OPINION

EX PARTE: THE NAMIBIA PRIVATE PRACTITIONERS FORUM ("CONSULTANT")

IN RE: POWERS OF THE NAMIBIAN ASSOCIATION OF MEDICAL AID FUNDS ("NAMAF") TO SET BENCHMARK TARIFFS

R TÖTEMEYER SC
4th FLOOR
NAMLEX CHAMBERS
333 INDEPENDENCE AVENUE
WINDHOEK
30 NOVEMBER 2017

A. QUARE 1. I have been instructed by Mr Eben de Klerk of Kriiger Van Vuuren & Co ("my instructing attorney") to provide consultant with a legal opinion on the powers of NAMAF to set benchmark tariffs for medical aid funds. In particular I have been requested to opine on the following issues: 1.1. May NAMAF, an entity created by statute, set benchmark tariffs to be employed by medical aid funds while not expressly empowered by the Medical Aid Funds Act 23 of 1995 ("the Act") to do so? 1.2. If so, do healthcare providers have any recourse to ensure that the input costs of healthcare delivery is sufficiently taken into account? 1.3. May medical aid funds refuse to make any payment to a healthcare provider directly if the health care provider splits the account between the fund (on NAMAF tariffs) and the patient for the portion of the provider's fee that exceeds the NAMAF benchmark tariffs, thereby creating two separate bills? B. RELEVANT FACTUAL AND OTHER ISSUES 2. My attorney prepared a helpful memorandum in which he had set out the background of this matter. I do not intend to repeat same herein but will refer to certain aspects thereof during the course of my opinion. 3. In short, however: 2

3.1. !. NAMAF is constituted under Part Ill of the Act. In the early 2000's it appropriated for itself a coding and tariff system used by an equivalent South African regulator. This consists of a coding and tariff system, which it presents to medical aid funds in Namibia. 3.2. My instructions are that it is common cause that the code and tariff set by NAMAF are used by every medial aid fund in Namibia (except Heritage Medical Aid Fund) as a bench mark to part of or all of the members' medical expenses (depending on the tariff actually charged by the healthcare provider). The Namibian Supreme Court in its judgement referred to below refers to the nature of these benchmark tariffs (and other facts relevant to same) as follows: (a) "[17] Fund rules are thus required by the MAF Act to spell out the minimum and maximum benefits according to a scale or directive. In practice, this is done with reference to benchmark tariffs set by NAMAF annually as a guide as to what the reasonable costs of medical services are for stipulated items and procedures which are individually coded and cover the complex range of medical services and goods available. These tariffs are reviewed annually for NAMAF by actuaries as independent expert consultants. In this annual review exercise, these consultants obtain input form healthcare service providers and funds in order to determine whether the coded services or items cater for the latest medical developments and innovations. The consultants also review the tariffs themselves with reference to inflation and its effect upon service providers, their capital costs, the effect of exchange rate fluctuations, lending rates, extent of utilisation and depreciation periods. The determination of tariffs in this setting thus entails a degree 3

of transparency form service providers to justify prices and increases with reference to those factors. (b) [21] The benchmark tariffs themselves thus are intended to serve as guidelines as to the reasonable cost of the specified categories or medical services. They are not compulsory - either as a minimum or maximum. Each fund would determine its own benefits and member contributions with reference to the benefit options as set out in their rules. It is not disputed that each fund has different benefits options which in turn differ in how they are structured. The benefits (levels of reimbursement) are usually specified as a percentage of the benchmark tariff." 3.3. My instructions are further that if NAMAF does not have a code for a specific procedure, no medical aid fund will pay for such procedure. Under such NAMAF codes, funds can also refuse payment to certain healthcare providers. 3.4. My instructions are further that experts on the costing of delivery of healthcare services have assessed the NAMAF tariffs and concluded that

those tariffs are incomplete, unscientific and severely lack the ability to properly assess input costs of the healthcare services delivery. 3.5. I am further instructed that although NAMAF requests some input from healthcare associations (only), the annual increases do not fully take into account the cost of healthcare service delivery. Since NAMAF requests input from associations only, numerous healthcare providers, - who for a number of reasons do not trust or belong to such associations - are not provided the opportunity to provide input as to the costs of service delivery. Upon enquiry: 4

(a) My instructing attorney informs me that he made enquiries with some senior members of consultant (who is a section 21 company) representing healthcare providers from across all regulated healthcare disciplines and established that none of them can remember any consultations with private healthcare providers at the time the benchmark tariffs were adopted by NAMAF in the early 2000's; (b) I have received examples from my instructing attorney of how NAMAF - in the past - attempted to obtain input from healthcare providers on annual increases. I am instructed that these documents are sent to associations only and the actual healthcare providers were never afforded the opportunity to provide input and that there is also no obligation to belong to any association. I have perused the writings forwarded to these associations by NAMAF provided to me (which relate to the years 2013,2014, 2015 and 2017). I gathered from the contents thereof that the invitations did not relate to inviting representations on the initial determination of the tariffs, but merely related to the extent to which it should be increased on an annual basis (taking into account various inflation factors on relevant cost items). 3.6. My instructions are further that the aforementioned form of split billing (as per the question posed under 1.3 above), is disallowed by NAMAF. Upon enquiry I was informed that officials of NAMAF have informed healthcare providers in the past that direct payment to healthcare providers will be refused if they practice "split billing" as aforementioned. 5

