

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

In the matter between: (1) REPORTABLE: YES/NO (2) OF INTEREST TO OTHER JUDGES: YES/NO (3) REVISED: 29 JUL 11 DATE VASAGEE GOVENDER N.O.	DELETE WHICHEVER IS NOT APPLICABLE SIGNATURE	Case No.: A 900/2008 Appellant
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And

PROFMED MEDICAL SCHEME

First Respondent

THE CHAIRPERSON OF THE APPEAL BOARD

FOR THE MEDICAL SCHEMES

Second Respondent

JUDGMENT

INTRODUCTION

1. The appellant, the executor of the deceased estate of Mahendran Neelapithambaran Govender ("the deceased"), appeals against the judgment of the Court *a quo* (Tolmay AJ, as she then was), in which she reviewed and set aside a decision of the second respondent, constituted in terms of section 50 of the Medical Schemes Act 131 of 1998 ("the Act"), which decision

confirmed the decision of the appeal sub-committee of the Council for Medical Schemes, that the first respondent was not entitled to terminate the deceased's membership of the first respondent *ab initio*.

2. The appeal comes before this Court with leave of the Court a quo.

THE PARTIES

3. The first respondent is **PROFMED MEDICAL SCHEME**, a medical scheme duly registered in terms of s 24 of the Act, having its principal place of business at 6 Anerly Road, Parktown, Johannesburg and having the necessary capacity to sue and be sued in its own name.
4. The second respondent is **THE CHAIRPERSON OF THE APPEAL BOARD FOR THE COUNCIL FOR MEDICAL SCHEMES**, cited in her capacity as such of the Appeal Board for the Council for Medical Schemes, as constituted in terms of section 50 of the Act.
5. The appellant has been identified in par 1. *supra*.

THE CHRONOLOGY AND SALIENT COMMON CAUSE FACTS

6. During 1999, the deceased applied to join the first respondent ("Profmed"). An application form was completed and dated the 1st August 1999. At the time the deceased was a member of PPS, the Professional Provident Society, a company associated with Profmed.

7. The deceased was at all relevant times a student without any significant income of his own. He was the son of dr P N Govender, a family physician who had at the time of the application being made to Profmed, been in practice for roughly forty years. His practice was conducted from the Merebank Medical Centre. His son, the deceased, stayed with his parents at all relevant times.
8. The application form was received at Profmed's Durban offices on or about the 9th November 1999 and faxed to Profmed's Johannesburg offices on the 12th November 1999 to be processed.
9. The application form was signed by the deceased, purportedly on the 1st August 1999. It emerged during the various stages of this protracted litigation that the deceased did not complete the form himself. In his own evidence under oath before the Disputes Committee he alleged that the broker who presented the application forms to him, Mr Ravi Naidoo, was responsible for the completion of the document. This was subsequently denied by Mr Naidoo in his evidence before the Appeal Board for the Council for Medical Schemes. The form was in all probability completed either by dr Govender or by the deceased's brother. The implications of the contradictory versions put up by the deceased and Mr Naidoo will be considered below.
10. The fact that the application form, allegedly signed on the 1st August 1999, was only received by Profmed's agent, Sanlam, at their Durban offices on the 9th November 1999 was never satisfactorily explained. Mr Naidoo alleged that he collected the completed application forms from dr Govender's practice toward the end of August 1999. He testified that he delivered the form to Sanlam within a few days, as he would normally do.

11. From Mr Lombard's evidence, which he gave in his capacity as Sanlam representative, it was clear that no application form addressed to Profmed could or would ever lie around in Sanlam's offices for months before being processed.
12. On the probabilities the application form only reached Sanlam's offices on or about the 9th November 1999. If this is correct, a shadow of irresolvable uncertainty is cast over the date upon and the manner in which the application form was completed. A reading of the record reveals no evidence that would dispel the uncomfortable suspicion that the application form was created only after the full extent of the tragedy that had befallen the deceased had become clear to the latter and to his family, particularly his father.
13. The deceased's application was accepted by Profmed. The effective date of acceptance was the 1st November 1999.
14. The application form did not disclose that the deceased was suffering from any medical condition that could be regarded as a significant risk to life and limb.
15. Neither the deceased nor his father or any other person acting on the deceased's behalf informed Profmed of a change that occurred in the deceased's health between the date appearing on the application form, 1st August 1999, and the date it was received by Profmed, 9th November 1999, the date the application was referred to the Johannesburg offices, the 12th November 1999, or the date upon which the deceased was accepted as a Profmed member.

