



SESSION 1
SECTION 59 INVESTIGATION
 Day 8
 Meeting Minutes

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| Date | Friday, 23 August 2019 |
| Time | 10:00 |
| Location | 420 Witch-Hazel, Block A, Eco Glades |
| Chairman | Adv. T. Ngcukaitobi |

| Agenda Subject | Discussion |
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| I. Call to order | Chair Adv. Ngcukaitobi called the meeting to order at 10:02 am. |
| II. Witness swore under oath | Chair called the motion to have the Optometrists; Doctors Harry Rosen, Dollars Boloka & Audience Maluleke from the SAOA (South African Optometric Association) to take an oath and then to begin with their power point presentation. |
| III. Noting of submissions made by SAOA | Chair noted that they (the Secretariat, Advocates Ngcukaitobi, Williams and Hassim) received the submission of their power point presentation. |
| IV. Introduction | <p>Dr D. Boloka started their presentation by appreciating the opportunity given to them as an association to present at this council. The burden of the SAOA is that they are responsible for the issuing of optical eye wear, the association was formed in 1924. Dr Dollars further mentioned that they are an NPC.</p> <p>Furthermore, he stated that the South African Optometric Association is a professional association which represents optometrists and dispensing opticians across all forms of practice modalities in both the private and public sectors. In essence the main objective of the SAOA is to accommodate the interests of optometrists and dispensing opticians as well as the general public in South Africa.</p> |
| V. Demographics of SAOA Membership | Dr Dollars Boloka also explained that their membership consists of optometrists from both Public and the Private Sector. Their membership numbers is 2600. Mostly entrenched deeply in the private sector, with 1600 membership. |
| | <p>Disclaimer: Dr Dollars Boloka exclaimed that the SAOA is against does not connect or associate itself with fraud, wastage and abuse of any form.</p> <p>Adv Ngcukaitobi interjected by stating that it appears that everyone accepts the rampant behavior of fraud within the profession, what is then their evidence statistically speaking as an association.</p> <p>Dr Boloka responded stating that they don't have statistics on their own. However,</p> |

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| | <p>they rely on the report issued by VHF that indicates 22 Billion cases of fraud, theft and abuse throughout the profession. This forms basis for their statement and not the evident prevalence of fraud within the optometry profession.</p> <p>Dr. Maluleke added that their cases are mostly of administrative coding errors, which are mostly labeled as fraud.</p> |
| <p>VI. Key Issues of Discussion</p> | <p>Issues of Concern</p> <p>Dr Dollars Boloka stated that the key issues they wish to present before the commission are:</p> <ol style="list-style-type: none"> 1. Race & Ethnicity and 2. CMS <p>Advocate Ngcukaitobi requested statistics of the scales and race of practitioners on the cases that the SAOA has handled based on the information presented by SAOA to the commission on page 3 of the document given to the Secretariat, stating that 8 practitioners were accompanied to schemes in 2019. Out of the 8, how many were black, Indian, or colored. What was the allegations, and in which specialization are the doctors in this statement.</p> <p>In response to this, Dr Maluleke, said that they will provide the commission of enquiry with statistics.</p> <p>Dr Harry Rosen, added a comment on the question raised by Chair saying that out of the 8 cases handled by SAOA in 2019, one practitioner was white and 7 were black.</p> <p>Examples of cases:</p> <ol style="list-style-type: none"> 1. Dr Harry Rosen briefly made mention of a case where the practitioner treated a patient on a particular date, but the claims were only submitted a day later. The scheme raised an argument that the patient was treated on the date in which the claims had been submitted. (the scheme in this instance was Medshield) 2. The other case was when probes were sent to the practitioners by Discovery to trick the Dr in issuing an extra pair of sunglasses or spectacles. And this according to SAOA was unfair. <p>Adv. Williams asked Dr Harry Rosen why they thought that this was unfair.</p> <p>In response to this, Dr Harry Rosen stated that in all cases the probes were actually tested and confirmed by the optometrists that they needed spectacles, regardless of them not being aware that these patients were actually probes. There is evidence that the practitioner didn't go out of their way to commit any fraudulent act.</p> <p>Adv. Hassim asked whether the interaction by probes secretly recorded.</p> <p>Dr Harry said that they are not sure, but believe so as one of the probes made an affidavit.</p> |