This forces most healthcare providers into submission charging only NAMAF tariffs. C. OPINION 4. NAMAF is a creature of statute and is established by Part Ill of the Act. The following are the relevant sections concerning inter alia its establishment, objects and powers: "9 Abolition of Namibian Association of Medical Scheme On the date of commencement of this Act - (a) the juristic person known as the Namibian Association of Medical Schemes, shall cease to exist; (b) the assets, liabilities, rights and obligations of that juristic person vest in the Namibian Association of Medical Aid Funds; (c) any reference in any document to the Namibian Association of Medical Schemes shall be construed as a reference to the Namibian Association of Medical Aid Funds. 10. Establishment of Namibian Association of Medical Aid Funds (1) There is hereby established an association to be known as the Namibian Association of Medical Aid Funds. (2) The Association shall be a juristic person. (3) The object of the Association shall be to control, promote, encourage and co-ordinate the establishment, development and functioning of funds in Namibia. 6

11. Constitution of Association The Association shall consist of all registered funds in Namibia 12. Powers of Association For the purposes of achieving its objects, the Association may (a) consider any matter affecting medical aid funds or the members of such funds and make representations or take such action in connection therewith as the Association may deem advisable; (b) purchase, hire or otherwise acquire any property, whether movable or immovable, keep or sell or let or hypothecate or otherwise dispose of, or deal in any other manner with

property acquired by it; (c) determine the subscription payable by registered funds to the Association; (d) raise or borrow money on such terms and conditions as may be agreed upon; (e) accept donations and receive moneys offered or due to it; (f) apply its funds to the establishment of a reserve fund, or invest at its discretion any funds not immediately required for its affairs; (9) appoint an executive officer for the performance of the functions of the Association and other employees and determine their duties and conditions of service; 7

(h) conclude any agreement with any person for the rendering of any particular services; (i) determine the allowances which may be paid to the members of the management when engaged in the affairs of the Association; (i) arrange with any insurer for the provision of insurance cover for the members of the management and for the said executive officer and employees, in respect of bodily injury, disability or death resulting solely and directly from an accident occurring in the course of the performance of their duties; (k) pay the expenses incurred in connection with its administration, and may generally, do anything that is conductive to the achievement of its objects and the exercise of its powers, whether or not it relates to any matter expressly mentioned in this section." 5. The question which arises - and which I am required to address in terms of question 1.1 posed to me as set out above - is whether NAMAF is empowered by statute to establish benchmark tariffs. This is because the"public administration can do only what it has statutory authority to do, and it must justify all its acts by pointing to a statute.' 1 Rose Innes, Judicial Review of Administrative Tribunals in South Africa, at 89, which principle was quoted with approval in numerous authorities inter alia Vereeniging City Council v Rhema Bible Church, Walkerville and Others, 1989 (2) SA 142 (T) at 149E and RBH Construction v Windhoek Municipal Council and Another, 2002 NR 443 (HC) at 449H-J. 8

6. In the memorandum of my instructing attorney | have been referred to the judgments of the High and Supreme Courts of Namibia in the matter of NAMAF and Others The Namibian Competition Commission and Another. The Supreme Court judgment was delivered 0n 19 July 2017 (the High Court judgment delivered by Parker AJ was handed down on 17 March 2016). With regards to these judgments: 6.1. The Supreme Court judgment superficially refers to the contention of the Competition Commission that NAMAF - by establishing and publishing benchmark tariffs - "had acted beyond its powers under the MAF Act " as well as the opposite contention raised by NAMAF that the issuing of benchmark tariffs is "authorised by the MAF Act" [see paragraphs 4 and 8 of the judgment]. 6.2. The Court also referred to the objects of NAMAF as per section 10(3) of the Act as well as the general powers contained in sections 12(a) and the rider to section 12 as quoted above [see paragraph 10 and 11 of the judgment]. It is apparent from the Supreme Court judgment that it (uncritically) referred to the benchmark tariffs as being determined under sections 10 and 12 of the Act without, in any manner, analysing whether indeed a vires exists under the Act (particularly sections 10 to 12), which indeed would authorise the issuing of benchmark tariffs. 6.3. In all fairness, this was probably an issue which the Supreme Court considered unnecessary to decide, given its findings that NAMAF and its conduct of setting benchmark tariffs is not subject to the reach of the Competition Commission and the Competition Act(i.e. falls outside the scope of the jurisdiction of the Competition Commission). It 9

is apparent from the judgment that the Court considered it unnecessary to consider the arguments as to whether or not the issuing of benchmark tariffs is authorised by the MAF Act (compare

