IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: A 171 / 2021

Case Number: 23378 / 2018

In the matter between:

PROFMED MEDICAL SCHEME	Appellant
and	
MIGNON ADELIA STEYN	First Respondent
REGISTRAR FOR MEDICAL SCHEMES	Second Respondent
COUNCIL FOR MEDICAL SCHEMES	Third Respondent
THE APPEAL BOARD	Fourth Respondent

(Established in terms of section 50 of the Medical Schemes Act)

Coram: Baartman *et* Steyn *et* Wille, JJ

Heard: 11th of March 2022

Delivered: Delivered by email to the parties' legal representatives on the 26th of April 2022

JUDGMENT

STEYN *et* WILLE, JJ:

INTRODUCTION

[1] This is an appeal, about a review, that was seemingly dealt with as an 'appeal' by the court of first instance. The appeal is before us with leave having been granted by the court *a quo*. The subject of the review application was a decision by the fourth respondent to dismiss an appeal brought by the first respondent. The issue before the fourth respondent related to the retrospective termination of the first respondent's membership by the appellant. This, because of her alleged failure to disclose material information at the time of her application for membership in and to the appellant.[1]

[2] The complaint by the first respondent was dismissed by second respondent and, the subsequent appeal against the second respondent's decision was also dismissed by the third respondent. Finally, the appellant's appeal against the decision of the third respondent was, thereafter and ultimately dismissed by the fourth respondent.

---

[1] This in terms of section 29 (2) (e) of the Medical Schemes Act, No 131 of 1998 (the 'MSA').

[3] The fourth respondent held that the first respondent's failure to disclose her gastritis and hip arthroscopy (and conditions related thereto), were material non-disclosures, which prevented the appellant from applying certain 'waiting periods' as a risk assessment measure. Further, the fourth respondent held (in view of their other findings), that it was unnecessary to determine whether the first respondent's failures to disclose a possible heart murmur and kidney stones amounted to material non-disclosures.

THE FACTUAL MATRIX

[4] The first respondent applied to become a member of the appellant during November 2015. Her membership commenced on the 1st of January 2016. She was listed as the principal member of the appellant. On the 7th of November 2016, the first respondent's membership was retrospectively terminated by the appellant. The reasons for the termination of the first respondent's membership in and to the appellant were meticulously recorded in a letter to the first respondent.

[5] No doubt this tiggered a complaint to the second respondent by the first respondent (at the instance of her husband). The appellant filed a detailed response to the complaint by the first respondent's husband. Thereafter, the second respondent handed down a ruling in favour of the appellant. The crux of the ruling by the second respondent was the following, namely:- (a) that the first respondent underwent a gastroscopy and a colonoscopy on the 4th of March 2015 for a gastric ulcer (b) that she failed to disclose same in her medical questionnaire (c) that a reasonable person would have considered the information omitted reasonably relevant to the assessment of risk by the appellant (d) that had this information been disclosed, the appellant

would have been aware of the risk (e) that the risk would have been assessed accordingly and (f) that this may have included the underwriting of the condition and the imposing of a waiting period.

[6] The first respondent initiated an appeal against the ruling by the second respondent. This, to the third respondent. In these appeal papers, the first respondent conceded that although she underwent both a gastroscopy and a colonoscopy she was only diagnosed with gastritis and not with a gastric ulcer. During this interim period, the first respondent had in addition applied for membership to an alternative medical scheme. She thereafter disclosed to this latter scheme certain details of other pre-existing conditions including, *inter alia*, a gastric ulcer, gastric influenza, and certain hip arthroscopes.

[7] At the hearing before the third respondent the appellant highlighted these 'new' disclosures made by the first respondent. These disclosures were made to her now new alternative medical scheme. The first respondent's legal team strenuously objected to this 'new' evidence and averred that this amounted to a trial by ambush. This notwithstanding, the third respondent dismissed the first respondent's appeal.

