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BY HAND AND EMAIL

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AND

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Dear Dr Mabeba and Dr Phaahla

COMPLAINT REGARDING THE MALADMINISTRATION OF THE COUNCIL FOR MEDICAL SCHEMES AND REQUEST FOR INFORMATION

1. **Introduction**

1.1 We are instructed by the Board of Healthcare Funders (**BHF** or **our client**) to address this letter to you on its behalf.

1.2 The BHF is a non-profit company, duly registered and incorporated as such in terms of the company laws of South Africa. The BHF has subscribers and a membership of approximately 40 registered medical schemes in South Africa which serve approximately 4.5 million beneficiaries.

1.3 The BHF acts as a representative of its members, and its object is to ensure the sustainability of the healthcare sector by enabling its members to provide affordable, accessible and quality

healthcare to medical scheme beneficiaries. The BHF is therefore a key player in the South African healthcare system.

1.4 As you are aware:

1.4.1 the Council for Medical Schemes (the **Council**) is a regulatory body established to control and co-ordinate the functioning of medical schemes in a manner that is complementary to national health policy;

1.4.2 the Council is granted certain powers and functions in terms of the Medical Schemes Act, 1998 (the **Act**) and its subordinate legislation;

1.4.3 in terms of section 3(4) of the Act, the Council is required to at all times, function in a transparent, responsive and efficient manner;

1.4.4 the Council's functions in terms of section 7 of the Act include, among others, to always protect the interests of beneficiaries and to advise the Minister of Health (the **Minister**) on any matter concerning medical schemes;

1.4.5 in terms of section 15 of the Act, the Council may consult the Minister in the exercise of the powers and the performance of its functions and in connection with any other matter that the Council deems necessary; and

1.4.6 the Minister may consult with the Council on any matter falling under the Act.

1.5 The Council and Minister therefore play a critical role together in ensuring a well-functioning healthcare sector to achieve the progressive realisation of the right to have access to healthcare services in accordance with section 27 of the Constitution of the Republic of South Africa, 1996 (the **Constitution**).

1.6 The Registrar of Medical Schemes (**Registrar**) was appointed by the Minister after consultation with the Council in terms of section 18 of the Act . The Registrar is the executive officer of the Council, managing its affairs and supervising its staff. The Registrar is required to act in accordance with the provisions of the Act, policies, and directions of the Council.

1.7 Our client assumes, unless corrected, that the conduct of the Registrar accords with the policies and directions of Council. However, our client is firmly of the view that in many respects, the Registrar's conduct does not accord with the Act.

1.8 With this context in mind, we are instructed to address some concerns of our client and its members regarding the manner in which they have been supervised by the Registrar and the staff of the Council, as well as the competence and conduct of the Registrar.

1.9 We must draw to your attention that BHF intends to lodge a complaint with the Public Protector should the issues below not be addressed promptly and adequately.

2. **Issues**

2.1 <u>Curatorship being used as a tool to intimidate the boards of trustees of medical schemes</u>

2.1.1 It has become evident, based on BHF members' common experience, that the Registrar readily reverts to the threat of the appointment of a curator to intimidate boards of trustees of medical schemes when there is an issue that he cannot resolve. His office demonstrates a marked hostility towards medical schemes themselves, even when the medical schemes indicate a willingness to work with the Registrar and the Council on the challenges the medical schemes face.

2.1.2 The Registrar misuses the remedy of curatorship rather than other, more reasonable solutions, despite the harm it could cause a medical scheme. Medical schemes suffer undue harm in the process as a baseless curatorship application can cause reputational damage. In particular, the medical scheme may struggle to attract new members and existing members may want to terminate their membership. Further, the medical scheme may spend a

significant amount of money on legal fees fighting a matter that could have been resolved by other means and thus exacerbating non-health expenditure. This may all threaten the financial stability of the medical scheme.

2.1.3 It appears that the Registrar believes that he can unjustifiably bring *ex parte* curatorship applications in respect of medical schemes as a matter of right. This undermines and violates the right to be heard in section 34 of the Constitution and the *audi alteram partem* rule.

