

THE COUNCIL FOR MEDICAL SCHEMES APPEAL COMMITTEE

In the Appeal between:

O A

Appellant

and

OXYGEN MEDICAL SCHEME

Respondent

APPEAL RULING

1. This appeal arises out of the Respondent's termination of the membership of the Appellant's son, AA and his dependants.
2. The reason given by the Respondent for the termination of membership was the non-disclosure, at the time of application for membership, by AA of the pre-existing heart condition, namely *supraventricular tachycardia*, suffered by his daughter.
3. The Appellant has submitted uncontested evidence that the existence of this condition was drawn pertinently to the attention of Mr. S a senior financial adviser employed by Old Mutual, who assisted AA with the completion of his application for

membership and who filled the applicable form in on Mr A's behalf.

4. Notwithstanding this disclosure to Mr S, the question in section L (*“Medical History and General Health questions”*) of the Respondent's membership application form which asks whether the Applicant or any of his or her dependants have ever been treated for, or had any indication of any disorder of the heart within the last twelve months was answered in the negative with regard to Savannah.
5. Section O of this form, which was signed by Mr A contained a warranty that all answers given in the application were true, correct and complete in every aspect, and also contained a declaration that any false statements in the application or the non-disclosure of any material information would render his membership null and void.
6. The essential dispute between the parties concerns who should bear responsibility for Mr S's failure to include the information given to him by the A family with regards to the daughter's heart condition in the application form. The Appellant contends that Mr

S acted as a representative and agent of the Respondent and the Respondent must bear responsibility for his actions; the Respondent contends that Mr S acted as an agent for the A family and the responsibility for his actions must therefore be borne by them.

7. This question, however, only arises in the event that there has been a non-disclosure of information that would justify the termination of the A family's membership.
8. During the appeal hearing Ms Le Roux, who represented the Respondent, recorded that, if it was found that the daughter's condition had been diagnosed more than 12 months prior to the submission of the application for membership, and if she had received no treatment for this condition in that 12 month period, the scheme would not have been entitled to cancel her membership.
9. It appears to be common cause that the daughter's condition was initially diagnosed in July 2004. It was unclear on the information before the Appeal Committee whether or not the daughter had been treated for her condition in the 12 months

preceding 26 February 2007. At the Appeal Committee's request an enquiry was directed to the daughter's treating doctor, Dr E, in this regard. It was established that Dr E had consulted with her, in respect of her heart condition, on 29 May 2006, when an ECG was conducted. Following the results of this ECG Isoptin 20mg was prescribed, to be taken 3 times a day. It thus appears that she was, indeed, treated for her condition in the relevant 12-month period.

10. The question that then remains to be answered concerns the capacity of Mr S. Ms Le Roux submitted, on the strength of the decision in ***Rabinowitz & Another NNO v Ned-Equity Insurance Company Limited & Another, 1991 SA 403 (W)***, that Mr S acted as the agent of the A family in assisting them for completing their application for membership.
11. At p.407H of that judgment, the court recorded as follows:

"Where a person employs an insurance broker to obtain insurance for him, the broker is his agent, and responsibility for the acts and omissions of the broker is governed by the ordinary law of agency."

12. It is clear from the context of this decision that the word "employs" in the above extract is used in the sense of "uses" as opposed to "engages for remuneration".
13. It was the uncontested evidence of the scheme that Mr S was employed by it, and was, instead, employed by Old Mutual Life. Had he been employed by the scheme, the scheme would have been responsible for his negligent conduct.
14. This committee has consistently held that the shortcomings in the conduct of brokers who assist applicants for membership of medical schemes cannot be used as a defence for the non-disclosure of material information in membership application forms. Regardless of who fills the form in, ultimately it is the applicant for membership who signs the form, who confirms that he or she has read the form, and who warrants that the information therein is correct.
15. AA signed the form, including declarations to this effect, on 26 February 2007. He did so in circumstances where he clearly had not fully satisfied himself that the form had been adequately

completed. He must, unfortunately, bear responsibility for his conduct in this regard.

16. The Appeal Committee has, in many disputes of this nature, had occasion to level criticism at the conduct of brokers who have been accredited under the Act. This dispute provides a further example of unacceptable conduct on behalf of such brokers.
17. Whilst the scheme has assured the Appeal Committee that steps have been taken to bring a complaint against Mr S, and whilst the Appellant and his family may have a claim against Mr S for the damages suffered as a result of his negligent conduct, it is nevertheless clear to the committee that consideration should be given by the regulatory authority to a method by which this general problem can be effectively addressed.
18. Having said that, however, under the current legislative system, the Respondent cannot be held responsible for Mr S's conduct. The responsibility for ensuring that his application for membership was correctly completed ultimately lay with Mr A, and it was his failure to discharge this responsibility that gave

rise to the non-disclosure which formed the basis for the Respondent's termination of his membership.

19. In the circumstances, the Appeal Committee holds that the registrar correctly ruled that the Respondent was entitled to terminate Mr A's membership on the ground of non-disclosure. The appeal is dismissed.

DATED at JOHANNESBURG on the day of JANUARY 2008

P R JAMMY

For: Appeal Committee