REPORTABLE

CASE NO 91/93

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

LUZELLE ELIZABETH SIMPSON	Appellant
and	
SELFMED MEDICAL SCHEME	First Respondent
SOUTH AFRICAN NATIONAL MEDICAL FUND LIMITED	Second Respondent

CORAM: Hoexter, Hefer, Kumleben, F H Grosskopf et Van den

Heever JJA

HEARD: 2 November 1994

DELIVERED: 30 November 1994

JUDGMENT

HOEXTER, JA.........

HOEXTER, JA

The first respondent is a medical scheme registered in terms of sec 15 of the Medical Schemes Act 71 of 1967 ("the Act"). The second respondent administers the first respondent. In terms of sec 20(1) of the Act no medical scheme shall be registered or carry on business unless its rules contain certain specified provisions. Relevant to the present appeal is paragraph (f) of sec 20(1) which prescribes that the said rules shall provide -

"(f) for the admission, as from the date of receipt of the application for membership, to the scheme as a member thereof, subject to the terms and conditions applicable to the admission of other members, but without a waiting period or the imposition of new restrictions on account of the state of his health or the health of any of his dependants, of any person who -

(i) has been a member of any other registered medical scheme for a continuous period of at least two years and whose application for membership of the firstmentioned scheme is necessitated by his changing employment;

or

(ii) has, for a continuous period of not less than two years, been a dependant of a person who, during that period,

has been a member of that scheme or any other scheme, and who applies within three months after the date on which he ceased to be a member of such other scheme or a dependant of a member of that scheme or such other scheme, as the case may be, to become a member." (Emphasis supplied.)

In the rules of the first respondent the matter of membership is dealt with in Clause 7. Clause 7.1.2.5 of the rules reads as follows:-

"Subject to the conditions and stipulations applicable to the admission of other members, SANMED [the second respondent] allows someone who has been a member or a dependant of a member of a registered medical scheme for an uninterrupted period of at least two years and who applies for membership within three months of the date on which he ceased to be a member or a dependant of a member of such scheme, to become a member without a waiting period or imposing new restrictions on account of his health or that of any of his dependants." The appellant is a divorced woman and the mother of two minor children. Preceding the end of August 1990 the appellant had for a period of some six years been employed by the O K Bazaars ("OKB"). The OKB has

a Medical Aid Society which is a registered medical scheme within the meaning of the Act. The appellant's two children were respectively born on 8 August 1986 and on 26 October 1987. On 18 May 1989 the appellant married the father of her children, Mr A N Simpson ("ANS"). She divorced ANS on 27 April 1990.

Having left the employment of the OKB the appellant wished to acquire membership of the first respondent for herself and for her two children as her dependants. At the beginning of October 1990 she sent to the second respondent an application form for membership completed by her, together with her cheque for R255 being the amount of the monthly membership fee for the appellant and her two dependants. On 12 October 1990 the cheque was deposited by the second respondent, but early in November 1990 the second respondent sent a letter to the appellant informing her that her application had been refused. As a refund of the R255 already paid by the appellant the letter of refusal enclosed a cheque from the second respondent for a like amount.

On 15 May 1991, and on notice of motion, the appellant brought an application in the Cape of Good Hope Provincial Division against the respondents. She sought an order declaring the admission to first respondent from 12 October 1990 of the appellant as a member and of her two children as dependants of a member (the appellant). The application was resisted by the respondents and lengthy affidavits were filed on either side. The matter came before Brand AJ. On 13 June 1991 the learned judge dismissed the application with costs. His judgment ("the application judgment") has been reported as Simpson v Selfmed Medical Scheme and Another 1992(1) SA 855(C). Thereupon the appellant appealed unsuccessfully to the full court, whose judgment ("the full court judgment") has been reported as Simpson v Selfmed Medical Scheme and Another 1993(1) SA 860(C). Pursuant to leave granted by this court the appellant now appeals against the full court judgment.

