IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: 58909/19

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED. ✓

3/12/19
DATE

SIGNATURE

In the matter between:

REGISTRAR OF MEDICAL SCHEMES	1ST APPLICANT
COUNCIL FOR MEDICAL SCHEMES	2ND APPLICANT

And

CHAIRPERSON OF THE APPEAL BOARD OF THE COUNCIL FOR MEDICAL SCHEMES	1ST RESPONDENT
COMPCARE WELLNESS MEDICAL SCHEME	2ND RESPONDENT
UNIVERSAL HEALTH ADMINISTRATORS (PTY) LTD	3RD RESPONDENT

JUDGMENT

Fabricius J,

Brief background:

[1] On 11 September 2014, the Second Respondent ("Compcare") made its annual submission to the First Applicant ("The Registrar") for certain amendments to its Rules. This included an amendment to reflect that Compcare had changed its name to "Universal Medical Scheme".

[2] These amendments were registered without the Registrar's Office apparently appreciating that Compcare had failed obtain the prior written consent of the Registrar for the name change, as required by s. 23 (4) of the ***Medical Schemes Act 131 of 1998*** ("the ***Act***").

[3] On 23 July 2015 when Compcare met with the Registrar's Office for certain discussions, including the implementation of the name change, the Registrar's Office realized that Compcare's name change had not been approved in accordance with s. 23 (4) of the ***Act***.

[4] On 19 May 2017 Compcare then submitted an application to the Registrar to obtain such consent in terms of s. 23 (4) of the ***Act***. A lengthy rationale was provided, but because of the very narrow nature of the relief sought by Applicants herein, it is not necessary to deal with the commercial exigencies.

[5] In a letter dated 18 December 2017 the Registrar refused consent on the basis that *inter alia* the change of name to "Universal Medical Scheme", was "likely to mislead the public" as contemplated in s. 23 (1) (c) of the ***Act***. This section of the ***Act*** reads as follows: "The Registrar shall not register a medical scheme under a name, nor change the name of a medical scheme to a name:

a) ...

b) ...

c) Which is likely to mislead the public".

[6] Compcare appealed against the Registrar's decision to the Appeal Committee of the Council in terms of s. 49 (1) of the ***Act***. The appeal was dismissed. This ruling is dated 13 July 2018.

[7] Compcare then appealed to the Appeal Board in terms of s. 50 of the ***Act***. The appeal was upheld. The Appeal Board set aside the decisions of the Registrar and the Appeal Committee, and directed the Registrar to approve the change of name from "Compcare Wellness Medical Scheme" to "Universal Medical Scheme" in terms of s. 23 of the ***Act***. The approval for the name-change was subject to Compcare implementing certain measures set out in the Appeal Board's decision. These are the following:

"7.1 The appellant would ensure that its brand-sharing administrator makes sure in its communications that it is the administrator itself, and not the appellant; the administrator distinguishing itself from the appellant.

7.2 *"(A)ll Scheme communication channels platforms and materials will be branded as Universal Medical Scheme – clearly indicating that it is the Scheme as an entity that is being dealt with. In clear distinction from this, the Schemes administrator will always be identified as 'Universal Administrator' or 'Universal Healthcare Administrators". (Paragraph 3 of the submissions).*

7.3 *"6.12 The independence and autonomy of the Scheme and its Board are of paramount importance. Thus under the shared 'Universal' brand attributes, the Scheme and its administrator will have separate and distinct governance structures which will include seperate legal advisors, separate auditors and a clear communications policy to ensure that the Scheme and its administrator (and its managed health care organization) are*

clearly delineated and that there is no confusion created in the minds of members of the general public that Universal Administrators carries on the business of a medical scheme, and that members and the general public are not otherwise misled in any manner...

(Paragraph 6.12 of the submissions).

6.13 *Independence will be ensured through the brand architecture and the scheme will be branded as an independent entity.*

(Paragraph 6.13 of the submissions).

6.14 *All Scheme communication channels platforms and materials will be branded with the Universal Medical Scheme logo – clearly indicating that it is the Scheme as an entity that is being dealt with. 'Universal Medical Scheme' will always be used when referring to the Scheme. The Scheme will also retain its own communication channels including but not limited to brochures, a website, client service line and letterhead. The*

same principles will apply in respect of the demarcation between the Scheme and its administrator".

(Paragraph 6.14 of the submissions).

6.15 The Board will continue to use every reasonable step available to educate its members and to reinforce previous training in respect of the demarcation between the Scheme and its administrator".

