



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 336/22

In the matter between:

CARLO SWANEPOEL N.O.
Executor in the Estate Late
MIGNON ADELIA STEYN

Applicant

and

PROFMED MEDICAL SCHEME

Respondent

Neutral citation: *Swanepoel N.O. (Executor in the Estate Late Mignon Adelia Steyn) v Profmed Medical Scheme* [2024] ZACC 23

Coram: Zondo CJ, Madlanga ADCJ, Bilchitz AJ, Chaskalson AJ, Dodson AJ, Majiedt J, Mathopo J, Theron J and Tshiqi J

Judgments: Majiedt J (unanimous)

Heard on: 14 March 2024

Decided on: 9 October 2024

Summary: Medical Schemes Act 131 of 1998 — substitution — transmissibility of right to just administrative action — procedural fairness — material non-disclosure

ORDER

On appeal from the Full Court of the High Court of South Africa, Western Cape Division, Cape Town, the following order is made:

1. The late filing of the application for leave to appeal is condoned.
2. The application for substitution is granted and the executor of the deceased estate is substituted for Ms Mignon Adelia Steyn as applicant.
3. Leave to appeal is granted.
4. The appeal is upheld.
5. The order of the Full Court is set aside and substituted with the following:
“The appeal is dismissed with costs, including the costs of two counsel where so employed.”
6. The respondent must pay the costs, including the costs of two counsel.

JUDGMENT

MAJIEDT J (Zondo CJ, Madlanga ADCJ, Bilchitz AJ, Chaskalson AJ, Dodson AJ, Mathopo J, Theron J and Tshiqi J concurring):

Introduction and background

[1] This is an application for leave to appeal to this Court against a judgment of the Full Court of the High Court of South Africa, Western Cape Division, Cape Town, which upheld an appeal against an order from a single judge of that Division. Special leave to appeal was refused by the Supreme Court of Appeal and a reconsideration application to the President of that Court in terms of section 17(2)(f) of the Superior Courts Act¹ met the same fate. The main issue concerns a medical scheme's

¹ 10 of 2013.

right to cancel a member's membership due to the non-disclosure of allegedly material information in terms of section 29(2)(e) of the Medical Schemes Act² (MSA). There is also an application to substitute the original applicant, Ms Mignon Adelia Steyn (Ms Steyn), who passed away on 12 January 2023, with her attorney and the executor of her estate, Mr Carlo Swanepoel (Mr Swanepoel). Lastly, an application condoning the applicant's late filing of the record is unopposed.

[2] The respondent is Profmed Medical Scheme (Profmed), a medical scheme established under the MSA.

[3] With regard to the condonation application, the delay is negligible and the explanation for the default adequate. Condonation is therefore granted.

[4] Ms Steyn was a member of Profmed until her membership was terminated by Profmed pursuant to her alleged failure to disclose material information on the prescribed membership application form when she applied for membership of the scheme. Upon termination of her membership, Ms Steyn lodged a complaint with the Registrar of Medical Schemes (Registrar) contesting the termination. The Registrar dismissed the complaint. Ms Steyn unsuccessfully appealed to the Council for Medical Schemes (Council) against the Registrar's findings. She then appealed the decision of the Council to the Appeal Board, also without any success.

[5] Ms Steyn launched an application in the High Court for the review and setting aside of the decision of the Appeal Board. The High Court granted the application, setting aside the ruling of the Appeal Board and ordering Profmed to honour the policy. Profmed's appeal to the Full Court was upheld. As stated, a further application for special leave to appeal and a reconsideration application to the Supreme Court of Appeal were unsuccessful. The unsuccessful review application in

² 131 of 1998.

the High Court was directed at the findings of the Appeal Board. In this Court, ultimately the assessment on the merits will thus have to be in respect of those findings.

Factual matrix

[6] The facts are mostly common cause, or not seriously disputed. In November 2015, Ms Steyn applied for medical aid insurance with Profmed. She completed the necessary medical forms with the assistance of her husband and a representative from Profmed, a Ms Susan Brits. Subsequently, Profmed accepted Ms Steyn and her dependants as members, and their membership officially commenced on 1 January 2016. Under the heading “Medical Questionnaire” the application form contained an important caution:

“This section is extremely important. Any misstatement in, or omission from this form may lead to refusal to admit any claims for treatment given, suspension, or termination of membership. A 12-month condition-specific waiting period may be applied to any condition declared, subject to the requirements of the Medical Schemes Act, 1998. It is essential to declare all conditions/illnesses/symptoms, no matter how insignificant they may seem Disclosure is not limited to the example conditions cited below. Related, consequent, and suspected conditions must also be disclosed.”

[7] The questionnaire contained a question, “[d]id you or any of your dependants ever suffer from any of the following diseases or medical conditions or disorders, or receive treatment, advice, and/or medication for any of them?” This was followed by 31 questions, one of which read: “Any affection of the digestive system, liver, and gallbladder (e.g. gastric ulcers, hernia, poor digestion, gallstones, spastic colon)?” Ms Steyn answered the latter question in the negative, despite having undergone a gastroscopy and colonoscopy which resulted in a diagnosis of gastritis.

[8] In the course of 2016, Ms Steyn and her dependants underwent various medical procedures, amounting to R400 000. The claims for these procedures were submitted to Profmed for reimbursement. In a letter dated 7 November 2016, Profmed terminated Ms Steyn’s membership with retrospective effect from the date of inception,

1 January 2016. The claims for reimbursement were thus declined. The termination was based on the alleged non-disclosure of specific medical conditions, namely—

- (a) gastric ulcer;
- (b) breast aspiration;
- (c) wrist pains; and
- (d) hip problems.

[9] In a further letter dated 13 December 2016, Profmed stated that its grounds for termination were Ms Steyn's non-disclosure of—

- (a) an MRI lumbar spine;
- (b) a breast aspiration; and
- (c) *a gastroscopy and colonoscopy for a gastric ulcer, where the final diagnosis was gastritis.*

Proceedings before the Registrar

[10] Following the termination of her medical aid, Ms Steyn lodged a complaint with the Registrar under section 47 of the MSA for a ruling that the termination of her membership was unlawful and that Profmed be ordered to honour its commitments to her and her dependants under the policy.³ In response, Profmed relied on the grounds contained in its letter of 13 December 2016.⁴ Profmed contended that Ms Steyn had failed to disclose that she had—

- (a) a lumbar spine MRI on 3 December 2015;

³ Section 47 reads:

- “(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 stir 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.”