A preliminary comment is necessary. An unsatisfactory feature of the appeal before us is the form of the appeal record lodged on behalf of the

appellant. It has been appreciably swollen by the improper incorporation therein of many and lengthy irrelevant documents. These include copies of the heads of argument used by counsel in the courts below and a copy of the petition to the Chief Justice seeking leave to appeal. The appeal record is further marred by the wholesale and careless duplication of various annexures to the affidavits. When the appeal was called the appellant's counsel was asked to explain the introduction of the superfluous matter. Having taken instructions thereon counsel was able to inform us only that such matter had been included by the attorney at the insistence of the appellant herself; and that the attorney had uncritically accepted such instructions. It need hardly be said that the explanation so proffered is an unacceptable one.

The relief sought before Brand AJ (see 8581-J of the application judgment) was based on the following three alternative causes of action:-

(1) on the basis of the provisions of sec 20(1) (f) of the Act, as incorporated in the first respondent's rules;

(2) on the basis of a contract alleged to have been concluded

between the appellant and the first respondent;

(3) on the basis that the respondents were estopped from declining the appellant's application for membership.

In dismissing the application Brand AJ found that on the facts neither the cause of action based on contract nor the cause of action based on estoppel had been established (see the application judgment at 865G-866B; 866B-H). In regard to both these alleged causes of action the full court agreed with the reasoning of Brand AJ (see the full court judgment at 8G7H-I). That reasoning appears to me to be unassailable; and its correctness was not challenged in argument before us.

I return to the first cause of action raised before Brand AJ and an examination of the facts on which it was sought to be founded. When during October 1990 the appellant applied for membership of the first respondent she annexed to her application form a certificate from the OKB Medical Aid Society. It reflected that the appellant had been a member of its medical scheme from 1 August 1984 to 30 September 1990 and that the appellant's

children had been registered as her dependants from their respective dates of birth until 30 September 1990.

In her founding affidavit the appellant alleged that she had been a member of the OKB Medical Aid Scheme ("the OKB scheme") for the prescribed period of two years immediately prior to September 1990. However, from affidavits lodged thereafter (see the application judgment at 8601- 861J) it emerged (1) that in fact the appellant's membership of the OKB scheme had been finally terminated on 31 August 1990; and (2) that during the relevant period of two years preceding the latter date the position of the appellant and her two children regarding membership of registered medical schemes was as follows:-

(a) From 1 September 1988 to 31 October 1988 she and her two children had been registered in the records of the OKB scheme as the dependants of ANS.............................. 2 months

(b) From 1 November 1988 to 28

February 1990 the appellant had been registered as a member and her two children as her dependants with the OKB scheme.................................. 16 months

(c) From 1 March 1990 to 31 May 1990 the appellant had not been a member of the OKB scheme at all; and in fact she was then registered as a member and her two children as her dependants of the Medical Aid Society of the Printing Industries Federa-tion.............................. 3 months

(d) From 1 June 1990 to 31 August 1990 the appellant was again registered as a member and her two children as her dependants with the OKB scheme........................... 3 months

24 months

Before Brand AJ it was contended on behalf of the respondents that, inasmuch as during the months of September and October 1988 she had been

registered with the OKB scheme as the dependant of ANS, the appellant had not been a member of any other medical scheme for a continuous period of two years immediately prior to 31 August 1990; and that her claim for admission could therefore not be founded on paragraph (f)(i) of sec 20(1) of the Act. Counsel for the appellant sought to counter this objection by suggesting that because during September and October 1988 the appellant had been registered in the records of the OKB scheme as the dependant of her "common-law husband", it followed that for those two months she had met the requirements of paragraph (f)(ii) of sec 20(1); and further that the requirement of a continuous two year period was satisfied inasmuch as the word "or" separating paragraphs (f)(1) and (f)(ii) was properly to be construed as "and/or" (see the application judgment at 864B-E). Having considered both the definition of "dependant" in the Act and the relevant rules of the OKB scheme Brand AJ concluded (see the application judgment at 864F-J) that the appellant was not a "dependant of a member" as envisaged in sec 20(1)(f)(ii); and consequently that she did not comply with the requirements of that sub-

paragraph during the months of September and October 1988. The learned judge further took the view (see the application judgment at 865A-B) that subparagraphs (f)(i) and (f)(ii) of sec 20(1) should be read disjunctively. On appeal to the full court the twin submissions indicated above were again raised on behalf of the appellant but in turn they were rejected by the full court (see the full court judgment at 867 F-H). In my opinion they were rightly so rejected by the courts below. They were not again advanced before us and nothing more need be said of them.

