REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 23378/2018

In the matter between:

MIGNON ADELIA STEYN	**Applicant**
and	
REGISTRAR OF MEDICAL SCHEMES	**First Respondent**
COUNCIL FOR MEDICAL SCHEMES	**Second Respondent**
THE APPEAL BOARD ESTABLISHED ITO SECTION 50 OF THE MEDICAL SCHEMES ACT	**Third Respondent**
PROFMED MEDICAL SCHEME	**Fourth Respondent**

Date of Hearing: 2 November 2020
Delivered Electronically: 25 January 2021

JUDGMENT

LEKHULENI AJ

INTRODUCTION

[1] The legal saga between the applicant and the respondents has taken many twists and turns and has eventually landed before this court for adjudication. In this application, the applicant seeks an order to review and set aside the rulings of the first to the third respondents made on 27 February 2017, 08 February 2018 and 25 August 2018 respectively in terms of sections 47 – 50 of the Medical Aid Scheme Act 131 of 1998 (*"the Act"*).

[2] At the hearing of this matter, it was settled between the parties that in fact, the decision that is sought to be reviewed and set aside is the one granted by the Appeal Board on 25 August 2018.

[3] The applicant sought relief that the third respondent's ruling and / or order of 25 August 2018 be substituted with the order that fourth respondent's termination of the applicant's membership under membership number 10118222, and / or that of her dependents is unlawful and set aside; and that this court should order the fourth respondent to honour the contractual commitments to the applicant and / or her dependents under the policy that governs the said membership. Alternatively, that this court grants an order directing that the orders of the first, second and third respondents be substituted with an order that the fourth respondent's termination of the applicant's membership and that of her dependents is unlawful and should be set aside and that this court should order the fourth respondent to honour the contractual commitments to the applicant and / or her dependents under the policy that governs the said membership.

[4] This application is opposed only by the fourth respondent ("*Profmed"*). Although the first to the third respondents initially opposed the relief sought, they however withdrew their opposition and filed a notice to abide by the outcome of these proceedings. The crux of this application, as it will appear fully in the course of this judgment, is whether the decision of Profmed to cancel the applicant's medical insurance membership can be successfully reviewed and set aside.

FACTUAL MATRIX

[5] During November 2015 the applicant applied for membership with Profmed. When doing so, she completed an application form which was to include certain disclosures of her medical condition which underlie the dispute in this matter. In completing the necessary application form, the applicant was assisted by her husband. It is common cause that a representative of Profmed, one Ms Susan Brits, also assisted her in the completion of the application form. The applicant and her dependents were subsequently accepted as members of Profmed. The membership commenced on 01 January 2016. During the year 2016, the applicant and her dependents attended to several medical procedures which amounted to R400 000 (*Four hundred thousand rand*) and the applicant and her medical practitioners submitted claims as such to Profmed and the latter refused to honour these claims.

[6] On 07 November 2016, Profmed terminated the applicant's membership on the basis that non-disclosure of certain ailments has been established in respect of gastric ulcer, breast aspiration, wrist pains and hip problems. On 08 November 2016, Profmed informed the applicant by email of the decision it has taken to terminate her membership due to non-disclosure of the ailments on her part and that the

termination would be effective from the inception date of 01 January 2016. Profmed also informed the applicant that any authorisation granted or any claim paid would be reversed and that the applicant will be liable for the amounts in question or that the Profmed would reclaim those amounts from the applicant.

[7] Aggrieved by this decision, the applicant appealed that decision to the Registrar for Medical Schemes (*"the Registrar"*). In a written response to the appeal addressed to the Registrar dated 13 December 2016, Profmed averred that when the applicant completed the application form, she failed to disclose the following:

7.1 that she had an MRI lumbar spine on 03 December 2015;

7.2 that on 02 February 2015 she had a breast aspiration by Prof. Apffelstaedt;

7.3 that on 04 March 2015 the applicant had a gastroscopy and colonoscopy for gastric ulcers and;

7.4 that on 4 September 2016 the applicant was admitted for migraine, abdominal pain, and a gastric ulcer.

[8] After considering the matter, the alleged non-disclosures and the relevant case law, the Registrar concluded that the gastroscopy and the colonoscopy were material in the matter and that they should have been disclosed. In the opinion of the

Registrar, a reasonable person in the position of the applicant would have considered the information omitted reasonably relevant to the assessment of the risk by Profmed. The Registrar opined further that had this information been disclosed, Profmed would have been aware of the risk and assessed the risk accordingly and this may have included underwriting the condition and imposed a waiting period. The Registrar eventually found that Profmed's decision to terminate the applicant's membership was justified in the circumstances as envisaged in section 29(2)(e) of the Act.

