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THE REGISTRAR
SOUTH AFRICAN PHARMACY COUNCIL
PRIVATE BAG X40040
ARCADIA

Per email: bn@sapc.za.org

Attention: Senior Manager: Legal Services and Professional Conduct

COMMENT ON BOARD NOTICE 26 OF 2020 - REGULATIONS RELATING TO FEES PAYABLE TO COUNCIL

Thank you for the opportunity to comment on the proposed procedure envisaged by Council to comply with the requirements of Section 49(1)(d) of the Pharmacy Act, 53 of 1974, (Pharmacy Act) in publishing fees payable in terms of the Act.

The Pharmaceutical Society of South Africa (PSSA) rejects the process suggested in this Board Notice by Council based on a number of legislative restrictions hindering Council to proceed as intended.

Our submission will focus on two sections of the Pharmacy Act namely;

49. Regulations-
   (1) The Minister may, in consultation with the council, make regulations relating to –
   (d) any fees payable under this Act; and
49A. Delegation of powers
   (1) The Minister may delegate or authorise in writing the Director-General or any officer of the Department or the council to exercise any of the powers conferred upon him or her by this Act, other than the powers referred to in section 49.
   (Underlining done to emphasise the wording)

We will also comment on Regulation 106 of the Regulations relating to the registration of persons and the maintenance of the registers (GNR. 1160, published on 20 November 2000), and delegation of powers.

1. Section 49 and 49A(1) of the Pharmacy Act

The Pharmacy Act makes no provision for the Minister of Health to delegate the responsibility for determining fees to anybody - refer to section 49A(1). Any delegated authority is unlawful and ultra vires the Act. The courts may review its validity. The Minister must set the fees by regulation as prescribed in the Act.

The background provided in the Board Notice cannot take the matter any further as the delegation would be unlawful and may not circumvent the Pharmacy Act. The explanation provided in the BACKGROUND section of the Board Notice states that Council shall have the power –

To require any registered person to pay the Council the prescribed annual fees [Section 4(c)]; and
To determine the fees payable to Council for services performed by the Council in terms of the Pharmacy Act, or any other reason the Council may decide on [Section 4(zG)].
The two Sections referred to above cannot be read in isolation and without considering the other provisions in the Pharmacy Act.

2. Regulation 106 of the Regulations relating to the registration of persons and the maintenance of the registers.

The Board Notice then states that Regulation 106 of the Regulations relating to the registration of persons and the maintenance of the registers [GRN. 1160, published on 20 November 2000] provides that every person registered in terms of the regulations must renew their registration annually by paying the annual fee(s) as determined by Council.

The above comments/background are then used to argue that Council may determine a fee and that the annual process of the publication of any fee payable can be done by means of a Board Notice.

The reliance by Council that Regulation 106 adequately provides for an annual fee increase to be determined by Council and then to be published as a Board Notice, and not by following (or ignoring) the prescribed process as specified in Section 49(1)(d) cannot be correct based on the following (The following comment has been copied from a submission received by the PSSA):

A. Regulation 106 - 106. Every person registered in terms of these regulations must renew such registration annually by paying the annual fee(s) as determined by council. This Regulation is ultra vires the Pharmacy Act. Fees are payable to the Council and must be determined by the Minister after due process otherwise the Council becomes a judge in its own cause and contrary to administrative law principles and in particular the doctrine of delegation of powers to an unauthorised person or entity.

B. The regulatory process is simple: The Minister must (shall) publish the proposed Fee Regulations for comment and give the profession and interested parties three months to comment. The internal workings of the SAPC is not the concern of the profession. The SAPC must follow the instructions of the Pharmacy Act and cannot use Regulations to circumvent what Parliament has instructed the Minister to do in the statute, the personal communication explains the point:

In the Constitution, unless the context indicates otherwise, national legislation includes subordinate legislation made in terms of an Act of Parliament. Regulations are known as legislative administrative acts whose validity may be reviewed by the courts. Delegated (subordinate) legislation (regulations) owes both its existence and its authority to its enabling statute.

Subordinate legislation may not conflict with original legislation. The persons allowed to issue regulations may do so only within the framework of the authority specifically given to them by statute. If not, they have acted ultra vires (outside their powers) and a court could invalidate the regulation because it does not comply with the requirements of administrative law (e.g. it is vague, ultra vires, etc.). Any subordinate legislation in conflict with the enabling Act (or any other original legislation) will also be invalidated.

Although regulations must be read and interpreted together with its enabling Act, it may not be interpreted based on the subordinate legislation made under it. Administrative guidelines are not legislation. The Interpretation Act (Act 33 of 1957) requires that regulations be published to start.

A provision in a statute must be interpreted before we consider the regulation, and if the regulation claims to vary the provision as so interpreted it is ultra vires and void. Also, the regulation cannot be used to cut back or enlarge the meaning of the statutory provision. A power must be exercised within the prescribed limitations and for the purpose intended and no other. The power cannot be extended to another thing. For example, regulations which
purports, without express power to alter or to change existing statutory rights or privileges is ultra vires the empowering provision in the statute.

Courts are loath to read into an Act words which are not there. They will only do so, when not to do so, will lead to an absurdity so glaring, that it could never have been contemplated by the legislature.

The comment above explains why Council therefore, cannot rely on Regulation 106 to follow a process to publish the fees payable in terms of the Pharmacy Act by a Board Notice. A regulation must do it, and the Pharmacy Act empowers only the Minister of Health to do so.

3. Delegation of powers Section 49A of the Pharmacy Act.

It is important to note the following:

A. The definition of “prescribe or prescribed” means prescribe or prescribed by regulation, as provided for in Section 1 of the Pharmacy Act.

B. Section 49, Regulations: sub-section 49(1) of the Pharmacy Act specifies that the Minister may, in consultation with the council, make regulations relating to- (d) any fees payable under this Act.

C. Section 4(c) of the Pharmacy Act, as already listed above, refers to the “prescribed annual fees” meaning by regulation published by the Minister and in Section 4(zG) reference is made to fees as determined by Council for services performed by the Council.

D. We submit that regardless of the different wording used Section 49(1)(d) refers to “any fees payable under this Act” and therefore all the fees, whether it was determined by Council or referred to as prescribed fees, must be done by the annual publication of the proposed fee by the Minister following the process prescribed in Section 49(5) allowing for a comment period of three months.

E. Note that Section 49A(1) of the Pharmacy Act states that the Minister may delegate or authorise in writing the Director-General or any officer of the Department or the council to exercise any of the powers conferred upon him or her by this Act, other than the powers referred to in section 49. Section 49(1)(d) as pointed out above lists the publication of “any fees payable under this Act”.

We therefore submit that the envisaged process to publish any fee by a Board Notice will be ultra vires the Pharmacy Act.

Our submission is not an objection to the payment of fees, but rather the procedure followed by the Council in achieving the result. The publication of a regulation is an administrative action and subject to PAJA (Promotion of Administrative Justice Act; Act 3 of 200) and therefore must comply with the process of publication of regulations as provided for in Section 49(5).

Yours sincerely

Ivan Kotzé
Executive Director