During argument before Brand AJ (see the application judgment at 8G5B-D) two further arguments were enlisted in support of the respondents' defence. These were respectively:-

(1) During the 22 months from the beginning of November 1988 to the end of August 1990 the appellant had been a member not of one but of two registered medical schemes, whereas - so contended counsel- sec 20(1)(f)(i) required membership of one such medical scheme only during the relevant period of two years.

(2) The appellant's application for membership of the first respondent had not been necessitated by her changing

her employment as required

bysec20(1)(f)(i). In the light of his earlier conclusions adverse to the appellant Brand AJ (see the application judgment at 865D-E) found it unnecessary to deal with these two further arguments.

At the hearing of the appeal before the full court the appellant applied on notice of motion to file further affidavits. The tenor of the further affidavits was that the appellant had in fact been a member of the OKB scheme for a continuous period of two years preceding her application for membership of the first respondent. In opposing this application the respondent filed an affidavit by one Du Preez, the principal officer of the first respondent and the general manager of the second respondent. The chief ground of opposition to the reception of such further affidavits was that the new version thus foreshadowed was quite incompatible with the earlier versions advanced by the appellant.

Before the full court counsel for the respondents submitted that the application for leave to introduce further evidence should be refused on the following two grounds:-

(1) the appellant had put forward so many conflicting factual versions that the fresh evidence tendered could not be presumed to be worthy of belief;

and

(2) such evidence, even if admitted and believed, would not conclude the matter in favour of the appellant since she had failed to establish, as she was legally obliged to do, either -

(a) that her application for membership of the first respondent was necessitated by her changing of employment (the "necessitated" argument);

or

(b) that during the two years immediately preceding her application she had been a member of one registered medical scheme only

(the "single scheme membership" argument).

In delivering the judgment of the full court Friedman JP pointed out (see the full court judgment at 864C-D) that if the argument indicated under (2) above were sound the admission of the further evidence tendered by the appellant would be pointless. The learned Judge-President proceeded to consider (see the full court judgment at 864D-867D) the validity of the "necessitated" argument. Friedman JP concluded that as no element of compulsion had attended the appellant's application for membership of the first respondent such application had not been necessitated by her changing of employment. Accordingly the full court was impelled (see the full court judgment at 867D-E) to the following conclusions: -

> "As the requirement of 'necessitated' has not been established, appellant was not entitled to insist on acceptance by first respondent, even if she established that she had been a member of another medical scheme or schemes for the immediately preceding period of two years before her application.
>
> It is accordingly unnecessary to deal with the question as

to whether it Is essential for an applicant to have been a member of only one scheme during the preceding period of two years, or whether the section, and likewise the rules, would have been satisfied had she been a member of two schemes."

The orders made by Friedman JP in the court a quo (see full court judgment at 868B) were the following:-

"In the result:

(3) the application to lead further evidence is refused with costs;

(4) the appeal is dismissed with costs, such costs to include the costs which were reserved when leave to appeal was granted."

The fresh evidence sought to be brought forward by the appellant in her appeal to the full court was foreshadowed in her Further Evidence Affidavit (jurat 21 November 1991). Before examining more closely the affidavits and documents annexed to this affidavit, and in order the better to gauge their cogency, it is necessary to see how in the course of the application before Brand AJ the factual basis of the appellant's claim altered. The vacillations

are conveniently summarised by Friedman JP (at 863A-I of the full court judgment) and will be noticed here in outline only.

