

APPEAL COMMITTEE OF THE COUNCIL FOR MEDICAL SCHEMES

In the matter between:

MEDSHIELD MEDICAL SCHEME

Appellant

and

REGISTRAR OF MEDICAL SCHEMES

First Respondent

L [REDACTED]

Second Respondent

RULING

- 1 This is an appeal by the scheme against a ruling of the Registrar directing the scheme to pay in full for treatment associated with the member's wife's pregnancy.

- 2 The member, through his broker, had complained to the Registrar about the scheme's imposition of a 12 month condition-specific waiting period on his membership. The reason cited by the scheme for this was the member's failure to disclose that his wife was pregnant at the time of his application for

membership. The application form contains a question 17 which asks: "*Are you or any of your dependants pregnant?*" The member's answer was in the negative.

3 The application form was completed and signed on 23 April 2009. The broker says it was submitted to the scheme on the same day. The scheme says it was received only on 4 June 2009. It is common cause that membership became effective from 1 May 2009.

4 During May or June 2009 the member's wife discovered that she was 7 weeks pregnant and on 18 June 2009 the member informed the broker who in turn informed the scheme. The scheme then imposed a 12 month condition-specific waiting period as a result of non-disclosure of the pregnancy.

5 The broker, on the member's behalf, said neither the member nor his wife was aware of the pregnancy at the time of application.

6 Having held that the onus was on the scheme to prove the contrary, the Registrar directed the scheme to prove that the member's wife was aware of the pregnancy at the time of application. Failing that, the Registrar directed further, the scheme must fund the treatment in relation to the pregnancy.

- 7 In its appeal against the ruling the scheme relies on a different declaration on the application form. It now relies on the declaration that reads: "*Should your state of health change significantly from the date of signing this application to the date of acceptance, please notify the Scheme in writing*".
- 8 But this is not the case it advanced before the Registrar. It is impermissible on appeal to advance a case that is at odds with that which was advanced at first instance. On this ground alone the appeal should be dismissed.
- 9 But even if the scheme were at large to introduce a new defence on appeal, the sanction it imposes on the member is wholly unfair, unjust, unreasonable and therefore contrary to public policy in the circumstances of this case. The jurisprudence in relation to the law of contract (since the application form and its acceptance constitutes a contract between the scheme and the member) has progressed somewhat since *Sasfin v Beukes 1989 (1) SA 1 (A)* where Smalberger JA (for the majority) said (at 9B-C)

"One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness."

- 10 Well, that was in 1989. In today's constitutional order, fairness, reasonableness and justice are the standard by which the acceptability of conduct between contracting parties must be measured. If the enforcement of a contractual clause would give rise to injustice, unfairness and unreasonableness, then such a clause is contrary to public policy and the

Courts (and in this case this appeals committee) would be justified in not enforcing it.

- 11 The Constitutional Court has said the following about a time-limitation clause in a contract:

“Public policy imports the notions of fairness, justice and reasonableness. Public policy would preclude the enforcement of a contractual term if its enforcement would be unjust or unfair. Public policy, it should be recalled, ‘is the general sense of justice of the community, the boni mores, manifested in public opinion’. Thus where a claimant seeks to avoid the enforcement of a time-limitation clause on the basis that non-compliance with it was caused by factors beyond his or her control, it is inconceivable that a court would hold the claimant to such a clause. The enforcement of the time-limitation clause in such circumstances would result in an injustice and would no doubt be contrary to public policy. As has been observed, while public policy endorses the freedom of contract, it nevertheless recognises the need to do simple justice between the contracting parties. To hold that a court would be powerless in these circumstances would be to suggest that the hands of justice can be tied; in my view the hands of justice can never be tied under our constitutional order.”

- 12 On the scheme’s version the member’s wife was 7 weeks pregnant on 25 May 2009. On that version, she must have been about 3 weeks pregnant when the member completed and signed the application form. The scheme has advanced no proof that the pregnancy was known at the time of the application. Thus, the member’s failure to disclose his wife’s pregnancy was caused by factors beyond his control.

- 13 The suggestion that the member should have informed the scheme about discovery of the pregnancy before 4 June 2009 (when it says it received the

application form) does not avail the scheme either. It is clear from correspondence that the application form was submitted to and received by the scheme's administration arm (M█████ Administration) on 23 April 2009. On 24 April 2009 M█████ Administration confirmed receipt of the application and wrote to the member saying:

"Please note that this confirms cover on Medshield Medical Scheme with effect from the benefit date shown above [1 May 2005]"

- 14 Ms O█████ for the scheme could not dispute the broker's submission that the application form was submitted on 23 April 2009. She conceded that the signed form could have been delayed somewhere at M█████ Administration, although she added that it might have been delayed by the member's broker too. The latter is inconceivable in light of the letter of 24 April 2009 from M█████ Administration.
- 15 Thus, on the undisputed facts it is clear that the member's wife discovered her pregnancy after the application form had already been received by the scheme through its administration arm. In the result, the rule about the member having to inform the scheme about any significant change in health between date of signature of the form and date of acceptance does not avail the scheme in this case.
- 16 In any event, even if the member's wife had discovered her pregnancy before the scheme received the application form and accepted the member's

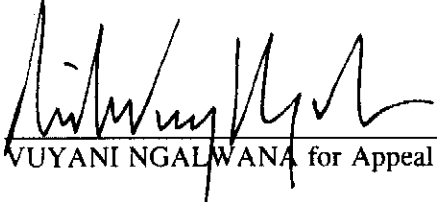
membership, a condition-specific waiting period is not the appropriate recourse for the scheme in the circumstances of this case. Section 29A(1) of the Act (pursuant to which the scheme seems to have acted) says waiting periods can only be imposed where application is made in respect of a person who has not been a member of a medical scheme for the 90 days immediately preceding the date of application. The provisions of this section are not there to deal with instances of failure to disclose a pre-existing condition.




17 It is common cause that the member was not, 90 days immediately before the date of application, a member of a medical scheme. Thus, if the scheme wanted to impose a waiting period it could have used that as a reason. But the condition-specific waiting period ranges "*up to 12 months*". There is nothing in the provision to suggest that a 12 month waiting period is mandatory. Anything between a day and 12 months can be imposed. If the scheme acted under this provision, then the 12 month waiting period appears to have been imposed arbitrarily. Ms O [REDACTED] could not say what factors were taken into account in deciding on 12 months.

18 The scheme seems to believe that it has done the member a favour by not terminating his membership for non-disclosure of a pre-existing condition. But there was no such non-disclosure on the facts of this case. The application form was signed on 23 April 2009 and submitted on the same date. The scheme's administration arm acknowledged receipt on 24 April

2009 and advised the member that membership would commence on 1 May 2009. On the scheme's version pregnancy was discovered on 25 May 2009. There was thus no non-disclosure of a pre-existing condition.

19 In all the circumstances, the appeal falls to be dismissed.

 19 April 2010
VUYANI NGALWANA for Appeal Committee

For the Appellant: Ms A O 
For the 2nd respondent: Ms S L ; M 

Date of hearing: 31 March 2010
Date of Ruling: 12 April 2010