South African Police Service Medical Scheme

“POLMED”

FURTHER SUBMISSIONS TO THE SECTION 59 INVESTIGATION PANEL

---

12 July 2023

TABLE OF CONTENTS:

1. Introduction……………………………………………………………………………….Page 2

2. Racial Discrimination Finding…………………………..…………………Pages 2-6

3. Due Process………..……………………………………………………………Pages 6-18

4. Standard Operating Procedure: Fraud, Waste and

   Abuse Process Investigation for Members………………………Pages 18-23

5. Summation and Conclusion….…………………………………………Pages 23-25

INTRODUCTION

1. Having submitted its legal submissions to the Panel on 27 June 2023, it became apparent that some clarification was in order to assist the Panel in finalising its report. To that end, these further submissions seek to clarify Polmed's position and to further enhance the submissions made to the Panel on 27 June 2023.

2. It must be borne in mind that these further submissions do not in any way replace the submissions made by Polmed on 27 June 2023.

RACIAL DISCRIMINATION FINDING

3. The alleged existence of racial discrimination, albeit implicit, was among the two broad category of findings by the Panel. In paragraph 337 of the Interim Report, the Panel stated the following in support of the abovementioned finding:

   "*[337] Based on an assessment of the evidence, together with the application of antidiscrimination law, the Panel is of the view that the outcome of the FWA investigations, conducted by Discovery, GEMS and Medscheme, on the whole have the effect of unfairly discriminating against Black practitioners."*

4. The fact that the issue pertaining to the finding of racial discrimination by the Panel is before the Equality Court and has been challenged by various medical schemes who commissioned expert

evidence to contradict or confirm Dr Kimmie and the Panels' findings thereof, makes it difficult for Polmed to make any meaningful contribution and or comment on this aspect. It would be undesirable to discuss it here in detail.

5. Polmed is of the view that it is important to allow that process to unfold and for the Equality Court to make a determination in that regard. We note that the Board of Health Funders ("*BHF")* also opted for this safe route especially where, like Polmed, the said organisation has not enlisted the service of an expert to contradict or confirm Dr Kimmie's reports. [1] Polmed takes a view that it is thus not advisable to comment, at this stage, on the Panel's findings on the Unfair Racial Discrimination issue.

6. Polmed has however noted, the submissions furnished by BHF and Government Employees Medical Scheme ("GEMS"), in this regard that medical schemes do not deliberately set out to acquire automated systems that would discriminate against the Blacks and Indian service providers. They contend that their automated systems are neutral and independent.

7. Be that as it may, Polmed submits that the Scheme complies with its constitutional obligation in its endeavour to protect its members' funds and ensure that effective controls in place to deter,

[1] See BHF's Submissions, at para 89 – 96.

stop and do away with incidences of FWA. The Panel would have noted from the submissions of other medical schemes particularly BHF that this protection of members' obligation is paramount to the nature, life and longevity of any medical scheme.[2]

8. BHF correctly states that the finding of Unfair Racial Discrimination by the outcomes does not presently detract from the statutory obligation resting on medical schemes to act as they do. Polmed shares this viewpoint and takes the mandate against FWA seriously.

9. Polmed does not read the Panel's findings on this aspect to be saying that the medical schemes are prevented from acting in the manner that they presently do. It seems evident that the main problem thus far is the outcomes of automated processes employed by the medical schemes that churn out outcomes that are allegedly racially undesirable. Various medical schemes have rejected this finding[3] and the matter is thus *sub judice*.

10. Polmed repeats its submissions that by itself and with its associations, Polmed abhors racial discrimination in any form or shape, and in that regard makes common purpose with the BHF submissions in that regard where in paragraph 2.5 of its submissions to this Panel, it stated that "*the BHF and its members do not condone, let alone promote, unlawful discrimination against any*

[2] See paragraphs 37 – 40 of BHF's Submissions.
[3] See GEMS's Submissions from para 16 etc.

person; on the contrary, any such unlawful discrimination is to be deprecated."

