



**IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)**

CASE NUMBER 09/29184

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| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED. |

25 September 2009

FHD van Oosten

In the matter between

STEVEN JOEL EPEL

APPLICANT

and

DISCOVERY MEDICAL SCHEME

FIRST RESPONDENT

DISCOVERY HEALTH (PTY) LTD

SECOND RESPONDENT

COUNCIL FOR MEDICAL SCHEMES

THIRD RESPONDENT

J U D G M E N T

VAN OOSTEN J:

[1] The applicant Dr Epel, is and has been a practicing psychiatrist since 1998. The vast majority of his patients are members of and enjoy medical health protection afforded by the first respondent medical scheme which is administered by the second respondent (Discovery). The third respondent (the Council) has understandably not entered the fray. The application arises from a dispute between Dr Epel and Discovery concerning his method of billing Discovery. The procedure followed was for Dr Epel to bill his patient

which was then submitted to Discovery for payment directly to him. The treatment given is identified in the bill by way of so-called billing codes in accordance with Discovery's billing manual. One thereof is relevant for present purposes, which is code 2975 applied in respect treatment consisting of one hour of psychotherapy. Dr Eppel's experienced difficulty in applying the codes in general and he says they were anything but user-friendly. For that reason he decided to make use of code 2975 as a "composite or cumulative code" to apply also in instances where strictly speaking the psychotherapy lasted for less than one hour but his treatment of the patient also encompassed extensive time spent by him *inter alia* involving blood and radiological investigations, both pre- and post consultation with the patient. During November 2001 Discovery queried Dr Eppel's use of *inter alia* code 2975 where a complaint had been received of a patient that the full consultation fee for one hour had been charged for a consultation of less than 5 minutes duration. Dr Eppel responded with a detailed explanation for his use of the code which was accepted "as satisfactory" by Discovery. Dr Eppel accordingly continued to charge on code 2975 as he had done before.

[2] During December 2008 Discovery informed Dr Eppel that they had conducted an investigation into his practice relating to irregularities concerning the manner in which he billed his patients. Protracted correspondence and meetings between Dr Eppel and Discovery followed but the issues could not be resolved. In a letter dated 16 March 2009 Discovery informed Dr Eppel that

As from today, Monday 16 March 2009, we will not pay any further claims from your practice. Furthermore, we will not refund any of your patients who pay you directly either.

On 4 June 2009 Dr Eppel lodged an "appeal in terms of s 48(2) of the Act" against Discovery's "decision" contained in the March letter (the appeal). Discovery in turn filed a complaint with the Health Professions Council of South Africa against Dr Eppel. Dr Eppel was advised that the appeal by way of the operation of law automatically suspended Discovery's "decision" but Discovery took the opposite view. The Council I have been informed, is busy processing the appeal and has confirmed that it is arranging a date for the

hearing of the appeal. Hence the present application which is aimed at obtaining *interim* relief pending finalisation of the appeal.

[3] The relief sought in this application in essence is for a declarator that the decision taken by Discovery in the letter not to pay any further claims from Dr Eppel's practice is suspended in terms of s 48(2) of the Medical Schemes Act 131 of 1998 (the Act) pending the decision of the Council on the applicant's appeal in terms of section 48(1) of the Act. The applicant further seeks an order restoring the status *quo ante* as far as payments of his claims by Discovery are concerned, pending the outcome of the appeal.

[4] The application is opposed by Discovery principally based on the contention that the applicant's reliance on s 48 (1) and (2) of the Act is misconceived. I will revert to this aspect later in the judgment.

[5] At the outset it is necessary to consider the nature of the relationship that existed between Dr Eppel and Discovery. The applicant evidently premised the application as will become apparent on an interpretation of s 47 and 48 of the Act and therefore must have assumed that their relationship is governed by statute. The assumption is clearly wrong. The applicant states that their relationship has, for a number of years been conducted in terms of an agreement styled Discovery's Premier Rate Agreement. Preciously little has been revealed concerning the agreement. All that has been stated by Dr Eppel is that he billed his patients in terms of that agreement which were then submitted to Discovery for payment to him directly. In the answering affidavit this aspect is taken one step further: firstly, a copy of a document (a fax cover sheet with annexure thereto) signed by Dr Eppel on 4 June 2006 evidencing below his signature his "agreement to participate in the Discovery Health Premier Rate Agreement, subject to 30 days written notice by either party" is annexed and secondly, in regard thereto it is stated

The applicant has however acted in breach of its provisions by employing billing codes which misrepresent the nature and/or duration of his actual attendances, to the prejudice both of his patients and of the First Respondent and its members.

