6th March 2025

Dear Mr Theron, dear Principal Officers of Medical Aid Funds,

I trust this correspondence finds you well. I write to follow up on outstanding matters previously raised, which remain unaddressed despite their significant implications for healthcare practitioners and fund members.

1. PCNS Policy

Reference is made to prior correspondence dated 10 February 2025 regarding NAMAF's PCNS policy, which was circulated to MAN as the one approved by the Management Committee (MC) . Notably, the MC has failed to provide a substantive response on the points raised. This lack of engagement is construed as an act of bad faith, particularly given that the principles underlying the policy served as justification for suspending practice numbers—an action with severe professional and financial repercussions for affected practitioners.

The same policy framework was further used to extract fees from practitioners in exchange for a practice number. As previous attempts to engage NAMAF on these concerns have gone unanswered, the same questions are now formally directed to the Management Committee, with an expectation of a prompt and substantive response.

2. Reimbursement of Fees

(a) NAMAF was formally informed on 4 December 2014 (see NAMAF 4_12_14 attached) that the imposition of renewal fees on healthcare practitioners was possibly unlawful. Despite this, non-compliance with the initial request for clarification of the legality to extract fees for practitioners resulted in subsequent practice number cancellations.

(b) NAMAF was explicitly informed over a decade ago that it lacked the legal authority to impose these fees. Despite repeated requests, it has failed to substantiate its legal basis for doing so creating the impression that these actions are justified. NAMAF's reliance on prescription to evade reimbursement appears to be an opportunistic technical defence rather than a lawful justification. This stance invites further legal action, likely to be protracted and financially burdensome for all parties involved.

(c) In 2024, following the cessation of the renewal fee practice practitioners learned that it was unlawful. Dr. Gustav Bertelsmann and numerous other practitioners rightfully claimed reimbursement under *condictio indebiti*. NAMAF's refusal to refund these unlawfully extracted fees—on the basis of the Prescription Act of 1969—is legally flawed. Points 3 and 4 of NAMAF's correspondence to Dr. Bertelsmann demonstrate an inconsistency with statutory requirements and established legal principles requiring restitution of unlawful payments.

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(d) NAMAF is currently embroiled in a constitutional challenge concerning its alleged regulatory overreach, reportedly costing several million Namibian dollars.

(e) Despite the provisions of Regulation 7 and Section 30 of the Medical Aid Funds Act, which do not mandate the introduction of clinical coding or permit withholding payments based on coding requirements, NAMAF has directed medical aid funds to enforce outdated ICD-10 clinical coding under threat of non-payment for services rendered. Substantial evidence indicates that NAMAF is the primary driver behind this enforcement, thereby exposing medical aid funds to litigation risks.

(f) Given that NAMAF does not generate independent revenue beyond fees unlawfully collected from practitioners and contributions from medical aid members, an urgent disclosure is required to clarify how these extensive legal expenditures—amounting to several million Namibian dollars—are financed.

(g) If NAMAF is indeed utilizing unlawfully collected fees to fund litigation against healthcare practitioners, this raises grave concerns regarding financial mismanagement and potential misappropriation of funds.

(h) NAMAF's persistent reliance on costly legal battles to enforce policies that lack a sound legal basis—policies endorsed by the regulator NAMFISA —highlights systemic governance failures that warrant immediate intervention by government to protect the interest of medical aid fund members.

If practitioners take legal action, NAMAF would likely struggle to justify its refusal of payment under **basic principles of unjust enrichment and ultra vires restitution**.

3. Namibia Benchmark Tariffs

The following concerns were raised in legal correspondence from Mr. Eben de Klerk to Ms. Uatavi Mbai regarding NAMAF's assertion that it is entitled to enforce ICD-10 compliance as a precondition for practitioner payment:

"NAMAF appears to increasingly misinterpret its statutory mandate, exhibiting disregard for the legislative framework governing medical aid funds. NAMAF is a regulator, not a manager, of medical aid funds. The legislator tasked NAMAF with regulating medical aid funds—not with direct involvement in their affairs. NAMAF's continued failure to enforce the requisite rules since 1995 further demonstrates its departure from its statutory obligations.