inter alia paragraphs 8 and 71 of the judgment). 6.4. Also the High Court judgment (which was reversed on appeal in terms of the aforesaid Supreme Court judgment) did not squarely address this issue. The High Court, in essence, held that" The issuing and publication of the benchmark' tariff is a thing that is unlawful in terms of the Competition Act" and . "That being the case the applicant cannot find succour in the omnibus provision in section 12 read with section 10(3) of . . . . "(the Act) [see paragraph 29 of the judgment]. The High Court then proceeded to find that: "[30] In any case, the 1st applicant has not established in what manner the benchmark tariff does 'control, promote, encourage and coordinate the establishment, development and functioning of funds in Namibia'. Cogent or convincing facts must be placed before the court establishing sufficiently in what manner the issuing and publication of the benchmark tariff - (a) control, (b) promote, (C) encourage and (d) coordinate the (i) establishment, and (ii) development, and (iii) functioning of funds in Namibia'; or one or more of (a), (b),(c) and (d), and one or more of (i), (ii) and (iii), No such cogent and convincing facts have been placed before the court, as I have said". 6.5. Again, the High Court did not squarely address the issue referred to in paragraph 5 above. 10

7. The heads of argument filed by the parties in both the High Court and Supreme Court proceedings were also furnished to me. Those heads also deal rather superficially with this issue: 7.1. In NAMAF's (i.e. the appellant's) heads of argument in the Supreme Court, for instance, it is (with respect rather baldly) contented that "When NAMAF publishes the benchmark tariff, it discharges its statutory mandate". The heads of argument then proceed to broadly state that sections 10(3) and 12(a) of the Medical Aids Fund Act"are sufficiently broad to authorise the publication of the benchmark tariff given (vide paragraph 58.1 of the heads). The appellants then proceed to make reference to the regulations made in terms of the Act which"provide that the invoices of service providers must refer to 'the item code number relating to the relevant service". Based on this it is then submitted that "The Regulations therefore envisage that there will be a uniform system of 'item code numbers' to which a medial practitioner may make reference when submitting an invoice. The only entity that could publish such a uniform system of 'item code numbers' is NAMAF. In effect, therefore, the Regulations envisage that NAMAF will publish the benchmark tariffs" [see paragraph 58.2 of the heads]. As an alternative it was contended that: (a) NAMAF is a statutory body whose powers are circumscribed by the Act and even if it were to be contended that NAMAF's conduct in publishing the benchmark tariffs is ultra vires, such conduct would - in terms of the principle expressed in Oudekraal Estates v City of Cape Town, 2004 (6) SA 222 (SCA) at para [26] continue to stand and have legal 11

effect unless it were to be set aside and that this has not occurred [see paragraph 59 of the heads]. (b) It must therefore be assumed that the benchmark tariff is intra vires and therefore "authorised by law" [see also paragraph 59.5 of the heads] 7.2. The Competition Commission - in both their heads of argument in the High Court and Supreme Court - argued that while NAMAF might be a statutory body, there is nothing in the MAF Act or in the regulations thereto, which authorises NAMAF to negotiate or set the benchmark tariffs. It is mentioned that section 12 of the Act, which sets out NAMAF's powers for the purpose of achieving its objects, nowhere makes mention of setting benchmark tariff nor is it implied and that "one cannot read 'anything that is conductive to the achievement thereof" (as per section 12 of the Act) "to mean that the appellants can do anything they wish The submission is also made that the uniform system of item code numbers (as envisaged by the Regulations) contemplates only a list of numerical codes assigned

to each medical procedure and does not contemplate the setting of benchmark tariffs [see paragraphs 147 to 156 of the heads of the Competition Commission in the Supreme Court]. It is, however, apparent from the contentions of the Competition Commission made in both Courts that the emphasis of the approach was that any powers that might have been given to NAMAF under the Act, should be read in conformity with the provisions of the Competition Act and did not exclude the application of the Competition Act and that the exercise of any power by NAMAF would still be subject to the scope 12

and operations of the Competition Act and the jurisdiction of the Competition Commission thereunder. 8. It is therefore clear that the Supreme and High Court proceedings do not offer much guidance to answer the most pertinent issues which I am required to address. A de novo inquiry - based on applicable general legal principles - is thus required. 9. It is apparent from reading of section 12 of the Act that the power to set or recommend benchmark tariffs is not expressly accorded to NAMAF in terms of section 12 of the Act. 10. It is apparent from section 10(3) that the objects of NAMAF includes "to control . . .(and) co-ordinate the establishment, development and functioning of funds in Namibia" (emphasis provided). For the purposes of achieving these objects NAMAF may: 10.1. "consider any matter affecting medical aid funds or the members of such funds and . . take such action in connection therewith as the Association may deem advisable" (emphasis provided) [vide section 12(a)]; 10.2. 66 may generally. do anything that is conducive to the achievement of its objects and the exercise of its powers, whether or not it relates to any matter expressly mentioned in this section" (emphasis provided) [see the rider to section 12]. 11. It is immediately apparent from the above provisions that the powers of NAMAF are very wide: 13