[9] Dissatisfied with the decision of the Registrar, the applicant appealed the Registrar's decision to the Council for Medical Schemes *("the Council")* in terms of section 48 of the Act. She filed the necessary affidavit as prescribed in section 48(3) of the Act and set out all her defenses to the three grounds raised by Profmed before the Registrar. Profmed however did not deliver any opposing affidavit before the Council but instead only filed written heads of argument. The Council considered the matter and also considered an application form which the applicant had subsequently made to Momentum Medical Scheme (*"Momentum")* upon termination of her membership with Profmed in which she made further disclosures which were not made when she applied for membership with Profmed. The Momentum application form was attached to the applicant's appeal affidavit in terms of section 48(3) of the Act to the Council. The applicant stated that the reason for annexing the Momentum application form to this appeal was because after Profmed repudiated her claim, she applied for membership with Momentum, a competitor of Profmed. With Profmed's repudiation in her mind, she decided to err on the side of caution by disclosing all of the purported conditions that Profmed alleged that she was suffering

from with additional conditions that she was not in fact suffering from but which she thought may constitute a condition.

[10] At the hearing before the Council, the Profmed's legal representative relied on the Momentum form submitted by the applicant to the Council despite a vociferous objection by the applicant's legal representative. The reason for the objection was that the applicant was prejudiced as this was not the case she was prepared to meet at the hearing. The applicant's legal representative argued that this was a classical case of a trial by ambush. The Council found that the MRI scan and breast aspiration were not matters which gave rise to any duty to disclose. The Council further found that although the gastritis was not as serious as gastric ulcer, it was nevertheless a sufficiently serious condition that warranted disclosure by the applicant in the Profmed application. The Council further found that the failure to disclose a hip arthroscopy in 2015 also constituted a material non-disclosure. It eventually dismissed the applicant's appeal.

[11] The applicant thereupon lodged a further appeal as contemplated in section 50(3) of the Act to the Appeal Board ("*the Appeal Board*"). The Appeal Board considered the decision of the Council and upheld it in respect of the MRI scan and the breast aspiration and found that they were not material. In respect of the non-disclosure of gastritis, the Appeal Board found that the non-disclosure of that condition was material in that it prevented Profmed from applying condition-specific waiting period in their risk assessment and risk management measure. The Appeal Board also considered the objection to the use of the information disclosed in the applicant's Momentum application form and found that it was entitled to consider

those aspects for two reasons. *First*, Profmed became aware of this information later when the applicant applied to another medical scheme being Momentum. *Second*, the Appeal Board found that it had to consider those aspects as this was a wide appeal. The Appeal Board found that the failure to disclose the hip arthroscopy was relevant for the same reason it gave for gastritis. The Appeal Board eventually concluded that the decision of the Council was correct and that Profmed had validly terminated the applicant's membership. This decision is essentially the subject of this application.

APPLICANT'S GROUNDS OF REVIEW

[12] The applicant's review application is premised on both the common law and the Promotion of the Administrative Justice Act 3 of 2000 *("PAJA").* In terms of the common law, the applicant contends that the Council and the Appeal Board contravened the fundamental principle of natural justice, that of giving both sides an opportunity to be heard before a finding is made (*audi alteram partem* principle).

[13] The applicant's grounds of review in terms of PAJA can succinctly be summarised as follows:

13.1 That the decision of the Appeal Board was materially influenced by an error of law as contemplated in section 6(2)(d) of PAJA;

13.2 That the ruling of the Appeal Board was arbitrary and / or capricious as contemplated in section 6(3)(iv) of PAJA;

13.3 That the ruling of the Appeal Board was not rationally connected with the reasons given by the Appeal Board, as contemplated in section 6(2)(f)(ii)(dd);

13.4 That the Appeal Board took irrelevant considerations into account and ignored relevant considerations, as contemplated in section 6(2)(e)(iii); and/ or;

13.5 That the Appeal Board's conclusion was not rationally connected to the reasons given for it, as contemplated by section 6(2)(f)(cc) of PAJA.