(Paragraph 6.15 of the submissions).

7.4 "7.3 We affirm our commitment to ensure the continued independence and autonomy of the Scheme and its Board".

(Paragraph 7.3 of the submissions)."

These conditions were proposed by Compcare itself and in its judgment the Appeal Board said the following: "The measures proposed by the Appellant to ensure that the public is not likely to be misled, are reasonable, and if diligently implemented as undertaken, are likely to go a long way towards averting the harm sought to be prevented by section 23 (1) (c). The

proposed measures weighed with us in favour of the Appellant. It would therefore be appropriate, in the order we make, to ensure that the Appellant lives up to its undertaking to implement them. This is because we believe that absent these measures, it is, as the ***Act*** says "likely" that the public will be misled; that much is recognized by the Appellant itself. Surely it must have been exactly as a result of that recognition that the Appellant tendered the above measures in support of its application. Once the name change is approved, as we believe it should be, on the strength of those measures, the Appellant cannot thereafter abandon them or fail to implement them as diligently as it has undertaken to".

It is not clear who will "supervise" the implementation of - and compliance with these measures, when this will be done and in which manner, and how any subjective non-implementation will be dealt with. I also do not know what the definition would be of a "diligent" implementation. The ***Act*** is obviously silent on this topic. Mr M. du Plessis referred me to sections 7, 8 (k), 21A, 43 and 44 of the ***Act*** as the answer to this question, whilst Mr A. Cockrell contended

that if the Registrar had no power to grant the relevant relief, the question of enforcement of conditions did not arise. I agree, though this topic could be of relevance in the interpretation process.

The Review Application:

[8] The Applicants are of the view that the Appeal Board's decision has the effect of directing the Registrar to perform conduct that is *ultra vires* the ***Act***. The Review Application was brought on this basis, and they seek to review and set aside the decision of the Appeal Board. The review grounds are the following:

1. The first review ground is that registration of a name change will require to the Registrar to exercise a competence that he does not have in law by registering a name that, according to the Appeal Board itself, is likely to mislead the public. The ***Act*** makes no provision for a name change to be registered subject to conditions.

2. The second review ground is that, even if it were to be assumed for the sake of argument that registration of a name change was permissible in terms of the ***Act***, the conditions sought to be imposed by the Appeal Board are inadequate to avoid the likelihood of the public being misled.

[9] Compcare brought a counter-application on 5 September 2019 in which it asked that the Review Application be dismissed and for the Registrar to be directed to implement the Appeal Board decision within either 10 or 14 days. This counter-application is of course in my opinion totally unnecessary and very little need to be said about it.

Compcare also contended that the Review Application should be dismissed on the grounds of unreasonable delay. The question of delay will be dealt with hereunder as I deem it appropriate to first consider the merits of the review application as this will be an important factor in deciding whether or not to grant the relief, even if it is found that an unreasonable delay had occurred.

The basis for the review: *PAJA* or the principle of legality?

[10] It was submitted on behalf of the Applicants that the Review Application had been brought in terms of the ***Promotion of Administrative Justice Act 3 of 2000*** ("***PAJA***"), alternatively, in terms of the principle of legality. Compcare adopts the position that the Applicants cannot bring this application in terms of ***PAJA***. It contends that the Applicants are challenging the decision of another Organ of State and are accordingly limited to the review grounds under the principle of legality. Applicants' Counsel disputed this contention and referred me to the decision in ***State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd 2018 (2) SA 23 CC***. In that decision the Constitutional Court held that where an Organ of State seeks to review its own decision, ***PAJA*** does not apply, and the review must be sourced in the principle of legality. However, the Constitutional Court qualified this by explaining that it was not "concerned with the situation where – in seeking a review of its own decision – an Organ of State is purporting to act in the public interest in terms of section 38 of the ***Constitution***" (par. 2). In addition,

I was referred to ***Hunter v FSCA 2018 (6) SA 348 (C)***, where the Constitutional Court explained that Gijima was based on the principle that s. 33 of the ***Constitution*** conferred rights on private persons, not Organs of State. The position is different when an applicant brings a Review Application in the public interest, because the Applicant then steps into the shoes of "the public", and "enjoys all the rights and obligations that each would ordinarily have shouldered had they chosen to be litigants" (par.49). In that case ***PAJA*** applies to such a review.