16. The deceased was suffering from a dry cough during late September and the beginning of October 1999 and experienced night sweat and shortness of breath.
17. On the 7th October 1999 a chest X-ray revealed the presence of a large anterior mediastinal mass, in other words a growth in the deceased's chest. An open chest biopsy was performed on the 9th October 1999 and on the 14th October 1999 the deceased and his family received the devastating news that he was suffering from a non-Hodgkins aggressive B-cell lymphoma, a form of cancer.
18. Treatment of the cancer commenced immediately by chemotherapy and radiation. The treatment was administered by dr Landers, who prepared a first report dated 19th October 1999, in which he recorded that the deceased had been suffering from a dry, non-productive cough for two months prior to this report being prepared. After consultation with the deceased's attorney, Mr Omar, who represented both him and his deceased estate at all stages of the litigation, dr Landers inserted a note into his report that indicated that the cough had been present for only three weeks prior to the cancer being diagnosed.¹
19. The cancer treatment was obviously expensive and highly uncomfortable for the deceased.
20. The deceased's application and its acceptance was governed by Profmed's 1998 Rules that were applicable in 1999. Rule 15 thereof provides that Profmed may, *inter alia*, terminate a member's membership if the latter failed

¹ Dr Landers was severely taken to task by the chairperson and members of Profmed's Disputes Committee for having inserted the note and having failed to inform the Disputes Committee thereof during his evidence in chief before it.

knowingly to disclose the existence of relevant facts relating to the applicant's state of health prior to acceptance of the member as such.²

21. On the 15th December 1999 Dr P N Govender addressed a letter to Profmed in which he recorded that the deceased, at that stage still wholly dependant upon dr Govender, *"whilst in the process of seeking membership to PROFMED,... was diagnosed as having a virtual silent anterior mediastinal mass which on biopsy has been diagnosed as non Hodgkins Aggressive B cell Lymphoma highly responsive to Chemotherapy (CHOPS) and Radium Therapy.... I place my sons (sic) case before your Medical Board for appraisal and membership of Profmed, which will enable him to cover the services stated."*

22. This letter was sent to a Cape Town address that was incomplete. It was never received by Profmed. (Profmed does have an office in Cape Town at an address that differs significantly from the one that appears on the letter). It is the only letter ever addressed to Profmed by the deceased or any of his family members or representatives that was not sent to Profmed's Durban or Johannesburg offices.

23. This letter, it should be remarked in passing, clearly indicates, as will be dealt with in greater detail below, that dr Govender was fully aware of the importance of disclosing any medical condition that might arise between the

² The relevant part of the Rule reads as follows:

"FALSE STATEMENTS OR ABUSE OF PRIVILEGES –

15.1 If the Committee suspects that a member, at the time of his application for membership of the Fund or of any previous fund to which he belonged, or subsequent application for registration of a dependant, made false statements or knowingly failed to give full information on the state of health or past medical history of either himself or of his dependants, or if the Committee finds the member guilty of abusing the privileges of the Fund, it shall inform the member accordingly. If after the consideration of the reply by the member, the Committee is satisfied that its suspicions are well-founded, the Committee may, subject to Rule 37:

15.2 terminate the membership of such member with effect from such date as it may determine,, with the proviso that no contributions paid by the member shall be refunded to him...."

date of the application for membership of the medical fund and the date of acceptance thereof.

24. Once Profmed approved the deceased's application for membership, it dispatched a certificate of membership together with other membership documents to dr Govender's practice, which his sons used as contact address. Part of this documentation was a copy of Profmed's general conditions. Addendum "P" thereto mirrors the provisions of Rule 15 as it read at that stage.³

25. (Again in passing, it must be observed that the content of this addendum would have come as no surprise to dr Govender or his sons. Mr Naidoo testified that dr Govender dealt with numerous insurance claims as a family physician and would have conducted many medical examinations for insurance purposes. It is only reasonable to assume that the need to make full disclosure of relevant medical facts when concluding an agreement with a medical fund must have been discussed in the Govender household.)