⁴ Enumerated in the preceding paragraph.

- (b) a breast aspiration on 2 February 2015;
- (c) a gastroscopy and colonoscopy for gastric ulcers on 4 March 2015; and
- (d) a migraine, abdominal pain and a gastric ulcer for which she was admitted to hospital on 4 September 2016.

[11] The Registrar understood the condition of gastritis, mentioned in Profmed's letter of 13 December 2016, to be a gastric ulcer. In reaching this finding in favour of Profmed, the Registrar relied on *Mahomed*⁵ which, in turn had relied on *Mahadeo*,⁶ that the test for materiality is objective, with the question being: would the reasonable person have considered the particular fact reasonably relevant to the risk and its assessment by the insurer? The Registrar concluded that Profmed's decision to terminate the membership was justified, as any reasonable person in Ms Steyn's position would have known to disclose the gastroscopy and colonoscopy procedures, as they were material. The Registrar also concluded that the failure to provide this material information hindered Profmed's ability to perform a comprehensive risk assessment on Ms Steyn's application, potentially resulting in the imposition of a waiting period had the information been properly disclosed.

Proceedings before the Council

[12] In her appeal against the Registrar's decision to the Council, Ms Steyn set out her defences to the three grounds raised by Profmed as justification for terminating her medical insurance. To demonstrate that she had subsequently successfully applied for membership of a competitor of Profmed, Ms Steyn annexed to her affidavit in the proceedings before the Council her application form to Momentum Medical Scheme (Momentum Form). In the Momentum Form, Ms Steyn disclosed, among others, that she had a gastric ulcer and a hip arthroscopy.

⁵ *Mahomed v Genesis Medical Scheme*, unreported judgment of the High Court of South Africa, Western Cape Division, Cape Town, 649 17351/2010 (15 September 2010).

⁶ *Mahadeo v Dial Direct Insurance Limited* 2008 (4) SA 80 (W) (*Mahadeo*) at para 17.

[13] Profmed did not file an answering affidavit. During the hearing, and in addition to the original three grounds which Profmed had invoked in its 13 December 2016 letter and before the Registrar, it placed reliance on the Momentum Form to raise new grounds for the termination of Ms Steyn’s membership, being the non-disclosure of—

- (a) a hip arthroscopy;⁷
- (b) a heart murmur;
- (c) kidney stones; and
- (d) fibromyalgia.⁸

[14] Before the Council, Ms Steyn complained that she was prejudiced by Profmed’s reliance on new grounds as she had not been given the opportunity to make submissions related to the Momentum Form. The Council considered these new grounds as it found that the appeal was wide, and so it was not restricted to the record of the proceedings before the Registrar.

[15] The Council formulated the test for materiality 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 a pre-existing medical condition.”

[16] The Council found in Profmed’s favour. It concluded that, while the MRI scan and breast aspiration were not matters that warranted disclosure, the non-disclosure of the gastritis, although a “lesser condition than a gastric ulcer”, was material, but made no finding regarding the hip arthroscopy. The Council thus dismissed the appeal.

⁷ A diagnostic procedure where a surgeon uses a device with a small camera to see inside the hip joint.

⁸ A chronic health condition that causes musculoskeletal pain, fatigue, and insomnia.

Proceedings before the Appeal Board

[17] Ms Steyn appealed against the Council's decision to the Appeal Board in accordance with section 50(3) of the MSA.⁹ The Appeal Board upheld the Council's decision; it held that the non-disclosure of gastritis and a hip arthroscopy were material non-disclosures. With regard to gastritis, the Appeal Board said that gastritis and gastric ulcers are distinct; gastritis is less serious and more common. It then applied the following test to establish materiality: section 29A(2)(a) of the MSA entitles medical schemes to impose a waiting period for conditions not covered within the prescribed minimum benefits (PMBs).¹⁰ Gastritis was not covered within the PMBs. Had gastritis been disclosed, Profmed would have imposed a waiting period. According to the Appeal Board, the non-disclosure prevented Profmed from doing so and the non-disclosure of gastritis was consequently material. As gastritis was not listed as a PMB by Profmed, Ms Steyn was obliged to disclose gastritis in her application form.

[18] The Appeal Board stated that there was nothing precluding it from considering the new grounds emanating from the Momentum Form, because Profmed only became aware of the information later and it was a wide appeal. The Appeal Board did not elaborate on why it considered the appeal as a wide one. Thus, held the Appeal Board, the non-disclosure of the hip arthroscopy was also material as Ms Steyn suffered from arthritis, most likely osteoarthritis. It held further that a hip arthroscopy is also not a

⁹ Section 50(3) reads:

“Any person aggrieved by a decision of the Registrar acting with the concurrence of the Council or by a decision of the Council under a power conferred or a duty imposed upon it by or under this Act, may within a period of 60 days after the date on which such decision was given and upon payment to the Registrar of the prescribed fee, appeal against such decision to the Appeal Board.”

¹⁰ Section 29A(2)(a) reads:

“(2) A medical scheme may impose upon any person in respect of whom an application is made for membership or admission as a dependant, and who was previously a beneficiary of a medical scheme for a continuous period of up to 24 months, terminating less than 90 days immediately prior to the date of application—

(a) a condition specific waiting period of up to 12 months, except in respect of any treatment or diagnostic procedures covered within the prescribed minimum benefits.”

PMB and so non-disclosure prevented Profmed from applying a condition-specific waiting period.

High Court

[19] Following the decisions of the Registrar, Council and Appeal Board (collectively, the Appeal Bodies), Ms Steyn brought a review application to the High Court, in which she sought—

- (a) the review and setting aside of the Appeal Bodies' rulings; and
- (b) the substitution of the Appeal Board's ruling with an order—
 - (i) declaring Profmed's termination unlawful and setting it aside, and
 - (ii) directing Profmed to honour its contract with Ms Steyn.