To her founding affidavit the appellant appended (as annexure "K") a certificate from the OKB scheme dated 21 January 1991 to the effect that she had been a member of the OKB scheme from 1 August 1984 to 30 September 1990. The correctness of annexure "K" having been challenged by the respondents, the appellant filed a replying affidavit Jurat 18 March 1991) from which it appeared that from 1 March to 31 May 1990 she had been registered as a member and her children as her dependants of the Medical Aid Society of the Printing Industries Federation. The respondents then filed an affidavit (jurat 18 March 1991) by Mr R P Slaughter, a director of D & E Holdings (Ply) Ltd, a company which has administered the OKB scheme since before 1984. In this affidavit Slaughter stated that annexure "K" must have been issued "inadvertently" because the information therein was not correct. To his affidavit he annexed fresh certificates of membership which his company "have today issued ... reflecting the correct information ..."

In response thereto the appellant filed her "Answering Affidavit" (Jurat 25 March 1991) stating that annexure "K" was indeed correct. She annexed hereto a further affidavit by Slaughter (jurat 26 March 1991) in which he stated that the information in his earlier affidavit had been incorrect. He proceeded to say:-

> "I therefore withdraw all previous Certificates of membership issued, one on 21 January 1991 and three on March 1991 and replace them with the Certificates of membership annexed hereto ..."

On 26 April 1991 the appellant filed her "Supplementary Founding Affidavit" setting forth the version (summarised at 861B-D of the application judgment) on which the judgment of Brand AJ was based.

To her Further Evidence Affidavit the appellant annexed a copy of an OKB service certificate reflecting that the employment of ANS had terminated on 26 September 1988; and copies of his pay slips for the months of September and October 1988. She also annexed two affidavits each sworn to in November 1991 respectively by Mrs Andrea Wiehahn ("Wiehahn"), who

is the Personnel Administration Manager at OKB Head Office in Johannesburg, and by Mr C N Altree ("Altree") who is a Trainee Manager employed by Davidson and Ewing, the administrators of the OKB scheme.

Apart from referring to some of the correspondence attached to the Further Evidence Affidavit, each of these two deponents avers in her or his affidavit:*

> "I confirm that the Appellant was the principal member and not a dependant of Allen Neil Simpson of the OK Bazaars Medical Aid Society during the period 1 September 1988 until 31 October 1988."

From the copies of certain correspondence annexed to the Further Evidence Affidavit it appears, inter alia, that on 28 June 1991 Wiehahn wrote an official letter to Altree in the following terms:-

> "MEDICAL AID MEMBERSHIP - L SIMPSON (NEEVOSLOO) As discussed telephonically, this serves to confirm that the period September and October 1988, Mrs Simpson was the principal member of the medical aid scheme and not a dependant of her husband.
>
> It would be appreciated if a letter could be issued by yourselves confirming the above as apparently the certificate previously issued did

not stipulate this information.

Could you please fax this information to myself and will ensure same is delivered to the [appellant's] attorney, Mr Smit." By letter dated 2 July to Wiehahn, Altree responded thus:-"RE: L SIMPSON (NEE VOSLOO) We acknowledge receipt of your letter dated 28 June 1991 and advise that we have amended our record to reflect that Mrs Simpson was registered as the principal member for the period September and October 1988 and not as a dependant of her husband as he was no longer employed by OK Bazaars."

On 12 August 1991 Altree wrote the following letter on the letterhead of the

OKB scheme to the appellant's attorneys:-

> "MRS L SIMPSON We refer to your letter dated 29 July 1991 and respond as follows. It appears that the premium in respect of September 1988 membership was deducted from Mr A Simpson and remitted to the Society. The premium was subsequently withdrawn by OK Bazaars, resulting in the termination of Mr A Simpson's membership on 31 August 1988. During March 1991, OK Bazaars advised that the premiums in respect of a member and three dependants for September & October 1988 would be paid to the Society in order that the membership of Mr A

Simpson could extend to 30 October 1988 and that Mrs L Simpson's membership as the principal member should commence on 1 November 1988.

According to a later instruction (28/6/91) from OK Bazaars, we were instructed to amend the membership to reflect Mrs L Simpson as the principal member for the period September & October 1988.

Mr A Simpson was however registered as a dependant of Mrs L Simpson as the premium paid, as mentioned above, was in respect of a member plus three dependants.