26. No disclosure was made to Profmed after receipt of the membership documentation of the terrible fate that had befallen the deceased. On the 16th May 2000 dr Govender addressed a letter to Profmed in which he pleaded with Profmed to reimburse him in respect of the medical expenses he had incurred on behalf of his son since the previous year. The relevant portions of this letter read:

"In October 1999, we discovered to our horror and mortification that our very athletic, outdoor type son of 31 years old was suddenly smitten with an

³ "One of the conditions for honouring future claims, is that there should have been no deterioration in the state of health, or where applicable, in the state of health of any of the dependants, since completing the Application, if a Doctor or Specialist has been consulted in the interim or if any illness or injury has occurred or if there has been any deterioration in the state of the Member's health since applying for cover, the onus rests on the Member to disclose this in full to the Society, failure to do so may be prejudicial in the event of a claim"

anterior mediastinal mass realisation that our child was smitten with cancer was total devastation.

I subjected him to treatment not minding the cost. Checking on my medical aid was the last thought in my mind until in April 2000, I received intimation of the restructuring of the medical aid ...

It then dawned upon me that I had failed to utilise the services of the medical aid..."

27. In the meantime, the deceased pursued, with his father's assistance, payment of his medical expenses on the basis of his own Profmed membership. On the 5th July 2000 Profmed sent a letter to the deceased in response to various enquiries in this connection regarding the payment of the deceased's treatment, in which the medical fund emphasised that it required " ... *written confirmation of the date of diagnosis from (the deceased) in (his) capacity as a Profmed member.*"

28. In a letter dated the 7th July 2000 Profmed suspended all benefits of the medical fund due to the deceased's failure " ... *to notify the Society of your deterioration in health before being granted Profmed membership.*" Such suspension was to last until the full Profmed Board had taken a final decision.

29. At the same time the letter recorded that some of the deceased's medical treatment had in fact been paid under his father's medical aid. Profmed gave notice of its intention to reclaim these funds as they had been paid in error. The allegation that some of the deceased's medical costs had been claimed by dr Govender under his own medical aid was never challenged in evidence.

30. The deceased immediately declared a dispute with Profmed regarding the suspension of his benefits. As he was about to undergo a bone marrow

transplant, an urgent preliminary hearing was held before the Disputes Committee, which upheld Promed's decision to suspend the deceased's benefits pending cancellation of his membership being considered by Profmed's Board.

31. On the 26th and 27th June 2001, the Disputes Committee of Profmed, chaired by adv Mike Hellens SC, held a hearing at which the deceased testified. He was legally represented by Mr Omar, as stated above.

32. During his testimony the deceased confirmed that he was aware of the cautionary note on the application form for Profmed membership that a full disclosure of all relevant facts was required. He knew that a failure to observe frankness could lead to the agreement between the deceased and Profmed being cancelled.

33. The deceased had to admit that the change in his medical condition occurred before his application for membership was approved by Profmed and that he failed to inform the medical fund of this fact. His explanation was that the pending application "*...was the furthest thing from (his) mind.*"

34. At the latest from this date, therefore, it is common cause between the parties that Profmed approved the application while the true state of affairs regarding the deceased's health was not disclosed to it.

35. The Disputes Committee had no hesitation to reject the evidence presented by the deceased and his legal representative. It drew a negative inference from the fact that dr Govender did not testify and did not explain his letters to Profmed. It held that the application form was in all probability backdated and was definitely presented to Profmed after the deceased and his family were fully aware of the deceased' terrible medical prognosis. The deceased's

assertion that he had not thought of his pending application for membership during his illness was rejected as false. It was found that the deceased and his family had conspired to defraud Profmed by a backdated application form purportedly having been delivered to Sanlam in Durban prior to the discovery of the deceased's cancer.

36. The deceased appealed to the Appeal Sub-Committee of the Council for Medical Schemes. By the time of the hearing on the 26th May 2003 the deceased had passed away and his executor represented the estate. Without discussing the evidence presented to the Disputes Committee in any detail, and paying scant attention to any legal issue the Sub-Committee concluded that the deceased had to be believed that his pending application was furthest from his mind during the critical period. Consequently it could not be held “ ... *that the complainant (deceased) either falsely, or knowingly, deliberately failed to disclose his medical condition to the scheme.*”

37. The Sub-Committee further found that Profmed would in any event have been compelled to accept the deceased's application because it was prohibited from refusing any application on the grounds of any pre-existing medical condition by the provisions of section 29(1)(n) of the Act.

