THE MEDICAL SCHEMES APPEAL BOARD ESTABLISHED IN TERMS OF SECTION 50 OF THE MEDICAL SCHEMES ACT 131 OF 1998

In the appeal between

M[redacted]	**Appellant**
and	
THE DISPUTES COMMITTEE OF THE LIBERTY MEDICAL SCHEME	**First Respondent**
LIBERTY MEDICAL SCHEME	**Second Respondent**
R.[redacted]	**Third Respondent**

DECISION OF THE APPEAL BOARD

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1. This is an appeal in terms of Section 50(3) of the Medical Schemes Act No. 131 of 1998 ("the Act") against a decision made by the Appeal Committee of the Council for Medical Schemes on 10 April 2009 in which it dismissed Appellant's appeal to it on the basis that the Appellant was time barred in terms of Section 48(3) of the Act as a result of the fact that the appeal was brought more than three months after the date on which the decision appealed against was given.

2. There are disputes as to which "decision" was being appealed and whether, if the appeal was late, condonation should have been granted and the appeal upheld.

3. In order to fully and properly deal with this matter it is necessary to chronologically set out what occurred which we do hereunder.

4. The Appellant's son H[redacted] who was born on 24 April 1988, suffers from a severe hearing loss, which is congenital. Dr Maurice Harold Hockman an ear, nose and throat specialist in March 2000 recommended that H[redacted] have a Cochlear Implant, which would in his opinion be of great assistance to H[redacted] The rules of

the Liberty Medical Scheme ("the Scheme") (Rule 3.4.16.1) exclude Cochlear Implants from the benefits provided by the Scheme unless such procedure is specifically authorised by the Scheme. Accordingly the Appellant sought such authorisation which was refused in September 2000.

5. Subsequently in 2005, a further request for authorisation of an implant was made based on the opinion of both Dr Hockman and a speech and hearing specialist W. Deverson. The Scheme, on 12 January 2006, declined to authorise the procedure. The Appellant nevertheless elected to have the implant done and on 15 February 2006 the operation was performed. Later on 20 November 2006 a second implant was done. The Appellant has paid for both implants. No authorisation was sought for the second implant.

6. After the first implant was performed, the Appellant applied to the Schemes Ex Gratia Committee for financial compensation for the medical expenses, which he had incurred. On 22 February 2006, after considering the application, the Committee informed the Appellant that it had declined his request for compensation.

7. On 17 November 2006, Appellant's attorneys wrote to the Scheme and requested that the matter be referred to its Disputes Committee for a decision. This was done and the matters argued before the Disputes Committee on 15 February 2007.

8. On 14 March 2007, the Disputes Committee after fully analysing the issues referred the application back to the Ex Gratia Committee for reconsideration. The referral back was accompanied by the following suggestion:

> "It is suggested that the Ex Gratia Committee deal with the matter by considering whether all the relevant facts, motivations and medical opinions were duly considered at the time when the application served before it in 2006, with due regard also to the comments and findings of the Dispute Committee".

9. On 21 June 2007, the Scheme wrote a letter to the Appellant's attorneys reading:

> "The Liberty Medical Schemes Disputes Committee recommended that the above matter be referred back to the Ex Gratia Committee. Please be advised that the Liberty Medical Scheme Ex Gratia Committee has reconsidered the above matter and the decision of the Committee is to decline the request. We therefore advise that your client refer this matter to the Council for Medical Schemes should he wish to take the matter further."

10. On 29 January 2008 (seven months after the letter from the Scheme) the Appellant's attorney wrote to the Disputes Committee informing them that the "decision" to refer the matter back to the Ex Gratia Committee was not competent as they were required to decide on the dispute and not "delegate its obligation to make a decision to the Ex Gratia Committee". The letter went on to make the following demand in paragraph 7 –

> "In the circumstances we hereby call upon the Disputes Committee to reconsider the matter and make an appropriate decision in respect of the dispute within a period of one calendar month of date hereof, failing which our client intends to appeal against your "decision" to the Council for Medical Schemes."

11. On 12 March 2008 the Scheme wrote to Appellant's attorney stating: "In the view of the Scheme, the Disputes Committee may validly elect to refer the matter back to the Ex Gratia Committee for reconsideration in accordance with the directive issued by the Disputes Committee ... In the circumstances, the Scheme is unable to accede to the request contained in paragraph 7 of your correspondence. You are invited, in terms of Rule 28, to refer the matter to the Council for Medical Schemes in accordance with the provisions of the CMA" (obviously the reference to "CMA" should have been to "MSA").