ISSUES TO BE DECIDED

[14] This court is therefore enjoined to consider the following:

14.1 Whether the Appeal Board, complied with the *audi alteram partem* principle when it dismissed the applicant's appeal. Put differently, whether the hearing before it was procedurally fair;

14.2 Whether the Appeal Board was correct in finding that the applicant had a duty to disclose the hip arthroscopy and the gastritis and that the non-disclosure thereof was a material condition which justified Profmed to cancel the insurance contract between the parties; and

14.3 Whether, the court should remit the matter to the Appeal Board for rehearing or to substitute the decision of the Board with its own finding, should the decision of the Appeal Board be reviewed and set aside,

PRINCIPAL SUBMISSIONS BY THE PARTIES

[15] Mr Steenkamp for the applicant argued that Profmed flip flopped on its reasons for the repudiation of the contract. It was his argument that the reason advanced by Profmed for the termination of the contract as reflected in the email addressed to the applicant on 07 November 2016 differed materially with the reasons it advanced to the Council. The Counsel contended that on 07 November 2016, Profmed relied on the non-disclosure of the gastric ulcer, breast aspiration, wrist pain and hip problem, as its ground for repudiating the contract. It was further contended that before the Council, Profmed relied on non-disclosure of additional conditions, namely, MRI lumbar spine, breast aspiration, gastroscopy and colonoscopy. The applicant's Counsel argued that when the matter was heard before the Council, Profmed's legal representative persisted with his reliance on the additional grounds of hip arthroscopy, possible heart murmur and kidney stones as the grounds for repudiation. Counsel for the applicant objected to the reliance by Profmed on the new grounds as these additional grounds were not relied upon in the proceedings before the Registrar and only came to light during the Appeal hearing before the Council. The reasons for the objection was that the applicant had suffered prejudice due to the fact that she had not been given an opportunity to give evidence on these additional grounds.

[16] Mr Steenkamp further argued that the Chairperson of the Council noted his objection but did not make a ruling at the time nor in his eventual ruling. Counsel also asserted that he raised the same objection before the Appeal Board but this tribunal outrightly dismissed this objection on the basis that Profmed only became aware of the information later from the applicant and that the appeal before it was a wide appeal. In Counsel's view, the decision of the Appeal Board was flawed in that the applicant was not given an opportunity to give evidence on these additional grounds and this is offending against the *audi alteram partem* rule. It was stated that the Appeal Board made a ruling against the applicant in respect of the hip arthroscopy without giving the applicant an opportunity to give evidence. More importantly, that there was no evidence before the Appeal Board that the applicant suffered from the hip arthroscopy. As far as gastritis is concerned, he submitted that Profmed failed to prove that the non-disclosure of this condition was material to warrant a repudiation of the contract. It is on the strength of these grounds that he asked this court to review and set aside the decision of the Appeal Board.

[17] Mr Van Reenen for Profmed argued that the case before this court is not an appeal but a review and that the applicant cannot simply argue that the decisions taken were incorrect. The reasons advanced by Profmed for the repudiation of the contract were widened when the applicant placed further information before the Council. Mr Van Reenen argued that the applicant was expected to disclose full information of any ailments/conditions/illnesses/symptoms no matter how insignificant they seemed as required by Profmed's application form which forms the basis of the contract between the parties. It was argued further that medical schemes in particular Profmed, relied on the *bona fides* of their clients and the

applicant's disclosure of any condition had to be full and to be made in good faith. Counsel contended that it was common cause that the applicant was diagnosed with gastritis following a gastroscopy and colonoscopy. The gastroscopy and colonoscopy were carried out on 04 March 2015 which is within the twelve months prior to the applicant's application for membership with Profmed on 06 November 2015. It was submitted that this condition was sufficiently serious that it required the applicant to have disclosed it when she completed the application form. He agreed with the views expressed by the Appeal Board that the materiality of the non-disclosure lies in the fact that Profmed, which may not refuse to accept an applicant as a member, was denied the opportunity to make an accurate assessment of the risk and imposing a specific waiting period it was legally empowered to impose where it had been aware of a pre-existing medical condition.

[18] With regard to the hip arthroscopy, Mr Van Reenen contended that the argument that Profmed raised a new issue and that the applicant was effectively ambushed was misplaced because it was the applicant who introduced the evidence in her Momentum application form as contained in her affidavit placed before the Council. It was argued further that the applicant failed to deal with the evidence when she had the opportunity to adduce evidence before the Appeal Board in terms of section 50 of the Act. It was submitted that the court should therefore dismiss the applicant's application with costs.

ANALYSIS AND RELEVANT LEGAL PRINCIPLES

[19] For the sake of brevity and completeness, I will deal with the issues in this matter ad seriatim.