38. It also held that the unilateral suspension of the deceased's benefits on the 7th July 2000 was procedurally unfair.

39. Profmed appealed to the Appeal Board for the Council for Medical Schemes in terms of section 50(3) of the Act. The Appeal Board decided to call Mr Naidoo to give oral evidence for the first time at this stage of the litigation. The ruling, against Profmed's objection, was unsuccessfully taken on review by the medical fund. That application was dismissed on the 8th February 2005.

40. Mr Naidoo testified that he delivered the application forms and collected the completed forms from dr Govender's practice at the end of August or the beginning of September 1999. He delivered these forms to Sanlam within a few days. He was unable to explain the huge delay that occurred thereafter before the applications were processed as from the 9th November 1999.
41. The Appeal Board accepted Naidoo's evidence, concluded that the delay in finalising the applications could not be explained but that Naidoo's evidence excluded any possibility that the applications had been backdated with fraudulent intent as held by the Dispute Committee. The Board did not refer to Lombard's evidence in this connection at all, but concluded that the deceased's and his brother's application forms had been completed by their father.
42. The Board further held that the deceased's and his father's failure to disclose that the deceased had been diagnosed with cancer was immaterial given the desperate circumstances that prevailed at that time in the Govender household. The Board referred in this regard to *Joubert v Absa Life Ltd* 2001 (2) SA 322 (W), '*... to the extent relevant.*' The Board added in par [117] of its judgment: '*In our Judgment (sic), the deceased, and/or his father, acting as reasonable men in the circumstances, did the best they could. Whilst they did not inform Profmed within 18 days of the initial period spoken of above, there is evidence that shortly after they received such Profmed Acceptance Notification, they did communicate (or attempt to communicate) a full disclosure by letter, at least.*' (The letter referred to is dr Govender's letter of the 15th December addressed to the incomplete Cape Town address.)

43. The Board consequently held that the failure to advise Profmed within the period of eighteen days between the discovery of the deceased's illness and his acceptance as member of the medical fund had to be excused and Profmed was not entitled to terminate the deceased's membership on the grounds of non-disclosure of essential information.

44. The Board found support for its approach in the provisions of section 29(1)(n) of the Act, which reads:

"29. Matters for which rules shall provide.—(1) The Registrar shall not register a medical scheme under section 24, and no medical scheme shall carry on any business, unless provision is made in its rules for the following matters:

.....

(n) The terms and conditions applicable to the admission of a person as a member and his or her dependants, which terms and conditions shall provide for the determination of contributions on the basis of income or the number of dependants or both the income and the number of dependants, 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 applicant's dependants, the frequency of rendering of relevant health services to an applicant or one or more of the applicant's dependants other than for the provisions as prescribed. "

46. As the section provides for what was termed during the various stages of these proceedings as 'open enrolment', the Board was of the view that Profmed was in any event not entitled to refuse the deceased's application for membership, even had it been aware of the deceased's illness. The failure to disclose a serious illness detected before acceptance of an application for membership was therefore immaterial.

47. The Board therefore held that Profmed's appeal had to be dismissed and ordered that the estate ought to be reimbursed urgently in respect of all medical expenses incurred to treat the deceased's condition.

48. After having made its original order, the Board supplemented this determination by quantifying an award to the estate after a dispute arose between the latter and Profmed. This supplementary award was made without prior reference to the parties, some three months after the original award..
49. Profmed launched a review to this court against both decisions. Tolmay AJ, (as she then was), reviewed the Board's decision and set aside both awards. The first award was set aside on the grounds that the Board failed to take relevant evidence into consideration, particularly the differences in the evidence of the deceased and Mr Naidoo, and failed to accord sufficient weight to the failure on the part of the deceased to make full disclosure of his medical condition while his application for membership was pending. The Board was furthermore held to have failed to properly consider, interpret and appreciate the conditions of acceptance that governed the deceased's acceptance as a Profmed member and consequently dismissed Profmed's appeal on irrelevant grounds. The second award was set aside because the Board was clearly *functus officio* once the first award had been made and was therefore not empowered to issue any further order, particularly one as procedurally flawed as the one under discussion..
50. The estate appealed with leave of the court *a quo* to this court. The various grounds of appeal will be dealt *seriatim* and the relevant decisions of the Board and the court *a quo* will be considered in the light thereof.