[20] In her review application, Ms Steyn argued that the Appeal Board had erred by relying on the additional grounds for termination raised by Profmed based on the Momentum Form (that is, the hip arthroscopy), and the Appeal Bodies had all erred by deeming gastritis to be a material condition. Ms Steyn submitted that Profmed had only relied on three grounds before the Registrar, and the additional grounds were raised for the first time in oral argument before the Council. Given the principle that parties must know the case that they are called to meet and in respect of which they must adduce evidence, and the principle of hearing the other side, Ms Steyn argued that the Appeal Bodies had erred by—

- (a) considering the additional grounds;
- (b) not allowing her to adduce evidence regarding the additional grounds;
- (c) not directing Profmed to adduce evidence regarding the additional grounds; and
- (d) not taking into account that no evidence was adduced to demonstrate that the non-disclosures resulted in Profmed's decision to terminate.

[21] According to Ms Steyn, the Appeal Bodies had also erred by deeming gastritis to be a material condition. The Council's conclusion that gastritis is material was made absent any factual basis; on the contrary, the evidence showed that gastritis was

immaterial. Ms Steyn contended that no evidence was presented by Profmed to show that the alleged non-disclosures were material.

[22] Ms Steyn submitted that the Appeal Board also erred in that it applied the incorrect test for materiality. She submitted that the test is not determined with reference to the PMBs, but that, where a condition is specifically mentioned, a reasonable person ought to conclude that it has to be disclosed. Gastritis was not mentioned by name and was therefore immaterial.

[23] Ms Steyn contended that, in terms of section 6 of the Promotion of Administrative Justice Act¹¹ (PAJA), the Appeal Board's ruling was—

- (a) materially influenced by an error of law (section 6(2)(d) of PAJA);
- (b) arbitrary and/or capricious (section 6(2)(e)(vi) of PAJA);
- (c) not rationally connected to its reasons (section 6(2)(f)(ii)(dd) of PAJA);
and
- (d) one where irrelevant considerations were taken into account (section 6(2)(e)(iii) of PAJA).¹²

[24] Profmed countered by arguing that the matter at hand was a review and not an appeal, emphasising that Ms Steyn could not merely argue that the Appeal Bodies' decisions were wrong. Profmed argued further that Ms Steyn was expected to disclose the full information regarding any ailments, conditions, illnesses or symptoms, regardless of how insignificant they may seem. Lastly, Profmed submitted that

¹¹ 3 of 2000.

¹² That section provides:

“(2) A court or tribunal has the power to judicially review an administrative action if—
 ...
 (e) the action was taken—
 ...
 (iii) because irrelevant considerations were taken into account or relevant considerations were not considered”.

Ms Steyn failed to address the information regarding her Momentum Form when given the opportunity to do so before the Appeal Board.

[25] The High Court¹³ identified three issues to be determined—

- (a) whether the hearing before the Appeal Board was procedurally fair;
- (b) whether the Appeal Board was correct in its finding that Ms Steyn had a duty to disclose the hip arthroscopy and gastritis, and that the non-disclosure was material; and
- (c) whether to remit the matter to the Appeal Board if it found in Ms Steyn's favour.¹⁴

[26] In relation to the procedural fairness of the Appeal Board's decision, the High Court held that:

- (a) The Appeal Board should have allowed Ms Steyn to lead evidence on the hip arthroscopy.
- (b) The Appeal Board had made a finding against Ms Steyn without giving her an opportunity to lead evidence or be heard.
- (c) The Appeal Board incorrectly relied on new facts raised by Profmed at the last minute without giving Ms Steyn an opportunity to respond to it.
- (d) Ms Steyn was prejudiced in that she was called upon to answer a case during the hearing of the matter which was not pleaded, and was confronted with a finding that adversely affected her based on facts that were not properly presented and ventilated before the tribunal.
- (e) The Appeal Board took irrelevant considerations into account and ignored relevant considerations in terms of section 6(2)(e)(iii) of PAJA.
- (f) The hearing before the Appeal Board was procedurally unfair, as envisaged in section 6(2)(c) of PAJA.¹⁵

¹³ *Steyn v Registrar of Medical Schemes* 2021 (3) SA 551 (WCC) (High Court Judgment).

¹⁴ High Court Judgment above n 13 at para 14.

¹⁵ High Court Judgment above n 13 at para 36. Section 6(2)(c) of PAJA provides:

[27] Regarding the materiality of the non-disclosure of gastritis, the High Court held that the onus rested on Profmed to prove materiality and that the non-disclosure induced Profmed to conclude the contract and to assume the risk it otherwise would not have accepted.¹⁶ In this respect, the Court cited *Regent Insurance*.¹⁷ The Court also referred to *Oudtshoorn Municipality*,¹⁸ where it was held that the question is whether a reasonable person in the position of the applicant would have considered that the risk should have been disclosed. It cited *Qilingele*¹⁹ as authority that the enquiry as to the materiality of the misrepresentation is focused on a particular assessment; the evidence of the underwriter is crucial; and evidence of the insurer's particular approach to materiality would be relevant. The High Court held that the Appeal Board's use of whether a condition falls within the PMBs as a test for materiality has the consequence that all conditions that are not within the PMBs must be disclosed during application. If the insured were to fail to disclose an *immaterial* condition that is not on the PMB list, then a medical scheme may terminate. This, held the High Court, is flawed.²⁰

[28] According to the High Court, Profmed did not lead evidence to prove the materiality of the alleged non-disclosure of the gastritis and that such non-disclosure induced it to contract with Ms Steyn.²¹ It held that the Appeal Board's finding in this regard was influenced by an error of law.²² The High Court held further that a hip arthroscopy is merely a diagnostic procedure, which showed that there was nothing

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- “(2) A court or tribunal has the power to judicially review an administrative action if—
 . . .
 (c) the action was procedurally unfair.”

¹⁶ High Court Judgment above n 13 at para 40.

¹⁷ *Regent Insurance Company Ltd v King's Property* [2014] ZASCA 176; 2015 (3) SA 85 (SCA) (*Regent Insurance*).

¹⁸ *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* [1984] ZASCA 129; 1985 (1) SA 419 (A) (*Oudtshoorn Municipality*) at 435G-I.