11.1. The powers of the Association are granted for "the purposes of achieving its objects", 11.2. One of the objects are "to control , "the functioning of medical aid funds in Namibia [in the memorandum of my instructing attorney it is stated that NAMAF denies being a regulator of medical aid funds. This stance conflicts with the statutory objects of NAMAF as per section 10(3)]; 11.3. For the purposes of achieving its objects it may take any action in connection with matter affecting medical aid funds as it "may deem advisable" and " 'do anything that is conducive to the achievement of its objects and the exercise of its powers", 11.4. Notionally, the above may include the exercise of a vast array of powers and would, on the face of it, include the setting of benchmark tariffs. 12. In deciding what action to take in connection with matters affecting the medical aid funds or what to do (in terms of its powers as per the rider to section 12), NAMAF would obviously be exercising a discretion, i.e, a choice from amongst alternative courses of action" n2 and clearly a very wide discretion. 13. The approach to wide discretions of the aforesaid nature has considerably developed and changed, especially since the advent of the constitutional dispensation in Southern Africa and in that regard: 2 s See Baxter, Administrative Law, page 80 14

13.1. A prime example of a conservative and restrictive approach to such wide discretionary powers is to be found in the matter of Omar and Others Minister of Law and Order and Others, (and other cases)" which concerned section 3(1) (a) of the then Public Safety Act, 1953 which empowered the State President to make regulations in an area in which a state of emergency has been declared. Section 3(1) (a) provided that the State President, may, in an area in which the existence of a state of emergency has been declared, by proclamation in the Gazette,"make such

regulations as appear to him to be necessary or expedient for providing for the safety of the public or the maintenance of public order and for making adequate provision for terminating such emergency or for dealing with any circumstances which in his opinion have arisen or are likely to arise as a result of such an emergency". There the Court held that "it is not open to a Court when considering a regulation, to substitute each assessment of what would be necessary or expedient to achieve the purposes necessary in the section for that of the State President and to hold that the regulation is invalid because the State President could in his judgment have dealt with the matter in issue in another less harsh way". The regulations made by the State President (under the abovementioned very wide powers) and which were sought to be declared invalid, empowered members of the Security Forces to arrest persons without a warrant and cause their detention without trial for certain 6 periods. 3 1987 (3) SA 859 (A) 40 Omar's case supra, at 889G -H 5c 'Omar's case supra, at 892F-G 6 See also De Ville, Constitutional and Statutory Interpretation, page 183 - 184 15

13.2. At the early stages of the Constitutional dispensation in South Africa, the courts - without expressing themselves on the validity of wide discretionary powers such as the aforementioned - clearly laid down the principle that the powers of review of the courts with regard to administrative action (also where wide discretionary power are conferred) have increased significantly 13.3. In yet further and more recent developments, both the South African and the Namibian Courts have developed this law further and - with reference to so-called"broad discretionary powers" - laid down the principle that a statutory measure conferring discretionary power on administrative officials or bodies must be sufficiently clear, accessible and precise and contain express constraints or guiding measures, as it may otherwise be unconstitutional. Given the importance of the principles expressed in these authorities I will deal with those more extensively. 14. My instructing attorney has referred me to the judgement of the Supreme Court of Namibia in the Medical Association of Namibia matter (now reported at Medical Association of Namibia and Another V Minister of Health and Social Services and Others 2017 (2) NR 544 (SC)), which concerned section 31(3) of the Medicine Related Substances Control Act 0f 2003 which reads as follows: "(3) The Council may issue a licence on application in the prescribed form by a medical practitioner, a dentist or a 1 Compare Deacon v Controller of Customs and Excise, 1999 (2) SA 905 (SE) at 915; Tettey and Another v Minister of Home Affairs and Another, 1999 (3) SA 715 (T) at 727 - 728 a Medical Association of Namibia supra, at para [4] 16

veterinarian, authorising that medical practitioner, dentist or veterinarian to sell Schedule 1, Schedule 2, Schedule 3 or Schedule 4 substances to his or her patients, subject to such conditions as the Council may determine, if the Council is satisfied that granting such licence is in the public need and interest and that the medical practitioner, the dentist or the veterinarian has the required competence to dispense those scheduled substances". (Emphasis added) 15. The following extracts of the judgment in the Medical Association matter is of particular relevance and I deem it appropriate to quote same in full: "[63] Conferment of discretionary power to be exercised by administrative bodies or functionaries is unavoidable in a modern state. However, where the legislature confers a discretionary power, the delegation must not be so broad or vague that the body or functionary is unable to determine the nature and scope of the power conferred. That is so because it may lead to arbitrary exercise of the delegated power. Broad discretionary powers must be accompanied by some restraints on the exercise of the power so that people

affected by the exercise of the power will know what is relevant to the exercise of the power and the circumstances in which they may seek relief from adverse decisions. Generally, the constraints must appear from the provisions of the empowering statute as well as its policies and objectives: Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC) at 267 paras 33 - 34. [80] A very important plank of the doctors' challenge against the licencing scheme is that it has made the Council an 'omnipotent legislature'. It is said that the expression in 'public need and interest' and ; required competence' permit the Council to disregard the doctors' rights as the vagueness, uncertainty and unintelligibility of that 17