51 THE ALLEGED INAPPLICABILITY OF REVIEW PROCEEDINGS

- a) The appellant argued that a review application was inapplicable as the Board's decision was not such that it could be reviewed, particularly in that it could not be said that the Board's decision was one which no reasonable decision-maker could take in terms of s 6(2)(h) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").
- b) This submission is untenable. As will be shown below, the Board failed very significantly to consider relevant evidence, made a wrong assessment of in particular Naidoo's evidence as a result thereof; failed to appreciate the import of the conditions attaching to an application for Profmed membership, committed a serious error of law in concluding that the failure to disclose the deceased's medical condition could be disregarded as being excusable and committed a further grave error of law in failing to appreciate the effect of the so- called 'open enrolment'. Its reference to the decision of *Joubert v Absa Life Ltd, supra* is misplaced as the decision provides no support for any of its conclusions. Not only section 6(2)(h) of PAJA, but also section 6(2)(d) and 6(2)(f)(ii)(cc) apply to the Board's decision. In the result, its decision is one that no reasonable decision maker could come to. It was therefore clearly reviewable.

52. WHETHER THE DECEASED (AND HIS FATHER) *KNOWINGLY* FAILED TO INFORM PROFMED OF HIS CHANGED MEDICAL CONDITION.

- a) It is clear that, for the reasons set out above, no-one in the Govender household could ever have been under any misapprehension that it was imperative for the acceptance of the deceased's application for Profmed membership to disclose the serious illness that he had been diagnosed with.
- b) Even if it could be argued that the application form was indeed signed on the 1st August 1999 – which, as will be demonstrated below, is highly unlikely – there can be no debate about the fact that the deceased and his family failed for at least eighteen days to disclose this fact.
- c) Given the extreme cost of the medical procedures the deceased was subjected to immediately his cancer was diagnosed, it is simply impossible that neither the doctor father nor the patient son could not have turned their thoughts to the question who would foot the very significant medical bills that would have to be met. The very suggestion that no thought would be given to this elephant in the room is outlandish and must be rejected out of hand.
- d) The conclusion that the failure was deliberate – or, worse, that the application had in fact not been made before November 1999 – is unavoidable in the light of the fact that the deceased contradicted the evidence of Mr Naidoo regarding the identity of the person who completed the application form. If dr Govender did in fact do so, as opined by the Board, the failure to tender his evidence to explain the date upon and the circumstances under which the form was completed justifies a negative inference. Mr Naidoo's explanation

that the form was delivered to Sanlam at the end of August 1999 – for which he has no proof of delivery or acknowledgment of receipt – appears highly suspect. There simply is no explanation how two applications that were duly delivered could have languished in Sanlam's offices for longer than two months undetected by anyone and then emerge for processing in the ordinary course of events. Mr Lombard's evidence in this regard was simply ignored by the Board. The fact that the only two applications to have suffered this fate happen to be the two delivered by Mr Naidoo only heightens the suspicious circumstances. If one adds the strange feature that Naidoo never enquired from Profmed about the fate of the applications – nor did the Govenders, not even after the discovery of the deceased's cancer – while their processing took far longer than usual, the discomfort becomes significant indeed. If the letter by dr Govender to Profmed to the incomplete Cape Town address is added to these unsatisfactory features, as well as the fact that he did claim for his son's medical expenses under his own medical aid, all of which remains unexplained, the conclusion is inescapable that the application form was completed and delivered to Profmed at the beginning of November 1999. If so, the Dispute Committee was correct in holding that the application represents a fraud upon Profmed.

- e) The Board never considered a single one of the above considerations and therefore clearly ignored relevant and significant evidence.
- f) But even if the conclusion that the Govenders attempted to defraud Profmed is incorrect, there can be no argument about the fact that the deceased and his father **knowingly** failed to disclose the truth to Profmed. Dr Governder's

professional appreciation of the need to take a medical fund into their confidence has been dealt with above. The deceased was aware of the content of the application form which included a reference to the need for openness and honesty in his dealings with Profmed.