11. BHF further appears to accept that complaints of the nature contemplated in section 59 of the Medical Schemes Act, Act No. 131 of 1998 ("MSA") should be properly investigated and appropriate relief be afforded to the deserving complaints, especially if discriminatory conduct offends against the rights entrenched in the Constitution of the Republic of South Africa Act, Act No. 108 of 1996 ("the Constitution").[4] It states further that it does not promote, condone and unlawful discrimination against any person, on the contrary, such unlawful discrimination must be deprecated.[5]

12. Polmed also notes that the GEMS, in their legal submissions, articulated the importance of eradicating racial practices:[6]

"*[7] We point out that in GEMS's comments, GEMS made it clear that it welcomes all investigations and efforts to identify and eradicate racial practices in the Republic, which has been plagued by racial prejudice and inequality for far too long, and that GEMS welcomed and commended the establishment of the Panel.*

[4] See para 2.4 of BHF's Submissions.
[5] Ibid, paras 2.5 – 2.6.
[6] GEMS Legal Submissions at paragraph 7-8.

[8] GEMS demonstrated that it is a transformative organisation, with clear focus on transformation, which progressively promotes Broad-Based Black Economic Empowerment."

13. Polmed shares these sentiments above by the BHF and GEMS that there is need to remove all forms of racial discrimination and abhorrent biased behaviour.

DUE PROCESS

14. The thrust, of Polmed's submissions on 27 June 2023 and possibly its sole focus, is the need for due process in the manner in which instances of FWA are investigated. Polmed advocated for the need for due process, which process it persists, should be an indispensable part of the investigation process. It has not adopted any partisan position on the issue and does not understand any of the medical schemes to be against a position where a medical scheme can and should act in any manner that "punishes" a provider without hearing a provider. This, we note the medical schemes either suggests, it is being done in any event, or there are other provisions in the Act that allows for same.

15. Polmed has noted and do not disagree with BHF's contention that where the parties agree to a process that regulates dispute mechanisms between them, then such must be the prevailing

avenue between the said parties. Outside the realm of contract, it seems to Polmed, the waters become muddy, and incidences of natural justice may arise.

16. Section 34 of the Constitution provides for resolution of disputes: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

17. Section 29(1) of the MS Act requires a medical scheme to provide in its rules for dispute resolution mechanism. Provisions of section 29(1) of the MS Act gives effect to the constitutional instruction to resolve disputes in a fair public hearing. Polmed rules provide for the establishment of a complaints and disputes resolution committee as required by section 29(1) of the MS Act.

18. Polmed does not read anyone objecting to this natural right to be heard. This position does not have anything to do with whether or not the service providers are naturally guilty of FWA or not. It is a stand-alone position on a process to determine the said guilt or innocence of a medical scheme, member or service provider.

19. Accordingly, Polmed does not differ or disagree with contextual and case specific interpretation of the section 59[7] and the case law relied

[7] See BHF's Submissions, at paras 13 – 32, 41.

on in support of this position, OR the contractual nature of these arrangements. The issues of reasonability and fairness are paramount. This is the lacuna, in general that Polmed seeks that it be closed.

20. Polmed submits that the application of the *audi alteram partem* rule encapsulate a principle that if the rights of an individual have been impacted (i.e. he or she has not been heard before an adverse finding is made against him or her) by tribunals or associations, such an individual may claim, depending on the circumstances of the particular case, that there has been a breach of the rules of natural justice.[8] The content of these rules can be summarized in the maxim *audi alteram partem*.

21. The *audi alteram partem* rule is part of the principles of fundamental justice. Whether a principle may be said to be a principle of fundamental justice will depend upon an analysis of the nature, sources, rationale and essential role of that principle within the judicial process and in our legal system as it evolves (Re *B.C. Motor Vehicle Act, supra*; *Chiarelli, supra* at 732). To borrow from the Canadian jurisprudence, in order to be a principle of fundamental justice, a rule or principle must be:[9]

[8] Craig PP Administrative Law (Sweet & Maxwell London 1983) at page 253.
[9] https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art7.html#:~:text=In%20order%20to%20be%20a,precision%20to%20yield%20a%20manageable

(1) a legal principle

(2) about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate; and

(3) it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.

