Council for Medical Schemes circular shows disregard for the rule of law – Business Day 26 Nov 2018

The principal officer of the Government Employees Medical Scheme (Gems), Guni Goolab, has sounded some cautionary notes on the state's plan to merge it with other public-servant medical schemes. This is largely in response to Circular 42 published by the Council for Medical Schemes in September, which outlines the government's pre-emptory strategy to consolidate 11 medical schemes into Gems.

The council's aim is to ready the industry and the country for the introduction of the state's contentious National Health Insurance (NHI) plan. The two bills health minister Aaron Motsoaledi published in June, the NHI and the Medical Schemes Amendment bills, are both aligned to enable NHI.

However, there are a few moot problems with all this resolve by the government. The council refers to this consolidation strategy in its circular as a fait accompli, even going so far as to recommend which Gems benefit options members from other schemes should go to. It even predicts Gems's financial results post these amalgamations. Presumably, all of this is under a mandate from the health department, but neither the council nor the government has the right to force medical schemes to amalgamate.

Medical schemes, irrespective of whether they are closed, employer-based or open, are private, autonomous entities with their own registered rules and democratically elected boards of trustees who are mandated to oversee the management of their scheme. This mandate includes deciding on whether to amalgamate and, if so, with whom to amalgamate, all of which must be predicated on them being able to validate that such action is in the best interests of their members.

This requires that the schemes appoint an independent expert to evaluate the risks and benefits of an amalgamation for each scheme. Once this is done, the schemes must communicate these findings to members and decide through a member ballot whether to proceed, with a majority from both schemes necessary for success.

Any action by the council to override such authority means the council becomes an accountable director of the affairs of a scheme rather than its supervisory watchdog. This supersedes the rule-of-law principle.

The 32-page circular published by the council shows no intent to first garner the input of members, relying rather on the dubious point that medical-scheme contributions are subsidised by the state. This insinuates that this so-called "subsidy" provides the council with the right to compel an amalgamation, but it fails to recognise that this subsidy is remuneration and that this subsidy is derived from taxpayer money.

This strategy is akin to the Treasury instructing the Financial Services Conduct Authority to compel Sanlam and Old Mutual to merge because many state employees bought life insurance policies from these two companies — obviously using "state money" to do so.

The Council for Medical Schemes is a regulatory body, mandated to regulate medical schemes within the ambit of the Medical Schemes Act. It cannot usurp the powers of trustees and officers of a medical scheme, who have been elected through a democratic process by its members to manage the affairs of the scheme in the best interests of those members. Any action by the council to override such authority means the council becomes an accountable director of the affairs of a scheme rather than its supervisory watchdog. This supersedes the rule-of-law principle.

But the Medical Schemes Amendment Bill shows explicit intent to override the rule of law. A proposed amendment to section 31 of the act reads that a directive issued to a scheme by the regulator that is not enacted by the scheme may be automatically implemented by the regulator, and will then be deemed to have been implemented by the scheme. This offers no course of legal defence by a scheme and makes trustees accountable for such actions implemented by the regulator. This is a flagrant disregard for the rule-of-law principle.

The council circular also fails to comprehend the inherent, well-documented risks associated with centrist-style consolidation — one scheme holding a monopoly will have no competition, and subsequently the usual frailties will creep in. Prices will rise, efficiencies will deteriorate and poor service delivery will be the norm for members. If this single state scheme fails, taxpayers would be called upon to bail it out. And insofar as that is concerned, Gems was on the brink of insolvency a mere two years ago.

Taxpayers should not be saddled with another monopolised entity needing a bailout. SAA, Eskom and the SABC — not to mention several others — are enough.

A strategy in which many medical schemes compete for the business of government employees, who are free to join any one of those competing medical schemes, is a much more compelling and less risky approach than having one consolidated scheme holding a state-engineered monopoly.

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