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| VII. | <p><u>Complaints against schemes:</u></p> <ul style="list-style-type: none"> • Unethical conduct • Indirect payment • Autonomy • Intimidation • Punitive actions in the absence of proven guilt • Withholding claims • AOD • Clawbacks • Random audits • Desktop systems and algorithms • Differential payments • Canvassing • Access to record cards • Discounts off discounted rates • 2019 Manual • Non-accredited MCOs |
| VIII. | <p><u>Managed Care</u></p> <p>Managed health care developed as a systematic response to increasing costs and persistent quality concerns in healthcare markets. Health insurance providers (medical schemes) typically contract with managed care organizations (MCOs) to provide services to mitigate against cost and quality concerns.</p> <p>Dr. Boloka stated that they have been having difficulty with MCOs which are unaccredited. He explained how these MCOs fail to make payments.</p> |
| IX. | <p><u>Change in Mark ups by schemes without notice to practitioners.</u></p> <p>Dr Harry complained that medical schemes such as discovery charge high mark ups of up to 65% on frames and without giving notice.</p> <p>Adv Williams asked Dr Harry how many black members has the SAOA had since 2012, and also how many are subjected to Section 59 investigations.</p> <p>Dr. Harry said that he would make the information available to the secretariat.</p> |
| X. | <p><u>CMS</u></p> <p>Complaints to CMS were logged concerning the tariff increases by medical aids, and Dr. Boloka stated that SAOA has not received responses said.</p> <p>The second issue that he raised was that any entity paying such as PPN optometrists should be under the radar of the CMS. Billing.</p> |
| XI. | <p><u>Clawbacks</u></p> <p>Dr Harry raised a statement that schemes and administrators unilaterally come up with billing tariffs without any policies in place or engaging the practitioners. Furthermore, even when they have increased mark- ups practitioners are not</p> |

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| | informed and as a result their claims get suspended or clawed back because of this unfair practice. |
| XII. Other business | None |

Adjournment: Adjourned at 12:12 pm to return at 13:00

Part 2

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| Date | Friday, 23 August 2019 |
| Time | 13:00 |
| Location | 420 Witch-Hazel, Block A, Eco Glades |
| Chairman | Adv. T. Ngcukaitobi |

| Agenda Subject | Discussion |
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| I. Call to order | Chair Adv. Ngcukaitobi called the meeting to order at 13:05 |
| II. Call on speaker | Chair called the motion to have Prof. Wim Trengove to begin with his presentation on clarifying and defining "Racial Profiling". |
| III. Prof. Wim Trengove's submission | Chair noted that they (Advocates Williams, Ngcukaitobi and Hassim) we're in receipt of his written submission. |
| IV. Prof. Wim Trengove's presentation | <p>Definition</p> <p>Prof. Trengove began his presentation by first stating that he would be defining unfair discrimination on the bases of race, and then further answer two sub questions, which are the difference between direct and indirect discrimination and the relevance and role of intention in assessing discrimination.</p> <p>Prof. Trengove explained that discrimination may be committed by a law or conduct, in this instance he would make reference to conduct as it might be of relevance to the inquiry. It can be for instance a policy, which constitutes elements of unfair discrimination.</p> <p>The way in which Prof. Trengove proposed that this be looked at was through the eyes of the constitution and then looking at the two-leading cases which created the framework for the regulation of unfair discrimination.</p> <p>Prof. Trengove stated that a good starting point was Section 1B of the Constitution because it makes it clear that non-racialism is a founding value of our society and constitution. It is then in the light of this value that this inquiry has included unfair racial discrimination.</p> <p>Prof. Trengove stated that for the purpose of this inquiry he would look at Equality:</p> |