[11] In the present case, the Founding Affidavit states that the Applicants bring the Review in the public interest as envisaged by s. 38 (3) of the ***Constitution***. They say that it is in the public interest that a decision requiring the Registrar to act unlawfully should be set aside on review, and moreover, that s. 23 (1) (c) the ***Act*** expressly contemplates the possibility of a name change causing harm to the public. Since the Review Application has been brought by the Applicants in the public interest, it is therefore regulated by ***PAJA***. However, it

was also contended that in the end result it would make little difference if *PAJA* did not apply since the Applicants' review grounds may comfortably be accommodated within the principle of legality if necessary. The first ground of review was lawfulness, which forms an essential component of the principle of legality, and the second review ground, involved irrationality which similarly forms part of the principle of legality.

See for instance: ***Albutt v Centre for the Study of Violence and Reconciliation 2010 (3) SA 293 (CC) at par. 44.***

[12] Applicants then submitted that since it made little difference to the outcome, they would refer to *PAJA* and the principle of legality. Mr du Plessis contended during argument that for this reason I need not determine the question, and I agree that if the outcome in this case would be the same, there is no point in deciding this issue, which however, I may add, usually does require a decision.

See: ***State Information Technology Agency Society Ltd v Gijima Holdings (Pty) Ltd [2016] 4 ALLSA 842 (SCA) at par. 33.***

The Appeal Board's decision is *ultra vires*:

[13] Section 23 (4) of the ***Act*** prohibits a medical scheme from changing its name without the prior consent of the Registrar. I have referred to the provisions of s. 23 (1) above. Section 23 (1) (c) means that the Registrar is obliged to refuse an application to change the name of a medical scheme if the new name "is likely to mislead the public". The important point is that the Registrar has no discretion. If the new name is likely to mislead the public, then he must refuse to approve the name change. Section 23 does not empower the Registrar to approve a name change that is likely to mislead the public even if he believes the conditions may ameliorate such a likelihood. I agree with that submission. Were it otherwise, the legislature would have clearly said so. I note that s. 24 (1) grants the Registrar the power to impose conditions when

considering the registration of a medical scheme, but not when considering a name or change of name under s. 23 (1).

The name change is likely to mislead the public:

[14] The Third Respondent forms part of the Universal Group of Companies. It is currently the administrator of Compcare. That fact does of course not mean that it will always be the administrator. Compcare may terminate the administration contract of the Third Respondent if it is dissatisfied with the pricing or the services that it is receiving from the Third Respondent. Since the Board of Trustees acts in the best interests of members, it would be obliged to terminate the current administration contract if it no longer served the interests of members. It was submitted that Compcare overlooks this when it states that "long term sustainability of the scheme as an open medical scheme with the potential of unlocking strong growth opportunities will be beneficial to the Universal Group as the administration and managed care services provider of the scheme. This statement assumes, incorrectly, that

Universal will continue in perpetuity to be the administrator and the managed care provider to Compcare. The Board of Trustees of Compcare is obliged to further the best interests of members, not the commercial interests of Universal".

[15] The Universal Group of Companies is described in the Answering Affidavit as being "one of the fastest growing groups of companies in the health care industry".

[16] The stated purpose of changing the name of Compcare to Universal Medical Scheme is to establish in the public mind an association between the Medical Scheme and the Universal brand. The establishment of such an association means that the public is likely to be misled in two interlinked respects, so it was contended:

1. First: the public is likely to be misled into believing that the Medical Scheme is necessarily tied to its current administrator

and will always be tied to such administrator. That belief would be incorrect since the Medical Scheme is at liberty to terminate such contract and indeed would be obliged to do so if it no longer serves the best interests of members.

2. Secondly: the public is likely to be misled into believing that the Medical Scheme forms part of the Universal Group of Companies. That is an inevitable consequence of the fact that the Medical Scheme will use the name "Universal" and will employ their "Universal" logo, in circumstances where "Universal" is a monolithic brand. Compcare explained that a "monolithic brand" is one where "a group ... uses one name and a constant brand appearance for all of its related partners, businesses, subsidiaries or products". Compcare is quite clear in its assertion that the whole point of the name change is to associate the Medical Scheme with the Universal brand. However, the correct position is that Compcare will not

form part of the Universal Group of Companies since a medical scheme can only be owned by its members. The perception that Compcare forms part of the Universal Group of Companies will therefore be misleading.

[17] It is clear from the reasoning of the Appeal Board that it agreed that the name change was likely to mislead the public. It said so in so many words and although the Respondents' Counsel was of the view that these comments were misinterpreted, I do not agree. The language of the Appeal Board and its reasoning in this context is in my opinion abundantly clear, and not open to any argument relating to misinterpretation or ambiguity, and the like.

