

Connection of the Consumer Protection Act, 2008 (“CPA”) with the Medical Schemes Act, 1998 (“MSA”)

Purpose and Application of the CPA

The main purpose of the CPA is to protect the South African “consumers” in general by establishing legal framework that will achieve and maintain a fair, accessible, efficient, sustainable and responsible consumer market. The CPA is to promote and advance the social and economic welfare of consumers in South Africa.

Consumer(s) in the Act is defined, any person (natural and juristic) to whom goods and services are supplied, a recipient of those goods and services and franchisee in respect of a franchise agreement. To be able to determine applicability of the Act – it is important to further look at the definition of goods and services.

Goods include tangible and intangible goods (including gas, lights and water) supplied for human consumption excluding goods supplied to the States. Services relates to any work performed by one person for the direct/indirect benefit of another person – with the exception of the following:

- Advisory services subject to the FAIS; and
- Services regulated in accordance to the Long term Insurance Act (“LIA”) or Short term Insurance Act (“SIA”).

However, despite the exclusion of the above transactions, it should be noted that in the event of inconsistencies between the CPA and any of the above mentioned Acts – s2(9)(a) and (b) recommends that both Acts should be applied to the extent possible to comply with the inconsistent Act without contravening the other and if not possible one would have to apply the provision that has greater extent of protecting the consumer. Furthermore, though the Act is explicit that both the LIA and the SIA have to be aligned with the CPA within 18 months, there is no mention of the advisory services subject to the FAIS and accordingly the Medical Schemes Act.

Rights of consumers

1. Unfair discrimination

The Act’s spirit promotes Equality as it is stated that the supplier should not unfairly:

- exclude any person or category of persons from accessing any goods or services offered by the supplier;
- grant any person or category of persons exclusive access to any goods or services offered by the supplier;
- assign priority of supply of any goods or services offered by the supplier to any person or category of persons;
- supply a different quality of goods or services to any person or category of persons;
- charge different prices for any goods or services to any persons or category of persons;

- target particular communities, districts, populations or market segments for exclusive, priority or preferential supply of any goods or services; or
- exclude a particular community, district, population or market segment from the supply of any goods or services offered by the supplier.

The above provisions are basically aimed at promoting equality and ensuring that accessing is granted to all levels of consumers. However, it is important to note that all businesses are aimed at a certain target market, that is what business is all about – hence the Act goes on and highlight reasonable grounds where the suppliers preference is taken into consideration. The understanding of this part of the Act is that, consumers should not be excluded based on race, beliefs, religion, age and gender. For the latter two cases, reasonable grounds in terms of section 9 are applicable. An example with regards to age is the fact that liquor shouldn't be sold to a minor child, thus in that way the supplier's exclusion will be justified.

2. Right to disclosure and information

The Act prescribes that any representation should be in a **plain language** – that could be understood by any ordinary person with average literacy and understanding, is expected to understand the context of the representations. The Act further acknowledges that it is difficult to prove that the representation was in a plain language so as to be understood by an ordinary person of the intended class of people – thus provided guidelines for the assessment of plain language. This clause is in protection of those consumers indicated under section 3(b).

3. Rights to fair, just and reasonable contract terms

Certain terms and conditions of suppliers' contract are regarded as unjust and unreasonable – particularly relating to pricing and terms and conditions of a contract. In the past these contracts have resulted in high consumer obligations which could have been eliminated through an establishment of certain marketing standards as indicated above. In these cases, the Act is against the supply of goods and services at an unreasonable price or on terms and conditions considered unjust and unreasonable. Furthermore, the Act provides the following guidelines in determining whether or not the terms and conditions of a transaction are considered unjust:

- it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied;
- the terms of the transaction or agreement are so adverse to the consumer as to be inequitable;
- the consumer relied upon a false, misleading or deceptive representation;
- the transaction or agreement was subject to a term or condition that reduces the risk of obligation of a supplier and places more obligation risk on the consumer.
- the term, condition or notice is unfair, unreasonable, unjust or unconscionable.

4. Right to fair and reasonable marketing

The Act prohibits discriminatory marketing (i.e. excluding persons from accessing any goods or services or targeting particular communities for exclusive supply of goods or services). It also deals extensively with general marketing standards; bait marketing; negative option marketing; direct

marketing; catalogue marketing; trade coupons and similar promotions; customer loyalty programmes; alternative work schemes and referral selling.

Marketing is one of the important areas for consideration when promoting the spirit of consumer protection, and guarding against misleading, fraudulent, over-promising and deceptive advertising. Therefore, by setting certain advertising standards, the Act is in good standing to reduce cases of misleading marketing – particularly relating to the price, quality and nature of goods.

5. Right to fair and good quality goods and services

The Act deals with the right to demand quality service; the right to safe, good quality goods; implied warranties of quality; warranties on repaired goods and warnings concerning the fact and nature of risks pertaining to activities or facilities.

However, the Act provides an exception where the consumer:

- has been expressly informed that particular goods were offered in a specific condition; and
- has expressly agreed to accept the goods in that condition, or knowingly acted in a manner consistent with accepting the goods in that condition.

Protection of consumer rights

The Consumer Commission was established by the Minister of Finance to enforce the regulations in terms of the CPA by:

- promoting informal dispute resolution between the consumer and a supplier;
- receive complaints concerning prohibited conducts or offences;
- monitor the consumer market in terms of conduct and effectiveness
- investigate and evaluate alleged prohibitions
- issue compliance notices.

