been expected to do so if he did not agree that the letter recorded the terms of the oral agreement) but also by his conduct in querying only the purchase price and not the other terms of the agreement.

7 The principle articulated by the Appellate Division in that case also contained a caveat that if the omission to respond to the letter is satisfactorily explained, then no adverse inference can be drawn against the party who failed to set the record straight. The Court said the following in this regard

"I accept that 'quiescence is not necessarily acquiescence' ... and that a party's failure to reply to a letter asserting the existence of an obligation owed by such party to the writer does not always justify an inference that the assertion was accepted as the truth. But in general, when according to ordinary commercial practice and human expectation firm repudiation of such an assertion would be the norm if it was not

accepted as correct, such party's silence and inaction, unless satisfactorily explained, may be taken to constitute an admission by him of the truth of the assertion, or at least will be an important factor telling against him in the assessment of the probabilities and in the final determination of the dispute. And an adverse inference will the more readily be drawn when the unchallenged assertion had been preceded by correspondence or negotiations between the parties relative to the subject-matter of the assertion."

8 Thus, the proposition for which the scheme contends in this case is more in the nature of an exception to the principle laid down by the Appellate Division rather than the principle itself. In other words, the case on which the scheme relies is not authority for the proposition advanced. It is rather an exception to the principle laid down by the Appellate Division. The Appellate Division's premise is recorded in the opening lines of the excerpt cited above, namely, **"a party's failure to reply to a letter asserting the existence of an obligation owed by such party to the writer does not always justify an inference that the assertion was accepted as the truth"**.

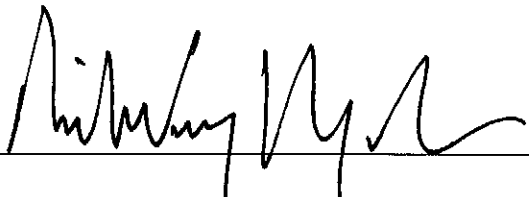
9 In any event, the registrar's Mr Mmatli denied receiving the letter referred to. If the scheme were intent on conveying its representations to the registrar one would have expected it to follow up and ascertain from the registrar's office that the letter had indeed been received. There was no evidence that this done. Even though Mr Baloyi says the letter was hand-delivered, he provided no acknowledgement of receipt by the registrar's office.

10 In complete contrast to what happened in the **McWilliams** case, here the registrar had expressly directed the scheme not to operate the benefit option. He

had not agreed orally to the representations of the scheme and then failed to respond to a subsequent letter sent to him to confirm the terms of that agreement.

11 The case does not assist the scheme.

12 In the result, the appeal cannot succeed.



VUYANI NGALWANA for Appeal Committee

For the Appellant: L Gabela; M Baloyi

For the 2nd respondent: Mr S Mmatli

Date of hearing: 29 June 2010

Date of Ruling: 27 July 2010