BEFORE THE APPEAL COMMITTEE OF THE COUNCIL FOR MEDICAL SCHEMES (SECTION 48 APPEAL)

HELD VIA MICROSOFT TEAMS VIDEO AND AUDIO-CONFERENCING TECHNOLOGY.

(Instituted in terms of the Medical Schemes Act No 131 of 1998)

In the matter between	**Ref number: CMS 81778**
Bestmed Medical Scheme	**Appellant**
And	
Ms K obo Mr. A	**First Respondent**
The Registrar of Medical Scheme	**Second Respondent**

Panel: Dr K. Chetty; Dr T. Mabeba; Dr X. Ngobese; Ms P. Beck; Dr S Naidoo.

Date of hearing: 9 October 2024.

Date of ruling: 4 December 2024.

RULING AND REASONS

THE PARTIES

1. The Appellant is Bestmed Medical Scheme (The “Appellant or the “Scheme”), registered and regulated under the Medical Schemes Act, Act 131 of 1998 (the “MSA” or “Act”).
2. Mr. G, Attorney for Bestmed appeared for the Appellant.’
3. Mr. V, Clinical Investigation Officer at Bestmed, Ms. S and Ms. K, Legal Advisors at Bestmed were also present at the hearing.
4. The Respondent is Mr. A (The “Respondent”).
5. The Respondent was represented by Ms. K, a Medical Broker.
6. The Second Respondent was not present and will abide by the Appeal Committee decision.

BACKGROUND

7. The Respondent, Mr A was a member of the Bestmed Medical Scheme.
8. The Respondent applied for membership on 14th June 2022 for inception of membership on 1st July 2022. On 21st December 2022 the Scheme retroactively cancelled the Member's membership due to the alleged non-disclosure of material information.
9. The Respondent states that the Member disclosed all his conditions and listed the prescribed medication for the aforesaid on the application form.
10. The Respondent applied for dialysis 3 months later, and it was at this stage that the Scheme decided to terminate his membership.
11. The Appellant submitted that based on the medical information disclosed on the application form the scheme issued the member an acceptance letter, indicating waiting periods for certain conditions.
12. On 23rd November 2022 the Scheme received a request to fund renal dialysis for end stage renal disease. The Scheme then commenced with investigations to exclude the possibility of non-disclosure of material information and found

that the full medical history was not disclosed. The Scheme subsequently cancelled the membership.

THE REGISTRAR'S RULING

13. The Registrar's Ruling was issued on 1st March 2023.
14. The Registrar of the Council for Medical Schemes (CMS) ruled that the decision to terminate membership due to material nondisclosure was unjustified.
15. The Scheme is directed to reinstate the Member's membership from inception date and on condition that contributions are paid up to date.
16. The Appellant is now appealing this decision in terms of Section 48 Appeal submitted on 30th May 2023.

APPLICATION TYPE AND RELIEF SOUGHT

17. This is an appeal under section 48(1) of the Medical Schemes Act (the "MSA or the Act").[1] This section provides that:
    a. *"(1) Any person who is aggrieved by any decision relating to the settlement of a complaint or dispute may appeal against such decision to the Council".*
18. The Appeals Committee heard the appeal on 9 October 2024 via an audio and video conferencing link.

RELEVANT STATUTORY AND REGULATORY PROVISIONS

19. The relationship between the Scheme and the Respondent is governed by the terms of the contract ("the schemes rules") the Scheme concluded with the Respondent. The contract in turn is governed by the "MSA" and the regulations (as amended) made in terms of the Act.
20. This is a wide appeal. The Appeals Committee may consider the matter afresh and is not restricted to the record of proceedings that were before the Registrar.

[1] Medical Schemes Act 131 of 1998 as amended by Act 55 of 2001; Section 48(1); Proc 13/GG 19725/19990129

21. The burden of proof rests on the Appellant who must prove on a balance of probabilities that the appeal should succeed.

THE ISSUE IN DISPUTE

22. The issue in dispute is whether the scheme was correct to terminate the Member's membership due to non-disclosure of material information.

