IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 17351/2010

DATE: 15 SEPTEMBER 2010

In the matter between:

ASHRAF DAWOOD MAHOMED Applicant

and

GENESIS MEDICAL SCHEME Respondent

J U D G M E N T

TRAVERSO, DJP:

This application was brought as one of urgency. At the hearing of the matter, Mr Ramdass, who appeared for the applicant, moved an amendment to the notice of motion, whereafter it read as follows:

"1. That a *rule nisi* do issue calling upon the Respondent to show cause on a date to be determined by the above Honourable Court, why an Order should not issue in the following terms,

pending the decision of the Council of Medical Aid Schemes presently pending before the Council:

1.1 That the Respondent forthwith reinstates the membership of the Applicant as a member of the Respondent;

1.2 That the Respondent is ordered, for so long as the Applicant remains a member of the Respondent, to deal with and process and pay all claims submitted by or on behalf of the Applicant in terms of its rules and is interdicted from declining to deal with, process and pay any such claim;

1.3 That the Respondent is ordered to stop the reversal of any payments made to any service providers in respect of the hospitalisation of the baby born to the Applicant and his ex-wife on 9 February 2010;

1.4 That, in the event that any reversals of payments have already been made in respect of the hospitalisation of the baby born to the Applicant and his ex-wife, that such payment be re-effected forthwith;

1.5 That the Respondent forthwith make available to the Applicant a copy of its rules;

1.6 That the Respondent is ordered to pay the

costs of this application."

What gave rise to this application is the following. The applicant, who is a medical practitioner, completed an application form to be admitted to a "Hospital Plan" with the respondent on 20 December 2009. The cover was in respect of his "wife", himself and five children. At the time his "wife" was pregnant. On 9 February 2010 she gave birth to her sixth child, a daughter, who was born with a heart condition. This resulted in her undergoing a procedure whereby a pacemaker was implanted. The procedure was performed at the Sunninghill Hospital. Another one of his children developed a condition which is known as a muco-coele in December 2009. A procedure to drain this muco-coele was performed on her during December 2009 prior to the applicant completing the application form in respect of the hospital plan.

There was a recurrence of this muco-coele in 2010 and it was recommended that the new muco-coele be excised under local anaesthetic. The applicant's "wife" applied for authorisation from the respondent, but it was refused on the basis that the contemplated procedure would not have been performed in a hospital and, therefore, it would not have been covered by the policy. The applicant at a later stage again applied for pre authorisation for the excision of the muco-coele, "in case the

procedure had to be performed in a hospital". This time it was contemplated that it might be done by a plastic surgeon.

On 29 June 2010 the respondent wrote to the applicant, informing him that his membership with the respondent had been terminated, because of his non-disclosure of the fact that his daughter had had a muco-coele, which was alleged to have been a material non-disclosure on the part of the applicant. The applicant was of the view that the disclosure was not material as muco-coele is a minor condition, which is not directly linked to any of the questions contained in the applicant's application form. By virtue, however, of the allegations contained in the founding affidavit to this application, the respondent realised that there were certain other non-disclosures and/or material representations contained in the application form which had been submitted to it.

Before I deal with these allegations, it is necessary to state that it is by now well established that where a party seeks to terminate an agreement on a ground which does not have substance, it is nevertheless entitled to take advantage of the existence of a justifiable reason for termination, notwithstanding the fact that it originally relied on an incorrect ground. (See Putco Limited v TV & Radio Guarantee Company

(Pty) Limited 1985 (4) SA 809 (A) at 832C-D.) This principle was accepted as correct by Mr Ramdass.

The other material misrepresentations and/or non-disclosures relied on by the respondent are the following:

1. In the application form the applicant referred to Tasneem as his wife. In fact he had been divorced from her since October 2006. He, therefore, falsely created the impression that they were still married.

2. He indicated in the application form that he was still living with his wife at the same address, whereas in truth and in fact they were separated and lived apart. The respondent's rules provides that ex-spouses may remain as adult dependants, but this does not apply to persons who are already divorced at the time when the principal member joins the scheme.

3. He claimed that Zareefa, who was born in June 2005, was his daughter in the following circumstances: On 31 October 2006 he and his wife were divorced and his wife was awarded custody of four minor children. Yet, a fifth child was included in the application form which was ostensibly born more than a year prior to the divorce. In

addition, the applicant disclosed that his spouse was pregnant at the time that the application was made. At that stage however the parties had been divorced for more than two years.