Was the Appeal Hearing before the Appeal Board procedurally fair

[20] It is not in dispute that when the applicant completed the application form for membership with Profmed she was assisted by Ms Susan Brits *("Ms Brits")*, a representative of Profmed. It is also not in dispute that the applicant depended on Ms Brits to guide her in filling in the relevant application form. Ms Brits was invited to access all medical records of the applicant and the applicant tendered her co-operation in this regard, including the signing of whatever form as may be necessary so as to waive her right to privacy. It is also not in dispute that the applicant depended on Ms Brits for her vast knowledge in the medical and insurance industry.

[21] As explained above, after the applicant's medical insurance was repudiated, the applicant applied to Momentum for medical insurance. It was only in this application form that the applicant indicated that she suffered from gastric ulcers; that she had been diagnosed with kidney stones approximately three years prior to the completion of the form; that she was diagnosed with possible heart murmur years prior to her membership with Profmed; and she disclosed that she had undergone hip arthroscopy in 2015. The applicant had not disclosed all these conditions in the Profmed application form. The applicant avers that the reasons she made these disclosures in the Momentum application form after Profmed repudiated her claim, was caution. She erred on the side of caution by disclosing all of the purported conditions that Profmed alleged she was suffering from together with additional conditions that she was not suffering from that which she thought may constitute a medical condition. The applicant thereupon attached the Momentum

application form to her appeal papers to the Council so as to make the point that Profmed was contriving reasons to repudiate her claim and that its competitor Momentum, did not deem any of these conditions material enough to limit her membership.

[22] It is worth noting that Profmed relied on these additional grounds in particular the hip arthroscopy during the appeal hearing before the Council and also before the Appeal Board. The Appeal Board found that the applicant clearly suffers from arthritis, most likely osteoarthritis, affecting large joints such as knees, hips and wrists. It also found that the applicant did not disclose this to Profmed and that this was a material non-disclosure. This finding was made despite the fact that the applicant raised an objection to a trial by ambush. The Council noted the objection and failed to make a ruling on it. Similarly, the Appeal Board noted the objection but found that this was a wide appeal involving a complete re-hearing of or fresh determination on the merits of the matter with or without additional evidence or information – See *Golden Arrow Bus Services v Central Road Transportation Board* 1948 (3) SA 918 (A) at 924; *S A Broadcasting Corporation v Transvaal Townships Board and Others* 1953 (4) SA 169 (T) at pp 175-6. In other words, this was not an appeal in the ordinary strict sense of a re-hearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong - See *Health Professions Council v Emergency Medical Supplies* (435/09) [2010] ZASCA 65 (20 May 2010) at par 8; *Commercial Staffs (Cape) v Minister of Labour and another* 1946 CPD 632 at pp 638-641).

[23] It is my considered view that the Appeal Board should have allowed the applicant to lead evidence on the hip arthroscopy. In my judgment, the Appeal Board committed a gross irregularity by failing to properly adjudicate on this objection, especially bearing in mind that the subsequent finding had an adverse effect on the applicant. The Appeal Board erred in failing to give the applicant an opportunity to give context to the disclosures she made in the Momentum application form and to present evidence to rebut the argument of Profmed, which was only disclosed and presented at the hearing of the matter.

[24] While I am aware that the application form disclosing further conditions was introduced by the applicant, this however did not preclude her from leading evidence on the reasons for these late disclosures. Had that have been done, the Appeal Board would have been placed in a much better position to make an informed decision after all the issues before it were properly ventilated. Furthermore, the Appeal Board found that the hip arthroscopy was not the original ground for Profmed to repudiate the applicant's insurance contract and that this information came to the attention of Profmed extremely late. Section 50(4) of the Act provides that any person who lodges an appeal under subsection (3) shall submit with his or her appeal written arguments or explanations of the grounds of appeal. In compliance with this section, the applicant filed written heads of argument and at paragraph 19 of those written submissions, the applicant in the alternative to her written submissions applied for leave to lead additional evidence with regard to new grounds raised by Profmed or to lead evidence with regard to any other submissions and allegations made by Profmed. In my view, the argument by Mr Van Reenen that the

applicant did not apply to lead evidence when she has expressly done so in her papers is, with respect, misplaced and devoid of substance and falls to be rejected.

