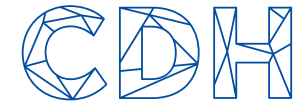


Dispute Resolution

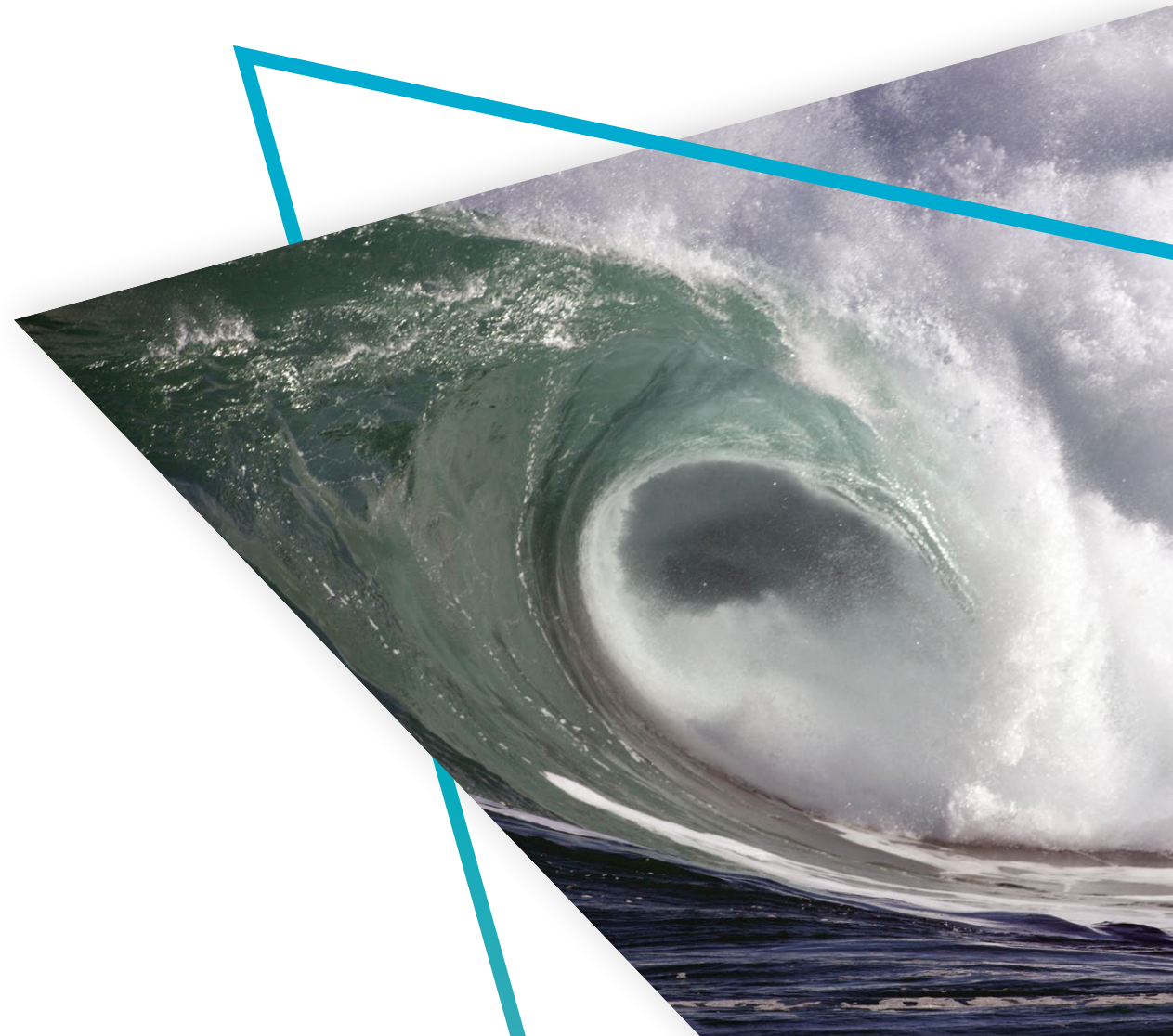
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SOUTH AFRICA

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**DISPUTE RESOLUTION
ALERT**

The transferability of administrative justice rights to a deceased estate in the context of a review of a medical scheme's decision

