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When must your medical scheme pay for treatment?

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On 26 August 2022, the High Court in Pretoria handed down judgment in an application concerning a three-year old boy suffering from a rare genetic disease called *Mucopolysaccharidosis* Type II ("MPS II") – also known as Hunters Syndrome (*M De Wet v MediHelp Medical Scheme,* Case Number: 2022-010668) ("the judgment").

Prescribed minimum benefits (PMB)

The question that arose, in this case, was whether or not payment for Elaprase, which is the first and only registered treatment for MPS II in South Africa ("the treatment"), would be covered by the young boy's medical scheme, Medihelp Medical Scheme ("Medihelp"). In deciding the question, the court was required to deal with the manner in which prescribed minimum benefits ("PMBs") are regulated in terms of the Medical Schemes Act No. 131 of 1998 ("the MSA").

Facts of the case

The application was brought, on an urgent basis, by the mother of the boy, together with Rare Diseases of South Africa NPC, which is a non-profit organisation in South Africa. The respondents were MediHelp and the Council for Medical Schemes ("CMS"), respectively.

In terms of the application, the applicants sought an interim order compelling MediHelp to pay for the treatment of the boy pending the outcome of the second part of the application – a complaint to be lodged with the CMS in terms of section 47 of the MSA. In this regard, section 47 provides for an internal dispute resolution process where members of a medical scheme may lodge a complaint with the Registrar of Medical Schemes ("the Registrar"). The Registrar will then take certain steps in an effort to resolve the dispute.

The boy's mother had, unsuccessfully, on two previous occasions submitted authorisation requests to MediHelp to cover the treatment. MediHelp, however, refused to authorise payment of the treatment on the basis, *inter alia*, that MPS II is not a registered PMB condition and, even if MPS II were a PMB condition, treatment with Elaprase was not available in the public health service.

As such, MediHelp argued that the treatment would not be covered – this despite the fact that all the specialist medical practitioners treating the boy had motivated for the provision of Elaprase, as being an essential part of his treatment (see paragraph 7 of the judgment).

The relevant law relating to PMBs in South Africa

PMBs are a set of benefits that a medical scheme is required pay in full, without co-payment or deductibles, in respect of the diagnosis, treatment and care costs of such benefits (see regulation 8(1) of the Regulations promulgated in terms of the MSA as GNR1262, dated 20 October 1999 ("the MSA Regulations")). In terms of section 29(1)(o) of the MSA, a medical scheme's rules must include the provision of PMBs to its members.

The term "prescribed minimum benefits" is defined in **regulation 7 of the MSA Regulations** as the benefits contemplated in section 29(1)(o) of the MSA, "and consist of the provision of the diagnosis, treatment and care costs" of –

- the Diagnosis and Treatment Pairs listed in Annexure A to the Regulations, which are discussed in further detail below in this article; and

- any emergency medical condition, which is defined in regulation 7 to mean "the sudden and, at the time, unexpected onset of a health condition that requires immediate medical or surgical treatment, where failure to provide medical or surgical treatment would result in serious impairment to bodily functions or serious dysfunction of a bodily organ or part, or would place the person's life in serious jeopardy".

Regulation 8(2) provides that the rules of a medical scheme may, in respect of any benefit option, provide that –

- the diagnosis, treatment and care costs of a PMB condition will only be paid in full by the medical scheme if those services are obtained from a Designated Service Provider ("DSP") in respect of that condition; and
- a co-payment or deductible, the quantum of which is specified in the rules of the medical scheme, may be imposed on a member if that member or his or her dependant obtains such services from a provider other than a DSP. The Regulations do contain some exceptions to this in cases where services are "involuntarily obtained" by a member from a provider other than a DSP, but those exceptions are not discussed in this article.

Two important aspects of PMBs must, therefore, be present before a medical scheme is required to make payment, in full, for PMBs in the manner described in the MSA: the first is that the PMB service must have been provided by a DSP, and the second is that the care received by the member or beneficiary must fall within the scope and ambit of the PMBs as they are described in Annexure A to the Regulations.

