BEFORE THE APPEALS BOARD OF THE COUNCIL FOR MEDICAL SCHEMES

In the matter between

The Board of HealthCare Funders	Appellant
and	
Council for Medical Schemes	First Respondent
Discovery Life Limited	Second Respondent
	Matter Ref No: CMS

Hearing: 19 October 2020

DECISION

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1. This is an appeal by the Board of HealthCare Funders ("the appellant") against a decision of the Council for Medical Schemes ("first respondent/CMS"), taken on or around 18 January 2019, in terms of which it granted Discovery Life Limited ("second respondent/DL") an exemption in terms of section 8(h) of the Medical Schemes Act 131 of 1998 ("the Act") from the provisions of section 20 of the Act. The appellant represents an association of medical schemes. Discovery is a registered long-term insurer under the Long Term Insurance Act, 52 of 1998, and not a registered medical scheme.

2. A point has been taken by the CMS that the appeal was noted out of time. It was noted on 1 November 2019, and the impugned decision is said to have been taken on 18 January 2019.

The remedy sought

3. As its first price, the appellant seeks an Order setting aside the exemption granted; alternatively, it prays that the exemption be varied by imposing a condition that DL may not offer the products in question to any new clients.

4. Both in its Notice of Appeal and heads of argument, the appellant concisely sets out its grounds of appeal; to use its language:

   4.1 Firstly, that the exemption granted to DL undermines the principles of social solidarity and cross-subsidisation.

   4.2 Secondly, that there are no exceptional circumstances justifying the exemption as required in terms of section 8(h).

   4.3 The exemption was granted for insufficient reasons.

   4.4 That the CMS ought not to have granted an exemption to an insurer outside what is described as the Exemption Framework (see later).

Brief background

5. The starting point must be reference to the provisions of section 20(1) of the Act which reads: "*No person shall carry on the business of a medical scheme unless that person is registered as a medical scheme under section 24*".

6. Next, is section 8(h) of the Act. It gives the CMS the authority to "*exempt, in exceptional cases and subject to such terms and conditions and for such period as* (it) *may determine, a medical scheme or other person upon written application from complying with any provision of* (the) *Act*".

7. Sometime in 2016, the Minister of Finance promulgated some regulations, known as "*Demarcation Regulations*", in terms of section 72 of the Long-Term Insurance Act 52 of 1998 ("*LTIA*") and section 70 of the Short-Term Insurance Act 53 of 1998 ("*STIA*"). In terms of these regulations, the Minister determined, it is common cause, that certain insurance policies that had the elements of a business of a medical scheme shall be termed "*health policies*" and "*accident and health policies*" which would in the demarcation regulations be regulated as insurance contracts under the LTIA or STIA as the case might be. Those policies and their providers would not be regulated under the Act, even if the conduct of the providers of such policies fell within the meaning of *"business of a medical scheme"* as defined in section 1 of the Act.

8. In contrast to insurance policies, primary healthcare products and hospital indemnity products were not determined as insurance policies by the Demarcation Regulations; therefore, their providers would be conducting the business of a medical scheme as defined in the Act, and thus required to be registered as a medical scheme in terms of section 20(1) of the Act.

9. Exemption Framework: In the wake of the Demarcation Regulations the CMS published on 15 March 2017, a document titled: "GUIDE: FRAMEWORK FOR

EXEMPTION OF PROVIDERS OF INDEMNITY PRODUCTS THAT CONDUCT THE BUSINESS OF A MEDICAL SCHEME FROM PROVISIONS OF THE MEDICAL SCHEMES ACT, 131 OF 1998 (the Exemption Framework). This was to ameliorate the situation for those providers, by creating a framework for exemption. It seems the main concern was the plight of clients who had already subscribed for those products. The idea was that the exemption would be for a limited period; a transitional period during which Low-Cost Benefit Option Framework (LCOBF) would be developed for medical schemes. Insurers who conducted the business of a medical scheme would, in terms of the Exemption Framework, be exempted from the provisions of section 20(1) of the Act after 1 April 2017 for a period of two years, allowing them to continue conducting the business of a medical scheme. This period has since been extended to next year. The idea was to protect existing policyholders.

