COUNCIL FOR MEDICAL SCHEMES APPEALS COMMITTEE
(CENTURION)

In the matter between:

S Appellant

and

DISCOVERY HEALTH MEDICAL SCHEME Respondent

RULING

A. INTRODUCTION

1. This is an appeal in terms of section 48 of the Medical Schemes Act, 131 of 1998 (*"the MSA"*) against a decision of the scheme's disputes committee dated 24 June 2015 in which it found that the scheme was not liable to fund a procedure known as Selective Dorsal Rhizotomy (SDR) from the scheme's Overseas Treatment Benefit (OTB). The basis advanced by the disputes committee for this finding is that SDR is available in South Africa.

2. SDR is a procedure done for the removal of spasticity in children with Spastic Diplegic Cerebral Palsy so as to afford them a chance of being able to walk in future. The appellant's son, aged 4, was one such child.

B. APPROPRIATE PROCEDURAL ROUTE

3. Both the scheme's disputes committee and the registrar's office advised the appellant to lodge an appeal against the disputes committee's decision with the Appeals Committee under section 48 of the MSA. But the judgment of the Cape High Court in *Genesis Medical Scheme v Chairperson of the Appeal Board of the CMS and Others* [2015] 1 All SA 672 (WCC) – in relation to which leave to appeal has been refused by the Constitutional Court – has made the position quite clear. It says:

> *"An internal body which seeks to settle a complaint is a body which forms part of a particular medical scheme. The complaint is lodged, in effect, against a medical scheme. This means that when a party complains to the internal mechanism and is dissatisfied with the decision taken by this internal body, the complaint must now be processed in terms of s 47 by the Registrar. In the event that the Registrar takes upon himself or*

herself to resolve this complaint, an appeal from the attempt by the Registrar to resolve the complaint falls within the scope of s 48. This conclusion must follow from the very idea of s 47, which envisages an external body, whether the Council or the Registrar, which must hear and resolve the complaints which had been lodged against the medical scheme, whether taken by the scheme or pursuant to a decision of the latter's internal mechanism as set up in terms of s 29 (1)(j)."[1]

4. It is thus clear that the appellant should rather have followed the section 47 route by complaining to the registrar before lodging an appeal with this Appeals Committee under section 48. But because she has followed the route that she has on the advice of everybody, it would be unconscionable to non-suit her on that basis.

C. LATENESS AND CONDONATION

5. A different point that arises is that the appeal is late and the appellant has sought condonation for the lateness. The scheme urges us not to condone the lateness. It says the reasons are *"not adequate"*. We are satisfied – especially given the confusion as regards the proper route to follow and the personal circumstances that the appellant has placed before us in explaining the lateness –

---

1 At para [22]

that the lateness ought to be condoned. The issue that falls to be decided is quite important and it is necessary that the Council for Medical Schemes provides some clarity on it as it is the first time that this issue has come up for determination.

D. THE MERITS

6. The appellant wants the scheme to fund SDR from the OTB. The OTB reads as follows:

> *"14.2 Included in the member's OTB is cover for both in- and out-of-hospital, evidence based, clinically-appropriate medical, surgical, dental and other treatment given by and on the authority of a registered member of the medical profession, where such treatment is not available in South Africa in circumstances specified below, and where the member has travelled specifically to seek such treatment. For the purposes of this clause, 'not available' in South Africa only means-*
>
> *14.2.1 where the envisaged treatment is not capable of being provided in South Africa in that the know-how, skill, expertise, device and/or equipment required for the*

> *treatment does not prevail or exist and no suitable clinically-appropriate or cost-effective alternative treatment is capable of being provided to satisfactorily treat the member . . ."*

7. According to the scheme it pays up to R500 000 under the OTB. The appellant says SDR was *"not readily available in South Africa"* at the time of her son's procedure in the United States in October 2014 at a princely cost of US$44,245. Another phrase that features repeatedly in her submissions to describe the position in South Africa is that SDR is not *"routinely available"* in South Africa. Another explanation is that there is no one *"experienced enough"* to do the treatment in South Africa.

8. But none of these considerations are relevant for purposes of funding under the OTB. What the appellant must show is that the treatment *"is not available in South Africa"*, not that it is *"not routinely available"* or *"not readily available"* or there is no sufficient experience here. The threshold is not higher than mere non-availability. The appellant raises the bar when she talks of *"routine"* or *"ready"* availability or sufficient experience. The OTB rule does not require that. What it requires is non-availability

of the procedure and absence of able professionals to perform it. In any event, in a transcribed telephonic conversation that the appellant has not called into question, Professor Figaji of the Red Cross Children's Hospital says *"we do it regularly"*.

9. We appreciate that every parent naturally wants her child to be attended to by the best and experienced medical professional. But one cannot force one's own standards – which are perfectly reasonable – on the scheme's funding modalities.

10. The appellant says she was misled by the scheme in that it referred her to hospitals which did not do the procedure. But she does not deny that she was given the names of professionals who perform that procedure. Even when she does eventually find the correct hospital, she says it did not perform that procedure *"routinely"* and the machines had not been used for over a year. She also anecdotally points to a *"waiting list for over a year"*. But that is quite simply not the standard. The standard is whether the procedure is *not available* in the sense that it is not *"capable of being provided"* in South Africa by people who are able to provide it. The words *"know-how"*, *"skill"* and *"expertise"* must be

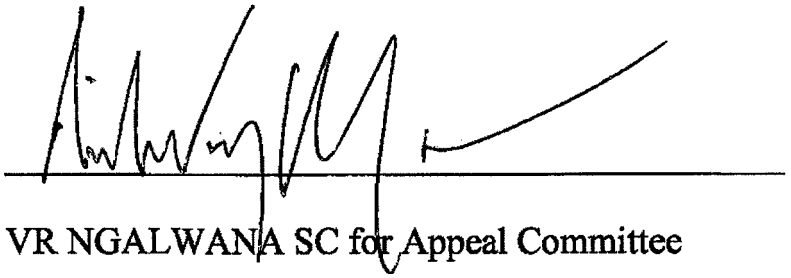
understood in that sense, not in the sense that service providers must be the best people among those who perform the procedure.

11. The scheme says the appellant's claim falls properly to be paid under a different benefit rule – the International Treatment Benefit (ITB) under which it has already paid her R98 511 and another R39 563. The ITB provides as follows in rule 11.6

> *"A beneficiary shall be entitled to cover for the usual, reasonable costs of medical, surgical, dental (to sound natural teeth) and other treatment given in a hospital and by and on the authority of a member of the medical profession, which the member elects to receive out of South Africa, provided that:*
>
> *11.6.1 such treatment is routinely available in South Africa from a registered member of the medical profession. For the purpose of this clause, "routinely available" shall mean where the envisaged treatment is capable of being provided in South Africa in that the know-how, skill, expertise, device and/or equipment required for the treatment does not prevail or exist and no suitable clinically-appropriate or cost-effective alternative treatment is capable of being provided to satisfactorily treat the member*

12. Thus, the appellant is entitled to the *"usual reasonable cost"* of the procedure in South Africa under the ITB, not to <u>full</u> *"cover"* for the procedure in the United States.

13. In the result, the appeal cannot succeed.



VR NGALWANA SC for Appeal Committee

For the appellant: *A Sops*
For the scheme: *N Taitz; S Singh; Dr N Madhlopha*
For the registrar: *M Winkler*

Date of hearing: *18 February 2016*
Date of Ruling: *11 April 2016*