2.1.4 One example of the abovementioned concerns is the matter of the *South African Police Service Medical Scheme (POLMED) v. the Registrar of the Council for Medical Schemes and Others* (Case number 24261/2020) where the issue before the court was the institution, by that Registrar of *ex parte* proceedings to place POLMED under curatorship. The curatorship application was later withdrawn without any reason and POLMED suffered undue harm in the process.

2.1.5 Another example is in the matter of *Hosmed Medical Scheme (Hosmed) and Others v. Registrar of Medical Schemes and Another* (Case number: 36027/2020) where Hosmed urgently appealed against the Registrar's decision to confirm an exposition of the proposed amalgamation of Hosmed and Sizwe Medical Scheme (Sizwe). Thereafter, the Registrar launched an application to place Sizwe under curatorship without affording Sizwe an opportunity to prepare its answering affidavits. Whilst Hosmed's appeal succeeded, the Registrar's curatorship application failed.

2.1.6 Pertinently, the High Court found that there was no rational basis or good cause shown for the appointment of a curator. The court reasoned that Sizwe was in a sound financial position and that its members' health and their economic investments were not at risk because of the policies or conduct of Sizwe and its board of trustees. The judge stated that:

"It was not appropriate for the registrar to use curatorship as a way of scrutinising the proposed amalgamation agreement. I therefore find that the opinion held by the registrar that curatorship was desirable is not based on reasonable grounds."

2.1.7 This experience is not uncommon and recently, several other BHF members have experienced the same or similar treatment.

2.1.8 BHF and several of its members have expressed concern that the Registrar, and accordingly the Council, are trying to exhaust smaller schemes into winding-up or consolidation.

2.1.9 In light of BHF's concerns, we are instructed to seek answers to the following questions:

2.1.9.1 does the Council have policy directives on legal proceedings against medical schemes, and related legal costs? If so, we request a copy of such policy directives;

2.1.9.2 please confirm whether the Council has tracked the Registrar's adherence to same. If so, our client requests a copy of any related report to this effect in the past 3 years;

2.1.9.3 our client is unaware of any 'customer service undertaking' or similar as issued by other regulators, like the Financial Sector Conduct Authority (**FSCA**). If so, we request a copy and if not, an explanation why no such service standard exists.

2.2 <u>Unnecessary legal expenditure</u>

2.2.1 By misapplying the remedy of curatorship, the Registrar and Council waste public money on expensive litigation (besides generating unnecessary legal expenditure by schemes themselves, contrary to their interests and to the detriment of their reserves). Our client is concerned that the Registrar appears ill-advised given the pattern of unsuccessful litigation, and whether that arises because the Registrar ignores legal advice; only procures legal advice that suits his or other council employees' personal views; bullies independent counsel into inappropriate legal strategies; or has failed to resource the internal legal function appropriately. We are instructed that there have been numerous punitive cost orders against the Council and the Registrar in recent cases that the Registrar has instituted.

2.2.2 An example of this is in the matter of *Registrar of Medical Schemes and Another* v. *Netcare Plus (Pty) Ltd and Another* (Case number: 007377/2022) where the Registrar and Council attempted to interdict Netcare and Discovery from selling prepaid doctor consultation vouchers to South Africans who cannot afford medical aid. This application was brought despite the matter being the subject matter of an internal appeal before the Council. The court declined to usurp the administrative functions of an organ of state and made a punitive cost order as follows:

"Where is ubuntu when an organ of state puts parties, who[se] only sin was to comply with the law, through costly legal action [?]. I do not see the reason why the respondent should be out of pocket. In exercising my true discretion, informed by the values of ubuntu and weighing up all the facts, I am persuaded a punitive costs order is justified."

2.2.3 The attempt to place Sizwe under curatorship, as explained above, was also dismissed with costs.

2.2.4 The recent example of Health Squared Medical Scheme is also concerning. The Registrar failed to respond to early indications of trouble, but when the board legitimately applied for liquidation, the Registrar imposed a curatorship at unmanageable cost on the weakened scheme. The BHF view is that a liquidator would have had the independence, professional skill, and statutory powers to investigate and report on the issues at play in the scheme. The net result instead was that members were compelled to seek new cover individually and subject to underwriting.