phraseology has the consequence of conferring wide and unfettered exercise of discretion on the Council. It is suggested in that context that those concepts do not provide any objective standard or norm and in that way imposes an unreasonable restriction on the fundamental right to carry on a doctor's profession, occupation, trade or business. For that proposition, Mr Heathcote relied on some comparative jurisprudence which held the concept 'public interest' unconstitutional for vagueness: From India, Harackhand Ratachand v Union of India and Others 1970 and Canada, S v Morales 1992 77 CCC (3d) 91 (SCC). [81] Focusing on the 'unfettered' discretion conferred on the Council arising from the uncertainty of the concepts of 'public need and interest' and 'required competence', Mt Heathcote drew the court's attention to some South African cases which interpreted the concept 'law of general application' under the South African Constitution. [82] Mr Heathcote submitted that the licensing scheme does not, to the extent that it limits the doctor's rights to sell medicine to their patients, comply with Art 22(a) of the Constitution which provides that a law providing for a limitation of fundamental freedom shall be of general application and shall specify the ascertainable extent of such limitation and identify the article or articles of the Constitution on which the authority to enact such limitation is claimed to rest. [83] In Janse van Rensburg No and Another V Minister of Trade and Industry NO and Another 2000 (11) BCLR 1235 (CC) at 1247C - D, the South African Constitutional Court (Constitutional Court) emphasised that: 'The constitutional obligation of the Legislature to promote, protect and fulfil the rights entrenched in the Bill of rights, entails that, where a wide discretion is conferred upon a functionary, guidance should be provided as to the manner in which those powers are to be exercised". 18

[84] In Dawood, Shalabi and Thomas V Minister of Home Affairs 2000 (3) SA 936 (CC) at para 47, the Constitutional Court held that: 'If broad discretionary powers contain no express constraints, those who are affected by the exercise of the board discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision'. [85] It is settled jurisprudence by the Constitutional Court that to pass the test of 'law of general application', a statutory measure conferring discretionary power on administrative officials or bodies must be sufficiently clear, accessible and precise to enable those affected by it to ascertain the extent of their rights and obligations (Dawood para 47); it must apply equally to all those similarly situated and must not be arbitrary in its application (S v Makwanyane para 156), and it must not simply grant a wide and unconstrained discretion without accompanying guidelines on the proper exercise of the power (Dawood para 47). [86] That approach commends itself in the interpretation and application of Art 22(a) of the Namibian Constitution. [87] I agree with Mr Heathcote that the licensing scheme of the MRSCA suffers from the defect that it does not provide guidelines, principles and norms for the exercise by the Council of its power to grant or refuse licenses under s 31(3). (It is

noteworthy that the NDP itself recognised the need for 'strict guidelines' to govern the authorisation of prescribers and dispensers). The absence of clear guidelines and standards results in arbitrariness as exemplified in the present case where medical practitioners who are perfectly equally situated are treated differently with no legal basis for such discrimination - a proposition not denied by the government. That, counsel for the doctors submitted, is a sufficient basis for declaring the licensing scheme unconstitutional because the concepts of 'public need and interest' and 'required competence' do not qualify as a 'law of general application' since they are understood, not according to objective criteria, but the Council's 19

subjective opinion. That allows the Council, as Mr Heathcote added not without justification, to continue to apply the policy of protecting pharmacists from competition by the doctors but now under the guise of 'public need' and 'interest' and 'required competence'. [88] I agree that the absence of clear criteria opens the licensing scheme to potential abuse which, in the language of an American Supreme Court case relied on by the doctors (Yick Wo v Peter Hopkins, Sheriff of the City and County of San Francisco 118 US 356 (1886) at 373) makes it possible for functionaries in taking decisions affecting others to proceed: from enmity or prejudice, from partisan zeal or animosity, from favouritism and other improper influences and motives which are easy of concealment and difficult to be detected and exposed, and consequently the injustice capable of being wrought under , cover of such unrestricted power. And in the words of Justice Jackson in Railway Express agency v New York 336 US 106 (1949) at 11 13: '[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus escape the political retribution that might be visited upon them if larger numbers are affected.' [89] To meet the government's argument that the licensing scheme is capable of being saved from unconstitutionality because the Council must still comply with Art 18 of the Constitution, Mr Heathcote relied on Dawood supra at 467B - C where the Constitutional Court rejected a similar argument in the following terms: 20