A person can file a complaint with the Commission where a consumer's rights in terms of the Act have been infringed, impaired or threatened, or that prohibited conduct has occurred or is occurring. A complaint in terms of the Act may not be referred or made to the Tribunal or to a consumer court more than three years after:

- the act or omission that is the cause of the complaint; or
- in the case of a continuing conduct, the date that the conduct ceased.

A person convicted of an offence is liable to a fine or to imprisonment for a period not exceeding 12 months, or to both a fine and imprisonment.

The Tribunal may impose an administrative fine in respect of prohibited or required conduct which may not exceed the greater of 10% of the respondent's annual turnover during the preceding financial year; or R1 million.

Summary of Medical Schemes Act in the context of members protection

Purpose of the Act and the functions of the Medical Aid Council

The 1998 Medical Aid Schemes Act (the Act) was introduced to deal with the following challenges facing the medical schemes industry:

- introducing a compulsory minimum benefit package for all schemes;
- prohibiting discrimination on the basis of age, medical history and health status;
- requiring that contributions be determined only on the basis of income and/or number of dependants
- enabling schemes and public hospitals to have an agreement for the provision of minimum benefits to its members with payment for hospitals
- forbidding schemes from excluding applicants for membership or their dependants except on certain prescribed conditions
- regulating administrators and other contractors to medical schemes, for example brokers and managed care organisations.

To be able to achieve the objectives of the Act as stated above, and to provide supervision of private health financing through medical schemes, Medical Schemes Council (the Council) was established as a statutory body in terms of the Act and to fulfil the following functions:

- protect the interests of the beneficiaries all times;
- control and co-ordinate the functioning of medical schemes in a manner that is complementary with the national health policy;
- make recommendations to the Minister on criteria for the measurement of quality and outcomes of the relevant health services provided for by medical schemes, and such other services as the Council may from time to time determine;
- investigate complaints and settle disputes in relation to the affairs of medical schemes as provided for in this Act;
- collect and disseminate information about private health care;
- make rules, not inconsistent with the provisions of this Act for the purpose of the performance of its functions and the exercise of its powers;
- advise the Minister on any matter concerning medical schemes; and
- perform any other functions conferred on the Council by the Minister or by this Act.

Protection of the Members

In order to fulfil the objective of protecting the interest of beneficiaries – the Act provides certain regulations to be complied with by the medical schemes. No medical scheme is to be registered by the Registrar without the following being documented in its Rules:

- The terms and conditions of membership which are based on income, number of dependants or number of dependants and income. In this way the Act is basically prescribing that membership contribution should be different, however, should be fair and reasonable on the member. Medical Schemes are not allowed to prescribe their own basis of contributions and in this way are restricted from manipulating member's contributions.

- No limitation shall apply to the reimbursement of any relevant health service obtained by a member from a **public hospital** where this service complies with the scope and level of minimum benefits that are to be available to beneficiaries as may be prescribed.
- The continuation, subject to such conditions as may be prescribed, of the membership of a member, who retires from the service of his or her employer or whose employment is terminated by his or her employer on account of age, ill-health or other disability and his or her dependants. The 1993 Act was deregulated because the benefits for the elderly were diminished and its benefits structure attracted the young and healthy. The current Act is now doing away with such and is basically against discrimination on the basis of age.
- As with the CPA, the Act doesn't allow for exclusion or discrimination of any member unless such is on the basis of non-payment, fraud and non disclosure. Most importantly, it is explicit on discrimination on the grounds of age, sex and ill-health – this means cannot be discriminated against on the basis of his/her HIV/AIDS status.
- The appointment or election of a board of trustees consisting of persons who are fit and proper to manage the business contemplated by the medical scheme. The board of trustees are charged with the managing of the affairs of a medical scheme. This should be for the benefit of the members and in protection of member's interest in compliance with the Act.

Prescribed Minimum Benefits (PMBs) is amongst those provisions in the Act that are in protection of the interest of the members: These benefits were introduced into the Act to ensure that members of medical schemes would not run out of benefits for certain conditions and find themselves forced to go to state hospitals for treatment. This rule is great in terms of ensuring that members are provided full benefit from their medical schemes, however, the Act still allows the medical scheme to make an election of these and it could be to the disadvantage of the member.

Enforcement of the Act

One of the registration requirements by the Act is the documentation and outline of the scheme's way to settle disputes and deal with complaints. Should any complaint be not resolved by the respective medical scheme, the Registrar is required to either resolve the matter or submit the complaint together with such comments, if any, to the Council, and the Council shall thereupon take all such steps as it may deem necessary to resolve the complaint.

Conclusion

Despite having the spirit of protecting the interest of the medical scheme members, the Act fell short on some of the provisions, including:

- **The Benefits options:** Though the Registrar of Medical Schemes assesses any new benefit option of the medical scheme, this is not assessed in terms of fairness and reasonability. Therefore, allowing medical schemes to come up with benefit options that are financially disadvantageous to the members. It would be best if the regulations were to specify that such new benefit options should not be in favour of the schemes and prejudice to the member.
- **Waiting period:** The 11 months **condition specific** waiting period is very long and permits the medical schemes to provide their own condition specific. Surely, medical aid scheme

will opt for those expensive conditions, which might result in a member paying high medical fees whilst contributing to the medical scheme.

- Language: Medical scheme rules are subject to different interpretations and understanding. There is no prescription in terms of language in the Act , and the Act puts the responsibility of the understanding of the rules on the member, irrespective of the industry complexities.

The Act is in line with the protection of member's interest – however, certain areas need to be amended so as to be in line with the CPA.

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