22. Therefore, the *audi partem* principle falls on all fours with the abovementioned characteristics. It is then immediately clear that for a process to be deemed fair, the affected party must be heard.

23. Speaking to the requirement of a fair procedure, in the matter of ***Gavric v Refugee Status Determination Officer***[10] the court held that:

"[79] It is nevertheless necessary to state that a person can only be said to have a fair and meaningful opportunity to make representations if the person knows the substance of the case against her. This is so because a person affected usually cannot make worthwhile representations without knowing what factors may weigh against her interests. This is in accordance with the maxim audi alteram partem (hear the other side), which is a fundamental principle of

[10] 2019 (1) SA (CC) at paragraph 21.

administrative justice and a component of the right to just administrative action contained in section 33 of the Constitution.

[80] <u>In order to give effect to the right to a fair hearing an interested party must be placed in a position to present and controvert evidence in a meaningful way</u>. In Foulds, Streicher J held that a decision maker was under an obligation to disclose adverse information and adverse policy considerations and <u>give an affected person an opportunity to respond thereto</u>. If an administrator is minded to reject the explanations of an interested party, she should at least inform the party why she is so minded, and afford that party the opportunity to overcome her doubts" (Footnotes omitted)

24. The crux thus, of Polmed's submission in that regard is that a medical scheme, CMS or a quasi-judicial structure formed by it, must follow a lawful and procedurally fair process in conducting, alternatively, at the very least adjudicating FWA incidences.

25. If these processes exist at a scheme, or CMS's level, it is not apparent that they are effective, hence the need to have this Panel to investigate the credibility of such claims or complaints. If they exist, then the Panel should make necessary recommendations for eradicating any semblance of unlawful, unreasonable and unfairness in resolving section 59 disputes.

26. Polmed concluded its submissions by providing the Panel with the following *inter-alia* advice and/or suggestions to provide for procedural fairness:

26.1. A relook at the existing regulations and amending same to specifically regulate the effective controls that the CMS and medical schemes need to put in place to resolve disputes relating to allegations of FWA.

26.2. establishment of a panel either on an ad-hoc basis or otherwise, to deal with the adjudication of deductions; and

26.3. an adjudication process where someone in a position, similar to an arbitrator, can sit as an appeal board established in terms of section 50 of the Ms Act, to deal with disputes emanating from FWA investigations.

27. The above submission notwithstanding, Polmed does not lose sight of the importance of combating FWA in the medical profession and that cannot be gainsaid. Polmed notes that fraud detection is a significant yet challenging and persisting problem in the health insurance industry and thus aligns itself with the position taken by all the other medical schemes that FWA is scourge that affects the industry detrimentally and therefore it must be uprooted by all necessary lawful means.

28. On the other hand, Solutionist Thinkers, the seemingly protagonist of this whole debacle, like all the concerned stakeholders, note the need to combat FWA[11]:

"*In summary of Dr. Kimmie's paragraph 485, which acknowledges that efforts to reduce fraudulent and wasteful activities (FWA) within medical schemes are important. It emphasizes the responsibility of schemes and administrators to prevent FWA and manage financial risks effectively through detection and prevention systems."*

29. The Panel itself noted that the prevalence of FWA is disturbing and that the need to deal with instances of FWA are "worthy societal goals" and further that:

"[485] We agree that efforts to reduce FWA is a "worthy and important societal goal". This is particularly so as FWA is ultimately experienced by members of medical schemes – as the schemes hold members' monies in trust and both administrators and schemes are obliged to take steps to prevent FWA. It is important that schemes, either themselves or through their administrators, manage their financial risk appropriately and this includes having systems for the detection and prevention of FWA.

[11] Solutionist Thinkers Legals Submissions page 3 at paragraph 3.

[486] We accept the importance of eradicating FWA and more particularly the importance of having effective risk management systems in place, despite the difficulties with the evidence that was adduced about the cost of FWA. However, such evidence at times appeared exaggerated and overstated. For example, Medscheme initially suggested that the impact of FWA could range between 3% - 15%, with some people claiming it could be as high as 23%. Medscheme conceded, however, that the figure applicable to Medscheme is 3%.595 Also, where for example, GEMS, in its own policy documents did not define "waste" but only defined fraud and abuse, it is difficult to accept that GEMS's calculations of the cost of at least "waste" was accurate.