¹⁹ *Qilingele v South African Mutual Life Assurance Society* [1992] ZASCA 189; 1993 (1) SA 69 (A) (*Qilingele*) at 75B-D.

²⁰ High Court Judgment above n 13 at para 46.

²¹ *Id* at para 47.

²² *Id*.

amiss with Ms Steyn's hip. A reasonably prudent person in her position would not have deemed this relevant to the risk of the insurer. It also concluded that gastritis is a common condition which a reasonable, prudent person would not deem as relevant to the risk of the insurer.

[29] Having found in favour of Ms Steyn, the High Court elected not to remit the matter to the Appeal Board, because it reasoned that the matter had already been adjudicated upon in multiple forums and remitting the matter to the Appeal Board would be of no consequence. It concluded that remittal would simply result in the incurring of further costs and the delay of justice.²³ The High Court thus set aside the Appeal Board's decision, declared Profmed's termination of Ms Steyn's membership unlawful, and set it aside and ordered Profmed to honour the contractual commitments under Ms Steyn's policy.²⁴

Full Court

[30] Profmed appealed to the Full Court, which reversed the decision of the High Court.²⁵ Regarding the issue of procedural fairness relating to the hip arthroscopy, the Full Court held that the evidence in the Momentum Form was relevant and the Appeal Board was correct to consider it. The evidence complained of was introduced by Ms Steyn herself and the High Court had erred in saying that Profmed raised new facts during argument without giving Ms Steyn an opportunity to respond, and that she was called upon to answer a case that had not been pleaded.²⁶ It was for Ms Steyn to set out her argument and the grounds for her appeal, and she manifestly failed to do so. This did not render the proceedings unfair.²⁷ The Full Court held further that

²³ Id at para 49.

²⁴ Id at para 50.

²⁵ *Profmed Medical Scheme v Steyn*, unreported judgment of the High Court of South Africa, Western Cape Division, Cape Town, 60 A 171/2021 (26 April 2022) (Full Court Judgment).

²⁶ Id at para 30.

²⁷ Id at para 31.

administrative bodies are generally not required to comply strictly with the rules of evidence and there is also usually no onus of proof applied.²⁸

[31] Regarding the error of law, the Full Court held that the Appeal Board did not commit an error of law in finding the non-disclosure of the “gastric condition” to be material.²⁹ It held that the test for materiality is whether a reasonable person would have considered the information reasonably relevant to the risk and this aspect must have become apparent from the detail required in the application form.³⁰ Because the gastric condition required a hospital visit for a gastroscopy and colonoscopy, a reasonable person would have considered these facts reasonably relevant to the risks and subsequent assessment by Profmed, held the Court.³¹

[32] The Full Court further held that the High Court had failed to have due regard to the distinction between appeal and review – it erroneously delved into the merits.³² The Full Court also held that there were no exceptional grounds for the High Court’s substitution of the Appeal Board’s decision. It thus upheld Profmed’s appeal and set aside the High Court’s decision.

[33] Following upon her unsuccessful application to the Supreme Court of Appeal for special leave to appeal and the subsequent unsuccessful reconsideration application to the President of that Court, Ms Steyn now seeks leave to appeal in this Court. But before engaging with that application, the substitution application bears consideration.

Issues

[34] These are the issues that arise:

²⁸ Id at para 32. The Court cited *Lambert v Director of Census* 1956 (3) SA 452 (T) at 455A-B.

²⁹ Full Court Judgment above n 25 at para 27.

³⁰ Id at para 25.

³¹ Id at para 26.

³² Id at paras 34-5.

- (a) The application to substitute Ms Steyn as applicant with her attorney and the executor of her deceased estate, Mr Swanepoel, and relatedly, Mr Swanepoel's standing.
- (b) Jurisdiction and leave to appeal.
- (c) If leave to appeal is granted, the merits of the appeal. This entails determining—
 - (i) whether the hearing before the Appeal Board was procedurally fair;
 - (ii) whether the Appeal Board was correct in its finding that Ms Steyn had a duty to disclose the hip arthroscopy and gastritis, and that the non-disclosure was material; and
 - (iii) whether to remit the matter to the Appeal Board if we were to find in Ms Steyn's favour or to substitute this Court's decision for that of the Appeal Board.

Substitution application

Parties' submissions

[35] The timeline of events relating to the substitution application is of importance. Ms Steyn passed away on 12 January 2023, after her application for leave to appeal (main application) had been filed in this Court (on 22 November 2022) and the filing of an answering affidavit in opposition to the main application (on 5 December 2022). On 9 May 2023, the attorney who had been acting for her throughout, Mr Swanepoel, was appointed as executor to Ms Steyn's deceased estate. On 8 August 2023, this Court issued directions relating to a number of issues in the main application. In response, on 22 August 2023, written submissions were filed, inexplicably citing the late Ms Steyn as the applicant at a time when Mr Swanepoel had already been appointed as the executor of her deceased estate. Profmed's written submissions were filed on 5 September 2023 and, on 3 November 2023, this Court directed the parties to file full written submissions in the main application. They were filed in January 2024 (the applicant) and March 2024 (the respondent) respectively.

[36] On 23 January 2024, written submissions were filed, citing Mr Swanepoel as the applicant and only thereafter, on 24 January 2024, was a notice of substitution and an affidavit delivered to Profmed and filed with this Court on 29 January 2024. Further affidavits and supplementary written submissions in the substitution application followed.

[37] When confronted at the hearing about the inordinate delay in the filing of the substitution application and the filing of written submissions on 22 August 2023 in the name of the late Ms Steyn, counsel explained that Mr Swanepoel laboured under the *bona fide* impression that under this Court's rule 7, any action was automatically stayed and that substitution followed as a matter of course. On his behalf it was submitted that in his role as the executor of Ms Steyn's estate, Mr Swanepoel may litigate on behalf of the estate. Mr Swanepoel maintains that monetary benefits to the deceased estate would include the R400 000 in medical claims due by Profmed under the policy.