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| | <p>“Everyone is equal before the law and has the right to equal protection and benefit of the law.</p> <p>(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.</p> <p>“(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”</p> <p>Prof. pointed out that this is a prohibition on the state.</p> <p>“(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.”</p> <p>Prof. pointed out that this is a prohibition on everyone.</p> <p>“(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”</p> <p>Furthermore, he stated that the above is a provision applicable to this inquiry.</p> <p>He then made reference to the two cases which he mentioned earlier and stated that they have created a framework or structure for which these provisions are applicable.</p> <p>Case History: Adjudication of a referral by the High Court in Harksen v Lane and Others (CPD, Case No 16552/96, unreported) to the Constitutional Court, regarding the constitutionality of certain sections of Act 24 of 1936, declaration of constitutional validity.</p> <p>Synopsis: Application for declaration of constitutional invalidity of section 21 and parts of sections 64(2) and 65(1) of the Insolvency Act, 1936, on the basis of property and equality. Referred by Cape of Good Hope Provincial High Court. Majority (written by Goldstone J) held that legislation not unconstitutional.</p> |
| | <p><u>Section 8(1) Analysis</u></p> <p>Where section 8 is invoked to attack a legislative provision or executive conduct on the ground that it differentiates between people or categories of people in a manner that amounts to unequal treatment or unfair discrimination, the first enquiry must be directed to the question as to whether the impugned provision does differentiate between people or categories of people. If it does so differentiate, then in order not to fall foul of section 8(1) of the interim Constitution there must be a rational connection between the differentiation in question and the legitimate governmental purpose it <u>is</u> designed to further or achieve. If it is justified in that way, then it does not amount to a breach of section 8(1).</p> <p>Section 8(2) Analysis</p> |

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| | <p>[43] Differentiation that does not constitute a violation of section 8(1) may nonetheless constitute unfair discrimination for the purposes of section 8(2).</p> <p>Furthermore, Prof. stated that taking as comprehensive a view as possible of the way equality is treated in s 8, we would suggest that it deals with differentiation in basically two ways: differentiation which does not involve unfair discrimination and differentiation which does involve unfair discrimination.</p> |
| | <p>Paragraph 54</p> <p>“ At the cost of repetition, it may be as well to tabulate the stages of enquiry which become necessary where an attack is made on a provision in reliance on section 8 of the interim Constitution. They are:</p> <ul style="list-style-type: none"> (a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination. (b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis: (c) (b)(i) Firstly, does the differentiation amount to “discrimination”? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner. (d) (b)(ii) If the differentiation amounts to “discrimination”, does it amount to “unfair discrimination”? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2). <p>Prof. stated that if the algorithm used points the finger to black doctors and not white doctors then that would mean differentiation based on the grounds of race and unfair discrimination, which would necessitate the inquiry on unfair discrimination.</p> |
| | <p>Chair asked Prof. if there is relevance to intention when it comes to discrimination.</p> <p>In response to this, Prof. stated that intention was not relevant or required. He then made reference to paragraph 43.</p> <p>The victim would have to prove that there is differentiation and discrimination on the grounds of race, and if there is then it ought to be also proven fair or unfair discrimination.</p> |
| | <p>Adv. Williams asked on the meaning of section 14, it stated that the determinants of fairness would rely on one if the factors of whether the discrimination is systemic or not. She wanted to know what Prof. Trengove’s view on that was.</p> <p>In response to this, he said systemic discrimination is far more serious as it in its nature discriminates day in and day out members of previously disadvantaged class. It requires more serious remedies.</p> |

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| | <p>Chair also asked Prof. a question based on the Walker decision concerning the impact on geography. He stated that in an instance where the policy is neutral and the impact is geographical rather than explicitly racial, how should one deal with this particular instance?</p> <p>In response to this, Prof. Trengove stated that in such an instance, then it's not differentiation on enumerated or enologist grounds.</p> <p>Chair asked that if the impact is felt disproportionately in medical practitioners practicing in townships and outlying areas. Could that possibly constitute racial discrimination?</p> <p>Prof. stated that it was emphatically so, and that it would closely resemble Walker's case.</p> <p>Adv. Hassim commented that in such an instance, it is where race and geography intersect, there would also be instances where socioeconomic status and race would intersect.</p> <p>Chair asked that if in an inquiry of this nature where race is the focal point, can socioeconomic status be a proxy for race.</p> <p>Prof. responded to this and stated that it was emphatically possible.</p> <p>Furthermore, Chair asked Prof. saying that assuming that the general population of doctors consists of 60% of white doctors and 40% is black including Indians and coloreds. But in this only 70% are investigating by means of the Section 59 investigations, and the 70% is made up of the black practitioners, does this constitute racial discrimination?</p> <p>In response to this, Prof. Trengove referred back to Harsen. He stated that there is differentiation on the grounds of race and the only question to answer is whether it is unfair or not. The schemes would then have to give proof that this discrimination or differentiation is fair.</p> |
| V. Other business | None |

