



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

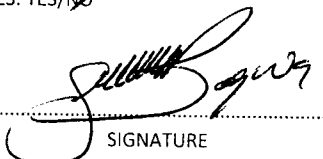
29/01/2016

CASE NO: 2973/2015

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHERS JUDGES: YES/~~NO~~
(3) REVISED

28/01/16
DATE


SIGNATURE

In the matter between:

GOVERNMENT EMPLOYEES MEDICAL SCHEMES

Applicant

and

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

1st Respondent

REGISTER FOR MEDICAL SCHEMES

2nd Respondent

ALFRED MOKODITOA

3rd Respondent

NTEBENG MOKODITOA

4th Respondent

JUDGMENT

Baqwa J

- [1] This is an application for an order reviewing and setting aside the decision of the Appeal Board of the Council for Medical Schemes (the first respondent) to dismiss the applicant's appeal against a decision of the Appeal Committee.
- [2] The Government Medical Scheme (the applicant) further seeks an order upholding the applicant's decision to terminate the membership of Alfred Mokoditsoa (the third respondent) and dismissing his appeal against that decision and ancillary relief.
- [3] The background to this application is as follows: The applicant is a restricted medical scheme registered in terms of the Medical Schemes Act 131 of 1998 ("the MSA") and Ntebeng Mokoditsoa (the fourth respondent) is the primary member of the applicant with the third respondent being a dependant.
- [4] The fourth respondent alleged that the applicant had wrongfully terminated the membership of the third respondent as a result of submissions of fraudulent claims by the latter.
- [5] The third respondent who is a pharmacist by profession owned four pharmacies which rendered services to the applicant's members. The **causis belli** relates to fraudulent claims submitted on behalf of the applicant's members through one of the pharmacies, Tshwane Pharmacy.

- [6] The applicant alleged that the **modus operandi** used in these fraudulent activities included submitting claims for items not covered by the medical scheme, claiming for items or medicine not actually supplied to members, claiming for other items to cover shortfalls on chronic medicine and members receiving cash in exchange for phantom claims.
- [7] Pursuant to a complaint by the fourth respondent, the Registrar of Medical Schemes (the second respondent) had found in favour of the third respondent and directed that the applicant re-instate the third respondent.
- [8] The applicant appealed against the decision of the second respondent to the Appeals Committee of the first respondent but was unsuccessful.
- [9] The applicant lodged a further appeal against the Appeals Committee's decision to the first respondent but was also unsuccessful. The first respondent upheld the decision of the Appeals Committee with the result that the third respondent continued to be a dependant member of the applicant.
- [10] In summary, the first respondent found that:
- 10.1 the applicant was precluded from relying only on the MSA to terminate the third respondent's membership for any fraudulent act not related to the third respondent's dependant membership of the scheme.
 - 10.2 Rule 12.5.1 (read with Section 29 (2)) provides for termination of membership for fraudulent claims by a person acting in their capacity as a member of the scheme.
 - 10.3 The rules of the applicant, with specific reference to 12.1.5 ought to be read together with Section 29 (2) of the MSA.

10.4 Even if it was accepted that the third respondent perpetrated the alleged fraud, he had not done so as a dependant member and as such, he was not in contravention of Section 29 (2) (c) and (d) and Rule 12.5.1 which do not permit the termination of membership in the circumstances of the third respondent's case.

[11] The applicant submits that the fact of the third respondent having committed fraud or otherwise is not for consideration in the present application and that this application ought to deal with questions of law and not fact.

[12] The submission by the applicant is however not entirely correct. Issues of law may play a preponderant role in the review but such issues cannot be considered **in vacuo** precisely because it was the factual considerations that ultimately resulted in the termination of the third respondent's membership.

[13] It is however correct that the specific question before the first respondent was whether the second respondent was correct in concluding that Section 29 (2) and Rule 12.5.1 of the Rules do not extend to submissions of fraudulent claims by dependants in their capacity as service providers. The first respondent was therefore not called upon to make a specific finding relating to the commission of fraud and it cannot be faulted for not making such a finding.

[14] In order to decide whether the first respondent's decision is reviewable or not it is necessary to briefly analyse the regulatory environment in which the applicant operates with reference to the MSA and the Rules.

14.1 That environment has already been traversed both in the heads of argument and in the address by Counsel today.

14.2 It is "*sensible and business-like*" as submitted by counsel for the applicant Mr Tsatsawane to treat Section 29 (2) as a stand-alone section – which could have been used by the applicant in terminating his membership without any provision for such in its rules. It would however in my view fly in the face of the Endumeni Municipality decision which cautions judges not to yield to the temptation of reading into laws what seems sensible but is not intended or stated in the legislation. The introductory words to Section 29 (2) read "*A medical scheme shall not cancel or suspend a member's membership or that of any of his or her dependants, except on the grounds of -*" Clearly that section is in line with what both Counsel for the respondents stated with reference to the Act namely that it was enacted to regulate business between a scheme and its members and not other parties such as service providers. There is no reference whatsoever to a service provider in Section 29 (2). If Mr Tsatsawane's submissions are accepted I would have to read the words service provider into that subsection.

14.3 In my view, upon a reading of the Act it is quite clear that the Rules do not have to be literally a mirror image of the Act. The fact therefore that the provisions of Section 29 (2) are not included under Section 29 (1) does not **ipso facto** create a stand-alone status to Section 29 (2). That much is indicated by the very introductory words of that section which means therefore that Section 29 (2) remains within the broader scheme of things which is indicated in the preamble to the Act, namely to regulate matters between the scheme and its members and no other parties.