[38] Profmed opposes the substitution application and submits that Ms Steyn's passing is material to the application for leave to appeal. It contends that Mr Swanepoel had deliberately chosen not to disclose Ms Steyn's death when he had responded to this Court's directives in Ms Steyn's name, even though she had already passed away. Profmed argues that no reasons have been provided for the timing of the substitution application and the lack of disclosure of Ms Steyn's passing. It contends that the effect of this failure to disclose has been that this Court has considered the application for leave to appeal in the absence of knowledge of material facts that may (or would) have influenced its decision to issue the directives on 8 August 2023, or to dismiss the application for leave to appeal without more.

[39] Profmed emphasises further the significance of the fact that, prior to issuing the directives referred to above, this Court was deprived of the opportunity to consider whether the executor had any right to the relief sought in the review, and whether the estate would have the same right to administrative justice in terms of PAJA, to which

Ms Steyn may have been entitled. Profmed answers this question in the negative – it submits that there is no authority for the proposition that a person’s right to administrative justice survives their death and is transferred to their deceased estate. Thus, according to Profmed, Mr Swanepoel does not, in his capacity as the executor, have the authority to litigate on behalf of Ms Steyn’s deceased estate in respect of the review application. Consequently, Profmed submits that the application for substitution is legally untenable and ought to be dismissed.

Evaluation

[40] Rule 7 reads:

“7 Change of Parties

- (1) If a party dies or becomes incompetent to continue any proceedings, the proceedings shall thereby be stayed until such time as an authorised representative or other competent person has been appointed in the place of such party, or until such incompetence ceases to exist.
- (2) Where an authorised or other competent person has been so appointed, the Court may, on application, order that such authorised or competent person be substituted for the party who has so died or become incompetent.”

[41] Self-evidently, the rules of this Court cannot grant substantive rights in respect of the substitution application – they merely govern aspects of procedure. Reliance on rule 7 in and of itself does not resolve the substantive questions of law relating to whether the cause of action and rights being litigated are transmissible to the estate or the heirs. Rule 7(2) provides that *an authorised person may apply to be substituted* for another party. It bears emphasis that “authorised” self-evidently must mean *authorised by law*.

[42] The approach, generally, is to treat substitution applications in the same manner as applications to amend pleadings. The overriding consideration is whether

substitution would cause irreparable prejudice to the other party. As it was explained in *Tecmed*:³³

“The settled approach to matters of this kind follows the considerations in applications for amendments of pleadings. Broadly stated it means that in the absence of any prejudice to the other side, these applications are usually granted . . . the risk of prejudice will usually be less in the case where the correct party has been incorrectly named and the amendment is sought to correct the misnomer than in the case where it is sought to substitute a different party. But the criterion remains the same: will the substitution cause prejudice to the other side which cannot be remedied by an order for costs or some other suitable order, such as a postponement?”³⁴

[43] Profmed contends that the prejudice it suffers by virtue of the substitution application is twofold – first, that it has been required to deal with an application for leave to appeal absent relevant and material facts that may have influenced this Court’s decision to hear the application for leave to appeal rather than simply dismissing it. Second, that should the substitution be granted, no case has been made out as to the entitlement of the executor to the relief sought in the main application or the application for leave to appeal.

[44] Central to the enquiry with regard to substitution is whether Ms Steyn’s PAJA review claim is transmissible to her deceased estate. If not, then absent any review claim that the deceased estate itself may have independently and separate from that of Ms Steyn, substitution is not legally tenable. In the High Court, the applicant sought an order that the Appeal Board’s ruling “be reviewed and set aside”; that its order be substituted with orders (a) holding that the termination of membership by Profmed “is ruled as being unlawful and is set aside”; and (b) an order that Profmed “honour [its] contractual commitments . . . under the policy”. This was plainly a review application against the decision of the Appeal Board. Counsel accepted that the decision sought to be reviewed is that of the Appeal Board, although an order was originally sought in the

³³ *Tecmed (Pty) Ltd v Nissho Iwai Corporation* [2009] ZASCA 143; 2011 (1) SA 35 (SCA) (*Tecmed*).

³⁴ *Id* at para 14. See also cases cited there.

notice of motion against all three of the first three respondents' decisions. As an aside, judging by the averments in the applicant's founding affidavit there, the review was brought in the High Court on both common law and PAJA grounds. That is impermissible – all reviews must now be brought under PAJA, which has subsumed the common law review grounds.³⁵

[45] The claim in the notice of motion to “honour contractual commitments” is undoubtedly one that is wholly dependent upon the review of the Appeal Board's decision – that much was conceded by counsel. That claim, if upheld, had a direct financial interest for Ms Steyn, namely payment of her medical claims by Profmed. If the claim was unsuccessful, she would have had to make payment from her own pocket. This financial interest is an important factor that bears consideration in determining the transmissibility of the claim. A further important factor is the nature of the claim, which is the next topic for discussion.

[46] In *Mkhize*, this Court clarified that the discussion of the nature of a right and its transmissibility focuses specifically on the relief that was originally sought by the deceased in the matter.³⁶ That case concerned a dispute regarding the appointment as *iNkosi* (traditional leader) of the Mbuyazi Traditional Community in KwaZulu-Natal. The original applicant had launched a review application against the Premier of KwaZulu-Natal after the latter had withdrawn his recognition as *iNkosi*. The original applicant passed away amidst the litigation and there was then an application by the respondents that, amongst others, the review application be dismissed. This application was premised on the argument that the rights of the deceased to be recognised as *iNkosi* were personal to him and that these rights were not transmissible to his heirs or anyone else. The contention was that there was no legal basis upon which the executrix or any

³⁵ *Minister of Health v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign as Amici Curiae)* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at para 96.

³⁶ *Mkhize N.O. v Premier of the Province of KwaZulu-Natal* [2018] ZACC 50; 2019 (3) BCLR 360 (CC) (*Mkhize*) at para 53.

heir could lay claim to the traditional leadership position, in the absence of a declaratory order confirming the deceased as the rightful *iNkosi*.

[47] This Court held in *Mkhize* that, when interpreting a judgment or order, one must consider the “manifest purpose” of that judgment or order and the court’s intention must be ascertained primarily from the language of the judgment or order which must be read as a whole. It stated that “[n]otably, the discussion of the nature of the right and its transmissibility focuses specifically on the relief that was originally sought by the deceased – his reinstatement as *iNkosi*”.³⁷ In that matter, this Court disagreed with the Supreme Court of Appeal’s finding that the review and monetary claim are distinguishable.