[8] In essence, the third respondent, *inter alia*, held that although the first respondent was ultimately diagnosed with gastritis (after being admitted to hospital for the treatment of a gastric ulcer), the non-disclosure of gastritis amounted to a material non-disclosure of a pre-existing medical condition. The first respondent thereafter lodged an appeal against the decision of the third respondent. This, to the fourth respondent.

[9] In her grounds of appeal, the first respondent took the position that the third respondent was incorrect because it found that the first respondent's non-disclosure of gastritis was a material non-disclosure of a pre-existing medical condition. The first respondent averred that this finding (by the third respondent), was inconsistent and irreconcilable with the appellants' original reasons for repudiating the first respondent's claim. This, because the non-disclosure of gastritis was an irrelevant consideration since, the non-disclosure was not that of gastritis but, was in fact a gastric ulcer.

[10] A further point was chartered to the effect that the fourth respondent incorrectly had regard to disclosures made by the first respondent in her application for membership of an alternative medical scheme. Despite some extensive preparation and prior notice of the hearing before the fourth respondent, the first respondent failed to apply for a postponement of this latter hearing, alternatively, no application was made for the introduction of new or further evidence (on appeal).

[11] It falls to be recorded that the first respondent was represented by counsel at this latter hearing. The fourth respondent dismissed the appeal at the instance of the first respondent and found that the non-disclosure of gastritis was material in that it prevented the appellant from applying a 'condition-specific waiting period' in their risk assessment and risk management measures.

[12] Although not germane to any of the reasons and conclusions for the purposes of this judgment, the fourth respondent also found that because of the specific nature of the appeal before the fourth respondent (being a wide appeal), the appellant was not precluded from taking into account the failure by the first respondent to disclose

her hip arthroscopy (which had only come to their attention after she had disclosed this in her alternative application form which featured before the hearing before the third respondent).

[13] Again, although not strictly relevant for the determination of this appeal, the fourth respondent also held that the first respondent's failure to disclose her hip arthroscopy also amounted to a material non-disclosure of a pre-existing medical condition (this for the same reasons that the failure to disclose her gastritis was material). In addition, the fourth respondent also found that it was not necessary to decide on whether the first respondent's non-disclosures in respect of the diagnosis of a possible heart murmur and certain kidney stones (which occurred more than (12) months before her application was lodged with the appellant), was a material non-disclosure or not.

[14] In a final throw of the dice, the first respondent took the decisions of the second respondent, the third respondent and the fourth respondent on judicial review before the court of first instance. In the review chartered for by the first respondent (in the court of first instance), the first respondent sought to rely on both the common law grounds of review and the grounds of review as indicated in PAJA.[2]

[15] At the outset, we have some procedural difficulty with this legal approach. This because, the basis of a judicial review of administrative action has its genesis in

[2] The 'Promotion of Administrative Justice Act' No. 3 of 2000.

PAJA and, not from the common law.[3] At the outset we record, that in our view, no election lies at the door of the first respondent in this connection.[4]

THE CASE FOR THE FIRST RESPONDENT

[16] The first respondent contends for the following: - (a) that the proceedings were procedurally unfair (b) that the rulings were materially influenced by an error of law (c) that irrelevant considerations were considered, and relevant considerations were not considered and (d) that the rulings were arbitrarily decided. Significantly, no claim is made that the decisions concerned were not rationally connected to the information before the decision maker or the reasons given, or that the decisions were grossly unreasonable or contravened a law.

[17] The first respondent does not advance that the actual procedure adopted was an unfair procedure or that the fourth respondent failed to adhere to the prescribed process. It is accordingly difficult to discern, having regard to the circumstances of this case, how the processes that unfolded, were administratively unfair to the first respondent.