Respondent's application

10. On 16 July 2018 DL submitted an application in terms of section 8(h) of the Act for an exemption from the strictures of section 20(1) because, whereas it is not a registered medical scheme but an insurer, it wanted to provide products known as Discovery Comprehensive PrimaryCare and Discovery Essential PrimaryCare. It is common cause that providing these products would amount to conducting the business of a medical scheme. Prior to the launch of the DL's application on 16 July 2018, two similar applications from the same group of companies (The Discovery Group) had failed. The first one was made by PrimeMed on 24 March 2017; it was turned down by the CMS. The application was correctly refused as PrimeMed was

not a registered insurer. The second one was made in January 2018 by Discovery Health (Pty) Ltd; it too was turned down by the CMS. An appeal against the CMS's decision to the Appeal Board was dismissed by the Board in its decision dated 2 October 2018. It must be accepted that DL's application of 16 July 2018 could not have been in terms of the Exemption Framework because, firstly, it was made outside of the period determined by the framework. Secondly, and very importantly, as at the time the Demarcation Regulations became operative, and the Exemption Framework created, DL was not yet conducting the business of a medical scheme; that is, it had no existing subscribers for the above products; in fact it did not even exist back then. The application was submitted while the Discovery Health appeal was still pending before the Appeal Board. DL's application was approved by the CMS either on 18 or 21 January 2019. It was against that decision of the CMS that the appellant brought this appeal.

Appellant's application for the condonation of the late filing of the Notice of Appeal, *locus standi* and authority

11. CMS opposed the appellant's application for the condonation of the late noting of an appeal; DL did not. The appellant explained that it needed to have CMS's reasons for its decision to grant the application before it could formulate and lodge its Notice of Appeal. Firstly, there were indeed no reasons given in the exemption letter. Secondly, CMS resisted giving reasons to the extent that the appellant had to resort to the provisions of the Promotion of Access to Information Act 2 of 2000 (PAIA) and to the Promotion of Administrative Justice Act 3 of 2000 (PAJA); only thereafter were the reasons given. It was therefore ironic that CMS turned out to be

the only party opposing the condonation. CMS challenged the appellant's *locus standi*. But it is clear from the papers that the appellant was acting in the interests of its members who are medical schemes and who therefore have interest in the matter. CMS also argued that the appellant had no authority to bring the matter on behalf of its members, this despite the fact that a resolution by members of the board was attached. The three points raised are therefore dismissed: the appellant does have *locus standi* and the authority to act on behalf of its members, and the condonation is granted. This takes us to the merits of the case.

MERITS OF THE CASE

12. As said earlier, the appellant raised a number of points. But it would be more appropriate to start with the issue whether or not the respondent established an "*exceptional case*" as stipulated in section 8(h) of the Act. It has already been mentioned that the application must be considered outside of the perimeters of the Exemption Framework for the reasons earlier stated. An argument by the appellant to the contrary cannot stand. Apart from attacking the granting of the exemption on the ground that the respondent did not establish an "*exceptional case*", the appellant raises three other points; namely; that the exemption undermines the principles of social solidarity and cross-subsidization; that it was granted for insufficient reasons and that it should not have been granted to an insurer outside of the Exemption Framework. The last point can be dismissed at the outset. Section 8(h) can be invoked without any reliance on the Exemption Framework; it is an open provision. It may, however, be relevant to the extent we set out below. The other two remaining grounds of attack are in truth not substantively independent; they are simply factors

to be taken into account in determining whether or not the real and only requirement for an exemption in terms of section 8(h) has been met; namely, whether an applicant has established an "*exceptional case*". It is to this fundamental requirement that we must now turn.

Whether or not the application establishes an "*exceptional case*"

13. The appellant contends that the respondent has not established an exceptional case. It is not correct, as the respondent argues, that the mere coming into operation of the amendments to the law to prohibit insurers from conducting the business of a medical scheme has by itself created an exceptional case. The amendment was meant to remove a particular mischief, and was properly passed by Parliament. True, its coming into effect might have created a difficult situation for insurers, but that cannot in itself constitute an "*exceptional case*" for the purpose of section 8(h); otherwise every single insurer would be entitled to an exemption; in fact, there would hardly be any need to ask for exemption, the granting of which would be a mere formality. Something more is needed by section 8(h) than a mere statement that the amendment has created some difficulty. There will, after all, always be problematic consequences when a particular mischief is brought to a halt. Even if the argument were correct, it would not assist DL: In developing its above argument, DL says, in its answering affidavit, that as a result of the amendments and in light of section 20(1) of the Act, "*all providers of healthcare insurance products, who were subsumed under the Act in terms of the amendment, would suddenly find themselves in contravention of the Act and have to cease their business immediately ... . The Council, acting in terms of its powers under section 8(h) of the Act,*

intervened, for good reason in the circumstances". Two points have to be made about this argument. Assuming that it is true that the amendments triggered a situation which could be regarded as constituting an exceptional case, it would only be in respect of registered insurance entities which were already in existence at the time, and which had until then been providing the products lawfully. Those insurers suddenly found themselves in a dilemma that was not of their making. DL was not one of them as it did not even exist at the time. Within the Discovery Group, it was PrimeMed that was selling the products at the time, a business it later passed onto yet another internal entity, namely, Discovery Medical Health. Both of them not only illegally sold the products in question, but actually proceeded to deliberately increase the number of enrolees. We return to this point later in showing that DL cannot legitimately now parade the enrolment of these people – deliberately illegally enrolled and increased – as constituting an *"exceptional case".*