- g) The word '*knowingly*' has been interpreted to mean '*fully aware*' or '*with full knowledge of the facts*'. It can also mean '*well informed*' or '*possessed of the necessary knowledge*'. Mark Twain writes in Chapter XXVII of *A Connecticut Yankee*: "*There are wise people who talk ever so knowingly and complacently about 'the working classes'.*" In legal parlance the word has been accepted as meaning to have knowledge of the facts from which a conclusion –often negative – is sought to be drawn: *Philotex (Pty) Ltd & Others v Snyman & Others; Braitex (Pty) Ltd & Others* 1998 (2) SA 138 (SCA) at 143A – B; per Howie JA (as he then was); *Triptomania Two (Pty) Ltd & Others v Conolly & Another* 2003 (3) 558 (C) at 562 B – G. In *Howard v Herrigel & Another NNO* 1991 (2) SA 660 (A) Goldstone JA (as he then was) said the following at 672G – 673I:

"In the Court a quo, Morris AJ was clearly aware that for an order to be made against Howard under section 424(1) it had to be established that he was "knowingly a party to the carrying on of the business in the manner aforesaid", i.e. "recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose". With regard to the necessary element of knowledge, Morris AJ correctly observed in his judgment that:

".... where the legislature has specifically introduced the word 'wetens' or 'knowingly' specific knowledge is to be proved, not by the respondent/defendant (or by the accused) but on the part of the accuser."

The reference to an "accused" arises from the provisions of section 424(3) which read as follows:

"(3) Without prejudice to any other criminal liability incurred, where any business of a company is carried on recklessly or with such intent or for such purpose as is mentioned in subsection (1), every person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be guilty of an offence."

In my opinion the word "knowingly" must be given the same meaning in both subsections (1) and (3) of section 424. In S v Parsons en h Ander **1980 (2) SA 397** (D) at 400 F, Leon J held that the word meant "met kennis van die feite". That conclusion finds strong support from the judgment of Schreiner JA in R v Thornton and Another **1960 (3) SA 600** (A). The statutory provision there relevant was section 10(1) of the Rents Act, 43 of 1950. It provided that an offence would be committed if a lessor "knowingly required or permitted a lessee to pay" a rent for controlled premises exceeding that determined by a rent board. At 611 F - 612 A, the learned Judge of Appeal said the following:

" Although we are not here concerned with the general question of mens rea in statutory offences it is useful, I think, to have regard to the well-known statement by STEPHEN, J., in Cundy v Le Cocq, **13 Q.B.D. 207** at p. 210, that

'it is necessary to look at the object of each Act that is under consideration to see whether and how far knowledge is of the essence of the offence created'.

In sec 10(1) we have the word "knowingly", so that no question of whether knowledge is essential arises; but the question of how far it is essential remains. The general rule is that even where knowledge is required it need not extend beyond the facts into the legal consequences flowing therefrom. So in Twycross v Grant, 2 CPD D 469, a civil case dealing, inter alia, with the meaning of "knowingly issuing" a prospectus in which mention was omitted of certain contracts which should have been mentioned, COCKBURN, C.J., at p. 541, said -

'Next, was the prospectus issued by the defendants 'knowingly' within the meaning of the section? It was contended that the term 'knowingly' must be taken to mean with a knowledge that the contracts were such as the statute required to be referred to; consequently, that, the jury having found that the mention of the contracts was omitted from the prospectus from a bona fide belief that such mention was

unnecessary, the contracts had not been 'knowingly' omitted. But this is to misconceive the meaning of the term. 'Knowingly issuing' means neither more nor less than issuing with a knowledge of the existence of the contracts within the section, and the intentional omission of them from the prospectus. Ignorance or mistake of the law cannot be admitted as an excuse for disobeying an Act of Parliament.'

I read the last sentence in its context as providing a reason for interpreting 'knowingly' as meaning 'with knowledge of the facts.'"