[18] The finding of the Appeal Board in this context is in my view plainly correct and I agree with the Applicants' submission in this regard. If the name change were to be approved, the public would likely to be misled in the respects identified above. Compcare itself accepted that "lay persons do not always have the clearest of understandings of the respective roles and responsibilities

of a medical scheme, an administrator and the other role players in the industry".

[19] The Appeal Board pointed out that it was not a jurisdictional requirement for s. 23 (1) (c) that prejudice will ensue from misleading the public. All that the section requires was that the name change "is likely to mislead the public". I agree with the conclusion of the Appeal Board in this regard.

The Appeal Board approved the name change even though it was of the view that the public was likely to be misled:

[20] The Appeal Board found that the name change was likely to mislead the public, but nevertheless approved the name change subject to the mentioned conditions. It was contended that this was a misdirection. Having regard to the clear wording of the ***Act,*** it ought to have refused its approval. It is clear that the Board appeared to be of the view that it could avoid this outcome by

approving the name change subject to the "measures" that I have mentioned.

It was submitted that this is incorrect in law for the following reasons:

1. Section 23 does not empower the Registrar to approve a name change subject to conditions. It is quite different to the provisions of s. 24 (1), which empowers a Registrar to register a medical scheme "and impose such terms and conditions as he or she deems necessary". The legislature would have used similar language if it had intended to confer on the Registrar a power to impose conditions when approving a name change, it chose not to do so. I agree with that argument.

2. Since the Registrar has no competence to approve a name change subject to conditions, the Appeal Board could not direct the Registrar to approve the name subject to conditions. The Board may not direct the Registrar to perform conduct that is *ultra vires* the Registrar's powers in terms of the ***Act***. Again, I agree with that contention.

3. Although the Appeal Board's order requires Compcare to implement the measures "fully and diligently", it does not indicate what sanction would apply if Compcare were to fail to do so. The ***Act*** does not provide for any sanction. There is also no mechanism in the ***Act*** that would allow the Registrar to take action, such as revoking his consent, in the event that a medical scheme were to fail to comply with a condition imposed upon registration of a name change. I have already mentioned that there is certainly no clarity how these conditions would be enforced, by whom, in which manner and who the parties would be to such an investigative process. This is also in my view a clear indication that the ***Act*** did not envisage or empower the imposing of conditions at all.

[21] Compcare contended that the Registrar could enforce conditions in accordance with the provisions of s. 66 of the ***Act***. Applicants' Counsel

however was of the view that this was plainly incorrect since s. 66 would find no application in these circumstances. But even if it did, there is no basis for Compcare's extraordinary "averment", as it was put, that s. 66 grants a Registrar "the power to impose penalties".

[22] It is clear that s. 23 (1) (c) is peremptory and I agree with that submission. Once it is determined that the name change is likely to mislead the public, the Registrar must withhold consent to the name change. The imposition of conditions is not catered for by the ***Act***, obviously for the reasons that I have mentioned.

[23] If the Appeal Board's interpretation were correct, any medical scheme might propose a name change that would be likely to mislead the public as long as it undertook to implement measures to avoid that likelihood from occurring. The example given was the following: a medical scheme might change its name to "Cheapest Medical Scheme" as long as it undertook to diligently

make clear to the public that it is not in fact the cheapest medical scheme. That would obviously be absurd.

Compcare's contentions:

[24] In its Answering Affidavit Compcare relied on two contentions to resist the conclusion that the Appeal Board had misdirected itself. It was submitted by Applicants' Counsel that both contentions posed the wrong question and therefore arrived at the wrong answer.

[25] In the first instance, Compcare contends "that the Appeal Court did not find that the name change will likely mislead the public, as the Registrar persistently (and incorrectly) states". Compcare says that the Appeal Board found that the name change was not likely to mislead the public since it would be implemented subject to the measures forming part of the Appeal Board's order. I agree that there is no merit in this contention and the Appeal Court certainly did not say that. Furthermore, s. 23 (1) (c) does not permit the

Appeal Board to ask itself the different question suggested by Compcare i.e. whether the proposed name change is likely to mislead the public if Compcare were to comply with the measures itself had proposed. The relevant question in terms of s. 23 (1) (c) is whether the name is likely to mislead the public, not whether the conduct of Compcare is likely to mislead the public. In any event, s. 23 does not provide for the imposition of conditions in circumstances where a name change is approved, and it makes no difference that those conditions were tendered by Compcare itself. I agree with this submission.

