

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



CASE NO.: 49159/2021

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED. ✓
17/06/2026	
[Redacted Signature]	

In the matter between:

SAPS COMMERCIAL AFFAIRS (PTY) LTD

Applicant

and

MINISTER OF HEALTH

Respondent

and 95 other Respondents

JUDGMENT

Van der Westhuizen, J

[1] This application related to the Constitutionality of the provisions of section 59(3) of the Medical Schemes Act, 131 of 1998 (the Act). In that regard, the issues that were to be considered were:

- (a) Whether section 59(3) of the Act infringed upon section 33 of the Constitution:
- (b) Whether section 59(3) of the Act infringed upon section 34 of the Constitution; and
- (c) Whether, in the event that section 59(3) of the Act impeaches upon those sections of the Constitution, the limitation(s) is/are justifiable under section 36 of the Constitution.
- [2] The shareholding of the applicant is wholly owned by SAPS, a voluntary professional membership organisation which is registered as a non-profit and public benefit organisation, whose members are exclusively physiotherapists.
- [3] In addition to the first respondent, the Minister of Health, a number of other respondents, in total 95, were cited including various medical schemes. Some opposed the application, whilst others abided in the decision of the court
- [4] The relief that the applicant sought was, *inter alia*, a declaration that section 59(3) of the Act is unconstitutional and invalid, and further sought an order suspending the declaration of constitutional invalidity for a period to afford Parliament an opportunity to correct the defect. The applicant also sought an interim reading into the terms of section 59(3) of the Act to contain certain safeguards. In the event that unconstitutionality was found, the first respondent sought a more limited declaration to the extent of its inconsistency with the Constitution.
- [5] The gist of the matter lies in the disputes between health care practitioners and medical schemes concerning payments made by the medical schemes to the practitioners.

[6] Section 59(3) of the Act provides as follows:

“Notwithstanding anything to the contrary contained in any other law a medical scheme may, in the case of-

(a) Any amount which has been paid bona fide in accordance with the provisions of this Act to which the member or a supplier of health services is not entitled to; or

(b) Any loss which has been sustained by the medical scheme through theft, fraud, negligence or any misconduct which comes to the notice of the medical scheme,

deduct such amount from any benefit payable to such member or supplier of health service.”

[7] Section 59 of the Act allows for two methods of payment in respect of medical services rendered to a member of a medical scheme, namely a payment to the member, or a payment directly to the service provider. In the first instance, the service provider renders an account in respect of the medical services provided to the member. The member is then obliged to pay the service provider the amount, after which the member claims the amount so paid from his or her medical scheme for reimbursement. In the second instance, the service provider renders the account for the services provided to the member directly to the medical scheme for payment thereof.

[8] Generally, the direct payment procedure is followed for practical and logistical reasons. This procedure leads to the very issue that the applicant seeks to address.

- [9] The Act provides for the promulgation of regulations.¹ These regulations were promulgated and are to be found in the General Regulations published in the Government Gazette of 1999.²
- [10] Regulations 5 and 6 of the General Regulations promulgated under the Act stipulates the manner in which a request for payment is to be submitted. The rendering of the account of the service provider is to be submitted within a prescribed period after the service was rendered. The medical scheme is obliged to consider the account within a further prescribed period and to effect payment thereof within a stipulated period. This procedure leans towards payments being made in error for various reasons. Section 59(3) of the Act aims to address that issue. It provides for a so-called “claw back” procedure where a medical scheme may recoup the amount paid in error, either from the member, or from the service provider directly. That is achieved, where the direct payment method is used, by withholding future payments to the service provider until the “debt” has been recouped.
- [11] The applicant contended that allowing the so-called “claw back” payment, it is the medical scheme that is judge, jury and executioner in its own case in determining whether there was a payment made in “error” and holding that a “debt” arose, that required repayment from the service provider.
- [12] In its founding affidavit the applicant provided an exposé of the manner in which the alleged payment in error is dealt with by the medical scheme. Considering the applicant's exposé and the provisions of regulations 5 and 6 of the General Regulations, the medical scheme is obliged to afford an opportunity to the service provider to either correct its account by providing the correct detail or amending it as required. However, the applicant contended that, where the query is disputed by

¹ Section 67 of the Act

² GN R1262 of 1999

the service provider, the medical scheme deals with it by utilising an administrator appointed by it. This procedure, the applicant contended, leads to no impartial consideration of the dispute. According to the applicant, it is this alleged bias that section 59(3) of the Act does not address, and thus renders that section unconstitutional, by infringing upon the service provider's constitutional rights in terms of sections 33 and 34 of the Constitution.