2.2.5 As you will be aware:

2.2.5.1 in terms of section 13 of the Act, the Registrar is the accounting officer of the Council, charged with accounting for all the money received and payments authorised by and made on behalf of the Council and the Registrar;

2.2.5.2 he must keep full and proper records of all money received and expenses incurred by the Council;

2.2.5.3 in terms of the Public Finance Management Act, 2008, as accounting officer, he is responsible for the effective, efficient, economical and transparent use of the resources of the Council;

2.2.5.4 the Registrar has a fiduciary duty to ensure the reasonable protection of the assets of the Council and must act with fidelity, honesty, integrity and in the best interests of the Council in managing its financial affairs; and

2.2.5.5 the funds of the Council come from various sources including taxpayers' money as determined by the Minister of Finance; fees raised in services rendered by the Registrar; penalties; and interest on overdue fees and penalties.

2.2.6 In light of BHF's concerns, we are instructed to seek answers to the following questions:

2.2.6.1 please confirm whether the Council tracks its legal expenditure and its rate of success in the High Courts? We request a 10 year report of the number of matters that its Registrars have instituted against medical schemes, the win rate, and the number and quantum of ordinary and punitive costs orders;

2.2.6.2 please confirm whether the Council has ever requested such analysis from the Registrar, or if not, an explanation why?

2.3 <u>Section 59 Investigation</u>

2.3.1 The Council published a circular on 25 June 2019 setting out the Terms of Reference (**TOR**) for a section 59 investigation panel (**Panel**) tasked to investigate claims that members of the National Health Care Professionals Association (**NHCPA**) were being unfairly treated and their claims were being withheld by medical schemes based on race and ethnicity. The TOR

indicated that the intention was for the Panel to complete its work within four months and that a final report would be delivered by 1 November 2019.

2.3.2 The Panel indicated that a draft interim report would be provided to the Chairperson of the Council by 1 November 2019; parties would be given an opportunity to comment by 30 November 2019; and the Panel would provide a final report to the Council by 21 December 2019. The interim report was released on 19 January 2021.

2.3.3 Our client still awaits a final report although it has been more than four years since the process started, with no end in sight. The way the investigation is being handled, in particular the ill-informed further information requests, is perceived as an attempt to victimise medical schemes at the expense of their members and for ulterior purposes outside of the Council's scope.

2.3.4 Please confirm when the final section 59 investigation report will be released.

2.4 <u>The publishing of benefit options and contribution increases</u>

2.4.1 Late in 2023, the acting Registrar instructed South Africa's five biggest open medical schemes to retract all communication about benefit options and contribution increases for 2024 as the Council had not yet approved them.

2.4.2 We are instructed that the directive came as a surprise because medical schemes have consistently published their plans in the previous years in order to give employers and beneficiaries an opportunity to consider and plan for the changes which take effect on 1 January. The acting Registrar only targeted the five biggest schemes.

2.4.3 The Act does not prohibit medical schemes from communicating their intended amendments prior to obtaining formal approval of the changes by the Council.

2.4.4 The Act does, however, require medical schemes to ensure that adequate and appropriate information is communicated to the members regarding their rights, benefits, contributions and duties in terms of the rules of the medical scheme. It appears from our instructions that the notices in question all included the standard disclaimer that informed members that the changes were subject to the Council's approval.

2.4.5 The Council's behaviour towards medical schemes could not have been in the best interests of beneficiaries, and again, suggests ulterior motives to medical schemes.

2.4.6 In light of the abovementioned actions, we are instructed to ask whether this conduct by the Registrar's office was in terms of a policy directive of the Council? If so, we request a copy of the directive. If not, our clients need to understand what precipitated a radical, unnecessary, and harmful departure from years of established practice.

2.5 <u>National Health Insurance (**NHI**)</u>

2.5.1 The NHI Bill was only approved by the National Council of Provinces in December 2023 and is yet to be assented to by the President. However, it appears that it has been informing regulation and regulatory action in the past 5 years. The Registrar's Ministerial Brief of September 2021, furnished to us by our client, seems to suggest this as it extensively deals with the NHI's strategic projects and refers back to the NHI when dealing with other regulatory initiatives.