[26] The error in Compcare's approach is evident from its averment that "the name change, together with the conditions which were tendered by Compcare originally in its application for a name change and enforced in the Appeal Board's decision, will not mislead the public. These phrases do not appear in s. 23 (1) (c), they are an interpolation of Compcare. I agree that this is so. All that s. 23 (1) (c) says is that the name change must be refused if it "is likely to mislead the public". That is all.

[27] In the second instance Compcare says that the Appeal Board has the power to impose conditions in terms of s. 50 (16) of the ***Act***, because that section entitles it to "vary" the decision that forms the subject matter of the appeal. Again, it was contended that this was the wrong question: the relevant question is whether the ***Act*** empowers the Registrar to impose conditions when he approves a name change. For the reasons given above, the answer is clearly "no". Once that is so, the Appeal Board's power to "vary" the Registrar's decision, cannot include the power to direct the Registrar to do what he has no competence to do in law. It was submitted that Compcare gets this wrong, because it elides the distinction between the Registrar's power on the one hand, and the Appeal Board's power on the other. The elision is apparent in Compcare's Answering Affidavit, which records the Applicants' contention that "the Registrar is not empowered to impose conditions", and then proceeds to say that this contention is incorrect, because the ***Act*** empowers the Appeal Board "to confirm, set aside or vary

the relevant decision". This leap of logic incorporates a manifest *non sequitur* and, again, I agree with that contention.

[28] The conclusion therefore is that the Appeal Board directed the Registrar to perform an act that is *ultra vires* the ***Act*** itself, and for that reason the decision should be set aside on the basis that it contravenes the law, or is not authorized by the empowering provision within the meaning of s. 6 (2) (f) (i) of ***PAJA***, alternatively, on the basis that it is unlawful within the meaning of the principle of legality.

[29] It was also contended that the Appeal Board's decision was unreasonable and irrational. I do not deem it necessary to deal with this argument simply because I found that the Appeal Board's decision ought to be set aside on the basis that it contravened the relevant Statute, and was certainly not authorized by the empowering provision that I have referred to.

Unreasonable delay:

[30] The review was launched 19 weeks after the Appeal Board's decision was handed down on 2 April 2019. Compcare describes this delay as "manifestly inordinate". It submits that this by itself warrants the dismissal of the review.

[31] I intend to deal with the material facts relating to this topic. In the Founding Affidavit the question of delay is not addressed by the Applicants.

[32] The Second Respondent's Answering Affidavit is dated 5 September 2019. On the same day, a counter-application was lodged in terms of which the Respondent sought that Applicants' review application be dismissed and secondly, that they be directed to comply with the order of the Appeal Board.

[33] In the Answering Affidavit the topic of delay is dealt with in some detail and reference is made to various correspondence. I have read this correspondence obviously, but do not intend to burden this judgment with

reference to lengthy letters. The conclusion on the unreasonable delay topic that the Respondent draws is the following:

1. It was not reasonable for the Registrar to take four and a half months (the review application was lodged on 13 August 2019) to launch this application: indeed such delay was manifestly inordinate in the circumstances of the case. The ***Constitution*** demands more from an Organ of State, and holds an Organ of State to a higher standard than an ordinary litigant where it seeks the review of the conduct alleged to be unlawful.

[34] This was particularly so in the circumstances of this case where:

1. The Registrar's attention has been pertinently drawn to the constitutional obligations of State to act "diligently and without delay", and where the Registrar has, on its own version, been intent on reviewing the decision since 11 June 2019;

2. The Registrar was aware of the importance of the name change to Compcare's business going forward, and has never denied the business rationale of the name change;

3. The Registrar had from the outset been encouraged by Compcare to effect the name change promptly;

4. The duty on the Registrar to bring any review application expeditiously was drawn to its attention in correspondence by Compcare's Attorneys after the Appeal Board's decision was handed down in Compcare's favour (the decision was handed down on 13 March 2019 and forwarded to the parties on 2 April 2019);

5. A full record of the proceedings before the Appeal Committee and Appeal Board in this matter, including the ruling (setting out the Appeal Board's reasons) was always at the Registrar's disposal;

6. The Registrar was represented by outside Counsel and an external firm of Attorneys;

7. The Registrar was furthermore aware of the critical "open season" period from around October each year during which time the vast majority of membership and plan changes occur, and for which Compcare requires certainty.

[35] It was said that Compcare was highly prejudiced by the Registrar's delays, but in this context I may add that Compcare itself stated that it was the fastest growing medical scheme in South Africa, with a growth of more than 40% in the last three years. As Applicants pointed out, if this is so, it occurred under the current name, and was therefore difficult to understand how the 19 – week delay in launching their review application could have caused any harm to Compcare at all.

