

**IN THE APPEAL COMMITTEE OF THE COUNCIL FOR MEDICAL  
SCHEMES**

**Case Number: CMS 17217**

In the matter between:

**B M**

Appellant

and

**REGISTRAR OF MEDICAL SCHEMES**

Respondent

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**RULING**

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Introduction

[1] The facts are common cause between the parties and do not bear repeating here.

- [2] The appeal raises two issues. The first is a preliminary point and it concerns an application by the appellant for condonation for the late filing of his appeal against, it would seem, the decision of the registrar in relation to his complaint regarding the correctness of Medihelp's imposition on his membership (and on the secondary membership of his wife) of a waiting period in terms of section 29A of the Medical Schemes Act, 131 of 1998 ("the Act").
- [3] The second issue concerns the proper construction of section 29A of the Act. The appellant submits that none of the waiting periods for which sections 29A(1), 29A(2) and 29A(3) of the Act apply to him because at the time of his application for membership of Medihelp he was still a member of another registered medical scheme.
- [4] In an electronic mail dated 30 January 2008 (but which the appellant says he received only on 4 April 2008), the registrar's office took the view that Medihelp was entitled to impose the waiting periods in the circumstances of this case.
- [5] The condonation application was dismissed and these are the reasons for that finding.

### Condonation Application

[6] First, some preliminary observations which were not made at the hearing. Nothing really turns on them for purposes of this case. However, they may be worth considering in future appeals.

[7] The appellant appeals against a decision of the registrar. Yet he proceeds under section 48 of the Act and not section 49. Section 48 applies in appeals against decisions other than those of the registrar. So if a member is aggrieved by a decision of the medical scheme, he or she would have to proceed under that section. The section requires that appeals must be

- (a) in the form of an affidavit,
- (b) directed to the Council for Medical Schemes, and
- (c) filed no later than 3 months after the date of the decision against which the appeal lies, unless this committee condones late filing on good cause shown by the appellant.

[8] Appeals against the decision of the registrar, on the other hand, are to be prosecuted in terms of section 49 of the Act. Such appeals must be filed within 30 days after the date of the registrar's decision against which the

appeal lies. There is no provision for condonation for late filing and the appeal need not be on affidavit.

[9] The appellant seems to have confused the two provisions. If it is against the registrar's decision that he appeals, then

(a) (assuming he is correct in his submission that he received the registrar's decision on 4 April 2008) his appeal is almost 16 weeks late – not 6 weeks,

(b) application for condonation is not open to him, and

(c) he need not have filed his appeal in affidavit form.

[10] Thus, ordinarily when an appellant is late in filing an appeal against the registrar's ruling under section 49, that is the end of the matter as this committee is not at liberty to entertain applications for condonation.

[11] But the appellant's condonation application was dismissed for a different reason and that was that his explanation was inadequate and so the committee was of the view that in those circumstances it need not consider the other factors normally relevant when determining the condonation issue for the late filing of pleadings, namely, prospects of success, degree of delay and the importance of the issue. Both the Appellate Division (as the SCA used to be) and the Labour Appeal

Court have said that if the explanation in condonation applications is inadequate, prospects of success in the main proceedings become immaterial (see *Ferreira v Ntshingila* 1990 (4) SA 271 (A) at 281J-282A; *NUMSA v Jumbo Products CC* 1996 (4) SA 735 (A) at 741G-I; *Mziya v Putco Ltd* [1999] 2 BLLR 103 (LAC) at 107A-C; *NEHAWU v Nyembezi* [1999] 5 BLLR 463 (LAC) at para [10]).

[12] The appellant's explanation for filing the appeal late was that upon receiving the registrar's decision he proceeded to the High Court for a declaratory order. He says he only discovered after preparing papers to the Pretoria High Court that he became aware of the provisions of section 48. Now, the appellant is an attorney of the High Court and a senior partner in a practice bearing his name. His explanation (ignorance of the statutory provisions governing the lodging of appeals) is quite inadequate coming as it does from a senior officer of the High Court.

[13] In any event, the construction that the appellant seeks to place on section 29A of the Act is not correct and so even on the merits he has poor prospects of success. The appellant had been a member of another medical scheme "for at least 10 years" at the time of his application for membership of Medihelp. Thus the application or otherwise of the

waiting period in his instance falls to be determined with reference to section 29A(3) of the Act which reads:

“A medical scheme may impose upon any person in respect of whom an application is made for membership or admission as a dependant, and who was previously a beneficiary of a medical scheme for a continuous period of more than 24 months, terminating less than 90 days immediately prior to the date of application, a general waiting period of up to three months, except in respect of any treatment or diagnostic procedures covered within the prescribed minimum benefits”. (emphasis supplied)

- [14] Clearly, the section applies in respect of applications from persons who, prior to the date of application,
- (a) were previously members of a medical scheme for a continuous period of no less than 24 months, and
  - (b) terminated their membership of such medical scheme less than 90 days immediately before applying for membership of another scheme.

[15] It matters not whether the “date of application” is the date on which the application was received by Medihelp or the date on which the appellant’s membership of Medihelp took effect. What matters is that the appellant had been a member of Discovery Health for 10 years and would have had to terminate that membership before joining Medihelp as he could not legally belong to two medical schemes at once. Such termination would thus have been effected “less than 90 days immediately prior to the date of application” whether that date falls on 1 September 2007 (when his membership would have taken effect) or on 27 August 2007 (when he applied for membership).

[16] Medihelp purported to apply a “condition-specific” waiting period. Under section 29A(3) of the Act this is not permissible as that subsection allows for imposition of a “general waiting period”. But this, in the circumstances of this case, is of no moment because the result is the same whether the waiting period applied is the one or the other. There may well be cases where an incorrect application of the one type of waiting period when the other type was more appropriate could determine the issue between the parties. This is not one such case. Thus, we must not be understood in this case as saying that where the length of the waiting period is the same, it matters not what label the scheme gives it. That is not what we are saying.

[17] In the result, the application for condonation was dismissed and thus the appeal cannot succeed.

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VUYANI NGALWANA for Appeal Committee

*For the Appellant:*                 *Mr MB*  
*For the Respondent:*             *M Helm and Ludwick*

*Date of hearing:*                 *15 December 2007*  
*Date of Ruling:*                 *16 January 2009*