APPELLANTS SUBMISSION

23. The Appellant states that Mr. A applied for membership on 14th June 2022. The Scheme states that this application was pre-dated by several medical examinations shortly before his application and inter-alia treatments on 24th and 26th May 2022 for chronic kidney disease and on the same day for prostate abnormalities.
24. The Scheme states that according to the Knysna Provincial Hospital Mr. A was diagnosed with hypertension in 2016 and he was managed in the private sector on Perindopril. The Scheme states that Mr. A presented with retinal detachment in June 2022 and was managed at Groote Schuur Hospital. During his pre-operative assessment for the management of his retinal detachment he was noted to have poor renal function with an estimated glomerular filtration rate (eGFR of 9). He was referred back to Knysna Hospital for further management.
25. The Scheme states that on 26th May 2022 a Groote Schuur Hospital investigation confirmed bilateral small echogenic kidney, suggestive of chronic kidney disease. The scheme avers that Mr. A was diagnosed with chronic kidney disease/stage 5 end stage renal disease during admission to Groote Schuur hospital for an ophthalmology procedure in May 2022.
26. The Scheme states that on 10th June 2022 (4 days prior to the application), Mr. A was examined again for poor renal function as well as a low potassium and a phosphate diet. The Scheme therefore claims that the facts were very fresh in Mr. A's memory, when he and/or his broker completed the Bestmed application form.

27. The Scheme responded that the basis for the material non-disclosure is as follows:

NO.	APPLICATION FORM	FACT FROM SCHEME
4.	Sensory organs: sight, hearing, speech also state spectacles and or contact lenses. **NO** Scheme states that he mentioned eye operations in paragraph 16 under operations	In March 2022 cataract operation. In June 2022 retinal detachment
6.	Cardiovascular systems eg hypertension, high cholesterol heart failure thrombosis. **NO**	Diagnosed with hypertension in 2016. Managed in the private sector on amlodipine/Perindopril.
7.	Digestive systems eg hiatus hernia, stomach ulcer, spastic colon, gallstones. **NO** Scheme states he does mention the use of Adco-Rozenal indicated for ulcers but under another heading	10th June 2022: Booked for a dietitian to assist with a low potassium and phosphate diet. Advised not to use non-steroidal anti-inflammatory drugs
8.	Urinary systems eg kidney problems (infections, failure, dialysis, stones or bladder problems (infections, incontinence) **YES** Ongoing Adco-Roznal and Statin.	Diagnosed with end stage renal disease in May 2022, echo showed kidneys suggestive of chronic kidney failure. In June 2022 diagnosed with poor renal function indicating chronic kidney disease. 10 June 2022 prescribed lansoprazole to prevent your uraemic gastritis and calcium and vitamin D as well as statin to

		prevent complications of abnormal kidney function.
9.	Metabolic disease eg obesity, diabetes, porphyria, thyroid problems. **YES** Ongoing blood pressure Amlodipine	
16.	Operations undergone. Please state type and date. **YES**	Enlarged parathyroid note Cataract operation Detached retina
18.	Current medication used, not yet stated above. **NO**	On 10th June 2022 Lansoprazole, statin, calcium, vitamin D prescribed.
21.	Any symptoms experienced in the last 12 months, or other illness or medical condition that you are aware of not mentioned above, even if you or your dependent/s did not consult a doctor. **NO**	Prostate enlargement, end stage renal disease, hypertension, digestive problems and eye problems
22a	Male reproductive system for example prostate and testes problem. **NO**	Prostate abnormalities picked up on 26th May 2022 with features of a benign prostatic hyperplasia (BPH)

28. The Appellant states that the Respondent signed and acknowledged that it is his responsibility to make full disclosure of the required information and that he is not omitted or concealed any information. The Appellant states that on the application form it is clearly stated *"if after, or during my admission, as a member of Bestmed, it is found that any statement to information furnished by me was knowingly and/or willfully inadequate, incomplete or untrue Bestmed reserves the right to cancel the membership."*

29. The Appellant states that the Member had the duty to disclose. The Appellant further states that whether non-disclosure of a material fact was in good faith, deliberate or innocent is irrelevant - nondisclosure *per se* affords the aggrieved party (the Medical Scheme) the right to avoid the contract.
30. The Appellant advised that the test to be applied is not whether the member knew or ought to have known or intentionally or innocently did not disclose certain information. The question is whether there was non-disclosure of material information.
31. The Appellant states that "*material facts on Mr. A's end-stage renal disease, prostate abnormalities, hypertension, difficulties with his digestive system, current medication used, operations undergone and any symptoms experienced in the past 12 months were not properly disclosed. Full medical reports were not presented, and the severity of the medical conditions were certainly not disclosed."*
32. Due to the non-disclosure of material information Bestmed had the right to avoid the contract with Mr. A and accordingly the notice to terminate the membership in terms of Section 29(2) of the Act was justified.
33. Bestmed requests the appeal to be upheld and will tender all premiums received back to Mr. A.

RESPONDENTS SUBMISSION

34. The Respondent Mr A was a member of Bestmed. He was represented by Ms K, a Medical Broker.
35. The Respondent stated that he had applied for membership on 14th June 2022, for inception of membership on 1st July 2022. On 21st December 2022 the scheme retroactively cancelled the Member's membership due to the alleged non-disclosure of material information.
36. The Respondent submits that the member disclosed all his conditions and listed the prescribed medication for the aforesaid on the application form. As a result, the scheme imposed a three-month general waiting. The Respondent further submits that the Scheme did not impose a condition-specific waiting period.