[36] Compcare continued to criticise the Applicants' attitude by stating that they had failed to provide an adequate explanation for the full period of the delay,

and to demonstrate the basis on which this Court should exercise its discretion not to entertain the application.

[37] In the Registrar's Replying Affidavit, in the context of unreasonable delay, the following was said:

Not surprisingly, the allegation that there was an undue delay was denied. It was said that after the Appeal Board decision was received and considered by his Office, the matter had to be tabled for consideration at the next scheduled Council meeting. Meetings of the Council take place on predetermined dates and the approval of the members were needed before he could launch the review application.

[38] On 2 April 2019, the Appeal Board's decision dated 13 March 2019, was communicated to the parties and thereafter, together with the Council for Medical Schemes, he had to consider the Appeal Board's decision and obtain

advice from their legal representatives before deciding on whether or not to proceed with the review of such decision.

[39] After the Board's decision became known on 2 April 2019, his Office analysed same for purposes of deciding whether or not to institute review proceedings. Thereafter, legal advice was sought and obtained from two sets of legal representatives during May and early June 2019, on the prospects of success in taking the Appeal Board's decision on review.

[40] During May 2019, his Office obtained the approval of the Council to institute the review application, and in June 2019, the Council's legal representatives were accordingly briefed to institute the review application.

[41] On 8 July 2019, the Applicants' Attorneys requested a copy of the tape recording of the Appeal Board hearing which was made available, and then

steps were taken to urgently transcribe the tape recordings for purposes of making the record available together with the review application.

[42] This transcript took longer than expected and only became available on 6 August 2019, almost a month after obtaining a copy of the tape recordings from the Secretariat of the Appeal Board.

[43] On 8 August 2019, the Registrar then deposed to the Founding Affidavit in the review application which was then issued on 13 August 2019.

[44] These explanations were then again criticised in Second Respondent's Replying Affidavit in the counter-application, mainly on the basis that they were opfuscatory and vague. It was said that references were merely made to certain months during the relevant period without the provision of particular dates. It was also said for instance that there was no explanation why a delay of more than a month occurred after the Board's ruling was received on 2

April 2019, before any steps were taken. The Registrar also did not explain, according to the Respondents, why it took more than a month to receive legal advice, or why it purportedly needed two sets of advice two months apart, or from whom it received such advice sand when. The Registrar was also criticised for not explaining why it took more than a month (from May to June 2019) to brief its Attorneys to institute the review, after the Council had already approved the institution of such in May 2019. It was also not explained why the transcript was necessary as it would not be relevant to the review. There was also no explanation why a further week was allowed to pass between the date of the Founding Affidavit and the issuing of the review application.

[45] The result of this delay was, according to the Respondents, that Compcare had now lost the potential to have its name change finalized before the 2019 window period. On the ground of undue delay therefore, the review application fell to be dismissed and the counter-application ought to be granted.

[46] It is of course so that in many instances references were made to months of the year without providing specific dates. On the other hand, can it really be said that the Second Applicant is not entitled to obtain two sets of legal advice having regard to the importance of the matter to it? In my long experience it is not unusual for either Counsel or Attorneys to consider and provide legal advice over a period of a month. I do not deem this to be unreasonable at all. It would of course be different in matters that are intended to be placed on the Urgent Roll.

[47] Applicants further stated in their Replying Affidavit that should an unreasonable delay be found, they would seek condonation for the late filing of the application for the following reasons:

1. The review application was brought in the interest of protecting the members of the Respondent and in the interest of the public in general;

2. The outcome of the review application requires determination of the primary issue, namely, whether a medical scheme's decision to co-brand with other entities within a group of companies will negatively impact on existing and future members of that scheme by unduly increasing the costs or obtaining access to health care;

3. The outcome of the review application is important for the medical schemes' industry, particularly those medical schemes that may wish to consider co-branding with other entities such as financial services companies;

4. There will be no prejudice to the Respondent should condonation be granted. The Respondent sought the urgent implementation of the Appeal Board's decision so that it could timeously implement the proposed name change in respect of the 2020 year. However, after the Answering Affidavit was delivered on 6 September 2019, the parties agreed to the

hearing of this matter on an expedited basis and, thus, there can be no prejudice to the Respondent should condonation be granted as the review application will be heard on an expedited basis;

5. It is in the interest of justice that the review application be heard as the outcome thereof is fundamentally important to existing and future members of the Respondent as the application is aimed at protecting their interests which the Applicants are statutorily enjoyed to do in terms of s. 7 (a) of the ***Medical Schemes Act.***

[48] For those reasons it was submitted that there was no undue delay in bringing the review application and if it was, I was asked to exercise in my discretion to overlook their delay in the interest of the public and the importance of the case.

