5 February 2021

TO: Associations of Healthcare Providers

AND TO: The members of the NPPF

Dear Esteemed Healthcare Providers and Associations of Healthcare Providers

ENVISAGED HIGH COURT CHALLENGE

Background

Over the past years the NPPF has been inundated with complaints against NAMAF, with particular reference to NAMAF's setting of what is commonly known as the "NAMAF Benchmark Tariffs".

In previous years, this document was published in hard copy and contained inter alia procedural codes, procedural descriptors, and tariffs. In recent years, this document is not available to the public; not even to members of medical aid funds. The data that makes up the Benchmark Tariffs is also not available to healthcare providers outside the scope of their practice. It is thus only NAMAF and medical aid funds that have access to the full document / data set known as the "NAMAF Benchmark Tariffs".

The statute that constitutes NAMAF, the Medical Aid Funds Act, Act 23 of 1995 (the "Act"), does not express provide NAMAF the powers to set the Benchmark Tariffs, which include procedural/treatment codes and descriptors. Instead, NAMAF relies on a phrase in the Act which states that NAMAF may "*do anything that is conducive to the achievement of its objects and the exercise of its powers*" to issue the Benchmark Tariffs.

Previous Legal Opinion

As it is now an established principle in our law that statutory clauses which provide such unlimited powers (as quoted above) is unconstitutional. With this in mind, and based on the vast amount of complaints we receive on a regular basis about NAMAF's conduct, and its unilateral setting of Benchmark Tariffs (which includes procedural/treatment codes and descriptors), and as the Benchmark Tariffs document / data set is widely used by medical aid

funds, the NPPF requested a legal opinion from Adv Tötemeyer (SC) ("Senior Council") in 2017.

Senior Counsel was requested to advise the NPPF on whether the setting of the Benchmark Tariffs by NAMAF is constitutional. Senior Counsel advised that the statutory provision in the Act (quoted above) is likely unconstitutional and any actions by NAMAF on the basis of such provision (such as the setting of Benchmark Tariffs) will thus also be unconstitutional.

However, only a court can rule conclusively that a statutory provision is unconstitutional, and thus give a ruling which protects a party injured by such unconstitutional conduct. Senior Counsel advised that such a constitutional challenge is likely to succeed.

The opinion was provided to NAMAF in 2017, but NAMAF disregarded same.

As much as the NPPF was confident that a constitutional challenge would succeed, a constitutional challenge of this nature held substantial risks:

1. Firstly, constitutional challenges are expensive, and several past constitutional challenges, which reached the level of the Supreme Court, cost between N$3 million and N$5 million for the applicant's legal team alone.
2. Secondly, because of the nature of such an application, all interest parties would have to be joined to the application as respondents. This would include all medical aid funds who use the Benchmark Tariffs in their administration and claims procedures. With numerous respondents to such application, a possible cost order against the applicants in such matter could result in the applicants facing a financial liability of N$15 million and more.
3. Thirdly, at least on applicant in such matter must be a natural person. A cost order against the applicants (usually jointly and severally), would mean that one healthcare provider could be saddled with the full liability of N$15 million and more.

For these reasons the NPPF could never obtain sufficient financial support (and a willing natural person) to pursue this constitutional challenge. As is evident from NAMAF's recently proposed regulations, which aim to legitimise NAMAF's issuing of the Benchmark Tariffs (and more) and also to expand NAMAF's control over healthcare providers, NAMAF is not concerned about any challenge against its unconstitutional conduct – probably because no legal action followed the abovementioned opinion.

We now have an opportunity to approach the court in an example-case which provides for a far cheaper avenue with far less risk. The NPPF strongly believes this opportunity must be grabbed, or the abuse of NAMAF, and by extension medical aid funds, of private healthcare providers, will not cease, and will likely increase in future.