37. The Respondent states that three months later the Member applied for dialysis. At this point the Scheme decided to terminate membership.

38. The Respondents further states that the Member followed the instructions on the application form and disclosed information under the headings he understood to be appropriate for his conditions, hence he signed the terms and conditions.

39. The Respondent further stated that an affidavit was signed stating that he was not aware of a prostate check or any prostate problems. He believed that these tests were routinely done for a person of his age in the public hospital.

40. In his oral testimony Mr. A stated that when he went to the hospital, he went for his eye problem and was told that he has renal problems and was referred to Knysna hospital. He avers that he was not aware of the extent or severity of his condition and categorically denies that there was any intention of non-disclosure.

DISCUSSION AND ANALYSES

The Appeals Committee considered papers filed in this appeal; the further submissions the party's made; the relevant provisions of the Medical Schemes Act; and the Rules of the Scheme.

41. It is common cause that:
    a. The Respondent applied to be a member of the Bestmed Medical Scheme on 14 June 2022.
    b. The Member's membership was terminated three months later for non-disclosure of material information.

42. Section 29(2) of the Medical Schemes Act[2] states:

> A medical scheme shall not cancel or suspend a member's membership or that of any of his or her dependents, except on the grounds of –
>
> (a) failure to pay within the time allowed on the medical scheme's rules, the membership fees required in such rules;
> (b) failure to repay any debt due to the medical scheme;

[2] Medical Schemes Act 131 of 1998

(c) submission of fraudulent claims;

(d) committing any fraudulent act; or

(e) the non-disclosure of material information

43. The Scheme relied upon section 29(2)(e) for termination of membership.

44. The crisp factor that needs to be determined is whether there was non-disclosure and whether that non-disclosure was material.

45. Section 29A(7) of the Medical Schemes Act indicates that: "*A medical scheme may require an applicant to provide the medical scheme with the 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."*

46. The key issue in order for an applicant to disclose a condition the applicant must be aware of the said diagnosis.

47. The Scheme alleges that in his application form Mr. A misrepresented himself in the following areas:

a. **Sensory organs**: The Scheme states that he did not elaborate the cataract operation and retinal detachment. However, they accept that it has been mentioned under eye operations. Not applicable to non-disclosure.

b. **Cardiovascular systems**: The Scheme states that this was answered in the negative. However, the Member disclosed it under metabolic disease. Therefore, there was no non-disclosure.

c. **Digestive systems**: The Scheme states that on 10th June 2022 Mr. A was booked for a dietitian to assist with a low potassium and phosphate diet, and he was advised not to use non-steroidal anti-inflammatory drugs. In the letter from Dr G she states that "*Mr. A presented to the Knysna hospital on the 10th of June 2022. She further states he was discussed with Dr S from George Regional Hospital. I was advised to book Mr. A for the dietician to assist with the low potassium and phosphate diet. He was advised not to use non-steroidal anti-inflammatory drugs. She further states that although Mr. A was not known to have a history of peptic ulcer disease, high cholesterol or bone density issues he was prescribed Lansoprazole to prevent the*

development of uraemic gastritis. He was started on calcium and vitamin D to protect his skeletal calcium stores." Mr. A could not disclose digestive system problems as according to Dr G, he did not have ulcers. The medication and diet were to try to prevent digestive system problems from occurring.

d. **Urinary systems:** The Scheme acknowledges that Mr. A answered YES. Therefore Mr. A did disclose that he has got urinary system problems. The issue that will be dealt with in greater detail is whether that is material.
e. **Metabolic diseases:** Mr. A reported on his hypertension in this section. Therefore, there was no non-disclosure of hypertension.
f. **Operations undergone**: The Scheme indicates that Mr. A answered in the affirmative. Therefore, there was no non-disclosure
g. **Current medication used not yet stated above:** The scheme says that on 10th June 2022 the following was prescribed lansoprazole, statin, calcium, Vitamin D. Mr. A disclosed the lansoprazole as Adco Roznal, as well as the statin and the vitamin D. The calcium was not disclosed but this is not material as any reasonable person will identify calcium as a vitamin. Therefore, there was no non-disclosure of the medication.
h. **Male reproductive system:** The Scheme states the prostate abnormalities were picked up on 26 May 2022. Mr. A indicated that he was not aware that a prostate test was performed. The Scheme presented a document obtained from the service provider, but the member indicates that he is not aware of this document nor the test result and signed an affidavit to this effect. The Respondent did not have knowledge of the test, therefore there is no non-disclosure.