12. The Appeal to the Council of Medical Schemes was then finally launched on 16 April 2008. The Appellant argued that the Appeal was against the decision of the Disputes Committee made on 12 March 2008 not to reconsider its previous decision and that accordingly it was brought within three months of the decision as provided for in Section 48(3) of the Act. In our view this submission is without merit in that a decision, whether competent or not, had been made on 14 March

2007 by the Disputes Committee. Another decision had also been made by the Ex Gratia Committee on 21 June 2007 after the matter had been referred back to it for reconsideration. A refusal to reconsider a matter cannot in our view amount to a decision "relating to the settlement of a complaint or dispute" as envisaged in Section 48(1) of the Act. In our view, the decision which the Appellant required the Council of Medical Schemes to adjudicate upon was the decision of the Ex Gratia Committee made on 21 June 2007 (vide Paragraph 9 above). By requesting a body to reconsider a decision made by it, a party cannot manufacture a new decision which is to be adjudicated upon by an Appeal Tribunal. We are accordingly satisfied that the appeal in terms of Section 48 of the Act was out of time and it is accordingly necessary to consider whether the Appeal Committee correctly refused to condone the late filing of the appeal.

13. The Appeal Committee found that a party could not avoid the consequences of a failure to comply with a time restraint if such failure was based upon the negligence of such parties' attorney. This finding was in our view based on a misreading of the authorities cited by the Appeal Committee. The correct approach which appears from a large number of authorities is that set out by Myburgh, J P in Mziya v Putco Limited [1999] 2 BLLR103 (LAC). The learned Judge said:

> "10. The approach which the Industrial Court should have taken in considering an application for condonation of this kind has been recently restated on a number of occasions. It is sufficient for present purposes to refer to the followings statement in the case of *NUM v Council for Mineral Technology* (unreported Case No. JP94/97 [LAC] at para 10) ... 'It is accepted by the Industrial Court and the Labour Appeal Court that in considering whether good cause has been shown in an application of this kind the approach in *Melane v Santam Insurance* Co. Ltd 1962 (4) SA 531 (A) at 532C-F should be adopted.'
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> ... 'The approach is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degrees of lateness, the explanation therefor, the prospects of success and the importance of the case. These facts are inter-related:

they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is that without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused ...cf *Chetty v Law Society* of the Transvaal 1985 (2) SA 756 (A) at 765A-C; *National Union of Mineworkers and Others v Western Holdings Gold Mine* 1994 15 ILJ 610 (LAC) at 613E. The courts have traditionally demonstrated their reluctance to penalize a litigant on account of the conduct of his representative but it emphasized that there is a limit beyond which a litigant cannot escape the results of the representative's lack of diligence or the insufficiency of the information tendered. (*Saloojee & Another NNO v Minister of Community Development* 1965 (2) A 135 (A) 140H-141B; *Buthelezi & Others v Eclipse Foundries Ltd* 18 ILJ 633 (A) at 6381-639A)."

14. In our view the Appellant's explanation for the delay in this matter is weak. He alleges that the appeal was not lodged timeously because his attorney thought that review proceedings should be brought. Yet there is no evidence that such proceedings were ever initiated. In the letter from the Scheme dated 21 June 2007, which the Appellant must have seen, he was specifically advised to refer the matter to the Council for Medical Schemes. In the light of this invitation the excuse of ignorance has a hollow a ring.

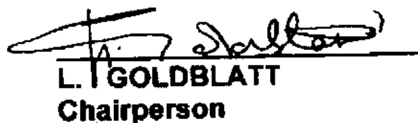
15. With regard to the Appellant's prospects of success, we are of the opinion that such prospects do not exist. The Appellant was seeking an ex gratia payment from the Scheme i.e. a payment made not as a result of any legal obligation but as a favour. The Ex Gratia Committee had, in our view, a discretion as to whether or not it would compensate the Appellant for the expenses he had incurred and if so, to what extent it would so compensate him. The rules of the Scheme make no provision for ex gratia payments and accordingly such payments are made without legal obligation and as a favour to assist members in circumstances considered appropriate by the Scheme. Provided the discretion granted to the Committee was exercised properly as opposed to capriciously or

arbitrarily we are not entitled to substitute our discretion for the Committee's discretion. The evidence before us is that the Committee had a charter of factors which you had to take into account when considering whether or not to make an Ex Gratia payment. It clearly took those factors into account as appears from the score card utilised by the Committee and which was referred to in the Affidavits before the Appeal Committee. The argument that the Committee should have preferred the evidence of Dr Hockman to that of the experts consulted by it does not mean that the Committee failed to properly exercise its discretion. It was, in our view, entitled to rely upon such expert evidence as seemed to it to be appropriate. Considering all the evidence before us, it is clear that the Ex Gratia Committee honestly and properly consider the request for compensation and acting in accordance with the discretion accorded to it refused such request. We must point out that the Appellant knew that the Scheme did not fund Cochlear Implants as of right but reserved to itself the discretion as to whether or not it would authorise such an operation. He accordingly incurred the expenditure claimed at his own risk and subject to a hope that he could later obtain an Ex Gratia payment. The only right that he had was that the Ex Gratia Committee had to act honestly in considering this claim. As already stated, there is no evidence that his claim was not honestly and properly considered.

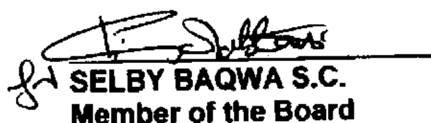
16. We make the following order.

The appeal is dismissed.

SIGNED at **JOHANNESBURG**, this 5th day of **July 2010**



L. I GOLDBLATT
Chairperson



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