After referring to other authorities, the conclusion of Schreiner JA was expressed thus at 612 H:

"In my view the word 'knowingly' in sec 10(1) means only that the party providing the premises must know of the determination and that he is receiving from the party who is being given use and occupation sums in excess of the determination. It matters not what his views are on the nature of the legal relationship between himself and the other party or on the proper legal description of the sums received by him." "

- h) The Board paid no heed to these authorities which leave no room for the suggestion that a failure to act in accordance with the Govenders' knowledge of the facts could be excused on the grounds of emotional distress or the reasonableness of their actions under the circumstances. The Board's conclusions in this regard represent a grave misdirection and resulted in a failure to act in accordance with the correct interpretation of the conditions that applied to the application for membership. Its decision must therefore be reviewed, as the Court a quo correctly concluded.

53. WHETHER THE PROVISIONS OF SECTION 29(1)(n) CAN BE RELIED UPON TO EXCUSE THE FAILURE TO DISCLOSE THE TRUE STATE OF AFFAIRS TO PROFMED

- a) It was argued at all stages of this litigation on the estate's behalf that the so-called 'open enrolment' decreed by this sub-section of the Act rendered the failure to disclose the truth irrelevant, as the medical fund, Profmed, was in any event obliged, so the argument ran, to accept the deceased as a member, regardless of his medical condition.
- b) This argument ignores the fundamental reason why Profmed and any other medical fund is entitled to insist upon honest and unlimited disclosure of all relevant facts. The duty to disclose is coupled in Rule 15, quoted above, with the prohibition of false claims being made against Profmed. The true purpose of the demand for full disclosure is to establish the basis of *bona fides* upon which the member and Profmed must interact with one another as long as the successful applicant remains a member. If an applicant fails to observe this standard, as the deceased manifestly did, Profmed is entitled to terminate the relationship that cannot be conducted on any other basis but that of mutual trust.
- c) The nature of any medical condition the applicant suffers from when the application is made is not relevant in this context – the honesty of the communication made to the medical fund is the touchstone of the application form properly completed.
- d) The very existence of the provisions of section 29(1)(n) – of which the Govenders were obviously aware – provides further proof of the fact that the application form was completed long after the deceased had been diagnosed

with cancer. The open enrolment provision ensured that the deceased could safely disclose all medical conditions he suffered from. Had he done so in November 1999, his father would have had to bear all the medical expenses incurred before his acceptance as a Profmed member. The probabilities are that the intention was to persuade Profmed to accept responsibility for these disbursements by backdating the application form.

- e) Again, the Board completely misconstrued the facts and the law in respect of this finding, rendering it liable to be reviewed and set aside.

54. THE SETTING ASIDE OF THE SECOND DECISION

The Board took the second decision that dealt with a material aspect of the dispute between the parties without prior reference to them, without affording them an opportunity to deal with the intended order and long after the proceedings had been concluded. It was so clearly *functus officio* and its second decision was so obviously irregular that no more than the mere recital of the facts is required to establish that the second decision must be reviewed and set aside. Any argument to the contrary is ill-founded.

55. THE ALLEGED FAILURE TO REMIT THE MATTER TO THE BOARD.

In the light of the above findings it is clear that only one conclusion could possibly have been reached by the Board, namely that Profmed's appeal should have been upheld. It would have been a mere exercise in delay to remit the matter, apart from the fact that the Board had clearly demonstrated an

inability to grasp the issues it was confronted with. There is no merit in this ground of appeal.

56. THE COUNTER APPLICATION

From the above facts it emerges clearly that the deceased was at no stage entitled to any benefits as a Profmed member. The alleged failure to grant a hearing to the deceased prior to his suspension is therefore irrelevant – it is clear that he exercised every possible right at his disposal since the suspension. The counter application is doomed to fail and need not be discussed any further.

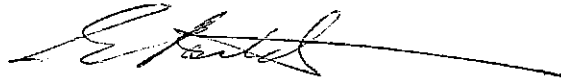
THE ORDER

The appeal is dismissed with costs. Such costs are to include the costs of two counsel.

Signed at Pretoria on this *27th* day of November 2011.

E BERTELSMANN

Judge of the High Court



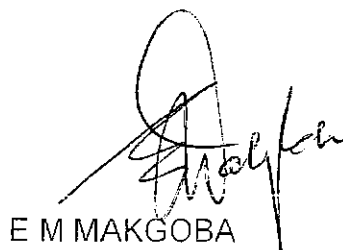
I agree



F G FRELLER

Judge of the High Court

I agree



E M MAKGOBA

Judge of the High Court