[25] In my opinion, the Appeal Board made a finding against the applicant without giving her the opportunity to lead evidence or to be heard, particularly in relation to the hip arthroscopy and / or the contents of the information that was disclosed to Momentum when she made an application for a medical cover. It must also be stressed that the argument about the hip problem, which was originally one of the grounds for the repudiation of the insurance agreement, was abandoned in writing by Profmed in their letter dated 13 December 2016 addressed to the Registrar. Clearly, the applicant approached the matter before the Council on the basis that the hip problem was no longer an issue in dispute as same was abandoned as a ground of repudiation. The hip arthroscopy on the other hand was only raised during argument at the Council and the Appeal Board. In my view, the Appeal Board did not properly bring its mind to bear on this objection. The appeal board only ruled on this objection in its final judgment, thus denied the applicant the opportunity to lead evidence or weigh her options. Therefore, in my opinion, the decision of the Appeal Board to the effect that the non-disclosure of the hip arthroscopy as reflected in the Momentum application form was material to warrant a repudiation of the medical insurance contract by Profmed, infringed on the applicant's right to procedural fairness, and in particular, the *audi alteram partem* rule.

[26] In *De Lange v Smuts* 1998 (3) SA 785 (CC) at para 31, Mokgoro J, stated as follows:

> "Everyone has the right to state his or her own case, not because his or her version is right, and must be accepted, but because, in evaluating the cogency of any argument, the arbiter, still a fallible human being, must be informed of the points of view of both parties in order to stand any real chance of coming up with an objectively justifiable conclusion that is anything more than chance."

[27] Both the Council and the Appeal Board did not properly adjudicate on the applicant's objection. To this end, I agree with the views expressed by the applicant's counsel that the appeal bodies, particularly the Appeal Board, effectively allowed Profmed to convert an admission into a denial during oral argument, without allowing the applicant to provide any context or to present countervailing evidence in respect of the hip arthroscopy.

[28] Section 47(1) of the Act requires a Registrar, where a complaint has been lodged with the Council, to furnish the party complained against (Medical Aid Scheme) with full particulars of the complaint and to request that such party to furnish the Registrar with written comments within 30 days of such notice or on such time as the Registrar may allow. Section 48(1) of the Act requires any person, who is aggrieved by any decision relating to a settlement of a dispute or complaint in terms of section 47(1), to appeal to the Council. Section 48(3) of the Act provides that an appeal to the Council shall be in the form of an affidavit directed to the Council whereas an appeal to the Appeal Board in terms of section 50(4) of the Act is lodged by filing written arguments or explanations of the grounds of his appeal. Unlike section 47(1), sections 48 and 50 dealing with appeals to the Council and to the Appeal Board respectively, are silent on whether a respondent (medical scheme) is obliged to file a response in the form of an answering affidavit to the grounds of

appeal lodged in terms of section 48(3) or written submissions in response to the grounds of appeal filed in terms of section 50(4). However, both sections empower the chairpersons of these institutions to determine the procedure for the hearing.

[29] Despite the shortcomings in the Act, it is my considered view that the Appeal Board was incorrect in relying on the new facts raised by Profmed at the eleventh hour or during argument without giving the applicant an opportunity to respond or to give context to it. It was not permissible in my view for the Appeal Board to consider the disclosure in the Momentum form in isolation, divorced it from the context of the case which the applicant was answering. In view of the adverse effect and the seriousness of the consequences of its decision, the Appeal Board should have adopted a more inquisitorial attitude and took extra caution to elicit the truth - See *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A). It could have done this by calling for evidence on the latest information that was placed before it by Profmed during argument.

[30] In *Administrator, Transvaal v Theletsane* 1991 (2) SA 192 (A), the respondent filed an answering affidavit which went further than was necessary to answer the case that was presented in the founding affidavit. The applicant in that matter sought to rely on the additional facts so as to raise a new argument. The court disallowed the applicant's reliance on these additional facts as it found would prejudice the respondent given that it was not the case the respondent was called upon to answer.

[31] On a conspectus of all the evidence placed before this court, I am satisfied that the applicant was prejudiced in that she was called upon to answer a case

during the hearing of the matter which was not pleaded. In my view, the Appeal Board procedurally erred in allowing Profmed to raise this argument at the late stage without affording the applicant an opportunity to respond thereto by presenting evidence in rebuttal. The Appeal Board erred in making a ruling on the objection in its final judgment without a proper argument of the said objection.

[32] Additionally, what I find surprising and startling in the Appeal Board's decision is that it concluded that the applicant suffered from arthritis, most likely osteoarthritis, affecting large joints such as knees, hips and wrists. The Appeal Board made this finding despite the fact that there was no evidence, *viva voce* or otherwise, placed before it either by the applicant or Profmed to the effect that the applicant had suffered from any of those conditions. It is therefore not clear where the Appeal Board obtained this information from and on what basis in law or fact the Appeal Board made such finding. It would seem though that the Appeal Board made these far-reaching and extensive findings without them being supported by any medical evidence.