14. In its reasons for the exemption, contained in the letter of 5 September 2019, the CMS deals with the issue of an exceptional case as follows:

> *"EXCEPTIONAL CIRCUMSTANCES*
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> *19. Discovery Life submitted that the application is exceptional for the following reasons:*
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> *19.1.1 Members who cannot afford medical scheme contributions currently access healthcare under Discovery primary healthcare products will be prejudiced if this product is cancelled;*

19.1.2 Employer groups have enlisted primary healthcare cover for employees who otherwise cannot afford to fund access healthcare from private providers;

19.1.3 Interruption of cover will limit continuity of access, and this may translate into lapse of treatment plans; and

19.1.4 The products have been accessed more than 8000 times in April and May 2018. 13 000 in Gauteng alone in a year; and R24 million has been paid in claims that would otherwise have been for own pocket.

20. The application for exemption in the circumstances met the jurisdictional requirements of section 8(h) of MS Act. There was no prejudice to the medical schemes industry and to the members that have subscribed for the primary healthcare cover. The products were purely designated to provide cover for persons who otherwise cannot afford medical scheme member contributions".

The motivations in paragraphs 19.2.1 to 19.1.4 come down to two points. Firstly, that the enrolees would be prejudiced if the products are cancelled. This is no compelling reason to allow the practice to continue because, as it was done by this Board in its decision of 2 October 2018 when turning down a similar application by Discovery Health, the respondent would be given adequate period of grace within which to make appropriate arrangements for them. Secondly, there is nothing exceptional about DL providing the products; many insurers can and would indeed do so once an open sesame is created. The reason stated in paragraph 20 by CMS

that there was no prejudice is misconceived. One of the points raised by the appellant was that medical schemes would be decimated by this kind of exemptions. CMS reasoning suggests that the steed be stolen first before the stable is closed. One fails to see how today's absence of prejudice constitutes an "*exceptional case"* for the purpose of tomorrow; that is, one may not build an *"exceptional case"* on the basis of a hypothesis such as that there would be no prejudice since I am today not shown any. The threshold *"exceptional case"* is too high for that; you don't cross it on the back of such a hypothesis. The provisions of section 20 and section 8(h), read together, are meant to operate pre-emptively; that explains the high threshold. Lowering it would result in the emasculation of section 20, which is the pillar of the medical scheme regulation regime created by the Act. To argue absence of proof of prejudice to medical schemes as DL did – and the CMS – does with respect show lack of appreciation of the pre-emptive force of the two sections; in fact, the argument turns section 8(h) on its head: the section does not say that an application shall be granted unless there are exception circumstances (prejudice)! This is why DL's argument that the appellant bears the onus to proof prejudice to medical schemes is wrong; if anybody were to carry any onus, it would in fact be DL to prove that the mischief sought to be pre-empted (prejudice to medical schemes) would not materialize. In this respect, there are two important points. Firstly, while DL argues that it would not allow buying-down, a successful enforcement of such prohibition would depend on the good faith and co-operation of employers – a point conceded by DL. Secondly, counsel for DL said that there has been some buying-down of about 2.2% which he described as being little. It was not clear whether it was a percentage out of the total number of people in the medical scheme(s) moving out

into the PrimaryCare products, or a percentage of the entire existing enrolees for the products. The number may not be high, but, either way, it validates the first point.

15. This is not the first appeal of this nature by an insurer to serve before us. As we stated in our latest decision dated 25 September 2020 in the matter of *Africa Direct Life Investment (Pty) LTD vs Council for Medical Schemes,* it is not enough for an applicant to show "*good cause"* or that the plan is plausible or would be beneficial to employees; what is required is an *"exceptional case".*

DL may not use the existing beneficiaries as a factor giving rise to an *"exceptional case"*

16. In an attempt to build an *"exceptional case",* DL relied heavily on the fact that it was having a number of enrolees on its lap; some 66,000 beneficiaries. As mentioned above, with a period of grace given, an arrangement can be made for them. That aside, there is, in any case a real problem with DL's case. It is that, as said earlier, the people were not only illegally enrolled, but also increased by design; they were migrated from one entity to the next within the Discovery Group. That the people were indeed migrated within the group, is confirmed in paragraph 8 of DL's application:

> "*8.7 Discovery Primary Care was launched within and provided to employers by:*
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> *8.7.1 DH from February 2015 to April 2017;*
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> *8.7.2 PrimeMed from April 2017 to October 2017 (arising from an internal restructure within DH's group); and*

