

**IN THE APPEAL COMMITTEE OF THE COUNCIL FOR MEDICAL
SCHEMES**

In the matter between:

EMC

Appellant

and

REGISTRAR OF MEDICAL SCHEMES

Respondent

RULING

[1] After a general waiting period of three months¹ the appellant was accepted into membership of the Oxygen Medical Scheme² on 30 September 2006. He was 67 years old. He had completed and signed the application form on 8 May 2006.

[2] One of the questions asked of him in the application form was whether he had “ever been treated for, or had any indication of any disorder of

¹ According to the appellant’s daughter in a complaint letter dated 11 June 2007, and the Registrar’s ruling of 6 May 2008, a condition-specific waiting period of 12 months had also been imposed. It is, however, not clear from the evidence to what specific condition the 12-month waiting period related.

² “the scheme”

the heart, blood vessels or circulatory system”. To this he answered “Yes” and the only detail he gave was that of high blood pressure.

- [3] The scheme subsequently discovered that the appellant had previously been treated for a heart condition which he did not disclose in the application form. It then terminated his membership on grounds of material non-disclosure on 1 June 2007.³
- [4] On 17 April 2007 the appellant’s wife, who was a dependant of the appellant in the scheme, required surgery. The necessary authorisation was obtained from the scheme. But then she developed complications which required further treatment on 5 June 2007. The scheme refused authorisation. It had terminated the appellant’s membership on 1 June 2007 for material non-disclosure. The appellant disputes that he failed to make a material disclosure.
- [5] The high-water mark of the scheme’s argument is that the appellant’s failure to disclose in his application form that he had a heart condition “kept the scheme from imposing the 12-month condition-specific waiting period” according to the Medical Schemes Act.⁴ For this argument the scheme relies solely on the appellant’s failure to disclose a

³ For this we rely on the ruling of the Registrar because we have not been provided with a copy of the letter of termination of membership.

⁴ “the MSA”. Section 29A(1)(b) would have been the applicable provision since the appellant had last been a medical scheme member in December 1995.

diagnosis or treatment or test that had been done at the Ngwelezane Netcare Hospital on 2 April 2006 and in relation to which the appellant had written “onleesbaar”. He had, however, disclosed chest infection according to the scheme.

[6] In this respect, the Registrar made the following finding:

“In so far as the heart-related condition the respondent scheme indicated post myocardial infarct angina However no such diagnosis was made prior to the application date and therefore it will be unfair to have expected the member to disclose what he did not know.”⁵

[7] Later, at paragraph H of the Registrar’s ruling, the following conclusion is made:

“The respondent scheme was incorrect in deciding the matter over an undisclosed heart condition when there were on-going tests.”

[8] The scheme did not take issue with these findings by the Registrar. In this regard the appeal committee agrees with the Registrar. But the Registrar then went on to find in favour of the scheme on the basis of the non-disclosure that was never invoked by the scheme in its reasons

⁵ See para G of the Registrar’s Ruling

for terminating the appellant's membership.⁶ Here we part ways with the Registrar because on the facts as presented to us it was never the scheme's case that the appellant's unstable angina and epilepsy were material non-disclosures for which his membership was terminated.

[9] We also agree with the Registrar that when the appellant indicated to the scheme that he was undergoing some tests and awaiting the results thereof, the prudent and reasonable thing for the scheme to have done in the circumstances would have been to put the underwriting process on hold pending the outcome of those tests, and not allow a 67 year old to run up costs of upward R1 million⁷ and then walk away on the basis that the appellant did not disclose a condition of which he was not aware at the time of signing the application form.

[10] We find that the scheme has been exceedingly negligent in this regard. The Constitutional Court has restated the test for negligence as follows:

“The traditional test for negligence is axiomatic but still bears the briefest repetition: negligence is established if a reasonable person in the position of the defendant would have foreseen the harm, the reasonable person would have taken steps to prevent it and the defendant failed to take those steps. When we are dealing with professionals acting in their professional field, the relevant

⁶ Unstable angina and epilepsy

⁷ At the hearing the appellant put the amount at R2 million

benchmark is not the ordinary reasonable person but the relevant reasonable professional person.”⁸

[11] The scheme should reasonably have foreseen that its failure to put the underwriting process on hold pending the outcome of the tests which the appellant had clearly indicated he was still awaiting at the time of application, and communicate its decision in that regard, would have led the appellant to believe in good faith that his wife’s treatment would be funded. This is particularly so because less than two months previously (in April 2007) the scheme had authorised surgery on the appellant’s wife despite its on-going investigation into whether or not there had been a material non-disclosure by the appellant.

[12] The reasonable steps that the scheme should have taken in these circumstances should have been to put the underwriting process on hold pending the outcome of those tests and communicate its decision in that regard to the applicant. Its failure to do so was exceedingly negligent. For that, the 68-year old appellant cannot be expected to foot the bill of over R1 million. The scheme must pay.

[13] In these circumstances, the appeal succeeds and the scheme is ordered to pay for the costs of the appellant’s wife’s diagnosis and treatment.

⁸ NM and Others v Smith and Other (Freedom of Expression Institute as Amicus Curiae) 2007 (5) SA 250 (CC) at para [100]

V NGALWANA for the appeal committee

Date of Hearing: 12 August 2008
Date of Ruling: 8 September 2008

For Appellant: Mr E
For the scheme: Ms Le Roux
For Registrar: Mr Mavuso