[487] Having accepted the importance of eradicating FWA, the measures and systems used should not do so at the expense of Black people's dignity and the principles of equality…"

30. After all the dust has settled, it is clear that all stakeholders are in agreement that FWA must be combated to keep the medical insurance industry viable. It is "the HOW-PART" that requires the tripartite sit down and resolution.

Public Function and PAJA

31. The Panel concluded in paragraphs 558-559 of the Interim Report that medical schemes, in terms of section 59(3) of the MS Act, exercise public powers and are constrained by the principles of administrative justice. To that end, the Panel stated the following in the Interim Report, which bears reproduction herein:

"*[558] On this basis, it is our view that the powers exercised in terms of section 59(3) of the Act are public powers and are constrained by the principles of administrative justice embodied in sections 1 and 33 of the Constitution and PAJA.*

[559] Even if we are incorrect in relation to the view that the powers exercised in terms of section 59(3) of the Act are public powers, the exercise of coercive private powers are also subject to the protections of administrative justice by way of the common law." (Own emphasis)

32. For reasons raised in the initial submissions and from the further legal authorities herein below, Polmed finds itself unmoved to comment otherwise.

33. Polmed considered carefully the submissions of BHF[12] and GEMS[13] that the relationship between the parties herein is entirely contractual in nature and that in rendering its business, medical scheme acts privately and not as a replacement of government. Polmed cannot deny or reject this position and accepts same as the basis of the relationship a medical scheme has between itself and its member or beneficiary. In some instances, this contractual relationship extends to the service provider.

34. The analysis of case law furnished by Polmed, the Panel and the two other medical schemes on this issue, reveal that there is no direct case law on the exercises of power in terms of section 59(3).

35. It is therefore Polmed's considered view and submission that section 59(3) of the MSA buttresses the need for due process in conducting FWA investigations.

36. It has already been demonstrated by Polmed in the legal submissions of 27 June 2023, the decision by a medical scheme to claw back or impose any of the sanctions flowing from an FWA investigation would invariably have an adverse effect on the provider involved.

[12] BHF's Submissions, at paras 43 – 50.

[13] See GEMS's Submissions, at paragraphs 73 – 76.

37. Further Polmed noted that there appears to exist a lacuna in the Act or the regulations, in that there are no regulations that deal with mechanisms or procedures to implement the cancellation, suspension or blacklisting of a delinquent provider. Currently, medical schemes appear to have unfettered power in this regard.

38. It is therefore Polmed's submission that when medical schemes conduct FWA investigations, the principles of fairness, equality, *audi* must take centre stage in the proceedings.

39. In so submitting, Polmed does not see itself as being misaligned.

40. In Polmed's view, it would be ideal to have an internal medical scheme driven process, that addresses this lacuna and lead to an industry that can regulate itself and do away with the need to possibly have over regulation by the Department of Health, the Minister, the Act, or the Regulations.

Self-Help

41. The Panel dealt with the prohibition of self-help at paragraph 493 of the Interim Report. This prohibition finds authority in the decision of ***First National Bank of South Africa Ltd v Land and Agricultural Bank of South Africa and Others; Sheard v Land***

and Agricultural Bank of South Africa and Another[14] where Justice Makgoro held the following:

"*The High Courts held that the process of execution sanctioned by sections 34 and 55 of the Act was essentially the same as that set forth in section 38(2) of the North West Agricultural Bank Act*[2] *which this Court struck down in Chief Lesapo v North West Agricultural Bank and Another as an impermissible infringement of the constitutional right to access the courts and* *<u>a form of self-help inimical to the rule of law</u>."* (Own emphasis)

42. The Panel found that[15] medical schemes claw back monies in a unilateral manner:

"[537.3] Section 59(3) empowers the schemes to unilaterally make a decision regarding when and what amount is clawed back from future benefits owed to members or providers."

43. The Panel's finding of unilateral power to claw back monies by medical schemes seems to point to a conduct that falls on all four with the self-help prohibited by the Constitutional Court above.