The Case of Dr B

During 2020 the NPPF received a complaint from a General Practitioner (Dr B). In this matter a medical aid fund, NHP alleged that Dr B billed incorrectly and NHP demanded payment from her in the amount of N$163,577.34. In the same letter of demand from NHP, NHP stated that they (NHP) have a right to deduct the amount from "*any future valid claim*". This is unlikely the correct position in our law, as stated in more detail hereunder.

Dr B obtained from NHP the data pertaining to the alleged claim in question, reassessed same and requested NHP (and for good measure, its administrator and agent, Medscheme) to provide clarity on the following five questions in order for Dr B to provide a substantive reply to NHP:

1. *Who compiled the treatment codes, treatment descriptors and tariffs on which the fund now relies to substantiate its claim?*
2. *On what basis in law does the fund claim the right to impose treatment codes, treatment descriptors and tariffs on healthcare providers, including myself?*
3. *On what basis in law do I have a legal duty to adhere to such treatment codes, treatment descriptors and tariffs, including the fund's interpretation of same?*
4. *If not the fund itself, who is responsible for interpretation of the treatment descriptors on which interpretation the fund now relies to substantiate its claim?*
5. *Why did the fund not follow the procedure as prescribed in Regulation 7 of the Regulations in terms of the Medical Aid Funds Act as per Government Gazette 1496 of 11 February 1997?*

In her reply Dr B also advised NHP not to deduct any amount from any future claim, as such action will be a unilateral and unlawful set-off, as the fund would deny Dr B a fair process, and more specifically, a proper judicial platform to dispute the allegations of NHP, as NHP would then effectively be acting as judge, jury and executioner in its own cause.

Medscheme (and not NHP) replied to the above five points raised by Dr B as follows (our own underlining throughout):

1. *Codes and Tariffs were compiled by NAMAF and Medical Aid Funds has relied on such since its inception. All healthcare providers who wish to be reimbursed by a Medical aid fund, follow these codes and tariffs.*
2. *Please refer to NAMAF for explanation of your enquiry, we can refer you to our point 1. Above.*
3. *You do not have to adhere to these codes and tariffs if your practice does not want to be reimbursed by a medical fund, you may operate on a cash basis with your patients.*
4. *The codes and tariffs were developed by your peers and other medical professionals, kindly refer to NAMAF for further clarity.*

5. *Medical Funds do not operate like insurance companies and are not able to verify each and every claim prior to payment, the Funds apply the relevant codes and tariffs for services which were submitted in good faith to Funds for payment. Should it appear retrospectively that a healthcare provider has submitted claims to which the healthcare provider was not entitled to, the Funds may recover such erroneous, abusive or wasteful claims from the relevant healthcare provider.*

The reply from Medscheme ended with the warning: "*Should we not receive the requested reimbursement timeously, we will proceed with a recovery for any future benefits which may accrue to your practice.*"

After assessment of all available information from Medscheme / NHP, Dr B replied to Medscheme denying any indebtedness to NHP. She specifically, again stated that should NHP decide to set-off such claim against any future claim, legal action would be taken, as such set-off effectively denies Dr B any legal platform to defend the allegations / claim and thus NHP would be judge, jury and executioner in its own cause.

The next correspondence Dr B received from Medscheme / NHP stated that the amount alleged to be due to the fund will be deducted from her future claims, and by the end of that month (December 2020) Dr B received a statement which confirms that the full amount claimed by NHP was indeed set-off against her latest claim. Dr B was not provided any judicial platform to defend the claim or any of the allegations against her.

Legal Consequences and Need for an Application to the High Court

It should be kept in mind that healthcare providers do not enjoy any statutory regulatory protection when dealing with medical aid funds or NAMAF.

Two important legal principles are applicable in the case of Dr B. If they are not brought before the High Court for constitutional scrutiny and proper adjudication, medical aid funds, and by extension NAMAF, will continue and probably expand their abuse of private healthcare providers in future.