[48] In our law of succession the estate of a deceased person does not include rights and liabilities of a purely personal nature attached to that person and that have terminated with the death of the deceased.³⁸ The right to fair administrative action can be claimed by a deceased estate, but then the right is that of the estate, not the deceased, inasmuch as that right forms part of the assets and liabilities in the estate and thus falls in the estate.³⁹ That has a direct impact on what can be claimed under the right. Here, this Court’s approach in *Mkhize* suggests that the personal claim to just administrative action of Ms Steyn is transmissible to her deceased estate.

[49] In this instance, we must holistically consider the components of the claim relating to the contractual performance relief and the claim for judicial review relief. Viewed thus, it appears to me that the judicial review and contractual relief are transmissible. If Ms Steyn had only claimed reinstatement as a member with no attempt to recover unpaid claims, the proceedings would be purely personal in nature and would perish with her. Where, however, the claim is for the reimbursement of expenses

³⁷ Id at para 51.

³⁸ Hofmeyr et al *The Law of Succession in South Africa* 3 ed (Juta & Co Ltd, Cape Town 2023) at para 1.9.

³⁹ Gildenhuys “Wills and Succession” in *LAWSA* 4 ed (2023) vol 44 at para 231.

pursuant to a wrongful termination of membership – which has a financial component – the claim would be transmissible.

[50] The cause of action for review must be transmissible where, as is the case here, the estate has a financial interest in the outcome of the review, and not only a mere interest in the right underlying the review. This approach finds support in *Mkhize*.⁴⁰

[51] This raises a different question whether a decision of a medical scheme (or any entity of that scheme) constitutes administrative action as defined in section 1 of PAJA.⁴¹ If it is administrative action, for the reasons given earlier, this may

⁴⁰ *Mkhize* above n 36 at paras 51 and 53.

⁴¹ Section 1 reads:

“‘administrative action’ means any decision taken, or any failure to take a decision, by—

- (a) an organ of state, when—
 - (i) exercising a power in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation; or
- (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include—
 - (aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79(1) and (4), 84(2)(a), (b), (c), (d), (m), (g), (h), (i) and (k), 85(2)(b), (c), (d) and (e), 91(2), (3), (4) and (5), 92(3), 93, 97, 98, 99 and 100 of the Constitution;
 - (bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121(1) and (2), 125(2)(d), (e) and (m), 126, 127(2), 132(2), 133(3)(b), 137, 138, 139 and 145(1) of the Constitution;
 - (cc) the executive powers or functions of a municipal council;
 - (dd) the legislative functions of Parliament, a provincial legislature or a municipal council;
 - (ee) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;
 - (ff) a decision to institute or continue a prosecution;

not render it transmissible if the review relief sought is entirely personal to the deceased. Judicial review would be competent only if the decision challenged is administrative action. Once that has been established, one must then enquire whether on the facts and the pleadings it is a claim for judicial review that is transmissible.

[52] This question was answered in the negative in *Pennington*.⁴² At the hearing, counsel for the applicant accepted that *Pennington* appears to be against the applicant's case. It seems to me that *Pennington* was not correctly decided. Instead, as stated, *Mkhize* supports the view that the PAJA claim is transmissible from Ms Steyn to the estate, insofar as it concerns the decision of the Appeal Board.

[53] The following passage from *Mkhize* is instructive:

“Beyond this, however, the review application was brought by the deceased in terms of the [PAJA], in terms of which anyone may institute proceedings for the judicial review of an administrative action. A review under PAJA determines, finally, whether an administrative action is lawful or not. It is an objective exercise, the outcome of which binds not only the litigating parties, but everyone else. *The review of administrative action attaches therefore not to the party bringing the review, but to the exercise of public power itself. It stands to reason then, that Ms Mkhize had standing both to bring and be substituted in the review application by virtue of her position as executrix of the estate and status as the legal guardian of her minor son, Phathokuhle.* This is not only because she has a direct and substantial interest in the matter, but also because she was entitled to review the Premier's administrative action under section 6(1) of PAJA. The Supreme Court of Appeal did not have explicit regard to the nature of a PAJA review, but the outcome it reached is compatible with previous

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- (gg) a decision relating to any aspect regarding the appointment of a judicial officer, by the Judicial Service Commission;
 - (hh) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or
 - (ii) any decision taken, or failure to take a decision, in terms of section 4(l)”.

⁴² *Pennington v Friedgood* 2002 (1) SA 251 (C) (*Pennington*) at paras 41-2; referred to with apparent approval in *Trustees for the time being of the Legacy Body Corporate v Bae Estates and Escapes (Pty) Ltd* [2021] ZASCA 157; 2022 (1) SA 424 (SCA).

decisions of this Court Given that this Court has held that the review of public power is a constitutional matter, it follows that a broad approach to standing must be taken in such reviews. That PAJA was enacted to give effect to the constitutional right to just administrative action in section 33 of the Constitution, and so reviews under PAJA are a way of enforcing the right in section 33, also implies that the broad standing requirements in section 38 should apply to the review of administrative action.”⁴³ (Emphasis added).

[54] The decision of the Appeal Board appears to me to constitute administrative action. In terms of the definition of administrative action in PAJA, the Appeal Board’s decision is by an organ of state exercising public powers and performing public functions under legislation. The Appeal Board exercises a public function – its establishment under the MSA serves the purpose of scrutinising decisions of the Council and, indirectly, those of the Registrar (since those decisions are appealed to the Council). This is very similar to internal appeals within other public bodies. Thus, the Appeal Board is performing a public function when it exercises its statutory appeal power over a decision of a scheme to terminate the membership of one of their members. The conclusion is therefore inescapable that the Appeal Board is an organ of state whose decisions constitute administrative action.

[55] In this regard, the MSA is designed to limit the contractual freedom of medical schemes by placing regulatory control over a range of their decisions (including decisions affecting their relationship with their members, like the decisions in the present case). Importantly, though, those decisions directly impact members’ fundamental right to access to medical care.