Adjournment: Adjourned at 14:15

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| Date | Friday, 23 August 2019 |
| Time | 14:30 |
| Location | 420 Witch-Hazel, Block A, Eco Glades |
| Chairman | Adv. T. Ngcukaitobi |

| Agenda Subject | Discussion |
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| I. Call to order | Chair Adv. Ngcukaitobi called the meeting to order at 14:30 |
| II. Call on speaker | Chair called the motion to have Dr. Thabo Twala of the Dental Professional Association to take an oath. |
| III. DPS's submission | Chair noted that they(Advocates Williams, Ngcukaitobi and Hassim) we're in receipt of his written submission |
| IV. DPA's presentation | <p>Dr. Twala begun his introduction by stating that the Association for Black(African) Dentists founded in 1992 by a few of our black colleagues who had qualified by then.It was registered as a company under the Republic of south Africa Companies act,1973 memorandum of Association of a Company not having a Share Capital Section 54(10,Regulation17(1) and 17(30</p> <p>Dr. Twala stated that the association had conducted a survey on their members. 60% of the members who responded to the survey are dentists. The association consist of 43% of dentists who practice in the city centers, 40% in townships, 18% rural areas and another 18% in suburban areas.</p> |
| | <p><u>Low turnover</u></p> <p>Dr. Twala stated that Many dentists are making a turnover of less than 100 000 a month.</p> <p>Chair asked if the turnover would not be affected by a number of years a practitioner has in experience.</p> <p>Dr. Twala responded and said that it wasn't the case, many dentists have been in the field for years but have not been able to increase their turnover.</p> <p>Adv. Williams asked how many of the members responded to the survey.</p> <p>In response to this, Dr. Twala stated that a 118 members out of the 500 responded. The survey was done in July in preparation for the inquiry.</p> <p>Adv. Williams noted that the 118 members who responded to the survey doesn't represent the whole association.</p> <p>In response to this, Dr. Twala stated that 118 is the representation of the two thirds of their members who are in the private sector to whom this inquiry is applicable to.</p> |
| | <p><u>The decline in remuneration is a result of Managed Care</u></p> <p>Dr. Twala based his allegations on the following:</p> |

- Rules and protocols
- Providers Network
- Complying with tariffs
- Reduction of the basket services to 4-5 options
- Algorithms
- Medical schemes don't identify errors or problems earlier but wait only to return 3 years later with a bill of millions of rands.

Adv. Hassim asked Dr. Twala if there is proof or evidence to substantiate his claims or allegations.

Chair resounded the same concern.

Dr. Twala could not give the proof but stated that members say that they have had these experiences.

Chair stated that nonetheless, there should be proof to substantiate these claims and complaints.

Dr. Twala then stated that in the past he has made submissions to the CMS. In these submissions he had stated that he was placed on suspension.

Adv. Hassim asked him to clarify as to which schemes in particular had placed him on suspension.

Dr. Twala stated that he had been suspended by many schemes like Gems, Polmed, etc.

He mentioned that around the year 2008 he had a similar encounter with Hosmed and he took the matter to court and unfortunately lost the case.

Adv. Hassim stated that he made reference to Medscheme that if there was an allegation of making an administrative error on one of the schemes that Medscheme administers, he would be suspended from all the schemes.

Dr. Twala stated that this was so.

Chair once again resounded on the the importance of providing substantial evidence to these claims.

Dr. Twala then stated that he has had this experience personally. In this instance he was determined to take the matter to court but withdrew when he realized that there were other schemes under Medscheme that he would also be suspended from. It was for this reason that he subjected himself to the requirements from them and they later released payments. He then stated that all of this is recorded in the submission he made some years back (2016).

Dr. Twala also stated that they have been experiencing losses due to medical schemes.

Adv. Hassim asked for statistics as proof to this claim.

Dr. Twala could not give a direct and factual response.

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| | <p>CMS's Reluctance to attend to their complaints</p> <p>Chair asked Dr. Twala to clarify this claim. He noted that it was difficult to work around such serious allegations without proof.</p> <p>Dr. Twala stated that he knows without a doubt that there are many practitioners that have logged complaints to the CMS, including himself but have not had their complaints attended to.</p> <p>Chair stressed the importance of having evidence to support his claims and advised that Dr. Twala would submit the omitted evidence to the secretariat.</p> |
| Other business | <u>None</u> |

Adjournment: Adjourned at 15:14

Next meeting scheduled: Thursday, 29 August 2019

Time: 10:00 am