44. Polmed notes with interest BHF's and GEMS's contentions that either, the service providers have alternative remedies within the MSA itself to raise their complaints, or that the schemes themselves have

[14] 2000 (3) SA 626 at paragraph 1.
[15] At paragraph 537.3 of the Interim Report.

mechanisms to afford the service providers with an opportunity to be heard before any sanction can be meted out against the provider.

45. Polmed believes that its Standard Operating Procedure ("SOP"), an internal process meant to deal with due process in dispute resolution, can play a meaningful measure to eliminate this perception. By this process and proposal, Polmed does not argue that suppliers should not be investigated and punished, where they are found to have violated the internal rules and policies of medical schemes. It simply seeks to follow a certain specified process to get to the said end.

46. This is the SOP that it referred to during the oral representations on 27 June 2023. We elaborate thereon below.

STANDARD OPERATING PROCEDURE: FRAUD, WASTE AND ABUSE PROCESS INVESTIGATION FOR MEMBERS

47. As indicated during the presentation before the Panel, during 2021 and after the release of the interim report, Polmed introduced a process with which it sought henceforth to have disputes between itself and its members, and soon with suppliers.

48. The process of investigating, dealing with and sanctioning fraud, waste and abuse cases ("FWA") pertaining to members begins with Medscheme as Polmed's administrator. This is where Polmed's reformed SOP interfaces with Medscheme. Thus, Medscheme as

Polmed's administrator plays a role within the scheme's SOP and ensures that both parties are heard thereby lending credence to the *audi partem* principle. As previously submitted by Polmed, the *audi partem* rule entails four principles. Firstly, a party to an enquiry must be afforded an opportunity to state his or her case before a decision is reached, if such a decision is likely to affect his or her rights or legitimate expectations. Secondly, prejudicial facts must be communicated to the person who may be affected by the decision, in order to enable him or her to rebut such facts. Thirdly, the rule also stipulates that the tribunal which has taken the decision must give reasons for its decision. Fourthly, the rule entails that the tribunal exercising the discretion must be impartial.

49. From the onset Medscheme begins the process by conducting a forensic investigation which is undertaken by extracting claims data from the claims submitted to it by members.

50. The investigations are precipitated by either the use of algorithms which pick up and detect instances where fraud was likely to have been committed; or by making use of reports by whistle blowers or even in some instances, a combination of both.

51. Where the investigation finds that a member was not involved in fraud, then that it is the end of the matter.

52. However, if the investigations finds that a member was involved in allegations of fraud, then Medscheme prepares a memorandum to Polmed's Fraud Forum. The Fraud Forum consists of Polmed officials from Clinical department, Operations department, and Legal department.

53. On receipt of the above memorandum, the Fraud Forum convenes to consider the contents thereof. The Fraud Forum then communicates with the affected member to inform the member of the allegations levelled against him/her and invite the member to respond to the said accusation.

54. The Fraud Forum, after considering the allegations, provides the Principal Officer with a recommendation on the outcome of the investigation. The Principal Officer is appointed by the Board of Trustees in terms of section 54(4)(a) of the MS Act. As one of their fiduciary duties, the Trustees appoint and delegate accountability for the day-to-day management of the Scheme to the Principal Officer, who is the chief executive and accounting officer of the Scheme.

55. To that end section 54(4)(a) provides that:

"(4) The duties of the board of trustees shall be to—

appoint a principal officer who is a fit and proper person to hold such office and shall within 30 days of such appointment give notice thereof in writing to the Registrar;"

56. Based on the recommendation made, the Principal Officer communicates with the affected member and invites the member to make representations in reaction to the findings, recommendations from the Fraud Forum together with recommendations from his or her office. The member would thereafter have two options on receipt of the recommendation. The member can either:

56.1. Appeal against the recommendation of a guilty finding; or

56.2. Accept the recommendation in which event, the investigation would come to an end.

Appeal of the recommendation by member

57. In circumstances where the member does not accept the Principal Officer's decision, the member can appeal against the Principal Officer's recommendation. The matter is then escalated to Complaints Dispute Resolution Committee ("CDRC"). Polmed makes provision for members, healthcare providers and third parties to lodge complaints or refer disputes. The CDRC handles complaints and dispute resolution.

