

THE FINACIAL SERVICE TRIBUNAL

In the application for reconsideration between

MEDIHELP MEDICAL SCHEME Applicant

And

THE REGISTRAR FOR MEDICAL SCHEMES First respondent

THE COUNCIL FOR MEDICAL SCHEMES Second respondent

For the applicant: Adv S Cowen SC instructed by Webber Wentzel Attorneys (Mr Versfeld)

For the respondent: Adv TT Brett SC instructed by Ndobela and Lamola Attorneys (Mr Mathebula)

Summary: Jurisdiction of FST to reconsider decisions by the Registrar of Medical Schemes.

DECISION

[1] The Council for Medical Schemes (“the Council”) instituted an investigation to review the relationship between Medihelp Medical Scheme (Medihelp) and Curamed Holdings from 2003 when Medihelp first invested in Curamed. Within its mandate, the Council appointed a firm, ARMS-Audit, to conduct the investigation.

[2] Pursuant to this, the Registrar for Medical Schemes (“the Registrar”) appointed the firm as inspector in terms of sec 44(2), and issued a directive under sec 44(4) of the Medical Schemes Act 131 of 1998, which provides that –

“The Registrar may order an inspection in terms of this section—(a) if he or she is of the opinion that such an inspection will provide evidence of any irregularity or of non-compliance with this Act by any person.”

[3] ARMS-Audit debited the Council with an amount of R1 641 625.00 for the inspection. The Registrar, in turn, debited Medhelp for the amount because, as the Registrar said, he had come to the conclusion that the allegations which led to the investigation have merits, that Medihelp had a case to answer, and that the inspection/investigation was/is in order to prove or disprove the allegations.

[4] The Registrar relied for the claim of payment on Regulation 4B of GNR.405 of 29 March 2018: Financial Sector Regulations, 2018 (Government Gazette No. 41550):¹

4B. Recovery of costs by Council for Medical Schemes.—When the Council for Medical Schemes exercises powers in terms of Chapter 9 of the [Financial sector Regulation] Act as contemplated in section 129 (2) of the Act, the Registrar of Medical Schemes may recover costs associated with the exercise of those powers from—

(a) the medical scheme that is the subject of the exercise of the powers, if the Registrar so decides, after having considered the results of the exercise of the powers; or

¹ It falls beyond the jurisdiction to consider whether the regulation is intra vires.

(b) any person, when it appears, after considering the outcome of the exercise of the powers, that the person was knowingly a party to the carrying on of the affairs of the medical scheme in a manner that constituted an irregularity, non-compliance or contravention.

[5] Medihelp is dissatisfied with the decision to pay and wishes, as it is obliged to do under section 7 of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”),² first to exhaust its internal remedies before it takes other steps. Having been advised that the correct tribunal for its “review/appeal” is the Financial Services Tribunal, it filed an application for reconsideration under section 230 of the Financial Sector Regulation Act 9 of 2017 (“the FSR Act”). The Registrar, however, holds the view that the internal remedy lies in the Medical Schemes Act which provides for an appeal to the Council:

49. Appeal against decision of Registrar.—(1) Any person who is aggrieved by any decision of the Registrar under a power conferred or a duty imposed upon him or her by or under this Act, excluding a decision that has been made with the concurrence of the Council, may within 30 days after the date on which such decision was given, appeal against such decision to the Council and the Council may make such order on the appeal as it may deem just.³

[6] Medihelp, to cover itself, also filed an appeal under sec 49(1), which is presently kept in abeyance by agreement. As to the application for reconsideration before this Tribunal, the issue of our jurisdiction has arisen. I have directed that this issue should be separated from

² Sec 7 (2) (a) Subject to [paragraph \(c\)](#), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

³ Sec 48 does not appear to be applicable.

the other issues and the parties have waived their rights to a formal hearing, and agreed that the jurisdiction issue may be decided on paper.

