

APPEAL COMMITTEE OF THE COUNCIL FOR MEDICAL SCHEMES

In the matter between:

V

Appellant

and

BANKMED MEDICAL SCHEME

Respondent

RULING

- 1 This is an appeal by the member against the scheme's refusal to recalculate a late joiner penalty that it had imposed on his monthly contributions or premiums.

- 2 The member says the imposition of the late joiner penalty was inappropriate not only because he was not a late joiner (having been a member of Discovery immediately prior to joining Bankmed and previously that of Bankmed) but also because he had in any event provided proof of this membership to the scheme on 30 January 2009.

- 3 The scheme, relying on regulation 13(4) of the Medical Schemes Act, 131 of
1998 (“the Act”), says it received evidence of previous membership only on 3
February 2009 and recalculated the penalty from 1 February 2009.
- 4 The member wants this late joiner penalty reversed retrospectively to the date
of his joining the scheme in April 2007. The scheme says it can only do so
from the date of receiving proof of membership of a medical scheme
immediately prior to his joining this scheme. The question that then arises is
whether the scheme’s interpretation of the applicable regulation is correct. It
also has a rule that materially mirrors the provisions of the regulation.
- 5 Regulation 11 defines a “*late joiner*” as a person who, as at the date of joining
a scheme for the first time, is 35 years old or older. There is no dispute that the
member was at least 35 years old in April 2007 when he joined the scheme.
- 6 There is also no dispute that, immediately prior to joining the scheme, the
member was a member of Discovery. What is in dispute is whether on a
proper construction of regulation 13(4) the scheme must reverse the late joiner
penalty to the date of joining – 16 April 2007.

7 Regulation 13(4) says

“Where an applicant ... produces evidence of creditable coverage after a late joiner penalty has been imposed, the scheme must recalculate the penalty and apply such revised penalty from the time such evidence is provided”.

8 The question is whether the words *“from the time such evidence is provided”* relate to the date with effect from which the revised penalty must be applied, or to the date with effect from which the penalty must be recalculated, or both.

9 A more reasonable interpretation of the regulation is that the scheme is required to recalculate the penalty when it receives proof of prior membership of a scheme. This construction is logical because there would be no need for the scheme to do any calculation of the penalty if no evidence has been submitted that the person applying for membership was previously a member of another scheme and (at 35 or older) is not joining a medical scheme for the first time. In short, proof of previous membership is the trigger for the recalculation.

10 Thus triggered, the purpose of the recalculation must surely be to place the parties in the position they would respectively have been in as at the date of the applicant joining the scheme. Had that not been the purpose of the recalculation, then the regulation (and the applicable scheme rule) would thereby countenance unjustified enrichment of the scheme at the expense of the member. The Legislature could never have intended such a result when enacting the regulation as the Legislature is presumed to know the law (*S v*

Martinez 1991 (4) SA 741 (NM) at 753F; S v Gqozo and Another 1994 (2) SA 756 (Ck) at 791G).

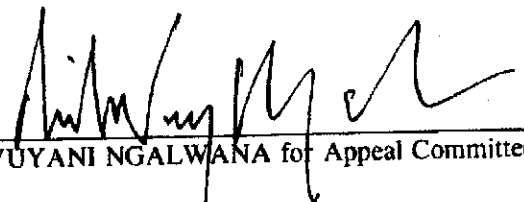
- 11 This proposition can be tested by asking whether the amount deducted monthly by the scheme from the member's salary over the 2 year period was in fact legally owing to the scheme. Clearly the answer is no, and the member would have a delictual remedy either under the *condictio indebiti* or the *condictio sine causa*. The former is a remedy for claiming back monies paid which were not legally owed. The latter is a remedy for claiming back monies paid but the underlying cause for which has fallen away. The fact that the member in this case was not a "late joiner" to begin with would justify a cause of action founded on a *conditio indebiti*. The fact that he was able to provide proof of such membership would justify relief under the *condictio sine causa*. The date on which such proof is provided is immaterial because that phrase in the regulation serves more as a trigger to the recalculation rather than as a limitation of the extent to which recalculation and refund is to be effected.

- 12 The scheme's interpretation of the regulation can thus not be correct because that would impermissibly justify unjustified enrichment even if the fault lies with the scheme. Consider, for example, an instance where the scheme's administrative official misreads an applicant's identity number and captures it incorrectly into the scheme's system, resulting in the scheme considering the member as being a day older than he actually is, thus making him 35 years old instead of 34 years and 364 days. It would be grossly unfair to say the member cannot be refunded the late joiner penalty retrospective to the date of his

joining the scheme if the error is discovered some 5 years later when he produces his identity document.

- 13 There are numerous examples one could come up with all of which would demonstrate the unreasonableness of the scheme's interpretation and the absurdity to which it would give rise. Another is where a member (on joining the scheme) produces proof of prior membership of another scheme but the proof is waylaid by the scheme's administrator. It would be absurd in that instance to say the recalculation will only be done with effect from the date on which the scheme became aware of the prior membership when the member re-submitted proof some years later.
- 14 In the circumstances of this case, the fact that deduction of the penalty was recorded in the monthly salary slips of the member is irrelevant. So, too, the fact that he was informed in April 2007 by letter (which he says he never received and the scheme has produced no proof of receipt) that a penalty would be imposed. This case turns on the proper construction of the regulation. For the reasons advanced above, it cannot mean what the scheme says it means.

15 In the result, the scheme is directed to recalculate the member's contribution from 1 February 2009 and refund the penalty it has charged him since the date of his joining the fund.


VUYANI NGALWANA for Appeal Committee

For the Appellant:

v

For the scheme:

Dr McDonald

Date of hearing:

30 April 2010

Date of Ruling:

11 May 2010