[49] In the Founding Affidavit it was said that the Appeal Board's decision would have far reaching consequences if it were to stand. These include the following:

1. Since the matter would set a precedent in the health care industry, other medical schemes would similarly be entitled to ask for the names to be changed to provide for co-branding with the administrators;
2. The Registrar does not have the capacity to monitor and ensure compliance by medical schemes where the conditions sought to be imposed by the Appeal Board's decision;
3. The ***Act*** does not provide for withdrawing the Registrar's approval of a name change in the event of a failure by a medical scheme to implement any of the conditions imposed upon it;
4. Once co-branding commences, it becomes costly and difficult for the medical scheme to terminate an agreement with its

Administrator whose name is being used by the Medical Scheme. If a medical scheme regards itself as being "locked into" a relationship with an incumbent Administrator, this operates to the detriment of members of the scheme;

5. It is in the interest of members that an incumbent Administrator be replaced by a new Administrator if the incumbent is not performing efficiently or cost-effectively.

6. Co-branding may have the result that a medical scheme becomes reluctant to replace an incumbent Administrator even if the Administrator is under-performing, also from a cost perspective. Such an outcome is not in the interest of members of a medical scheme.

[50] It is of course so that all constitutional obligations must be performed diligently and without delay.

See: Section 237 of the ***Constitution***.

The section elevates expeditious and diligent compliance with constitutional duties to an obligation in itself, and is thus a requirement of legality. The requirement is based on sound judicial policy that includes an understanding of the strong public interest in both certainty and finality.

See: ***Khumalo and Another v Member of the Executive Council for Education: Kwa-Zulu Natal (2014) 35 ILJ 613 (CC) at par. 45 to 47.***

[51] The decision in ***Buffalo City Metropolitan Municipality v ALSA Construction (Pty) Ltd [2019] ZACC 15***, delivered on 16 April 2019, the Constitutional Court dealt with an unreasonable delay in the context of a legality review. A number of important considerations arise from this decision. Otherwise than provided for in s. 9 of ***PAJA***, where the 180 day period becomes of importance; there is no similar fixed period under legality review. It is clear from the ***Khumalo*** decision *supra,* and from par. [48] of the ***Buffalo City*** decision *supra*, that the test is the following:

1. Firstly it must be determined whether the delay is unreasonable or undue. This is a factual enquiry upon which a value judgement is made, having regard to the circumstances of the matter.

2. Secondly, if the delay is unreasonable, the question becomes whether the Court's discretion should nevertheless be exercised to overlook the delay to entertain the application.

[52] The standard to be applied in assessing delay under both ***PAJA*** and legality is thus whether the delay was unreasonable. Moreover, in both assessments the proverbial clock starts running from the date that the Applicant became aware, or reasonably ought to have become aware of the action taken. The assessment is however not the same, as I have said inasmuch as the 180 day period is not *per se* of relevance in a legality review.

It is also so that when assessing the delay under the principle of legality, no explicit condonation application is required. A Court can simply consider the

delay and then apply the two-step ***Khumalo***-test to ascertain whether the delay is undue, and, if so, whether it should be overlooked.

[53] The second principle relating to delay under legality is that the first step in the ***Khumalo***-test, the reasonableness of the delay, must be assessed on, amongst others, the explanation offered for the delay. Where the delay can be explained and justified, then it is reasonable, and the merits of the review can be considered. If there is an explanation for the delay, the explanation must cover the entirety of the delay.

[54] Even if the unreasonableness of the delay has been established, it cannot be "evaluated in a vacuum", and the next leg of the test is whether the delay ought to be overlooked. This is the third principle applicable to assessing delay under legality. Courts have the power in a legality review to refuse an application where there is an undue delay in initiating proceedings or discretion to overlook the delay. There must however be a basis for the Court

to exercise its discretion to overlook the delay, and this must be gleaned from the facts made available or objectively available.

[55] The approach to overlook a delay in a legality review is flexible.