We therefore confirm that Mr A Simpson's membership, as principal member of the Society was terminated on 31 August 1988. We were not aware that his employment with OK Bazaars was terminated on 26 September 1988 as this was not communicated to the Society via OK Bazaars."

On the day before the appeal in this court was due to be heard the appellant filed with the registrar a petition containing a request that at the hearing of the appeal this court should receive the further evidence set forth in the appellant's Further Evidence Affidavit.

Before us the appeal on behalf of the appellant was argued by Mr Unterhalter. I should add that he did not represent the appellant in either of

the courts below. Mr Unterhalter strongly urged upon us that the full court erred in concluding that since no element of compulsion had prompted the appellant's application for membership of the first respondent, the statutory requirement that her application was "necessitated" by her changing employment had not been satisfied. Counsel submitted that the Act was a remedial measure and that provisions in question should be benevolently interpreted. It was said that in the context of the Act the phrase "necessitated by" was not necessarily indicative of any element of compulsion or unavoidability; and that it signified no more than the satisfaction of a practical rather than a legal exigency. In other words, so proceeded the argument, the words "necessitated by his changing employment" should be construed simply as "required as a result of his changing employment".

In the view which I take of the appeal, and of the appellant's request for the reception of further evidence, it is unnecessary to express any opinion as to the correctness or otherwise of the conclusion at which the full court arrived on the "necessitated" argument; and I refrain from doing so. I likewise refrain

from venturing an opinion on the soundness of the single scheme membership argument which was addressed to the full court and upon which it was unnecessary for the latter to adjudicate. I adopt this approach for the reason that on the version of the facts which was common cause at the stage of argument in the application before Brand AJ, so it seems to me, the legal conclusion adverse to the appellant to which Brand AJ was impelled was entirely correct. I think that Mr Unterhalter was wise in deciding not to challenge its correctness in this court. Unless, therefore, any necessity arises to re-examine the issue decided by Brand AJ in the light of the fresh evidence sought to be introduced by the appellant in her appeal to the full court, and again in her appeal to this court, no good reason exists for disturbing the judgment of Brand AJ. For the reasons which follow it seems to me that neither in her appeal to the full court nor in her appeal to this court has the appellant made out a sufficient case for the bringing forward of the further evidence tendered by her.

Since leave to bring forward fresh evidence on appeal is an indulgence, it is incumbent upon the appellant to satisfy us that it was not owing to any remissness on her part that she failed to adduce the evidence in question before Brand AJ. For purposes of the appeal I shall assume in her favour that she is able to discharge this onus. It is trite that in general further evidence will be allowed only where special grounds exists. In Shein v Excess Insurance Company Ltd 1912 AD 418 it was further pointed out at 428/9 that a court will be particularly chary of granting such an application where the evidence sought to be brought forward involves points contested and decided upon at the trial. Here the evidence tendered by the appellant bears directly upon the very issue contested before and decided by Brand AJ in the motion proceedings before him.

Although each case falls to be decided on its own peculiar facts certain guiding principles to govern an application for the hearing of further evidence on appeal have been enunciated by this court in Colman v Dunbar 1933 AD

141 at 161-2. For purposes of the present case it is necessary to do no more than to apply to the facts before us the third of these principles. It is described by Wessels CJ (at 162) in the following words:-

> "3. The evidence tendered must be weighty and material and presumably to be believed, and must be such that if adduced would be practically conclusive, for if not, it would still leave the issue in doubt and the matter would still lack finality..."

As a means of furnishing evidence that a particular individual is registered in its records as one of its members, and at the same time to indicate the status of his membership, it is common practice for an association to issue certificates of membership. For present purposes a certificate may broadly be defined as a written statement of some fact signed by or on behalf of the party certifying the fact. As is demonstrated by the proceedings in the application before Brand AJ it was the practice of the OKB scheme to issue certificates of membership; and such certificates were invariably signed on behalf of the certifying authority.