'The fact, however, that the exercise of a discretionary power may subsequently be successfully challenged on administrative grounds, for example that it was not reasonable, does not relieve the legislature of its obligation to promote, protect and fulfil the rights entrenched in the Bill of Rights'. [90] As previously noted this court said in the doctors review challenge (at para 92) 'The purpose of the dispensing of medicine is to heal or to bring relief to people who are ill or in pain and in need of treatment for their illnesses. There exists no need to limit access to medicine to pharmacists to the exclusion of medical practitioners, and there is, in my opinion also no reason why people should not have a free choice whether to obtain their medicine from a medical practitioner or a pharmacy." 16. It is clear from the above that it is unconstitutional for the legislature to lay down broad discretionary powers without any constraints or clear guidelines as this may result in arbitrariness and the inability of those affected by it to ascertain the extent of their rights and obligations. Although the matter in the Medical Association matter was considered in the context of Article 22(1) of the Constitution, which provides that the laws providing for a limitation of a fundamental right or freedom (such as Article 21(2) which allows for a limitation of Article 21(1) rights) should be of general application and specify the ascertainable extent of such limitation, it is submitted that this constraint placed on the

legislature is also required to safeguard and protect other fundamental constitutional rights and other fundamental constitutional principles. In that regard: 16.1. In the matter of Janse van Rensburg NO (referred to above and with approval of the Supreme Court of Namibia in the Medical Association matter) the broad and unfettered 21

discretionary powers were held to offend the administrative justice clause of the South African Constitution (section 33). It is submitted that it would similarly offend Article 18 of the Namibian Constitution, which requires fair and reasonable 9 administrative action. Such wide and unfettered discretionary powers opens the way for arbitrary decision making which is the antithesis of fair and reasonable administrative action. 16.2. In the Dawood matter (also referred to with approval by the Supreme Court of Namibia in the Medical Association case) it was held that it is an important principle of the rule of law that the rules be stated in a clear and accessible manner. Because if broad discretionary powers contain no express constraints, those who are affected by the exercise of those powers will not know what is relevant to the exercise of those powers or in what circumstance they are entitled to seek relief from an adverse decision.' 10 16.3. It is submitted that such broad discretionary powers without constraints would also offend Article 1(1) of the Namibian Constitution, which states that the Namibian state is "founded upon the principles of democracy, the rule of law and justice for all". (emphasis provided) As per the South African Constitutional Court, the rule of law "embraces some internal qualities of all public law: that it should be certain. that it is ascertainable in advance so as to be predictable and not retrospective in its operation and that it be applied ㈩Janse van Rensburg NO V Minister of Trade and Industry NO, 2001 (1) SA 29 (CC) at inter alia paragraph [25] 10 Dawood, Shalabi and Thomas v Minister of Home Affairs 2000 (3) SA 936 (CC) at para 47 22

11 equally, without unjustifiable differentiation". (emphasis provided) 17. The aforementioned principles have also received more recent approval in South Africa in the minority judgment of the Constitutional Court in the matter of SA Reserve Bank v Shuttleworth, 'Z which refers, with approval, to the judgment on this aspect in the Dawood matter supra at paragraph [113]. 18. In the circumstances, even had section 12 (read with section 10) contained an express power to lay down or recommend benchmark tariffs, it was still required - in order to pass constitutional muster - to have contained guidelines as to how the discretion to determine said tariffs be exercised. All the more would provisions such as section 12 (read together with section 10), which allows NAMAF to determine any conceivable measure (without limitation or guide), which would in its opinion be conductive to achieve its objects (or be an action in connection with its object to control the functioning of medical aid funds), be unconstitutional. 19. I. In the Medical Association case above, the Supreme Court of Namibia declared section 31(3) of the Medicines and Related Substance Control Act,2003 (as quoted above) unconstitutional on the above basis. It is concluded that the same fate should follow the wide and unguided discretionary powers contained in section 12(a) as well as the rider to section 12 of the Act quoted above. 20. I may add that I do not see any relevance in the fact that the benchmark tariffs set by the NAMAF only serve as guidelines and 11 See Pharmaceutical Manufacturers Association of SA and Others: In re Exparte: President of the Republic of South Africa and Others 2000 (2) SA 674 (CC) at para 39 12 2015 (5) SA 146 (CC) 23

are not compulsory (as the Supreme Court in the NAMAF matter held to be the case). Cleary, a recommendation of that nature, at least, proposes that the tariffs laid down as a guideline should

be followed in determining the benefits payable to members. The expectation of MAF would thus be that the latter would largely happen, which will have a clear and significant impact on those affected (including obviously medical service providers). In practice this is indeed what has happened since the vast majority of funds consistently follow and apply those tariffs in determining benefits. The fact that the benchmark tariffs may not be compulsory does not detract from the principle that the powers given are impermissibly wide and, for that reason, unconstitutional and thus should be declared invalid. That would then include the power to lay down (non-binding) guidelines. 21. I may also add that regulations made under the Act as per Government Notice 11 of 1997, which I have been referred to (in the absence of any other indication I assume that those regulations are still valid and unamended), also do not authorise the NAMAF to set or recommend benchmark tariffs. Although those regulations refer to a practice number to be allocated to a supplier of medical services as well as a code number relating to types of medical services rendered (compare inter alia regulations 5 and 6), benchmark tariffs as such are not authorised. 22. I therefore conclude that consultant should have reasonable prospects of success in constitutionally challenging the aforementioned provisions of the Act. On that basis everything purportedly done under the Act can also be challenged (such as the benchmark tariffs). Such tariffs can only stand until set aside by the Court. Until the Act and everything done under it (such as the benchmark tariffs) are set aside, the tariffs will probably remain 24

