

***The RPL judgement
Information to schemes and the way forward***

Presented by Heidi Kruger



The Registrar's report

- Claims outweighed contributions by R2.5b
- Hospital costs increased by 18%
- Specialists increased by 19%
- Hospitals have increased by 74.6% in the last 10 years. (figure adjusted for inflation)
- Specialists have increased by 58.5% in the last 10 years (figure adjusted for inflation)
- Recent judgement on the 2008/09 RPL has a significant impact on the sustainability of an already vulnerable industry.



Judgement on the 2008/09 RPL

- **The Regulations** Relating to the Obtainment of Information and the Process of Determination and Publication of Reference Price Lists in terms of the National Health Act 61 of 2003 promulgated on 23 July 2007 in terms of which the RPL was published; and
- **All acts performed in terms of the Regulations** (e.g. 2008 and 2009 guidelines published by the Director-General [DG] of Health, notices, invitations for submissions, publication thereof and the publication of one or more RPLs) declared **null and void**.
- **The whole process has to commence *de novo*** in a proper, open and transparent manner and in terms of reconsidered Regulations.



Legal challenge

- Wording of communiqué 47 challenged.
- HASA/Werksmans requested recall
- Further clarification sent out to schemes



Legal opinion on the judgement by Esmé Prins-van den Berg of Benguela Health

- Since the RPL for both 2008 and 2009 were declared to be invalid, there appears to be no benchmark for tariff and/or benefit determination at present. It should, however, be noted that **the National Health Reference Price Lists (NHRPL) published by the Council for Medical Schemes (CMS) were not challenged** and declared invalid by a court of law. The last version of the NHRPL published by the CMS occurred on 21 February 2006. **This version was known as the CMS NHRPL 2006 Version 6 (2006.06)** and was effective from 1 March 2006.



Legal opinion on the judgement by Esmé Prins-van den Berg of Benguela Health

- **Schemes should therefore review and amend their rules, if indicated,** to reflect an appropriate rate at which scheme benefits were to be paid. If necessary, it could be linked to the 2006 NHRPL being the last valid benchmark published
- **Any amendments to the codes and/or descriptors made since the publication of the 2006 NHRPL, if any, would also no longer be valid.**



Legal opinion on the judgement by Esmé Prins-van den Berg of Benguela Health

- It could be argued that the judgment effectively rendered all payments made by schemes that were linked to the Department of Health's RPL in the light of the judgment "invalid". In practice this would be impracticable and not rational. It was also unlikely that these payments would be challenged. Should a legal challenge, however, arise schemes could defend their conduct with reference to their registered rules.



Legal opinion on the judgement by Esmé Prins-van den Berg of Benguela Health

- Without an official RPL, schemes would implement their individual scheme rates and all service providers would determine their own billing rates, which was largely the position already in practice. This might, however, **encourage service providers to insist on an increasing basis that beneficiaries settle their accounts and then claim benefits from their respective schemes. Such an eventuality would impact on the administration costs of schemes and the affordability of health care services by beneficiaries.**

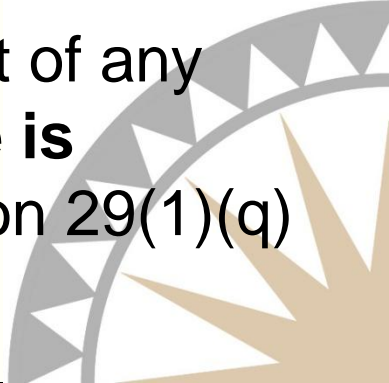


Legal opinion on the judgement by Esmé Prins-van den Berg of Benguela Health

- Since the Health Professions Council of SA (HPCSA) scrapped its Ethical Price List last year, **there is no ceiling tariff in place.** It therefore appears that no complaint against “over-charging” by a service provider could be entertained by any regulatory body in the absence of benchmark and ceiling tariffs.
- It should also be noted that a properly determined tariff structure and guidelines would be essential for the implementation of the proposed National Health Insurance (NHI). **The invalidity of the Health Department’s RPL was therefore also a grave impediment to the proposed implementation of NHI.**



Extracts from the legal opinion on the judgement by Advocate Salie Joubert SC for Medscheme

- **The 2006 NHRPL published by the Department of Health and the Council for Medical Schemes, was not challenged or declared invalid by this judgment. The 2006 NHRPL had obviously been determined prior to the promulgation of the Regulations published in Government Notice 681 of 23 July 2007. It was obviously the appropriate benchmark in that year to be applied by medical schemes, as a reference, in arriving what the appropriate scale, tariff or recommended guide had to be for the payment of any benefits. This is an aspect a **medical scheme is obliged to provide for in its rules** (see Section 29(1)(q) of Act 131 of 1998).**
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Extracts from the legal opinion on the judgement by Advocate Salie Joubert SC for Medscheme