Except for the two page annexure containing information on the Discovery Health Premier Rate arrangement, nothing has been made known concerning the terms of the agreement. What remains beyond question however is that there exists a contractual relationship between the parties. As much was readily and in my view correctly, conceded by counsel for the applicant. But it goes further, whatever those terms may be Discovery in legal phraseology has alleged a breach/repudiation of the agreement by Dr Eppel entitling them to cancel the agreement. Discovery's allegations in this regard stand uncontroverted. There is nothing before me to show that they were not entitled to do so. The logical conclusion flowing from this is that the provisions of the Act accordingly do not apply and that the applicant's reliance on those provisions indeed is misconceived. For this reason alone the application is doomed to failure.

[6] The argument before me proceeded on an interpretation of the Act. Although I have found that the Act is not applicable I consider it necessary to briefly express my views on the arguments presented in respect of which I in any event would also have found against the applicant. The starting point is to consider the purpose of the Act as stated in the preamble thereof which paraphrased is to provide for the registration, operation and control of medical schemes and importantly the protection of members of medical schemes. What is seemingly absent from the Act are any provisions relating to the relationship between medical schemes and medical practitioners who after all are the other class of beneficiaries of medical schemes. It is perhaps convenient at this juncture and for the ease of reference to quote the provisions of s 47 and 48 in full:

47. Complaint – (1) The Registrar shall, where a written complaint in relation to any matter provided for in this Act has been lodged with the Council, furnish the party complained against with full particulars of the complaint and request such party to furnish the Registrar with his or her written comments thereon within 30 days or such further period as the Registrar may allow.

(2) The Registrar shall, as soon as possible after receipt of any comments furnished to him or her as contemplated in subsection(1), either resolve the matter or submit the complaint together with such comments, if any, to the Council, and the Council shall thereupon take all such steps as it may deem necessary to resolve the complaint.

48. Appeal to Council – (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.

(2) The operation of any decision which is the subject of an appeal under subsection (1) shall be suspended pending the decision of the Council on such appeal.

It is common cause that the applicant has not lodged a complaint within the meaning of s 47. Discovery is of the view that the applicant could possibly only have relied on these sections had he lodged a complaint. The contention is unassailable. In any event what the applicant has endeavoured to do in this application is to force into the provisions of s 48 the situation where a medical practitioner is dissatisfied with any decision taken against him by the medical scheme. The attempt sparked off interesting and even ingenious arguments concerning the interpretation to be afforded to s 48 (1) brought about by the (as so often happens) the much debated disjunctive of conjunctive appearance of the words “or dispute” in s 48(1) which absence the reference to a dispute in s 47, led counsel for the applicant to conclude that Discovery’s letter constituted a “decision” relating to a “dispute” in regard to the billing codes used by Dr Eppel in respect of which an appeal lies and was noted to the Council which then of course would bring into operation the suspension of the decision provided for in sub s (2) on which the present application is based. The contentions in my view cannot be sustained for the plain reason that it simply falls foul of the clear intention of the legislature which was to provide for a mechanism to deal with complaints and appeals in relation to matters provided for in the Act. The applicant stands in a relationship vis-à-vis Discovery that is purely contractual in nature upon which it is impossible to paste those provisions cut from the Act. Any attempt do so by employing interpretive measures merely leads to artificial and fanciful arguments. As counsel for the respondents aptly and correctly put it, it could never have been the intention of the legislature to render any decision even one by a medical scheme in relation to any dispute whatsoever, subject to s 48(1) and (2).

[7] The application is dismissed with costs.

**FHD VAN OOSTEN
JUDGE OF THE HIGH COURT**

COUNSEL FOR THE APPLICANT

APPLICANT'S ATTORNEYS

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***DATE OF HEARING
DATE OF JUDGMENT***

***17 SEPTEMBER 2009
25 SEPTEMBER 2009***