[18] Furthermore, the facts about the alleged non-disclosure in connection with her hip arthroscopy (which the first respondent sought to have excluded), were introduced by way of an affidavit deposed to and filed by the first respondent. This, prior to the hearing before the third respondent. Following upon this appeal process, the first respondent piloted an appeal to the fourth respondent and in these endeavours, she was assisted by an attorney and was represented at the hearing by counsel. Despite

---

[3] *Transnet Ltd and Others v Chirwa* 2007 (2) SA 198 (SCA) at [11].
[4] *Minister of Health and another v New Clicks South Africa (Pty) Ltd and others* 2006 (2) SA 311 (CC) at [96].

this, it is argued that the first respondent was not afforded a fair opportunity to make any representations she may have wished to make, regarding her hip arthroscopy.

[19] This in essence amounts to a procedural attack by the first respondent. This despite the fact that it is trite law that it was for the chairperson of the fourth respondent to determine the procedure at the hearing. It must be so that the rules of natural justice must fall to be applied. It seems to us that the first respondent does not agree with the general proposition that there is no automatic procedure for any party to insist (or require that if their submissions are not accepted), they should then be given one more opportunity to lead additional evidence of a vague and unspecified nature. This, particularly in circumstances when the relevance of the proposed additional evidence remains unclear.

THE CASE FOR THE APPELLANT

[20] It is the case for the appellant, *inter alia*, that the court *a quo* erred in finding that there was an error of law on the part of the fourth respondent. This must be viewed against the factual background (which is not the subject of any dispute) that both the fourth respondent and the court *a quo* found that the first respondent had manifestly failed to disclose her hip arthroscopy and her gastritis. It is further submitted that even where a party may have initially relied on certain 'incorrect' grounds for termination that party may nevertheless rely on any justifiable reason for such termination.[5] Again we do not need to make any definitive findings in this

[5] *Mohamed v Genesis Medical Scheme* (17351/2010) [2010] ZAWCHC 475 (15 September 2010) at p 4.

connection as the non-disclosures by the first respondent were manifest considering the detail required in the application form for her membership.

[21] Further, it is contended that the court *a quo* also erred by considering certain policy considerations connected with 'insurance legislation' enacted to preclude insurers from treating trivial misrepresentations or non-disclosures as grounds from avoiding insurance contracts and rejecting claims. The point is made that these cases referred to concern the interpretation of insurance legislation. It is indicated on behalf of the appellant that this case fundamentally differs from insurance legislation because an insurer is entitled to not conclude a contract of insurance. To the contrary, a medical scheme cannot exclude cover or terminate membership save for certain limited circumstances.

[22] By contrast, it is alleged that in the case of a medical scheme, it is necessary to also protect the scheme and its members who ultimately pay the cost for non-disclosure on the part of new applicants to the scheme. It is argued that in the circumstances, the fourth respondent correctly made its determination of the materiality of first respondent's failure to disclose her gastritis and her hip arthroscopy. We do not find is necessary to deal with the arguments that were indicated on behalf of the appellant in connection with the issue of estoppel. This again because we hold the view that these arguments are not germane or relevant for the determination of the core issues in this appeal. The issues in this appeal are those connected with material non-disclosures.

CONSIDERATION

[23] It was common cause that the first respondent did not disclose her gastritis in her application form when she applied to become a member of the appellant. In the final analysis, the fourth respondent held that gastritis 'was and is' a serious condition. Accordingly, the non-disclosure of such a condition is relevant to the risk and its assessment by the scheme. This because it precludes a scheme from applying a 'condition-specific waiting period' in its risk assessment and in its risk management measures.

[24] Most significantly, there was no indication in the decision by the fourth respondent that a non-disclosure (of a pre-existing medical condition) is linked to the enquiry of (or whether it relates to) a prescribed minimum benefit condition. Put in another way, the fourth respondent did not equate the issue of 'materiality' with the consideration of whether a condition is a prescribed minimum benefit condition. This is of course undoubtedly the correct approach.

[25] The only core issue for determination before the fourth respondent was whether the non-disclosures on the part of the first respondent related to material information. In turn, the question as to whether a reasonable and prudent person would have considered the information concerned as reasonably relevant to the risk and its assessment by an insurer must have become readily apparent from the detail required in the application form.