See **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 (SCA) at para 18 where the following was stated:

“Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production.

Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbussinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made.”

[15] Rule 4.5 defines “beneficiary” as being “a Member or a Dependant duly registered as such in accordance with these Rules”.

[16] Rule 4.13 defines “Dependant” as “a person who qualifies as a Child Dependant or as an Adult Dependant of a member in accordance with the definitions in these Rules and the provisions of Rule 6 hereof and who is accepted and registered as a Dependant of such a member of the Scheme, for so long as such person’s registration is approved and current in accordance with these Rules.”

[17] Rule 4.23 defines a member as follows: “*a member is any person who is eligible to be a member of the scheme in terms of Rule 6 of the Rules or who is registered as such by the scheme.*”

[18] The MSA defines a beneficiary as “*a member or a person admitted as a dependant of the member.*”

[19] As can be observed from the provisions of the MSA and the Rules, a membership relationship is created between the scheme and a member concerned which entitles the member to derive benefits from the services provided by the scheme. This relationship defines the environment and parameters within which the scheme and the member interact. It does not permit the involvement of a third party not referred to in the Act or the Rules.

[20] The relationship between the third respondent and the applicant was as a service provider.

[21] The third respondent's relationship with the applicant is as a dependant of the fourth respondent.

[22] There is no definition of a service provider in the rules. Rule 4.14 defines a “*Designated Service Provider*”. That being a category of healthcare providers who form part of a preferred list of providers which members are required to utilise for the provision of services. The third respondent does not fall within this category.

- [23] Rule 15.5 provides for the procedure to be followed whenever there is a query regarding an account, statement, claim or other request for reimbursement from a healthcare provider: *"The scheme shall notify the relevant member and the healthcare provider, within thirty (30) days after receipt thereof and state the reasons for such an opinion. The scheme shall afford such member and provider the opportunity to resubmit such corrected account or statement to the scheme within sixty (60) days following the date from which it was returned for correction."*
- [24] Rule 15.6 provides for the suspension of a claim or request for reimbursement to a provider when there is alleged fraudulent action by a member or any of his/her dependants or the provider. Alternatively, in terms of Rule 17.4 the scheme may make payment of the claim in full or pay a portion thereof at the discretion of the Board.
- [25] This is the procedure which the applicant ought to have followed regarding any queried claims by Tshwane Pharmacy as a service provider. There is no provision for suspension of membership as a form of sanction or penalty.

[26] Paragraph 6 of the decision of the first respondent reads as follows:

“6. The relevant portion of Rule 12.5.1 reads:


“The Board may... terminate the membership of a Beneficiary whom the Board finds guilty of abusing the benefits and privileges of the scheme by presenting false claims or making a material misrepresentation.....”

*While the Rule does indeed provide for the termination of membership for “false claims”, the difficulty for the applicant is that as the Rule reads, the person whose membership is sought to be terminated must have committed fraud in his/her capacity as a member of the applicant; that much is clear from the context. Surely, it is only when one is acting in one’s capacity as a member that one can be “guilty of abusing the benefits and privileges of the scheme”; the “benefits and privileges” which are not to be abused are those attaching to, and enjoyed by, a member in his/her capacity as such. There is nothing in the Rule, as it stands, providing for the termination of membership where a member has committed fraud in any capacity other than in their capacity as a member of the scheme; there must be a nexus between the act of fraud and the fact of being a member. Where, as **in casu**, the third respondent allegedly committed fraud in his capacity as a service provider, the connection above is missing.”*

[27] On a conspectus of the provisions of the MSA and the Rules referred to above, the facts of the case and the excerpt quoted from the decision of the first respondent, it is self-evident that there was no misdirection or irregularity on the part of the first respondent in reaching its decision. On the other hand the respondent appears to have had a thorough grasp of the law in a manner that cannot justify a review of that decision.

- [28] The applicant omitted to pursue then, a number of options which were at its disposal. It could have instructed its members to deal only with the approved service providers to the exclusion of the Tshwane Pharmacy. If it was satisfied that Tshwane Pharmacy was involved in unprofessional or criminal conduct, it could have reported the matter to the South African Pharmacy Council or the South African Police Service. It would appear that these steps have now been taken.
- [29] It would indeed appear, in retrospect that the applicant misconstrued its own rules by conflating the capacity of a beneficiary who received membership benefits **qua** member and the capacity of a service provider who provided services to members of the scheme without proper reference to the rules and subjected them to the same sanction or penalty.
- [30] In the circumstances, I find that the decision of the first respondent was the correct one and it does not fall to reviewed or set aside. It is accordingly upheld.
- [31] In the result the following order is made:

The application for review is dismissed with costs which shall include the cost of counsel.

A handwritten signature in black ink, appearing to read 'S. A. M. Baqwa', is written over a horizontal line.

S. A. M. BAQWA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

<u>Date of Hearing:</u>	28 January 2016
<u>Date of Judgment:</u>	29 January 2016
<u>For the Applicant:</u>	Adv. K. Tsatsawane Adv. J. Raizon
<u>Instructed by:</u>	Gildenhuys Malatji Inc.
<u>For the 1st & 2nd Respondents:</u>	Adv. N. Rajab-Budlender Adv. P. Pillay
<u>Instructed by:</u>	The Appeal Board for Medical Schemes Norton Rose Fulbright South Africa Inc.
<u>For the 3rd & 4th Respondents:</u>	Adv. B. L. Manentsa
<u>Instructed by:</u>	Matojane Malungana Inc.