- [13] The applicant further explained in its founding affidavit common instances where the medical scheme often refuses to make payment of a rendered account to a service provider. Such as where a member is not covered by the scheme for a particular service or procedure or treatment, or the funds allotted therefor have been exhausted, or the incorrect code for the treatment, service or procedure was utilised in the account. In respect of the issue of the "code" relating to the service or procedure or treatment, the coding of treatments or services or procedures, were addressed by the Department of Health when it published an ICD-10-Master Industry Table for South Africa. Those are referred to as "billing codes". The applicant contended that the Medical Schemes are not in unison in using the same codes. Some make use of codes contained in the so-called Reference Price Lines published by the Director-General of Health in terms of the National Health Act, of 2003.
- [14] The applicant lamented that the non-unison approach by the medical schemes in respect of billing codes leads to disputes which are then referred to the administrators for decision on the dispute. The *fons et origine* for such disputes is the co-existing of two different coding references. This issue is in nature an administrative one. There ought to be conformity in that regard. However, this issue falls outside the scope of the present enquiry.
- [15] The applicant's quarrel in this matter is directed at the dispute that arises after the initial period for payment and after the payment has already been made, hence the reliance on the "claw back" provision of section

59(3) of the Act. That section of the Act allows for the recoupment of amounts paid to a service provider in specified circumstances. The applicant further contended that the use of administrators in its employ to deal with a dispute, effectively renders a partial approach to the dispute, in favour of the medical scheme.

- [16] Section 59(3) of the Act stands to be read in conjunction with the provisions of the General Regulations promulgated under the Act. The mechanism thereof is to be found in the General Regulations, in particular regulations 5 and 6 thereof.
- [17] In that regard, section 59(1) of the Act requires the rendering of an account in respect of the services rendered to the member. In this regard, regulation 5 provides for the format and content of such account.
- [18] The requirement contained in section 59(2) of the Act relates to the procedure of submitting a claim. Regulation 6 provides the mechanism therefor.
- [19] The applicant's main contention is that the referral to employed administrators for decision making is not addressed by the provisions of section 59(3) of the Act. It alleged that a *lacuna* exists in that regard. That *lacuna* renders the said section unconstitutional and invalid.
- [20] The applicant further contended that the first indication that there was a problem with an account rendered, was on receipt of a letter from the administrator. That letter would invite the service provider to comment and address the issue raised in the letter. The applicant complained that such letter more often than not lacks particularity and contained a veiled threat to invoke the provisions of section 59(3) of the Act. In my view, this procedure is an administrative one which falls outside the ambit of section 59(3) of the Act for what is recorded later. However, the service provider is encouraged to participate in a process to address the vexed issue.

- [21] In determining whether the provisions of section 59(3) of the Act infringes upon the service provider's rights under sections 33 and 34 of the Constitution, regard must be had to the content and context of section 59(3). That is undertaken by determining the interpretation to be afforded that section. That exercise is undertaken by applying the trite canons of construction and principles of interpretation.
- [22] Applying the canons of construction and the principles of interpretation,³ section 59(3) of the Act is to be read: in its own context; in the context within the section of which it is a subsection, and within the context of the Act as a whole.
- [23] In this regard, section 59 of the Act comprises three distinct provisions:
- (a) Sub-section (1) obliges a service provider to render an account to the member of a medical scheme to whom the service was provided;
 - (b) Sub-section (2) obliges the medical scheme to make payment of the account to the member who received the service, or to the service provider who rendered that service; and
 - (c) Sub-section (3) grants the medical scheme a so-called claw back right in the event of the occurrence of either of two specified instances. The first relates to where a payment was made *bona fide* in respect of a service to which the member or a supplier of the service is not entitled to. The second relates to where any loss was sustained by the medical scheme through stipulated occurrences such as theft, fraud, negligence or any misconduct which comes to the notice of

³ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012(4) SA 593 (SCA) and subsequent authorities

the medical scheme. In either of these circumstances, the medical scheme may deduct such amount from any benefit payable to such member or supplier of health service.

