

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

In the matter between:

TELEMED

Appellant

and

REGISTRAR OF MEDICAL SCHEMES

Respondent

RULING

[1] This is an extraordinary appeal.

[2] On 8 June 2007 Telemed's Chief Executive Officer addressed a letter to the Financial Supervision Unit of the Council for Medical Schemes. In it he "advised" that Telemed's board of trustees had "*taken a decision*" to implement an interim increase of 6% in member contributions in respect of its Platinum, Gold and Gold Select benefit options. This, he said, was on account of considerations of the scheme's solvency levels which were deteriorating. To illustrate this, he forwarded the scheme's business plan.

- [3] With effect from 1 July 2007, the new interim increase was implemented by the scheme. No rule amendment in respect thereof had been sought from the Registrar, and no draft rule amendment and board resolution in relation to any such rule amendment had been conveyed to the Registrar. At the hearing, the scheme's representative conceded that the scheme had implemented an unregistered rule.
- [4] On 19 September 2007 the Registrar's office required of the scheme to explain in writing, among other things, the reasons for the increase as explained to members, and why no application had been made to the Registrar for such increases. It also requested the scheme to show cause why penalties should not be imposed on the scheme for implementing an unregistered rule.
- [5] In its response the following day, the scheme said it considered the letter of 8 June 2007 to be "*an application ... for ... approval of the interim increase*". It said when no response to that letter was received from the Registrar's office, it "*proceeded on the basis that the interim increase [had] been approved*". In a letter of 26 September 2007, the Registrar's office advised the scheme that the letter of 8 June 2007 was clearly not an application for rule amendment as required by section 31(2) of the Medical Schemes Act, 131 of 1998 ("the MSA"). Unhappy with the scheme's response, it then imposed a penalty of R80 000 for the implementation of an unregistered rule (comprising R1000 for each day of continuing contravention of the MSA – for the days 1 July to 18 September 2007 – in terms of regulation 32 read together with section 66(3) of

the MSA). It appears from the appeal papers that the penalty had initially been calculated at R92 000.

- [6] In response to that letter the scheme, belatedly on 19 October 2007, sought a retrospective approval of the interim contribution increase (with effect from 1 July 2007), again referring to its business plan and letter of 8 June 2007 as motivation. Again, no rule amendment application was submitted – just a short missive signed by three members of the board of trustees. It read, tersely:

“We, the undersigned, certify that the Interim Increase of 6% on the Platinum, Gold & Gold Select Options was approved by the Board of trustees at a meeting held on 31 May 2007.”

- [7] The Registrar’s office declined the request in a letter dated 23 October 2007. Three days later, the scheme’s Chief Executive Officer applied for a 12% interim increase and requested that the penalty be waived because the trustees had no malicious intent in implementing an unregistered rule. It would seem that finally a rule amendment application for a 12% increase was submitted because the Registrar, in a letter dated 25 January 2008, approved the application effective from 1 October 2007. The contributions unlawfully collected from members for the months of July, August and September 2007 were to be refunded. The penalty was reduced from R80 000 to R40 000.

- [8] Two weeks later, on 7 February 2008, the chairperson of the scheme’s board of trustees confirmed to the Registrar’s office that “*the process of refunding*

members for the illegal contributions [had] been finalized". The concession as regards the illegal implementation of unregistered rules, and the Registrar's charitable reduction of the penalty from R92 000 to R80 000 and then to R40 000 notwithstanding, the scheme conveyed to the Registrar that it has now taken a decision to lodge an appeal for the waiver of the penalty. The Registrar has indicated that the penalty is to be payable not from the scheme's account but from the remuneration of the board of trustees whose responsibility it is to ensure the scheme's compliance with the MSA.

[9] Section 31(2) of the MSA provides that no rule amendment is valid unless approved by the Registrar. Regulation 32 stipulates the amount of penalty to be levied for breach of the MSA, and how such penalty is to be calculated. Section 66(3) gives the Registrar the discretion to waive any penalty, wholly or in part, levied as a result of breach the MSA. He has exercised that discretion – not once but twice – when the penalty was reduced from R92 000 to R80 000, and again from R80 000 to R40 000. Now the scheme wants it reduced further to zero.

[10] I am satisfied that there is absolutely no ground upon which this appeal committee should interfere with the Registrar's decision. In fact, this is a case in which an increase in the penalty to the original R92 000 would be justified – with costs to boot. An order that the penalty be waived in its entirety would send the wrong message as regards implementation of unregistered rules, regardless of the circumstances.

[11] In the result, the appeal cannot succeed and the penalty imposed by the Registrar remains. It is to be defrayed from the board of trustees' remuneration and not from the scheme's account. They have the ultimate responsibility to ensure the scheme's compliance with legislative provisions. Clearly they have failed to do so in this case. The scheme's wallowing solvency levels is no reason to contravene the law. A timeous rule amendment application could have been lodged and none of this would have happened.

V NGALWANA for the appeal committee

Date of Hearing: 08 May 2008

Date of Ruling: 19 May 2008

For Telemed: Mr S Pilane

For Registrar: Mr E Theys