[56] In sum therefore, Ms Steyn’s PAJA claim to just administrative action is transmissible to her deceased estate. The decision of the Appeal Board constitutes administrative action and is not merely personal in nature. The application for substitution must therefore be granted. In view of this conclusion, a related matter

⁴³ *Mkhize* above n 36 at paras 69-70.

which requires brief consideration, is Mr Swanepoel's standing to bring this application.

Mr Swanepoel's standing

[57] Section 38 of the Constitution provides a broad scope for legal standing.⁴⁴ Mr Swanepoel seeks to act on behalf of the late Ms Steyn in a review application in which he alleges that a right in the Bill of Rights has been infringed. He plainly falls within the purview of section 38. Further, given that the review of public power is a constitutional matter, a broad approach to standing must be taken.⁴⁵ As stated, this is a PAJA review, which seeks to determine whether administrative action is lawful or not, the outcome of which binds not only litigating parties, but everyone else. The review of administrative action therefore attaches not to the party bringing the review (the applicant), but to the exercise of public power itself. These rights are thus not of a "purely personal nature". Therefore, self-evidently Mr Swanepoel has standing to be substituted in the review application.

[58] There is another compelling basis on which he has standing – by virtue of section 6(1) of PAJA, which states that any person may institute proceedings in a court or tribunal for the judicial review of administrative action. It would be legally untenable to conclude in the face of section 6(1), that these rights are merely personal, or to liken them to claims such as one for damages under the *actio iniuriarum* (infringements of

⁴⁴ Section 38 reads:

"Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members."

⁴⁵ *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* [2012] ZACC 28; [2013] 3 BCLR 251 (CC) at paras 45 and 47.

personality rights). For all these reasons, Mr Swanepoel has the requisite standing to bring this PAJA review application and to be substituted for the late Ms Steyn.

Jurisdiction and leave to appeal

[59] The grounds of jurisdiction outlined in section 167(3)(b) of the Constitution have been the subject of a number of judgments of this Court and they are well established (by that I must not be understood to say they are without complexity; they are not). Before us, Profmed accepts that the subject of the appeal before the High Court and the Full Court concerned administrative action in the form of a decision taken by the Appeal Board. However, Profmed submits that the Full Court judgment is manifestly not a decision on a constitutional issue. According to Profmed, although the applicant has attempted to suggest that there are constitutional issues that arise from the Full Court judgment, it is clear that no such issues arise. What was required, contends Profmed, was at least some basis for asserting that the Full Court failed to uphold the applicant's constitutional rights relating to the Appeal Board proceedings. It submits that no such case has been made out in this Court.

[60] By virtue of the finding that the review claim is transmissible from Ms Steyn to the deceased estate, this Court's constitutional jurisdiction is engaged. The issue relating to standing bears on section 38 of the Constitution⁴⁶ and that of judicial review implicates section 33 of the Constitution.⁴⁷ The procedural unfairness component of the review is a constitutional issue beyond the factual disputes about the materiality of the non-disclosures of the various conditions.

[61] The appeal also raises a point of law of general public importance – whether the materiality of a non-disclosure on the objective common law test constitutes an adequate ground permitting a medical aid to terminate membership, or whether, as has

⁴⁶ Id.

⁴⁷ Id at paras 28-9.

been most recently reaffirmed in *Regent Insurance*,⁴⁸ an insurer must also prove that the non-disclosure induced it to enter the contract. This is an arguable point of law of general public importance, because it will govern all cases where a medical aid seeks to terminate a member's membership on grounds of non-disclosure.

[62] We must decide whether the argument advanced by Profmed that the reference to “the non-disclosure of material information” in section 29(2)(e) of the MSA means that it is sufficient for a medical scheme to prove that the non-disclosure was objectively material for it to be able to terminate the membership without also having to prove the additional common law element of showing that the non-disclosure, in fact, induced it to enter into the contract. This argument was necessary, because Profmed failed to adduce any evidence to show that it was, in fact, induced to enter into the contract by the non-disclosure. If we were to find that the statutory test does not do away with the inducement element in the common law test, the law point will be particularly important, because that would entail that the statutory test and the common law test are the same. A medical aid wanting to terminate membership on grounds of non-disclosure will have to show what its membership acceptance practices are in relation to applicants who make full disclosure and have similar health histories to that of the member they want retrospectively to terminate for non-disclosure.

[63] A further consideration why this Court's constitutional jurisdiction is engaged is that medical aids provide a gateway for many in South Africa to the right to have access to health care services. Decisions of the Appeal Board may thus in certain (I calculatedly do not say *all*) circumstances implicate that right. It is, to some extent, analogous to the position of the South African Social Security Agency and its contracted entity, Cash Paymaster Services, whose role was considered in *Allpay II*⁴⁹ in respect of the right to social assistance in section 27(1)(c) and (2) of the Constitution to

⁴⁸ *Regent Insurance* above n 17 at para 23.

⁴⁹ *Allpay Consolidated Investments Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC) (*Allpay II*).

be “the gatekeeper of the right to social security [which] effectively controls beneficiaries’ access to social assistance”.⁵⁰ To that extent, medical aid schemes perform similar functions in respect of healthcare.

[64] It is furthermore in the interests of justice that leave be granted to decide this matter so that clarity be provided regarding the issue of the materiality of the non-disclosure of medical conditions in respect of membership of medical aids, a matter that affects a significant number of people.

Merits

Applicant’s submissions

[65] The applicant’s PAJA review grounds have been set out earlier.⁵¹ Regarding the hip arthroscopy, the applicant submits that a hip arthroscopy is merely a diagnostic tool, and an insured cannot be expected to disclose a non-existent condition. According to the applicant, the Full Court judgment has the consequence that, should an insured fail to disclose each and every visit to medical establishments or to doctors’ appointments, irrespective of the diagnosis (material or immaterial), the insurer will have the right to terminate medical cover. The applicant contends that the procedural unfairness lies in Profmed initially relying on three grounds of termination and later adding further grounds (the hip arthroscopy). In addition, Ms Steyn was then deprived of the opportunity to lead evidence pertaining to the hip arthroscopy.