valid in terms of the aforesaid Oudekraal principle, which has also been approved by the courts of Namibia.' 13 23. The next question I am required to address is set out in question 1.2 above. In view of the conclusion reached, this requires only brief consideration, since the question is premised on a conclusion that NAMAF is indeed entitled to set benchmark tariffs. As set out above, the conclusion is reached that they are not. I will nevertheless briefly address this aspect insofar as I may be wrong in the conclusion I have reached: 23.1. If it is indeed so that NAMAF is authorised to set benchmark tariffs in terms of the relevant provisions of the Act, this would be an administrative act which would bring into play Article 18 of the Constitution, which requires fair and reasonable administrative action. The right to audi alteram partem (i.e. the right to be heard) is a common law as well as a constitutional right, which comes into play whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting an individual in his liberty, property or existing rights or whenever such an individual has a legitimate expectation entitling him to a hearing; a:14 23.2. Procedurally fair administrative action (including the application to the heard) is required irrespective of the 13 'Rally for Democracy and Progress v Electoral Commission of Namibia 2010 (2) NR 487 (SC) at 522 - 523 14 Du Preez and Another v Truth and Reconciliation Commission 1997 (3) SA 204 (A) at 231B-E;Sikunda v Government of the Republic of Namibia (3), 2001 NR 181 (HC) 191 -193 and numerous of the South African and Namibian Supreme Court authorities there referred to; Kessl v Minister of Lands Resettlement and Others, 2008 (1) NR 167 (HC) at 199-200; Waterberg Big Game Hunting Lodge v Minister of Environment and Tourism 2010 (1) NR 1 (SC) at 11A 25

merits of the decision. Although procedural fairness is a flexible concept of which the requirements may differ from case to case, it entails the following basic components: (a) The first is that the affected party should be entitled to a reasonable opportunity to make representations. This requires the following: (a) the opportunity to make representations relates to the decision to be made and this must be made clear to the affected party; ,15 (b) the affected

party must be properly apprised of the information and reasons that underlie the impending decision; 16 (C) the affected party is given an opportunity to present and dispute information and arguments; ,17 and (d) the decision-maker must keep an open mind in hearing the representations. 18 15 Sokhela v MEC for Agriculture and Environmental Affairs (KwaZulu-Natal) 2010 (5) SA 574 (KZP), para 55; See also Minister of Safety and Security v Moodley [2011] ZASCA 93, para 35 16 'Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism 2005 (3) SA 156 (C) at paras 52 - 69; Yuen v Minister of Home Affairs 1998 (1) SA 958 (C); Mhlambi v Matjhaberg Municipality 2003 (5) SA 89 (0) 17 Sokhela v MEC for Agriculture and Environmental Affairs (KwaZulu-Natal) (KZN) supra para 52; Du Bois v Stompdrift-Kamanas sie Besproeiingsraad 2002 (5) SA 186 (C) at 198H-199A 18.1 Janse van Rensburg N.O. v Minister of Trade and Industry N.O. 2001 supra, at para 24; Platinum Asset Management (Pty) Ltd v Financial Services Board and Others; Anglo Rand Capital House (Pty) Ltd and Others v Financial Services Board and Others 2006 26

23.3. The principles of procedural fairness require, furthermore, "[flirstly that the person concerned must be given a reasonable time within which to assemble the relevant information and to prepare and put forward his representations; secondly he must be put in possession of such information as will render his rights to make representations real, and not an illusory one.' ,19 23.4. The cases further re-emphasise that, incorporated into the principal of legality is the concept of procedural fairness, as captured in the maxim audi alteram partem. Rationally, as subsumed under legality, itself requires that interested parties be heard prior to decisions that may materially and adversely affect their rights.' 20 23.5. It appears from what is set out in paragraph 3.5 above that these principles were not followed and that affected parties were not given sufficient opportunity to be heard. This appears to have been the position as from the early 2000's when benchmark tariffs were initially introduced 23.6. A challenge on the basis that the benchmark tariffs did not comply with the principles of procedural fairness and Article 18 of the Namibian Constitution generally (also on the basis that same are unreasonable and in that context irrational, (4) SA 73 (W) para 143; Hamata and Another v Chairperson, Peninsula Technicon Internal Disciplinary Committee and Others 2000 (4) SA 621 (C) para 69 19 H Heatherdale Farms v Deputy Minister of Agriculture 1980 (3) SA 476 (T) at 486F - G 20 Administrator, Transval v Traub, 1989 (4) SA 731 (A); Albutt v The Center for the Study of Violence and Reconciliation 2010 SA 293 (CC) at paragraph 68-69; Masetlah v President of the Republic of South Africa and Another 2008 (1) SA 566 (CC) at paragraph 187; Transval Agricultural Union v Minister of Land Affairs and Another 1997 (2) SA 621 (CC) 27