In *Carlo Swanepoel N.O v Profmed Medical Scheme* [2024] ZACC 23 the Constitutional Court considered an application for substitution brought by the executor of the deceased estate for Ms Mignon Adelia Steyn. The administrative law question at the heart of that application was whether Steyn's claim to just administrative action under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) was transferable to her deceased estate. The determination of the substitution application was critical to the success or failure of Steyn's review application that was on appeal to the Constitutional Court against a ruling by the Council for Medical Schemes Appeal Board (Appeal Board) in respect of a decision by Profmed Medical Scheme (Profmed) to terminate Steyn's membership and not honour her claims for reimbursement for medical procedures that she underwent in 2016. If the substitution application failed, so would the review as it would be unnecessary for the Constitutional Court to consider the merits of Steyn's review application. Looking at the matter holistically, it was comprised of at least three tiers of administrative law questions that had to be considered and adjudicated on.

Tier one: The nature of the right

The Constitutional Court began its assessment by considering the nature of the right in question. In *Mkhize NO v Premier of the Province of KwaZulu-Natal and Others*; 2019 (3) BCLR 360 (CC) the Constitutional Court clarified that the discussion on the nature of the right and its transferability focuses specifically on the relief that was originally sought by the deceased. In this matter, the deceased sought both reinstatement to the medical scheme and monetary relief in the form of a reimbursement. The court confirmed that under the laws of succession, the estate of a deceased person does not include rights and liabilities that are of a purely personal nature, which would have terminated with the deceased. With that in mind, the relief sought in the reinstatement of Steyn to the medical scheme would clearly be non-transferable, but the financial relief sought would be, by virtue of the fact that it formed part of the assets and liabilities in the estate. The court concluded then that based on its approach in *Mkhize*, Steyn's personal claim to just administrative action in so far as the monetary claim was concerned was transferable to her deceased estate:

"The cause of action for review must be transmissible where, as is the case here, the estate has a financial interest in the outcome of the review, and not only a mere interest in the right underlying the review. This approach finds support in Mkhize."

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Tier two: the decision of the medical scheme

The next issue was whether the decision by Profmed constituted administrative action as defined in terms of section 1 of PAJA. Although the court dealt with this question after it discussed the nature of the right, it is perhaps an antecedent question because the judicial review proceedings would only be competent if the decision challenged was administrative action. In *Pennington v Friedgood* 2002 (1) SA 251 (C) the High Court held that the proceedings of an annual general meeting of a medical scheme are not administrative action on the basis that medical schemes remain subject to common law review. The Constitutional Court considered *Pennington* and ruled that it was incorrectly decided. The Constitutional Court held that the decision of the Appeal Board was administrative action. It found further that the Appeal Board was established in terms of the Medical Schemes Act 131 of 1998 (MSA), which was enacted to limit the contractual freedom of medical schemes by placing regulatory control over a range of their decisions, including decisions affecting their relationships with their members, which have a direct impact on their members' fundamental right to access medical care. As such, the finding of the Constitutional Court suggests that the definitive position in law now is that in addition to a decision taken by the Appeal Board, any decision taken by a medical scheme with respect to contracts with its members would be administrative action that would be susceptible to judicial review under PAJA. This may well have implications for medical schemes down the line.

Tier three: the review application itself

The primary issue in the merits of the review application was whether the hearing before the Appeal Board was conducted in a procedurally fair manner. The Constitutional Court found that the Appeal Board's refusal to allow Steyn an opportunity to lead evidence in order to object to the new evidence that was brought before her appeal was a serious procedural irregularity which was grossly unfair and in contravention of the fair procedure requirement under PAJA.

Conclusion

The purpose of this alert is to highlight the administrative law principles that stood out in the judgment. In particular, these include the finding that administrative rights can be transferred to a deceased estate and that the Appeal Board's decision constituted administrative action, both of which may have implications for the future conduct of medical schemes. The judgment may also have some indirect implications for the future conduct of other entities whose affairs are regulated by a statute or a regulatory body.

As a final point, it is useful to note that the judgment also considered other issues, such as the executor's standing to bring the application under section 38 of the Constitution and the decision by the Constitutional Court to substitute the decision of the Appeal Board with its own decision. It also dealt with an interpretation of section 29(2) of the MSA.

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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