8.7.3 DH again from April 2017 to October 2017, to date (when DL took the enrolees over*)."*

It was an internal migration of enrolees which was throughout tainted with illegality; a migration which DL now wants to parade as constituting an exceptional circumstance. It was not denied before us that the number increased during the time of PrimeMed and also with Discovery Health; the respondent was, however, vague about the figures. What we heard was an emphasis that the increase went up a lot with DL. But the point is that throughout, even as their applications for exemption were refused, PrimeMed and Discovery Health kept on increasing the number of enrolees regardless. With regard to DL, an argument was advanced that it increased the number because it had gotten an exemption. Asked why it kept on recruiting more knowing that an appeal was in the pipeline, the answer was that they initially did not know about the appeal. But there was not even a hint that upon becoming aware of the appeal, DL halted the recruitment. We have noted that DL says that at some point, CMS assisted the group in trying to regularise the situation; but there is no evidence that CMS advised them to increase the enrolment; in any case such an advice would have been unlawful. True, if we were to uphold the appeal, we would need to be concerned about the enrolees and see how they should be assisted. But we are not inclined to reward such illegality by construing the dilemma of the enrolees as an exceptional circumstance in favour of DL. Moreover, an appropriate Order may be made to protect them, as was done before. Once DL cannot use the situation of enrolees as constituting an *"exceptional case",* nothing is left of its so-called *"exceptional case".*

17. There is yet another consideration against DL's case. On 29 September 2018 CMS issued "*Circular 50 of 2018: EXEMPTION APPEAL OUTCOMES*" for general consumption. The circular followed decisions of the Appeal Board which had dismissed appeals by Discovery Health and another company (Agility Insurance Administrators (Pty) Ltd) against the CMS's decision to refuse them exemption in terms of section 8(h). The Appeal Board's decision in respect of Discovery Health has already been referred to above a few times. The circular is of importance. The relevant portions read:

> *"5. The two affected entities submitted appeals in terms of section 50(3) of the Act, formally appealing Council's decision not to grant exemption.*
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> *6. The appeals served before the Appeals Board; ... . These affected entities and Appeal Board rulings are:*
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> *6.1 Discovery Health (Pty) Ltd; and*
>
> *6.2 Agility Insurance Administrators (Pty) Ltd.*
>
> *7. The Appeals Board confirmed the decision of the Council and dismissed both appeals. ... ...*
>
> *8. ....*
>
> *9. The CMS hereby cautions members of the public, current and potential contractors of health products from the affected entities, Discovery Health (Pty) Ltd and Agility Insurance Administrators (Pty) Ltd that these products are unregulated and are prohibited. Discovery Health (Pty) Ltd is directed*

by the Appeals Board to move the approximately 22 000 members that are affected to a regulated product no later than 28 February 2019.

10. *If you have purchased* ***Discovery Comprehensive Primary Care*** *or* ***Discovery Essential Primary Care*** *products from Discovery Health (Pty) Ltd you are urged to contact Discovery Health (Pty) Ltd to make arrangements for appropriate cover".*

Three points are to be made from the circular: Firstly, it is clear that the employers were warned against taking Discovery Health's above products; the warning was emphasized by CMS in black. Secondly, Discovery Health was not only to make arrangements for the 22,000 enrolees but, importantly, not to increase the number; it defaulted in both respects. Realistically speaking, some of the employers of prospective enrolees might have been unaware of the circular; accordingly, we are minded to factor that in when considering an appropriate Order.

Conditions subject to which the exemption was granted

18. The CMS granted the exemption subject to certain conditions. However plausible and well-meaning these conditions might be, they do not assist DL. Section 8(h) is very clear: an *"exceptional case"* must first be made out; only thereafter would a discretion arise as to what conditions, if any, to attach. DL's case fell at the first hurdle; the stage for imposing conditions was never reached.

Conclusion:

19. For the reasons given above, the appeal must succeed. The following Orders are therefore made:

19.1 The appeal is upheld.

19.2 The Decision of the Council for Medical Schemes taken in January 2019 granting Discovery Life exemption in terms of section 8(h) of the Council for Medical Schemes Act 131 of 1998 from the provisions of section 20(1) is hereby set aside.

19.3 The operation of the Order in paragraph 19.2 above is suspended until 31 May 2021 or until the development and implementation of the Low-Cost Benefit Option Framework, whichever of the two occurs first.

19.4 Discovery Life LTD shall forthwith not enrol new members for its Discovery Comprehensive PrimaryCare or Discovery Essential PrimaryCare products during the period of the suspension of the Order in paragraph 19.2 above.

Dated this 28th day of October 2020

Judge B M Ngoepe, Chair

Dr N B Jada, Member

Dr L Mpuntsha, Member