[7] The respondents argue in paras 40 to 42 of the heads that sec 7(2)(a) of PAJA precludes this Tribunal from reviewing the Registrar's administrative decision unless any internal remedy (namely the appeal to the Council) has been exhausted. This argument is based on an incorrect premise. This Tribunal does not review matters under PAJA. It reconsiders matters. The PAJA tests do not apply to it and it does not have PAJA powers. It is, accordingly, not a "tribunal" established by national legislation for the purpose of judicially reviewing an administrative action in terms of "this Act", being PAJA, as per the definition of "tribunal" in sec 1.⁴

[8] Nevertheless, a reconsideration of a decision in terms of Part 15 of the FSR Act constitutes an internal remedy as contemplated in section 7(2) of PAJA, which means that a decision of a decision-maker under the FSR Act can generally only be reviewed under PAJA once this Tribunal has reconsidered the impugned decision (sec 230(2)).

[9] The FSR Act and its structures do not generally apply to the Council and its structures. There is, however, the exception contained in sec 129 of the FSR Act. The section is contained in Chapter 9, which deals with information gathering, supervisory on-site inspections and investigations. Section 129 states as follows:

129. Application and interpretation of Chapter

⁴ "tribunal" means any independent and impartial tribunal established by national legislation for the purpose of judicially reviewing an administrative action in terms of this Act

(1) This Chapter applies to information gathering, supervisory on-site inspections and investigations by the Prudential Authority or the Financial Sector Conduct Authority.

(2) The Council for Medical Schemes may exercise powers in terms of this Chapter in respect of powers and functions set out in the Medical Schemes Act, and powers and functions granted to it in this Act.

(3) In relation to the exercise of the powers in terms of this Chapter by the Council for Medical Schemes in respect of a medical scheme, a reference in this Chapter to:-

(a) a financial sector regulator or the responsible authority must be read as including a reference to the Council for Medical Schemes;

(b) the head of a financial sector regulator must be read as including a reference to the Registrar of Medical Schemes appointed in terms of [section 18](#) of the Medical Schemes Act;

(c) a financial sector law must be read as including a reference to regulatory instruments and to the Medical Schemes Act; and

(d) a licensed financial institution must be read as including a reference to a medical scheme registered in terms of the Medical Schemes Act or an administrator of a medical scheme approved in terms of the Medical Schemes Act.

[10] The appointment of investigators is regulated in the FSR Act by sections 134 and 135. Reading the provisions in the light of the definitions in sec 129, the Council [financial sector regulator] may, in writing, appoint a person as an investigator and may instruct the investigator appointed by it to conduct an investigation in terms of this Part in respect of any

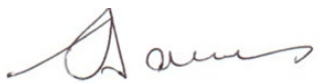
person, if the Council reasonably suspects that a person may have contravened, may be contravening or may be about to contravene, the Medical Schemes Act [a financial sector law] for which the Council [financial sector regulator] is the responsible authority.

[11] For present purposes the question is whether this Tribunal has at this stage jurisdiction to reconsider the decision by the Registrar under Regulation 4A. The answer depends on the question whether the decision of the Registrar was “a decision by a financial sector regulator” because the only relevant decision that may be the subject of reconsideration is one of a financial sector regulator, and that, in terms of sec 129, is the Council and not the Registrar. Furthermore, the Council is a financial sector regulator for purposes of Chapter 9 and not for Chapter 15 of the FSR Act. And although the decision was taken in terms of “financial sector law” in the extended sense, it was, as submitted by the applicant, incidental to the exercise of Chapter 9 powers.

[12] Finally, as a matter of legal policy, it is unlikely that the Legislature intended that the Registrar could be subject to two administrative “appeals” under different Acts for fulfilling the same function.

The defence of lack of jurisdiction is upheld and the application for reconsideration is dismissed. There is no cost order.

Signed at Pretoria on 1 July 2020

A handwritten signature in black ink, appearing to read 'LTC Harms', is written over a light blue horizontal line.

LTC Harms (deputy chair)