It is clear that there are certain anomalies relating to the fifth and the sixth children and the applicant still gives no explanation for their inclusion as his dependants on the application form. The applicant, in addition, failed to disclose that Lutfiya had, contrary to his declaration in the proposal form, experienced a benign growth in the form of a muco-coele on her lower lip. I will return to this non-disclosure at a later stage. However, the previous misrepresentations are, in my view, material. I refer to those regarding to his marriage to Tasneem and the anomalies regarding to his fifth and sixth daughters.

The materiality or otherwise of a misrepresentation must be dealt with objectively. Boruchowitz, J, in Mahadeo v Dial Direct Insurance Limited 2008 (4) 80 (W), after considering various authorities dealing with the test for materiality, summarises the position as follows on pages 86 and following. He first refers to the amendment of the Insurance Amendment Act 17 of 2003 and the current wording thereof which he quotes, and which I do not intend quoting in this judgment. I

continue to quote on page 86, paragraph 17:

"17. The effect of the most recent amendment is to bring the law with regard to positive representations into line with the law on non-disclosures. The statutory definition of materiality in section 53(1)(b) is effectively identical to that adopted in the President Versekeringsmaatskappy case supra, in relation to the common law position. The test remains objective: The question whether the particular information ought to have been disclosed is judged not from the point of the view of the insurer, or the insured, but from the point of view of the notional, reasonable and prudent person. The subjective test propounded in the Qilingele case would appear to no longer apply.....

18. Thus, the test in respect of both positive and negative misrepresentations is not whether the reasonable person would have disclosed the fact in question, but whether the reasonable person would have considered the fact reasonably relevant to the risk and its assessment by an insurer.

19. The reasonable man's assessment of whether a fact is material will often be influenced by the specific questions which the insurer may ask of the

proposer for insurance, and what the insured considers to be relevant will often depend upon the nature of the questions asked in the proposal form or, as in the present case, during the sales conversation. The nature of the questions posed may lead to the conclusion that a reasonable person would not have regarded certain facts as material. The questions put by the insurer may, therefore, enlarge or limit the proposer's duty of disclosure and depending on the circumstances, served to define the limits of what is material. In certain instances, the nature and the range of questions may constitute a waiver on the part of the insurer of its right to receive information about particular material facts...."

It is trite that a person in the position of the applicant has a duty of good faith to a party in the position of the respondent. This includes a duty not to misrepresent or fail to disclose a fact which is material to the contract proposed to be entered into.

In the context of this case, at the time of making the proposal for membership of the respondent's medical aid, the applicant owed a duty to the respondent to disclose all material matters

material to the question of his and his declared dependants membership of the scheme. Where, as in this case, the respondent has been induced to enter the contract with the applicant on the strength of misrepresentations and non-disclosures, he is entitled to avoid the contract. This is so, irrespective of whether the misrepresentations or non-disclosures were fraudulent, negligent or completely innocent.

I have no doubt that in the eyes of any reasonable, right thinking person, these misrepresentations to which I have referred would be regarded as material. The reasons for this are so self-evident that I do not believe that it requires any further motivation. By the same token, however, I am not convinced that the applicant's failure to disclose the existence of his daughter's muco-coele was material. It is common cause that this is a minor ailment, less serious apparently or at best as serious as a common cold. The nature of the questions contained in the applicant's form indicate that the information required by the respondent related to serious and/or chronic conditions, which may in the future require hospital treatment. There is no suggestion that muco-coele falls within that category.

To summarise, therefore, I am satisfied that the applicant failed to disclose material facts to the respondent and that the

respondent was, therefore, entitled to terminate the agreement. From this it follows that the applicant failed to establish a *prima facie* right, though open to some doubt. He, therefore, failed to cross the first hurdle necessary for obtaining the relief sought in this application. I am also satisfied that the matter did not require the extremely urgent attention of the Court that was suggested by the applicant. There was nothing more than a suggestion of the possibility that the applicant's daughter might, at some stage in the future, require treatment at a hospital.

There was no suggestion that such treatment was not available at State hospitals or alternatively that the applicant, or his "wife", would be unable to afford to pay for such medical expenses pending the outcome of the decision by the council of medical aid schemes. Both the applicant and his "wife" are medical doctors and they do not appear to be destitute.

In the circumstances the application is dismissed with costs, such costs to include the costs of 16 and 19 August 2010.

TRAVERSO, DJP

/bw

/...