2.5.2 Has the NHI Bill been regarded as unofficial national health policy? If so, on what basis? If not, under what empowerment in the Act was it afforded such status?

2.5.3 Please confirm how this aligns to the Council's mandate, and whether the Council has issued any directions to the Registrar in this regard in terms of section 18 of the Act or otherwise. Was the Registrar acting on his own accord or receiving direction on the conduct of his regulatory function directly from the office of the Minister? In that event, from whom did the Registrar receive instructions in the Minister's office, and under what official powers was such direction given?

2.5.4 Please confirm that it is not national health policy nor the substance of any Council directive to force the consolidation of medical schemes that have less than 6000 members (as the Registrar's Ministerial Brief of September 2021 seems to suggest), nor to deploy inspection powers in order to render medical schemes unsustainable and to improve the relative perceived value of the proposed NHI fund.

2.6 Low-Cost Benefit Option Framework (**LCBO**)

2.6.1 We are instructed that the Council and the Registrar have delayed finalising the LCBO, which has been under development in one form or another for almost a decade. It took the Registrar approximately a year after the last round of comments on the LCBO to finalise and send his report to the Minister of Health. The Council has an obligation to develop LCBO guidelines and protect the interests of medical schemes and their members. However, the Council has failed to protect the interests of medical schemes as it has delayed developing LCBO guidelines timeously and continues to permit the continuation of an exemption framework which functions to the detriment of the viability of medical schemes and continues to affect the affordability of medical scheme contributions by members.

2.6.2 Please let us have a copy of the final report that was sent to the Minister of Health.

2.6.3 Please confirm that the exemption framework under the Demarcation Regulations will not be extended beyond 31 March 2024 and that the industry will have LCBO guidelines in good time.

2.7 Prescribed Minimum Benefits (**PMB**) Review

2.7.1 Recommendations must be submitted to the Department of Health for the review of PMB Regulations as required in terms of the Act. We are instructed that all past Registrars and Councils have failed to submit these recommendations for 24 years. The relevant Regulations came into effect on 1 January 2000 and provide that "a review shall be conducted at least every two years by the [Department of Health] that will involve the Council for Medical Schemes, stakeholders, provincial health departments and consumer representatives".

2.7.2 We note that the Health Market Inquiry (**HMI**) report which was released in 2019 by the Competition Commission noted that PMB's were currently being reviewed at the time, but our client and its members have no evidence of any progress or an intention by the Council to implement the recommendations set out in the HMI regarding the review of PMBs.

2.7.3 We are instructed that, as a result, the cost of PMBs continues to increase significantly to the detriment of members, and that the current PMB regulatory landscape remains unsustainable for both medical schemes and their members due to the failure of the Registrar and the Council to abide by the Regulations.

2.7.4 Kindly inform our client why there has never been a review as required by law, and whether the Council has held the Registrar to account during his tenure?

2.8 Risk-based Capital Solvency Framework (**RBC**)

2.8.1 We are instructed that engagement around potential risk-based solvency models has been ongoing for several years.

2.8.2 Our client is surprised that the 2022-2023 annual report of the Council noted that the Council will not be pursuing the implementation of the RBC. Our clients regard the reasons cited as abrupt and at odds with global best practice at an operational and audit level. Their understanding is that most financial regulators across the globe have transitioned to a RBC regime as it is more efficient and provides better oversight. The recent failures regarding Health Squared highlight weakness of the current solvency regime.

2.8.3 The Council's 2022-2023 annual report notes that the Council "continues to explore various risk-based solvency models" and promises an industry impact assessment and further engagement. Our client is concerned that this underplays the practical issues affecting

medical schemes and their auditors' need for a relevant and standard audit framework for the current financial year, noting that the IFRS 17 standard took effect from 1 January 2024.

2.8.4 Kindly inform our client when its members and health sector auditors will be engaged officially in this regard.

2.9 The appeal processes of the Council

2.9.1 Our members' common experience is that the administrative appeal processes of the Council are ineffective and delayed. We understand that the Council regularly fails to issue dates for hearing of appeals timeously, and to issue its rulings timeously. Sections 48 and 49 of the Act, permit any person aggrieved by any decision of the Registrar, to lodge an appeal within 30 days after the date on which such decision was made. Our client lodged an appeal on Circulars 80 and 82 of 2019 on 3 February 2020. This has not been heard nor has a date has been set.