In so far as **Annexure A to the Regulations** is concerned, Annexure A divides PMBs into categories based on diagnosis and treatment pairs in respect of which a code, diagnosis and treatment are prescribed for the categories. The application of Annexure A and the table of PMBs is not a straightforward process and a number of explanatory notes to and definitions in Annexure A are set out in items 1 to 9 of the Annexure. The explanatory note that is particularly relevant to the case at hand appears in item 2, which provides that –

> *"Where the treatment component of a category in Annexure A is stated in general terms (i.e. 'medical management' or 'surgical management', it should be interpreted as referring to prevailing hospital-based medical or surgical diagnostic and treatment practice for the specified condition. Where significant differences exist between Public and Private sector practices, the interpretation of the [PMBs] should follow the predominant Public Hospital practice, as outlined in the relevant provincial or national public hospital clinical protocols, where these exist. Where clinical protocols do not exist disputes should be settled by consultation with provincial health authorities to ascertain prevailing practice…". (our emphasis)*

Therefore, in certain circumstances, the application of Annexure A requires a medical scheme to consider the costs of providing PMBs in the context of a public hospital environment. What this means is that, because the PMBs refer to the treatment of a condition in general terms, the costs that are to be covered must be calculated with reference to prevailing medical practices in the public sector. Any disputes over the costs applied to a PMB condition must, in turn, be settled with reference to provincial health authorities in order to ascertain the prevailing practice.

The judgment

In the judgment, the first question that had to be considered was whether or not MPS II is a condition that falls within Annexure A to the Regulations. Ultimately, however, this issue was conceded by Medihelp, following a separate CMS ruling, on 11 February 2022, that confirmed that MPS II is in fact a PMB condition and that it falls under category 901K in Annexure A to the Regulations (see paragraph 21 of the judgment). Category 901K is, in turn, described in Annexure A as follows –

- category: "endocrine, metabolic and nutritional";
- diagnosis: "Life-Threatening Congenital Abnormalities of Carbohydrate, Lipid, Protein and Amino Acid Metabolism'; and
- treatment: "*Medical Management*" (our emphasis).

Despite its concession, MediHelp, argued, *inter alia*, that because the treatment prescribed for MPS II in Annexure A is described as "Medical Management", MediHelp would only be required to cover the costs of Elaprase if treatment with Elaprase was a "prevailing predominant public hospital practice" – which MediHelp argued was not the case. In particular, Medihelp argued that, whilst Elaprase is the prevailing and preferred treatment protocol within the private healthcare sector.

The same cannot be said for the public healthcare sector (paragraph 12 of the judgment). MediHelp's position was, however, challenged by the applicants through the production of various expert affidavits.

Having considered the evidence, Millar J ultimately held that Medihelp's arguments could not be sustained, concluding that –

- the use of Elaprase is, in fact, the only available treatment for MPS II in both the private and public sectors. In this regard, although Medihelp argued that "availability" ought not to be equated with "prevalence" or "predominance", Millar J held, based on the affidavits placed before him, that Elaprase is provided "in the public healthcare service in the four most populous of the Republic's nine provinces and in some instances, notwithstanding the rarity of the condition, in more than one public hospital in a particular province" (paragraph 43); and
- given that MPS II is so rare, it is unsurprising that the numbers of patients for whom the treatment is prescribed is low. "The rarity of the condition means that the criteria that must be applied, and the regulations and their explanatory notes [must be] construed in this context. To do otherwise would render them ineffective for rare conditions or those with low patient numbers" (paragraph 44).

In so far as the urgency of the matter was concerned, Millar J held that the deterioration in the boy's condition since April 2022, meant that if he was not afforded treatment with Elaprase, his life and quality of life will be irreparably adversely affected and that the matter was, therefore, indeed an urgent one.

Accordingly, Millar J found in favour of the applicants and ultimately handed down the following order –

- MPS II is declared a PMB Condition under the category 901K as listed in Annexure A of the Regulations; and
- pending the resolution of a complaint to be submitted by the applicants to the CMS, Medihelp was required to –
    - within 30 days of the order, authorise the treatment and care costs of all medical interventions required by the young boy and prescribed by his treating practitioners for MPS II as PMB level of care, which treatment includes Elaprase;
    - pay accounts and/or claims for healthcare services rendered by the treating practitioners within 30 days of presentation of the account and/or claim; and
- the CMS was ordered to pay the costs of the application

Conclusion

The above case shows that the application of PMBs in terms of the MSA is a difficult area to navigate in South African law. Medical schemes should, however, be slow to exclude conditions from a PMB classification, especially where rare conditions are involved and a patient is faced with a life-or-death scenario.

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