58. Once the CDRC is seized with the appeal, it would consider the recommendation by the Medscheme, the member and the Principal Officer, and then provides the member with an outcome. The CDRC has two possible outcomes. The CDRC can either:

58.1. overturn the decision of the Principal Officer, and in that case, it would notify the member; or

58.2. upholds the decision of the Principal Officer. In that case it affords the member a further thirty (30) days period to respond to the outcome of the appeal.

59. At this stage and where the CDRC has resolved to persist with its outcome, it would liaise with the Human Resources of the South African Police Service (SAPS HR) with regards to the outcome. Depending on the severity of the findings, criminal charges may possibly be laid against the member with the relevant law enforcement. If no charges are being brought against the member, both the SAPS and the member are informed of this.

60. Where criminal charges are laid, the matter might be referred to SAPS's Directorate of Priority Crime Investigation ("DPCI"). In that case the CDRC would follow up the matter with the relevant law enforcement to be appraised on the progress of the matter. The law enforcement processes are then allowed to unfold in that regard.

Acceptance of Principal Officers decision by member

61. If the member accepts the decision by the Principal Officer, then the member's membership may be suspended or terminated. This eventuality is communicated to SAPS HR.

62. The acceptance of the decision by the member exposes him/her to criminal charges. If no charges are laid against the member, then that decision is communicated to the member and the SAPS HR.

63. However, if the decision is to lay criminal charges against the member, the Principal Officer follows up the matter with the relevant law enforcement to be appraised on the progress of the matter.

64. Upon successful completion of a criminal case, the member might end up with a criminal record.

65. The decision of the CDRC may be appealed in terms of section 48 of the MSA act. However, this appeal process is beset with delays and inefficiencies in regard to speedy resolution of appeals. It is in this context then that the arbitration process mentioned in the legal submissions of 27 June 2023 can be an alternative mechanism to settle a dispute. Discovery Medical Scheme speaks to such an arbitration process it is submissions at paragraph 525.

SUMMATION AND CONCLUSION

66. Polmed is a medical scheme as provided for in the MS Act and accepts its primary mandate as protection of its members' contributions from the persistent incidences of FWA by most of the service providers. It intends to eradicate and uproot this illegal and criminal conduct. It intends to continue clawing back and recovering the monies it loses at the hands of these unscrupulous providers.

67. To this end, Polmed aligns itself with all the medical schemes on the need to investigate, unearth, punish the perpetrators of FWA.

68. It is the "HOW-PART" that appears to be in issue as to the process of dealing with this scourge.

69. In its own analysis of the industry and the Panel's report, Polmed noted that there is a lacuna on how, *inter alia*, this claw back process should be carried out. The MSA only provides for the termination of relations with a member who contracts with a medical scheme but does not provide for the termination of a contractual relationship between a medical scheme and a provider.

70. As previously mentioned, these further submissions do not in any way detract from what Polmed has already submitted to the Panel, rather these submissions serve to emphasise the need for proper process to give effect to due process.

71. Additionally, Polmed has sought to demonstrate the following:

    71.1. That it takes incidences of FWA seriously as this is an industry wide problem which affects the quality of and access to health care.

    71.2. The need for a participatory mechanism that deals with supplier FWA investigations and due processes within the scheme that are ideally not CMS driven.

71.3. Polmed recognises the right of every to a fair hearing to settle disputes envisaged by section 34 of the Constitution; and

71.4. Other than the diverging stances on the findings of alleged racial discrimination which Polmed notes, Polmed aligns itself with the industry in the common position to clamp down FWA.

72. Polmed carefully considered the submissions of Medscheme and Discovery Health which are indeed legal, in nature, and are largely pointed towards numerous failures by the Panel, and it elects herewith, and while these points await further ventilation, to express no view on the correctness or otherwise thereof.

73. The Panel should not however read Polmed's above election as an indication of Polmed differing with these medical schemes.

Compiled for Polmed by:

T J MACHABA SC

G TIKI

KHR INC.

JOHANNESBURG

12 July 2023