See: ***Department of Transport v Tasima (Pty) Ltd 2017 (2) SA 622 (CC) (Tasima 1) at par. 144.***

In this decision, reference was made to a "factual, multi-factor, context sensitive framework, has had been expounded in ***Khumalo supra.*** This entails a legal evaluation taken into account a number of factors, namely the potential prejudice to affected parties, as well as the possible consequences of setting aside the impugned decision. Another factor relevant to overlooking delay is the nature of the impugned decision. This requires a consideration of the merits of the legal challenge against that decision, and I therefore do not agree with the rather ambivalent submission by Mr M. du Plessis during argument, that when considering whether or not the review application should fail on the grounds of unreasonable delay, a consideration of the merits would

not be necessary. It is clear from the ***Buffalo City*** decision *supra* (par. 55), that any decision of this Court or any higher Court to the contrary, is not in accordance with the jurisprudence of the Constitutional Court. The decision in ***Khumalo*** *supra*, makes this abundantly clear as well (par. 57).

The decision in ***City of Cape Town v Aurecon South Africa (Pty) Ltd 2017 (4) SA 223 (CC) at par. 49***, is to the same effect.

[56] I have also noted that another important consideration, quite apart from the fact that an Organ of State is subject to a higher duty to respect the law, is that whether or not the particular Organ acted in good faith. In the present instance, the parties were *ad idem* that there was no absence of good faith, although it was Respondent's view that the Applicants did not act as "a model litigant".

[57] A further consideration in my view, are the provisions of s. 172 (1) (a) of the ***Constitution***, which enjoins the Court to declare invalid any law or conduct

that it finds to be inconsistent with the ***Constitution***. I do not in this judgment intend to enter into the debate whether or not the provisions of that section are the decisive ones when the question of condoning an undue delay is considered. It suffices to say that I regard it as being a very important factor. It was made clear in ***Tasima 1*** *supra*, that a Court should in any event be slow to allow procedural obstacles to prevent scrutiny of a challenge to the exercise of public power, but nevertheless went also on to emphasize that it was a feature of the Rule of law that undue delay should not be tolerated.

[58] I have carefully considered the explanation for the delay tendered by the Applicants. I could not describe them as being "model litigants". The time periods referred to, are mainly of general nature, and very little, if any, specifics are given. As a Statutory Body they are under a higher duty to perform their task diligently and expeditiously, and if that cannot be done, to fully explain that to a Court. Mere references to the month of "May" then to the month of "June" would in that context not be sufficient.

For the reasons set out by the Respondents herein, I therefore hold that the delay is unreasonable on the present facts, such as I have them.

[59] This brings me to the question whether or not the delay ought to be condoned. It is my opinion that I should do so, and I say so for the following reasons, seen holistically:

1. The delay would only have been of a few weeks, maybe about eight, if one looks at the correspondence;
2. The explanation for the delay tendered by the Applicants and the Respondents' criticism thereof;
3. The absence of *mala fides*;
4. From a realistic appraisal of administration and all that it entails, the particular delay is not so grossly unreasonable that it for that reason would require a dismissal of the review application;

5. The importance of the review to the Applicants, to the general public and to medical schemes;

6. The merits of the review application which I have dealt with;

7. The provisions of s. 172 (1) (a) of the ***Constitution***;

8. The prejudice to the Respondents having regard to their own version of their development over the last years, despite the absence of a name change.

[60] Viewing these considerations holistically, I am of the view that the delay ought to be condoned and that the review application therefore succeeds.

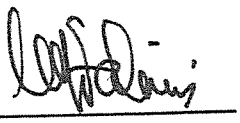
[61] In the light of the fact that I am making this order on the basis of the legality principle, there is no point in referring this matter back to the Appeal Board inasmuch as I have found that the name change "is likely to mislead the public", and that therefore the only permissible decision that the Appeal Board could then make, would be to refuse the name change.

[62] My order is the following:

1. **The review succeeds in terms of prayer 1 of the Notice of Motion with costs, including the costs of two Counsel;**

2. **The undue delay in launching the review application in this instance is condoned;**

3. **The counter-application is dismissed with costs, including the costs of two Counsel.**



JUDGE H.J FABRICIUS

JUDGE OF THE HIGH COURT GAUTENG DIVISION, PRETORIA

Case number: 58909/19

On behalf of the Applicants: Adv A. Cockrell SC
Adv A. Lapan

Instructed by: Lawtons Inc. practising as Lawtons Africa

Counsel for the 2nd Respondent: Adv M. du Plessis SC
Adv S. Pudifin-Jones

Instructed by: Edward Nathan Sonnenbergs

Date of Hearing: 25 November 2019

Date of Judgment: 3 December 2019 at 10:00