[33] However, what is more concerning is that this finding was made without the Appeal Board being apprised with the results or the outcome of the applicant's hip arthroscopy. From the evidence placed before court, I could not find any document that supports the appeal Board's finding other than the applicant's mention of arthritis in her hand written notes on the Momentum application form. To this end, I consider the views expressed in *Minister of Land Affairs and Agriculture v D and F Wevell Trust* 2008 (2) SA 184 (SCA) at para 43, to be apposite in this matter where the court stated:

> "It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest - the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts…In motion proceedings, the affidavits constitute both the pleadings and the evidence… and the issues and the averments in support of the parties' cases should appear clearly therefrom."

[34] In my view, if the Appeal Board allowed the applicant to present evidence, it would have been furnished with a response on affidavit regarding the applicant's hand written notes of the Momentum application form. The Appeal Board would have been placed in a better position to determine if the non-disclosure was material or not. It must also be mentioned that it was also open to the Appeal Board to invoke the provisions of section 50(9) of the Act to call for evidence for the purposes of ascertaining the issue of arthroscopy like it did in *Govender NO v Profmed Medical Scheme and others* [2012] JOL 28654 (GNP) at para 39. It could have summoned witnesses, including Dr Bosch, who treated the applicant. The Appeal Board could have examined Dr Bosch as a witness and called for the production of books and related documents relating to the examination of the applicant.

[35] In *Turner v Jockey of South Africa* 1974 (3) SA 663 (A), the Court found that a domestic tribunal was fundamentally unfair because members of the inquiry Board drew conclusions from their own observations and film of the race without disclosing this to the accused jockey. The court found that it was unfair towards the appellant to

be suddenly confronted with a serious additional charge after evidence was already presented at the enquiry.

[36] In *casu*, the applicant was confronted with a finding that adversely affected her based on facts which were not properly presented and ventilated before the tribunal. In my view, the Appeal Board took irrelevant considerations into account when it dismissed the applicant's appeal. The Appeal Board ignored relevant considerations as envisaged in section 6(2)(e)(iii) of PAJA in that it ignored the outcome of the hip arthroscopy which was readily available. I am further of the view that the hearing before the Appeal Board was procedurally unfair as contemplated in section 6(2)(c) of PAJA and must therefore be reviewed and set aside. This leads me to the second issue for consideration.

Whether the Appeal Board was correct in finding that the applicant had a duty to disclose the hip arthroscopy and the gastritis and that this was a material condition which, if not disclosed, justified Profmed to repudiate the insurance contract

[37] Section 29(2)(d) and (e) of the Act provides that a Medical Scheme shall not cancel or suspend a member's membership or that of his or her dependents, except on the grounds of committing any fraudulent act or the non-disclosure of material condition. The general rule is that he who asserts must prove. Thus in this case, the onus to prove the non-disclosure lies with Profmed.

[38] It is trite that at common law, an insured, when requesting insurance cover, must make a full and complete disclosure of all matters material to the insurer's assessment of the risk. Failure to do so will entitle the insured to reject a claim under a policy and to treat it as void. In *Regent Insurance v King's Property* (5/2014) [2014] ZASCA (176) 21 November 2014 at para 20, the court observed that "legislation has been enacted, however, to preclude insurers from treating misrepresentations that are trivial, and more recently non-disclosures that are trivial, as grounds for avoiding insurance contracts and rejecting claims".

[39] To this end, section 29(2)(e) of the Act allows a Medical Aid Scheme to terminate a membership on the basis of the non-disclosure of material information. The meaning of material information for the purposes of section 29(2)(e) of the Act in my view entails the all-encompassing information which is pertinent and relevant to a Medical Aid Scheme in assessing the risk posed by a prospective insured who is applying for membership. This presupposes that a contractual risk undertaken on the strength of false information or misrepresentation may be a ground for the repudiation and the renunciation of a subsequent contract. However, the non-disclosure must be material to warrant a cancellation of the contract. If the non-disclosure is immaterial, the Medical Aid institution may not repudiate or cancel the contract. The test for materiality as envisaged in section 29(2)(e) relates to the assessment of risk by the insurer. In *Qilingele v South African Mutual Life Assurance Society* 1993(1) SA 69 (A) at 75, the court observed that 'the enquiry as to the materiality of the misrepresentation is consequently not conducted in abstracto, but is focused on a particular assessment. It therefore follows that the evidence of the

underwriter who attended to that assessment is not only relevant but may prove crucial. So, too, the evidence that the insurer had a particular approach to risks of the kind in question would be relevant and could be cogent.'