NAMAF's setting of benchmark tariffs remains unconstitutional, as per the legal opinion of Adv. Totemeyer (SC), which has been shared on multiple occasions. The forced implementation of ICD-10—achieved not through lawful mandate but through coercion—likewise lacks constitutional legitimacy. It further demonstrates NAMAF's disregard for common law principles and healthcare regulations.

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Despite numerous attempts to engage the relevant regulatory authorities, there appears to be a persistent unwillingness to ensure compliance with the law. As such, urgent ministerial intervention is now warranted."

Ms. Mbai's assertion that NAMAF is "***mandated to manage the affairs of medical aid funds"*** is once again contextualised:

- The **MAF Act** does not empower NAMAF to "manage" medical aid funds. Instead, **Section 10(3)** limits NAMAF's mandate to the **oversight, promotion, and coordination** of the establishment, development, and functioning of medical aid funds.
- **Administrative law principles** dictate that regulatory bodies must **act within the scope of their enabling legislation**. Micromanagement or direct interference in the operational and contractual affairs of medical aid funds **falls outside NAMAF's statutory authority**.

4. Regarding ICD-10 enforcement:
NAMAF's directive requiring medical aid funds to **incorporate ICD-10 coding as a condition for payment** is not supported by **Section 10, Section 12, Section 30, or Regulation 7** of the MAF Act. There is no legislative provision granting NAMAF or the Funds the authority to **impose clinical coding requirements on healthcare providers as a precondition for payment**.

Furthermore, the **ICD-10 classification**—a clinical diagnostic system—**was never intended as a billing mechanism** to curb FAW. The requirement that these codes be linked to item codes from the **plagiarized and outdated SAMA tariff manual (unchanged since 2003)** lacks both legal foundation and medical justification.

Therefore, **NAMAF's directive is ultra vires**, meaning it exceeds the powers granted by the Act and is legally unenforceable.

Additionally, Dr. Sophia van Rooyen has prepared the attached document, *Benchmark Tariffs Explained*, detailing the significance of benchmark tariffs within this ongoing dispute on the ultra vires implementation of ICD-10 as a precondition of payment. Points 1 and 2 summarize key findings, while Points 3 to 5 provide an analytical interpretation.

This document should be presented and perused by all **Board of Trustees** of Funds to ascertain the risk when implementing ICD-10 as a condition of payment.

5. Escalation Measures
Given the continued failure of NAMAF and the Management Committee to address these concerns, formal steps are now being taken:

1. **Level 1:** Principal Officers of medical aid funds have been notified of the legal risks associated with continued ICD-10 implementation (**Completed)**.
2. **Level 2:** Engagement with the Minister of Finance and Public Enterprises to advocate for legislative reform, including repealing the Medical Aid Funds Act and replacing it with legislation establishing a Medical Control Board **(Completed).** The Minister of Health and Social Services has also been briefed.
3. **Level 3: Public Awareness Campaign** – If no substantive response is received within one week, the media will be informed regarding the implications of ICD-10 on the public and the broader issues at stake.
4. **Level 4: Executive Engagement** – If no response is received within two weeks, the matter will be escalated to the Office of the President for intervention to ensure that legislative reform aligns with Article 95(k) of the Constitution.
5. **Level 5: Legal Action** – If no response is received within three weeks, an application will be brought before the courts to challenge the enforcement of ICD-10 as a condition for payment.

6. **Conclusion**

As no response has been forthcoming from NAMAF or the Management Committee, we are now on the verge of initiating **Level 3** of this escalation process. This letter serves as formal notification of the intended course of action. We request an urgent response addressing the substantive concerns outlined above.

We trust that NAMAF, the Management Committee and the Funds will take due note of this communication and respond accordingly.

Kind regards,

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