Administrative Law

It is a pivotal principle of the Rule of Law (and the Namibian Constitution) that a person has the right to a fair hearing, also in civil matters such as these, "*by an independent, impartial and competent Court or Tribunal established by law*" (Article 12 of the Constitution), and to fair administrative procedure (Article 18 of the Constitution). This means that a party claiming that an amount is due to it, while the other party disputes such indebtedness, must approach the appropriate judicial platform, i.e. a court, where such dispute is adjudicated upon within a prescribed process and after assessing evidence and arguments from both parties. Dr B was denied such constitutional right by NHP.

Article 18 of the Namibian Constitution states: *"Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.*"

A medical aid fund such as NHP and NAMAF, as statutory body, are administrative bodies as envisaged in the Constitution.

Dr B has been denied the right to a fair hearing and fair administrative action throughout her ordeal. NHP simply forced Dr B to pay the amount it (NHP) regarded as due. Dr B was not afforded any judicial platform to provide any evidence and arguments which could have proven NHP's alleged claim to be without substance, or otherwise unlawful and/or unconstitutional and/or unenforceable. Most importantly NHP, elected NOT to approach a court to prove the legitimacy / validity of its claim, but instead simply took funds due and payable to Dr B, and thus effectively, by force.

Constitutional Law

During this saga NHP admitted (through its agent, Medscheme) that NAMAF compiles the codes, treatment descriptors and tariffs, and that the medical aid fund has "*relied on such since its inception*". NHP also stated (through its agent, Medscheme) that only NAMAF can explain on what basis in law NHP claims the right to impose treatment codes, treatment descriptors and tariffs on healthcare providers. This goes to the heart of Senior Counsel's legal opinion as discussed above with regard NAMAF's unconstitutional conduct in making such prescriptions, which medical aid funds then follow slavishly. Having said this, NAMAF is fully controlled by the medical aid funds, and thus it is also likely that the funds use this statutory body for their own purposes, to create this likely unconstitutional system to control healthcare providers.

<u>Conclusion</u>

Dr B's case serves as a textbook example of the abuse which the private healthcare sector suffers under the rule of medical aid funds and NAMAF. Although the private healthcare industry is acutely aware of the unfairness in this distorted imbalance of rights and obligations, healthcare providers are not always aware that the imbalance is brought about by what Senior Counsel regards as unconstitutional conduct, based on an unconstitutional clause in the Act. Should this clause in the Act not have existed, a fair system of ethical tariffs and widely agreed upon procedural descriptors, established through an inclusive process, would have existed today. The financial services industry would not have had carte blanche to control almost every aspect of the private sector healthcare industry, as is currently the system in place.

It is therefore imperative that the private sector healthcare industry unites to address this injustice once and for all.

It is then for that reason that the NPPF reaches out to its members, and all other associations of healthcare providers, to join hands with the NPPF, and to fund an application to the High Court. Dr B is willing to assist and allow herself to be the test-case before court, but she cannot possibly do this without the assistance of at least the majority of the private sector healthcare industry.

We are under time bar to approach the court, and thus urge you to revert to us as soon as possible, but no later than the **end of February 2021**, to pledge your support to pursue this matter.

The first phase of the process will be to seek an informal legal opinion from advocate Ramon Maasdorp (Administrative Law and Constitutional expert), instructed by the legal firm Kruger, Van Vuuren & Co, on the possible remedies (as shortly explained above) and the prospects of success. We estimate this phase will cost around N$300,000. By the end of the first phase, we will be able to better estimate the costs of proceeding with the application.

Should you support this application, kindly provide your name and email address to eben@isgnamibia.com and state whether your support the application as individual, or as an association, and if as association, the details of your association.

This is the time for the private healthcare industry to take a stance and have justice prevail in what has in the past often been a grossly abusive relationship. If this is not done, the status quo will continue for many decades to come.

We anxiously await your reply.

Regards

Dr Dries Coetzee
CEO