[40] As discussed above, the onus rests on Profmed to prove materiality and that the non-disclosure or representation by the applicant induced it to conclude the contract and to assume the risk it otherwise would not have accepted. The question is whether a reasonable person in the position of the applicant would have considered that the risk, if any, (hip arthroscopy) should have been disclosed to Profmed - See *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 (A) at 435G-I. The applicant avers that she underwent a hip arthroscopy during June 2014 and approximately 17 months prior to the completion of the Profmed's application form. The result thereof showed that she had no indisposition and /or ailment to her hip. This MRI scan procedure, was merely a diagnostic tool to determine whether, if anything was amiss with her hip. She avers that this did not constitute treatment, nor does undergoing it necessarily meant that one is suffering from a medical condition. She submitted a medical report of Dr Bosch in support of her contention. The applicant further contended that had the Appeal Board afforded her the opportunity to present evidence, she would have led evidence that the hip arthroscopy did not constitute treatment and that she had no condition in her hip. There was no evidence presented before the Appeal Board or before this court to rebut the evidence that the applicant underwent a hip arthroscopy in 2014 and that there was no problem with her hip. In fact, this averment was not denied or disputed by Profmed. Moreover, section 29A (7) of the Act provides that:

"A medical scheme may require an applicant to provide the medical scheme with a medical report in respect of any proposed beneficiary only in respect of a condition for which medical advice, diagnosis, care or treatment was recommended or received within the 12 month period ending on the date on which an application for membership was made." (*My underlining for emphasis)*.

[41] In my view, pursuant to the guidelines set out in the above section, there was no duty upon the applicant to disclose a procedure which she underwent in 2014 which was performed almost two years before her application to Profmed. However and most importantly, when the applicant completed the Profmed application form, she was assisted by Ms Brits, a representative of Profmed. The applicant waived her rights to privacy and allowed Ms Brits to obtain all her medical records. Ms Brits advised the applicant that any affliction that predated 12 months prior to completing the form need not be mentioned in the form. In my opinion, Profmed is estopped from relying on the non-disclosure. Its representative made representations to the applicant. The applicant believed in the truth of the representations, and she trusted Ms Brits and acted in terms of the representations - See *Aris Enterprises (Finance) v Protea Assurance Company Limited* 1981 (3) SA 274 (A) at 291D.

[42] Furthermore, from the totality of the evidence, there was no duty upon the applicant to disclose that she had a hip arthroscopy in 2014 especially when the court considered the provisions of section 29(2) which requires a prospective insured to only disclose a medical condition that is material. There is no duty on a prospective applicant for medical insurance in terms of the Act to disclose a

condition that is immaterial or non-existent. In my opinion, the hip arthroscopy that the applicant underwent was so immaterial to warrant a cancellation of the contract. The reliance of the Appeal Board on this ground in dismissing the applicant's appeal was therefore misplaced. The Appeal Board's finding in my view is glaringly in conflict with the permissive provisions of section 29A (7) of the Act.

[43] With regard to gastritis, it is common cause that this condition was not disclosed by the applicant in the application form. It is also common cause that the Profmed application form that the applicant signed, did not mention this condition whereas the form provided amongst others that it is essential to declare all conditions /illness/symptoms, no matter how insignificant they may seem. It also provided that disclosure is not limited to the example conditions listed in the form.

[44] As contained in their letter dated 07 November 2016 addressed to the applicant, Profmed initially repudiated the applicant's contract on the basis that she failed to disclose that she suffered from gastric ulcer. In their formal written response to the Registrar dated 13 December 2016, Profmed stated that the applicant had gastroscopy and colonoscopy for gastric ulcer. The Registrar of the Medical Aid Scheme erroneously found that the applicant indeed suffered from gastric ulcer. This confusion was clarified by the applicant when she appealed to the Council and to the Appeal Board. The applicant averred in her papers that although she underwent both a gastroscopy and a colonoscopy, she was however diagnosed with gastritis and not with gastric ulcers. In addition, she was not placed on any medication and did not suffer any further symptoms after she was discharged. The applicant also stressed the difference between gastritis and gastric ulcers. The applicant's version in this

regard was supported by a laparoscopic and vascular surgeon, Dr Etienne Swanepoel, who confirmed that gastritis is an irritation and inflammation of the stomach lining and is indeed a very common condition with about 50 per cent of the population suffering from it. Gastric ulcers on the other hand is an open sore in the lining of the stomach and is indeed a more serious condition. According to Dr Swanepoel, the purpose of the gastroscopy and colonoscopy is merely to ascertain and diagnose a potential medical condition and it does not constitute a treatment *per se* nor does undergoing it meant that one is necessarily suffering from a medical condition.