Annexure "K", dated 21 January 1991, was signed on behalf of Davidson and Ewing (Pty) Ltd ("D & E"). The three certificates of membership appended to Slaughter's affidavit (jurat 18 March 1991), which he caused to be issued in replacement of annexure "K", were all dated 15 March 1991 and were signed on behalf of SA Medical Aid Consultants (Pty) Ltd as administrators. The later certificates of membership annexed to Slaughter's second affidavit (jurat 26 March 1991) which he caused to be issued in replacement of all previous certificates of membership were all dated 25 March 1991 and signed on behalf of SA Medical Aid Consultants (Pty) Ltd as administrators. These last-mentioned certificates reflect that during September and October 1988 the appellant and her two children were registered as the dependants of ANS.

Against the above backdrop it must be considered whether the evidence tendered by the appellant is not only worthy of credence but such that, if believed, would operate decisively to settle the issue in favour of the appellant.

From the letter dated 12 August 1991 written by Altree to the appellant's attorney it appears that on 28 June 1991 OKB instructed SA Medical Aid Consultants (Pty) Ltd "to amend the membership to reflect Mrs Simpson as the principal member for the period September & October 1988." From the correspondence between Wiehahn and Altree it appears that SA Medical Aid Consultants (Pty) Ltd "amended" the record to reflect the membership of the appellant as a "principal member" following upon a telephone discussion between these two persons on or before 28 June 1991.

From the statements contained in Altree's letters it must be inferred that until the record of membership of the OKB scheme was "amended" it reflected that during September and October 1988 the appellant was registered as a dependant of ANS and not as a member in her own right. The stark allegation to be found in the affidavits of both Wiehahn and Altree in which each "confirms" that during September and October the appellant "was the principal member" and not a dependant of ANS, cannot, so I consider, be taken at face value. At highest that statement must be taken to signify that in the opinion

of the deponent the membership records contained a faulty registration which was sought to be corrected by an "amendment". The volte face performed by Slaughter in the proceedings before Brand AJ (compare his first affidavit (jurat 18 March) with his second affidavit (jurat 26 March)) would seem to raise as a distinct possibility that the system of membership registration may have been unreliable. But there is nothing to suggest that the certificates of membership issued on 25 March were ever subsequently replaced. They were issued at the behest of Slaughter who was a director of D & E. Altree, on the other hand, was merely a trainee Manager of D & E. By what official of that company and upon what or whose authority the record of membership was "amended" is not stated in Altree's affidavit. Upon what primary facts Wiehahn decided that during the relevant months the appellant was a "principal member" is not disclosed by her.

In these circumstances it seems to me that the certificates of membership issued on 25 March 1991 must be accepted as prima facie evidence of what is certified therein; and as evidence which, in the absence

of countervailing evidence a court will be disposed to accept as proof of what is certified. The countervailing evidence which the appellant seeks to bring forward is to the effect not that in September and October 1988 the appellant had been registered as a "principal member" of the OKB scheme, but simply that she had been wrongly registered as the dependant of ANS; and that (some nine months after she had applied to the first respondent) an attempt was made to correct the record by a nunc pro tunc entry. The question is whether the appellant had a proper cause of action when she launched her application before Brand AJ. I have already mentioned that the categorical assertions in the affidavits of Wiehahn and Altree (to the effect that during September and October 1988 the appellant was in fact a member in her own right) cannot be presumed to be correct. Nor can it be said, for the further reasons indicated above, that the evidence tendered by the appellant would, if received, operate conclusively in favour of the appellant on the issue which Brand AJ decided against her. I agree with Mr Kuschke, who argued the appeal on behalf of the respondents, that the appellant has failed to satisfy the

initial requirements for the hearing of further evidence on appeal.

It follows that although the full court found it unnecessary to deal with the merits of the application to hear further evidence which was before it, the full court's order refusing such application was the correct one.

For all the reasons aforegoing the following orders are made:-

(5) The appellant's application, embodied in her petition filed on 1 November 1994, for leave to lead further evidence on appeal to this court is refused with costs.

(6) The appeal is dismissed with costs.

G G HOEXTER JUDGE
OF APPEAL

HEFER JA)
KUMLEBEN JA)
F H GROSSKOPF JA) CONCUR
VAN DEN HEEVER JA)