- **The Applicants in the HASA judgment had decided not to seek an order for the NHRPL lists for 2004 to 2006 also to be declared invalid and therefore cannot bemoan the use thereof in establishing a scheme tariff based on what is now considered to be the last valid reference price list, being that for 2006.**



Extracts from the legal opinion on the judgement by Advocate Salie Joubert SC for Medscheme

- To grant assistance in defraying expenditure incurred in connection with the rendering of any relevant health service, specifically pertains to *inter alia* what should be provided for in the rules of a medical scheme, as is set out in Section 29(1)(q), in that the rules of a medical **scheme should provide for:**

***“The payment of any benefits according to –
A scale, tariff or recommended guide; or
Specific directives described in the rules of the
medical scheme”.***



Extracts from the legal opinion on the judgement by Advocate Salie Joubert SC for Medscheme

- It is assumed that each and every medical scheme will provide therefore that a member would be informed that annually a beneficiary will be entitled to specific benefits in a relevant financial year. This is an undertaking of liability that a medical scheme cannot renege on. **The medical scheme also cannot function *in vacuo*.** Purely based thereon that the latest NHRPL had been declared invalid and therefore because it was used as a reference in establishing the scale, tariff or recommended guide (collectively referred to herein as a “scheme tariff”) regarding payment of any benefits, **it cannot now be assumed such a scheme tariff of the relevant medical scheme is also invalid.**



Extracts from the legal opinion on the judgement by Advocate Salie Joubert SC for Medscheme

- If there is in any scheme rule a definition of “*reference price list*” by referring to it as **the current, valid reference price list** for health services duly published by the National Department of Health from time to time for any period in terms of the National Health Act, then I would **advise amendment of such rule pending the promulgation of new regulations.**



Extracts from the legal opinion on the judgement by Advocate Salie Joubert SC for Medscheme

- **I am of the view that it is a flawed submission to argue that as the HASA judgment does not refer to the 2006 RPL, therefore to make use of a “*fallback benchmark tariff*” in the sense that the NHRPL 2006 be utilised, would be an undermining of the judgment. To state that the imposition of such a “*fallback benchmark tariff*” is consequently unlawful is furthermore an indifferent submission.**



Extracts from the legal opinion on the judgement by Advocate Salie Joubert SC for Medscheme

- There must be a scheme tariff, beneficiaries have to be paid and the medical scheme has to adhere to its guarantee and undertaking of liability. **If there is no other RPL to refer to other than the NHRPL 2006 then that is the bench-mark tariff to be used as reference.**



Extracts from the legal opinion on the judgement by Advocate Salie Joubert SC for Medscheme


- This would obviously have to be adjusted for the 2011 circumstances (probably by adding an annual inflationary component as from 2006 onwards). It certainly is not the ideal situation, but a medical scheme has to carry on doing the business of a medical scheme.



Extracts from the legal opinion on the judgement by Advocate Salie Joubert SC for Medscheme

- To rely on the Competition Act, 89 of 1998 to consider the NHRPL 2006 as unlawful and threatening that: *“Any advice to such third party/ies in contravention of the Competition Act exposes such third party/ies to possible liability under the provisions of the Competition Act”*, is a submission made and an argument **advanced without taking cognisance of the statutory liability of a medical scheme in terms of the Medical Schemes Act.**

Everything done by a medical scheme is to be in accordance with the responsibilities and liabilities created in terms of the Medical Schemes Act. In any event, as set out above, it appears from **Circular 10 of 2003 of the Council of Medical Schemes, dated 20 October 2003** that the NHRPL from 2004 onwards was published with the blessing and approval of the **Competition Commission of South Africa.**



Extracts from the legal opinion on the judgement by Advocate Salie Joubert SC for Medscheme

QUESTIONS POSED:

- Whether the scheme tariffs applied in terms of the Medical Scheme Rules are now illegal?

Answer: No, for the current year the relevant medical schemes should adhere to the scheme tariffs so as to ensure they comply with their guarantee and undertaking to the member to provide the necessary required statutory assistance in performing the benefit at scheme tariff against payment of the member's premium.



Extracts from the legal opinion on the judgement by Advocate Salie Joubert SC for Medscheme

QUESTIONS POSED:

- Whether it is necessary for the medical schemes to amend their rules for the remainder of the current year?