48. The Scheme in its Heads of Arguments states in paragraph 20[3] "*From the facts above, it is clear that:*

20.1 Material facts on Mr. A's end stage renal disease, prostate abnormalities, hypertension, difficulties with his digestive system, current medication used, operations undergone and any symptoms the past 12 months were not properly disclosed. Full medical records were

[3] Page 87 of the bundle.

not presented, and the severity of the medical conditions were certainly not disclosed.

49. The analysis under paragraph 46 clearly shows that they were disclosures with regard to the arguments made by the Scheme. Where there were no disclosures, it was shown that Mr. A did not have knowledge of the issue. The issue of materiality will be dealt with below.

50. The Constitutional Court of South Africa[4] cited that the test for materiality is thus:

> *"Materiality of the non-disclosure lies in the fact that the Scheme was denied the opportunity to make an accurate assessment and mitigate its risk by imposing a statutorily empowered condition specific waiting period if it had been aware of the pre-existing medical condition."*

51. Section 29(1)(n) of the Act states "*the terms and conditions applicable to the admission of a person as a member and his or her dependents, which terms and conditions shall provide for the determination of contributions on the basis of income and the number of dependents or both the income and the number of dependents, and shall not provide for any other grounds, including age, sex, past or present state of health, of the applicant or one or more of the applicants dependents, the frequency of rendering of relevant health services to an applicant or one or more of the applicant's dependent other than for the provisions as prescribed."*

52. Section 29(1)(n) contains the two key principles of the Medical Schemes Act which are open enrolment and community rating. With open enrolment all registered open medical schemes must enroll any person who wishes to join the scheme. They may not discriminate against any person who wants to join the scheme and is able to pay the monthly membership contributions.

53. With community rating registered medical schemes are not allowed to charge members varying contributions for the same plan unless such contributions are based on the level of income of the applicant and or number of dependents.

54. A medical scheme cannot reject an application, but they can impose certain waiting periods for new members and or their dependents when joining a

[4] Swanepoel NO (Executor in the Estate Late Mignon Adelia Steyn) v Profmed Medical Scheme [2024] ZACC 23

medical aid scheme. There are generally two kinds of waiting periods: a general waiting period of up to three months and a condition-specific waiting period of up to 12 months.[5]

55. When the Scheme approved Mr. A's membership in a letter dated 24th June 2022 the Scheme imposed condition-specific waiting periods for up to 12 months for the following conditions:

    a. Hiatus hernia/peptic ulcer/acid reflux and its treatment and complications
    b. Hypercholesterolemia and its treatment and complications
    c. Hypertension and its treatments and complications
    d. Retinal detachment and its treatments and complications
    e. Vitamin D deficiency and its treatments and complications

56. The Scheme, therefore, listed almost every condition where Mr. A responded in the affirmative including the medication that was recorded and imposed a 12-month condition-specific waiting period. However, even though Urinary system was in the affirmative **(YES)**, a condition-specific waiting period of 12 months was not imposed.

57. When questioned about this the Scheme said that is because the details had not been given. However, the condition specific waiting periods as listed in paragraph 54 is also generalised. The Scheme could have included *Urinary system and its treatments and complications* as it had done for the other condition-specific waiting periods, but it did not.

58. The Scheme states in its Heads of Argument: "*It is on the basis of the factual information disclosed, that schemes are able to determine the overall risk and benefit they can consequently offer to members on the contributions they will levy."*

59. The test of materiality of the non-disclosure lies with the Scheme being given the opportunity to make an accurate assessment and mitigate its risk by imposing a statutorily empowered condition specific waiting period, but did not do this.

---

[5] Section 29A(1) one of the Medical Schemes Act: A medical scheme may impose upon a person in respect of whom an application is made for membership or admission as a dependent, and who was not a beneficiary of a medical scheme for a period of at least 90 days preceding the date of application:
(a) A general waiting period of up to three months and
(b) A condition specific-waiting period of up to 12 months

FINDING

60. The Scheme had been given the opportunity as with the other conditions, but did not impose the condition-specific waiting period. Therefore, there was no material non-disclosure.

61. The Appeal Committee finds that the Scheme's decision to terminate membership of Mr. A due to material non-disclosure was unjustified.

ORDER

62. Having considered the matter the Appeals Committee orders that:

    b. The appeal is dismissed.
    c. The decision of the Registrar is upheld.
    d. There is no order to costs.

Dated at Johannesburg on 4th December 2024

Dr KS Chetty (For and on behalf of the Appeals Committee)

Appeals Committee Panel:

Dr T. Mabeba.

Dr X. Ngobese

Ms P. Beck

Dr S Naidoo.

The majority of the panel concur.