[45] The Appeal Board found that the applicant was indeed suffering from gastritis and not gastric ulcers. It also accepted that gastritis is relatively less serious but more common condition than gastric ulcer. The Appeal Board found that in terms of section 29A(2)(a) of the Act, a medical scheme may impose a condition-specific waiting period of up to 12 months upon a potential member or his / her dependents, except for a condition that is covered within the Prescribed Minimum Benefits. It found that an uncomplicated gastritis is not covered within the Prescribed Minimum Benefits. It concluded that non-disclosure of gastritis is material in that it prevented Profmed from applying condition-specific waiting period in their risk assessment and risk management measures.

[46] The Prescribed Minimum Benefits referred to by the Appeal Board are contained in the Regulations of the Act, and are listed in Annexure A of the regulations. If I correctly understood the ruling of the Appeal Board, all ailments and conditions that are not prescribed in the Regulations must be disclosed during

application. The impression created by this ruling is that if the insured fails to disclose an immaterial condition that does not appear on the list, then the Medical Scheme may lawfully repudiate the medical insurance. For those reasons, the Appeal Board found that the applicant had a duty to disclose gastritis because gastritis is not listed as a prescribed minimum benefit in the regulations. With respect, this ruling is flawed and in conflict with the prescribed provisions of section 29(2)(e) of the Act.

[47] In my view, the provisions of section 29(2)(e) are very clear and unambiguous. This section does not refer or make mention of Prescribed Minimum Benefits as a test to be invoked regarding materiality. In terms of this section, a Medical Scheme cannot revoke or suspend a member's membership or that of his/ her dependents except on the ground of non-disclosure of material information. In *Regent Insurance Co Ltd (supra)* the court held that the onus is always on the insurer to prove the materiality of the non-disclosure and that the non-disclosure in fact induced it to conclude the contract. It is common cause that in this case, Profmed did not lead evidence to prove the materiality of the alleged non-disclosure of the gastritis and that such non-disclosure induced it to contract with the applicant. In my view, the Appeal Board paid no heed to these authorities and its conclusion in this regard represent a grave misdirection and has resulted in the failure to act in accordance with the correct interpretation of the section 29(2)(e). In my view, its decision must be reviewed and set aside as its finding was influenced by an error of law as contemplated in section 6(2)(d) of PAJA. This leads me to the determination of the last issue.

Whether to remit the matter to the Appeal Board or to Substitute

[48] Mr Van Reenen argued that in the event the court finds favour with the applicant's argument, the matter should be remitted to the Board for hearing. Mr Steenkamp however argued that the correct approach for the court to adopt in this case is to substitute its ruling with the one contemplated in the Notice of Motion. Section 8(1) of PAJA affords the court a wide discretion to grant any order in judicial review that is just and equitable. In terms of section 8(1)(c)(ii)(aa) of PAJA a court may after setting aside an administrative action, either remit it for reconsideration by the administrator or in exceptional cases, may substitute the administrative action without remitting it.

[49] This case has been adjudicated upon by multiple forums. In my view, to refer this matter back to the Appeal Board will be of no consequence. Instead, it will exacerbate incurring unnecessary costs and the delay of justice for the applicant. This court has all the relevant information placed before it to substitute the decision of the Appeal Board. Furthermore, I am of view that nothing will be gained if the matter is remitted to the Board for hearing especially in the light of the findings made above that there is only one conclusion that should have been reached by the Appeal Board, namely that the applicant's appeal should have been upheld.

ORDER

[50] In the result, having read all the documents filed and having heard arguments from both parties, the following order is granted:

1. The Appeal Board's ruling / order of the 25 August 2018 is hereby reviewed and set aside.

2. The termination by Profmed of the applicant's membership under membership number 10118222, and or that of her dependents, is declared unlawful and is set aside.

3. Profmed is ordered to honour the contractual commitments vis-à-vis the applicant and or her dependents under the policy that governs the said membership.

4. Profmed is ordered to pay the costs of suits, including the costs attendant to the employment of counsel.

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LEKHULENI AJ

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the Applicants:	Advocate J.P. Steenkamp
Instructed by:	Carlo Swanepoel Attorneys (Ref: Mr. C. Swanepoel)

For the 1st to 3rd Respondents:	Abide the Court's decision
For the 4th Respondent:	Advocate D. Van Reenen
Instructed by:	Knowles Husain Lindsay Inc. (Ref: Mr. N. Taitz)