[26] The 'gastric condition' concerned was of such a nature that it required an emergency visit to a hospital and a gastroscopy was undertaken to establish whether there was a gastric ulcer. As a matter of logic, it must be so, that in the circumstances of this case, a reasonable person would have considered the abovementioned facts,

which were not disclosed, as reasonably relevant to the risks and their subsequent assessment by the appellant.

[27] In our view, there was no judicial administrative error on the part of the fourth respondent in its finding specifically in connection with the failure by first respondent to disclose this material information to the appellant.

[28] The finding by the court of first instance that the fourth respondent considered irrelevant considerations and ignored relevant considerations is based on its finding that the first respondent was confronted with facts not properly before the fourth respondent. However, the evidence concerned was relevant and the fourth respondent correctly had regard to the non-disclosures concerned.

[29] Furthermore, the sole reason why the hip arthroscopy and the circumstances relating thereto was not before the fourth respondent was precisely because of the failure by the first respondent to disclose the hip arthroscopy and its outcomes to the appellant.

[30] In our considered view, the court *a quo* erred in its finding that the appellant raised new facts during argument without giving the first respondent an opportunity to respond. This is fortified by the fact that the first respondent was not called on to answer a case which had not been pleaded. Moreover, the facts complained of were introduced at the instance of the first respondent.

[31] It was for the first respondent to set out her argument and the grounds of her appeal and she manifestly failed to do so. This did not render the proceedings unfair. Further, the fact that the fourth respondent did not concur with the submissions made by the first respondent (regarding the exclusion of evidence) did not, *per se* render the proceedings unfair.

[32] Furthermore, as a general proposition it is so that administrative bodies are generally not required to comply strictly with the rules of evidence and there is also usually no onus of proof applied. The penchant remarks in *Lambert*[6] are apposite with reference to the circumstances of this case. The following was emphasized;

'*…The rules of evidence relating to the incidence of proof are formulated in relation to legal proceedings properly so-called, and there is no justification for the extension of these rules to enquiries held by a non-judicial body unless the statute under which the body operates creates presumptions expressly or impliedly operating against or in favour of a party to the enquiry…'*

[33] The administrative respondents are all administrators established with specific knowledge regarding the medical schemes industry, the challenges confronted by these schemes and mechanisms put in place to safeguard members of the schemes. These respondents are also familiar with the conditions and benefits which these schemes are obliged to provide.

[34] In addition, where an administrative decision does fall to be set aside, it is only in exceptional cases that a court may substitute that decision. The usual remedy is to remit the matter for reconsideration by the subject administrator, with or without directions for the further conduct of the administrative action. In our respectful view

---

[6] *Lambert v Director of Census* 1956 (3) SA 452 (T) 455 A-B.

the court of first instance failed to have due regard to the fundamental distinction between an appeal process and a review process, in these circumstances.

[35] Further, rather than limiting itself to a consideration of the legislated grounds of review, the court of first instance reconsidered the merits and appropriateness of the decision by the fourth respondent to terminate the membership of the first respondent. By contrast, all the administrative respondents were well placed to determine whether the failure to disclose information was material. Most significantly, in our view, there were no exceptional grounds in existence for a substitution of the decision. This decision was in essence made by all the administrative respondents. This is also fortified by the fact that there was no suggestion of any bias or malice on the part of these administrative respondents.

CONCLUSION AND ORDER

[36] It is for these reasons that the following order is proposed, namely:

1. That the appeal is *upheld*, the decision of the court *a quo* is set aside and the review application by the first respondent, is dismissed.

2. That the first respondent be ordered to pay the appellant's costs, including the costs of two counsel (where so employed) on the scale as between party and party as taxed or agreed.

STEYN, J

I agree and, it is so ordered.

BAARTMAN, J

I agree.

WILLE, J