Answer: No, it is, however, **advised that reference to the NHRPL of 2008 and/or 2009 be removed** and it be brought in line, as set out herein above, with reference to the 2006 RPL.



Extracts from the legal opinion on the judgement by Advocate Salie Joubert SC for Medscheme

QUESTIONS POSED:

- Whether it could be argued that the judgment renders all payments made by the medical schemes linked to the Department of Health's NHRPL invalid?

Answer: No, all such payments were made *bona fide* and the NHRPL now declared invalid merely served as a reference in establishing what the particular scheme tariffs should be.




Extracts from the legal opinion on the judgement by Advocate Salie Joubert SC for Medscheme

QUESTIONS POSED:

- Whether, given that NHRPL tariffs are monetary values linked to clinical codes determined by the medical treatment rendered, the court's decision affects the legal status of the clinical codes as well?

Answer: I get the impression that the clinical codes have been designed by the South African Medical Association in their Doctors' Billing Manual and that healthcare providers will continue to make use of such clinical codes as it is practical. I am therefore of the view that **even if the legal status of the clinical code is affected, then the practical use thereof should be continued.**



Extracts from the legal opinion on the judgement by Advocate Salie Joubert SC for Medscheme

QUESTIONS POSED:

- What the legality would be of amendments to the clinical codes and/or descriptors made since the publication of the 2006 NHRPL?

Answer: Even if the legal status of the amendments to the clinical codes and/or descriptors is affected, then based on the practical use thereof I would advise the continued use thereof.



Extracts from the legal opinion on the judgement by Advocate Salie Joubert SC for Medscheme

QUESTIONS POSED:

- Whether it would be correct to say that no complaint against “*overcharging*” by a service provider can be entertained by any regulatory body given the absence of the benchmark and ceiling tariffs (the Health Professions Council of South Africa scrapped its ethical price list in May 2009 which was previously seen as a ceiling tariff)?

Answer: No. It still remains **the test of reasonableness**, whether there had been overcharging by a service provider.



The way forward

- Meeting with BHF/CMS and other parties on the **6th September on the way forward** with regards reference price lists
- The vacuum created by the judgement coupled with the HPCSA's scrapping of the ethical tariff has meant that there is now carte blanche for providers to charge as they wish.
- The CMS believes that they are mandated to intervene to play a coordination role with regards to finding a solution to the tariff problem. Furthermore, the recent Registrar's report has highlighted the sharp increase in hospital and specialist costs since 2004, further indicating the need to intervene.



The way forward

Extract from the Registrar's closing address:

“The CMS is concerned that the absence of a price schedule would pose a challenge to medical schemes in developing their benefits for 2011. The CMS must approve the proposed scheme benefits and rules by November 2010. Consequently, we will then be in a position to consider the publication of an interim cost of benefits schedule, NOT prices of 2011. The CMS will withdraw all cost schedules from the market when a new pricing system is finally legislated. The current rates registered with the CMS still apply”.



The way forward

- CMS suggested that schedules be broken down into:

Codes

Billing guidelines

Prices (scheme and provider)

Increases

- Essentially the CMS are suggesting a pricing forum based on a negotiation process with funders and providers on all the above aspects of the tariff schedule.



The way forward

- Where there is a dispute, this would go to a body which imposes final contract arbitration, i.e. that the arbitrator simply chooses one of the two bids. This process would not be appealable.
- For the first year, the process would be a 'dry-run'.
- The process would be voluntary
- This would be an interim arrangement which may feed into the Minister's proposed health pricing commission.



The way forward

- The process would be voluntary, with the understanding that if parties did not participate then there would be a push for legislated prices.
- CMS have met with providers and will engage with other stakeholders
- CMS will then give report to MoH and DG and BHF will be invited to that meeting.



Discussion



Declarator

- In order to obtain an urgent declaratory, the dispute needs to be 'live' and we would need to demonstrate the urgency for the industry.
- This could potentially be done in the following ways:

Join a current dispute.

Enter into correspondence with the Registrar on the differences in interpretation of Regulation 8.

Use the Code of Conduct and the Registrar's conference closing speech as the Council's intention the force schemes to comply with the 'payment in full' obligation.



Declarator

- The open ended liability for schemes created by the vacuum means that the industry is extremely vulnerable at the moment and it is conceivable that some small schemes could fold.
- We could use the impact on schemes of the newly released billing guidelines from the e.g. cardio thoracic surgeons to demonstrate the potential threat to the industry.
- Would have to cite the MOH.



Discussion