which is a difficult enquiry in itself) will, most probably, be met with the response that the challenge is belated and therefore falls foul of the rule that a review of administrative action should be brought within a reasonable time.?' (In the case of a constitutional challenge of section 12 a challenge based on the delay rule will probably not avail the respondent). Care should therefore be taken in any application for a review of a decision to set the benchmark tariffs under the Act, to carefully explain the delay in challenging such application and should properly set out the reasons for such delay so as to invoke a favourable exercise of the Court's discretion to condone such a delay. 24. The last issue I am required to address (as per question 1.3 above) is whether medical aid funds are entitled to refuse to make payment to a health care provider in the case of "split billing" as described above. I will deal with this aspect below. 25. In as much as NAMAF has laid down a directive that "split billing" is not allowed, the power to do so, is not

expressly authorised by section 12 of the Act (setting out the powers of NAMAF). In as much as NAMAF may rely on its general powers under section 12 (read with section 10) of the Act for such a power, those general powers are unconstitutional for the reasons already referred to above. A successful challenge of the constitutionality of those provisions (i.e. section 12(a) and the rider to section 12) would also do away with any such directive issued on this basis. 26. The 1997 regulations referred to above, however, contain the following provisions: 21 Compare inter alia Kruger v TransNamib Ltd (AirNamibia) and Others 1996 NR 168 (SC) and Namibia Grape Growers and Exporters Association and Others v The Minister of Mines and Energy and Others 2004 NR 194 (SC) 28

"Statement of account of suppliers of medical services 6.(1) A supplier of medical services who has rendered a medical service to a member of a registered fund or to a dependent of such a member shall within 30 days of rendering such service, and, in the case of a credit transaction, monthly thereafter, furnish to such member a statement of account showing - (a) the surname and initial of the member; (b) the surname and first name and other initials, if any, of the patient; (C) the name of the registered fund concerned; (d) the membership number of the member; (e) the practice number of the supplier concerned, and in the case of a group practice, also the name of the practitioner by whom the medical service was provided; (f) the date on which each medical service was rendered; (9) the nature and the cost of each medical service rendered, including, where applicable, the item code number relating to such service, and, if any medicine was supplied to the patient, the name thereof and particulars of the quantity and dosages . and the net amount payable in respect thereof; (emphasis provided) (h) in the case of medicine supplied by a pharmacist to the patient according to a prescription, a copy of the original prescription or a certified copy of such prescription, if required by the registered fund; 29

(2) Every receipt issued by a supplier of medical services in respect of the payment for any medical services rendered to a member or former member of a registered fund or a dependent of such member shall contain the supplier's practice number. (emphasis provided) Payment of claims 8.(1) A registered fund shall- (a) subject to its rules and these regulations, pay any claim for any benefit lodged under its rules by a member of the fund or a supplier of medical services within the six weeks of the date on which such claim is received by the fund; and (b) together with such payment, send a payment advice to the member showing - (i) the name and membership number of the member; (ii) the name of the supplier of medical services; (iii) the final date of service reflected on the statement of account which is covered by the payment; and (iv) the total amount charged by the supplier of medical services and the amount of the benefit awarded for such service". (emphasis provided) 27. It is apparent from the above regulations that the full amount charged to the patient (which would include that portion of such amount which may be based on NAMAF tariffs as well as that portion of the provider's fee which may exceed the said NAMAF 30

tariffs) should be contained in an account submitted to the patient by the healthcare provider and, by implication, should also be presented to the medical aid fund. (The latter follows from regulation 8(b) (iv) which implies that the medical aid fund should be aware of the total amount charged by the supplier for the relevant medical service). The above peremptory requirements should therefore be complied with. 28.). What the healthcare provider could possibly do is - and which would not offend the regulations - is to present an account which contains his full charges

and also simultaneously submit a "second account" setting out the portion for which the patient is liable for and demarcate this second account as such (i.e. that it represents the patient's portion of the full account or a similar description properly indicated on the second account as such). The same can possibly done with the account submitted to the medical aid fund (i.e. an account for the full charge complying with the regulations as well as an account containing the medical aid fund's portion). 29. In addition, the individual rules of medical aid funds may in terms of section 30(1) (m) of the Act, contain provisions setting out "specific directives" to which the payment of benefits may be subject to. This could notionally include a provision relating to split billing. Since I am not privy to those rules, I am unable to comment on their nature and effect. Of course, those rules are only binding on the fund as well as the members and their dependents (as well as the trustees, principal officer and other employees of the fund) (see section 30(3)) and will not bind healthcare providers as such. Healthcare providers, may, however, individually have specific contractual arrangements with the funds, which I am also not privy to and which may influence the situation. 31

30. In short, in terms of the aforementioned regulations medical aid funds could adopt the attitude that split billing which transgresses regulations 6 and or 8, is not permitted and that they will not effect payment in terms of accounts presented by healthcare providers which transgress those regulations. 31. I trust you find the abovementioned of assistance. Should you have any further enquiries you are welcome to revert to me. R TOTEMEYER SC NAMLEX CHAMBERS WINDHOEK 32