2.9.2 The parties lodging any appeal in terms of either sections 48, 49 or 50 of the Act, must comply with the required timelines for the filing of an appeal. However, in many instances, appeals lodged before the Council are not set down for hearing in a period of less than two years. Our client's experience is that the secretary appointed by the Registrar does not provide hearing dates and, in particular, does not respond to the parties' requests for hearing dates for appeals. Once a matter is heard, the secretary does not respond to the parties' follow ups regarding when a judgement can be expected as they should be provided within a reasonable time.

2.9.3 The maladministration of secretariat functions of the Appeal Committee and the section 50 Appeal Board materially hinders access to justice for parties who are compelled to exhaust internal remedies before accruing a right to approach the High Court. The Registrar remains unresponsive to the BHF members' concerns, which effectively renders the appeal process before the Council a waste of time to their minds.

2.9.4 The Registrar regularly fails to make factual submissions regarding his own administrative actions to the Council's Appeal Committee and the section 50 Appeal Board.

2.9.5 Our client's members' unfortunate experience is that the delay in finalising appeals causes severe prejudice to medical schemes and their members in that:

2.9.5.1 medical schemes are denied administrative justice;

2.9.5.2 the decision/s appealed by medical schemes remain unresolved for a longer period of time, and as a result medical schemes are unable to implement proper decisions in the best interests of their beneficiaries.

2.9.5.3 medical schemes are unable to take decisions which enable them to provide affordable and quality healthcare services to their beneficiaries; and

2.9.5.4 there are increased legal costs and as such, medical schemes are deterred from bringing appeals before the Council.

2.10 Concurrent jurisdiction

2.10.1 The Council has concurrent jurisdiction with the FSCA and Prudential Authority (**PA**) until 31 March 2024.

2.10.2 Please provide us with evidence of the Council seeking or obtaining concurrence from the FSCA and PA in respect of any conduct matters, e.g. curatorship, litigation, banning of publishing notices on benefit options and contribution increases, preparing submission of LCBO report, etc. In the absence of such documentary evidence, our client will assume that all regulatory actions under the Act have been illegal since the inception of the Financial Sector Regulation Act, in 2017.

2.10.3 Kindly confirm whether the Council has sought the Registrar's, or independent legal opinion on the legitimacy of acting without a formal concurrency arrangement between the regulators?

3. **Summary**

3.1 We understand that the Council, after consultations with the Minister, recommended the Registrar's appointment. In our client's view, the Registrar has been incompetent in key respects since assuming office in that he has apparently abused and unjustifiably exercised his power in an unfair manner as illustrated above, including undue delays in the exercise of his functions.

3.2 Our client and its members are concerned that it appears that the Council has failed or neglected to manage the Registrar, or to hold him accountable to its own policy directives and the governance and operational provisions of the Act, particularly in that:

3.2.1 curatorship is used as a tool to intimidate the boards of trustees of medical schemes;

3.2.2 money is wasted on expensive, unnecessary litigation;

3.2.3 medical schemes are unjustifiably targeted;

3.2.4 the NHI Bill has been informing regulation and regulatory action before its promulgation;

3.2.5 the Registrar has acted under instruction or influence of the Department of Health;

3.2.6 the implementation of various frameworks such as the LCBO have been delayed;

3.2.7 PMBs have not been reviewed every two years as required by law;

3.2.8 a RBC framework has not been implemented;

3.2.9 the appeal processes of the Council are ineffective and delayed; and

3.2.10 there appears to be no concurrency in the jurisdiction of the Council with the PA or FSCA.

3.3 We request that the Council and the Minister revert with answers to our client's questions, by no later than Friday, 8 March 2024.

3.4 We are also instructed to request that the Council and the Minister engage one another with due urgency in terms of the Act, in order to attend to the concerns raised by our client and its members, and to find suitable solutions.

Yours faithfully

Bowman Gilfillan
per: David Geral