- [24] It is to be noted that section 59 of the Act is directed first and foremost at the member of the medical scheme. Thus, should any of the occurrences contemplated in sub-section (3) apply, the intended deduction would be for the account of the member, presumably by the withholding of further benefits.
- [25] It is further to be noted that section 59(1) of the Act requires an account to be rendered to the member. In that event, section 59(2) of the Act provides that the medical scheme may either pay the member, or pay the service provider directly. Consequently, if the amount is paid directly to the service provider, then in that event, the deduction would presumably be for the account of the service provider.
- [26] From the foregoing, the context of subsection 3 within the context of section 59 of the Act, has direct bearing on the rendering of an account to the member and the payment of that account. Section 59(3) of the Act is not a provision to be read in isolation. It is dependent on the compliance with two other requirements provided for in subsections 1 and 2 of section 59 of the Act.
- [27] Section 59 of the Act in the context of the whole Act is dependent on the compliance with other provisions of the Act such as, for example, the establishment and registration of a medical scheme with the established Council for Medical Schemes under which authority it will operate.⁴
- [28] Considered in that context, section 59(3) of the Act bears no independent existence. It stands to be read in that context. It follows that the constitutionality of section 59(3) of the Act is dependent on

⁴ Section 3 of Act 131 of 1998

compliance with at least the requirements contained in sections 59(1) and (2) of the Act.

- [29] In the event that regulation 6 of the General Regulations does not provide for a dispute procedure, that regulation stands to be amended. The regulations referred to in the Act are intended to provide the necessary mechanisms required by the provisions of the Act. To hold otherwise would require an amendment to section 59 of the Act to encapsulate all the present provisions contained in regulations 5 and 6 of the General Regulations.
- [30] The applicant further lamented that where a dispute is referred to the administrator appointed, and where such dispute is resolved in favour of the medical scheme, and the service provider is dissatisfied therewith, the service provider is hamstrung and consequently its constitutional rights under sections 33 and 34 of the Constitution are infringed.
- [31] Considering section 59 of the Act in its entirety, regard is to be had to the provisions of section 48 of the Act. That section provides for where a person is aggrieved by any decision in a dispute, it may lodge an appeal to the Council of Medical Schemes. That section stipulates the procedure to be followed in that regard.
- [32] Consequently, the service provider is not without remedy.
- [33] It follows that applying all the foregoing, when considering the issues posed earlier, section 59(3) does not infringe upon the service provider's rights under sections 33 and 34 of the Constitution. Consequently, no reading-in of any "clarifying" wording is required in the interim.
- [34] Accordingly, the relief sought in the notice of motion stands to be refused.

[35] There remains the issue of costs. It is trite law that when interpreting a document, or a contract, or a statute, the canons of construction and principles of interpretation are to be applied.⁵ Although the parties did not concede the unconstitutionality of section 59(3) of the Act, they approached this application on issues that would arise in the event of a settled interpretation of the said section constituting unconstitutionality. In my view, the appropriate order as to the issue of costs would be no order as to costs.

I grant the following order:

1. The application is refused.
2. No order as to costs.


 C J VAN DER WESTHUIZEN
 JUDGE OF THE HIGH COURT

On behalf of Applicant:

Adv N Ferreira
 Adv I Cloete
 Adv S Mohammed
 Bower Cardona Inc

Instructed by:

On behalf of Respondents:

1st Respondents:

Adv T Seboko SC
 Adv J Berger
 State Attorney, Pretoria

Instructed by:

2nd Respondents:

Instructed by:

Adv D Matlate
 Mothobi Attorneys

3rd to 13th, 15th, 17th to 22nd, 24th Respondents:

Adv W Trengove SC
 Adv A Govender SC
 Knowles Husain Lindsay Inc

Instructed by:

⁵ *Natal Joint Municipal Pension Fund, supra*

45 th , 54 th and 63 rd Respondents:	Adv G Marcus SC Adv E Kromhout Adv M Salukazana GMI Attorneys
Instructed by:	
65 th Respondent:	Adv S Baloyi SC Adv V Mabuza Adv R Marakalla Diale Mogashoa Attorneys
Instructed by:	
67 th Respondent:	Adv A Gabriel SC Adv V Naidu Cox Yeats Attorneys
Instructed by:	
73 rd Respondents:	Adv C Steinberg SC D Smith Knowles Husain Lindsay Inc
Instructed by:	
75 th Respondent:	Adv Y Peer Malatji & Co Attorneys
Instructed by:	
79 th Respondent:	Adv V Maleka SC Adv S Mahlangu Malatji & Co Attorneys
Instructed by:	
88 th , 25 th , 26 th , 28 th , 30 th , 62 nd & 86 th Respondents:	Adv C Loxton SC Adv JW Schabort Jacobs Roos Fouche Inc
Instructed by:	