[66] In respect of gastritis, the applicant submits that the Appeal Board concluded that, because gastritis is not on the list of PMBs, it is to be treated as a material condition. The applicant points out that section 29(2) of the MSA makes no mention of PMBs. It is submitted further that PMBs have no bearing on the materiality of non-disclosures, because it is used in a completely different context. If the Appeal Board’s reasoning is followed, this would mean that an insured who applies for medical insurance can

⁵⁰ Id at para 55.

⁵¹ In [23].

circumvent section 29(2)(e) of MSA by not disclosing any of the plethora of medical conditions listed in the PMBs.

[67] The applicant submits that the Full Court overlooked the fact that Profmed's application form did not require the disclosure of diagnostic procedures. It also overlooked that the gastroscopy had established that Ms Steyn did not have a gastric ulcer, but merely gastritis and that Profmed had presented no evidence that gastritis gives rise to a material risk on Profmed's part. According to the applicant, the High Court had correctly found that the onus rests on the insurer to prove materiality and Profmed did not lead any evidence to discharge that onus. The High Court had also correctly relied on *Oudtshoorn Municipality*⁵² and *Regent Insurance*.⁵³

Respondent's submissions

[68] Profmed submits that the Full Court was correct to find that the Appeal Board committed no reviewable irregularity, taking into account that the core issue for the Appeal Board to determine was whether the non-disclosure was related to material information. According to Profmed, it was apparent from the detail required in the application form, that the information regarding the gastric condition was "reasonably relevant to the risk and its assessment by an insurer". A reasonable person would consider a "gastric condition" relevant to their risk of assessment especially when considering the facts surrounding Ms Steyn's condition (that is, the suspicion of a gastric ulcer, the hospital visit, and the gastroscopy). Profmed submits that Ms Steyn had admitted that she did not disclose that she suffered from gastritis.

[69] Regarding procedural fairness, Profmed submits that Ms Steyn's complaint is not that she was deprived of an opportunity to make representations, but rather that the Appeal Board should have precluded Profmed from referring to the hip arthroscopy. Profmed contends that it was entitled to refer to this non-disclosure and the

⁵² *Oudtshoorn Municipality* above n 18 at 435G-I.

⁵³ *Regent Insurance* above n 17 at para 23.

Appeal Board was entitled to take it into account. There was nothing precluding Ms Steyn from advancing any explanations regarding the hip arthroscopy in her written argument or evidence before the Appeal Board. It is submitted further that Ms Steyn had every reasonable opportunity to make representations to the Appeal Board and that the Appeal Board was not entitled to disregard the documents evidencing the non-disclosures before it as they were manifestly relevant. Thus, submits Profmed, the Full Court was correct to reject this ground of review.

[70] In respect of the alleged error of law, Profmed submits that, while the High Court had found that the Appeal Board made an error of law in not applying *Regent Insurance*, the Full Court did in fact apply *Regent Insurance*. Thus, Profmed submits, the Full Court had correctly interpreted section 29(2)(e) of the MSA. Profmed supports the Full Court's reasoning in respect of the PMBs.

[71] Profmed submits that there is usually no onus of proof applied in proceedings before administrative bodies and Ms Steyn's reliance on Profmed's onus is misplaced. The only issue for determination before the Appeal Board was whether the non-disclosures related to material information. According to Profmed, it is apparent from the signed application form that a reasonable and prudent person would have considered the information concerned as reasonably relevant to the risk and its assessment by an insurer. There was no error by the Appeal Board in finding that the information ought to have been disclosed, thus submits Profmed. Even if there was an error of law, a mere error of law is not sufficient for an administrative act to be set aside; an error will not be material if it does not affect the outcome of the decision.

[72] Profmed's position regarding the test for materiality is that the assessment of the materiality of non-disclosures requires an enquiry as to whether the undisclosed information ought to have been disclosed to afford the medical scheme the opportunity to assess the risks to the medical scheme of undertaking liability in respect of that applicant, and for the purposes of considering its entitlement to exercise its limited right to impose upon the applicant the waiting periods provided for by section 29A.

[73] According to Profmed, the materiality or otherwise of a misrepresentation must be dealt with objectively. It contends that this approach is consistent with the well-established common law test for materiality set out in *Oudtshoorn Municipality and President Versekeringmaatskappy*.⁵⁴ Profmed points out that the test relied on in *Qilingele* (and the High Court) was criticised in *Clifford*.⁵⁵ According to Profmed, the Full Court applied the correct test for materiality and the non-disclosures were accordingly material. Lastly, Profmed submits that Ms Steyn has not made out a case for arbitrariness.

The legislative framework

[74] Section 29(2)(d) and (e) of the MSA provides that a medical scheme, like Profmed, may cancel or suspend a member's membership on the grounds of, inter alia, committing any fraudulent act or the non-disclosure of a material condition. It reads:

- “(2) A medical scheme shall not cancel or suspend a member's membership . . . except on the grounds of—
- . . .
- (d) committing any fraudulent act; or
- . . .
- (e) the non-disclosure of material information.”

⁵⁴ *President Versekeringsmaatskappy Bpk v Trust Bank van Afrika Bpk* [1988] ZASCA 88; 1989 (1) SA 208 (A) (*President Versekeringmaatskappy*) at 216F.

⁵⁵ *Clifford v Commercial Union Insurance Co of SA Ltd* [1998] ZASCA 37; 1998 (4) SA 150 (SCA) at 156D-J, where the Court held:

“If I, as a member of this Court, were asked to interpret section 63(3) for the first time, I would not interpret it as Kriegler AJA did in *Qilingele* [above n 19]. To my mind, his interpretation does not give effect to the purpose or import of the subsection; nor does it differentiate clearly the concepts of materiality and inducement. At common law an insurer relying upon being misled must prove both things. He must prove, in the first place, materiality. This is, of course, also an aspect of wrongfulness in a delictual setting. The standard is an objective one, that of the average prudent person or reasonable man: the *Oudtshoorn Municipality* case [above n 18] at 435H-I. The test is not, however whether in the reasonable man's view the evaluation of the risk is affected by the falsity, but whether a reasonable man would consider that that particular information should have been disclosed to the insurer, so that the latter could form his own view as to its effect: *President Versekeringsmaatskappy* [above n 54] at 216F-G.”

[75] Section 29A(2)(a) of the MSA, which deals with waiting periods, provides:

- “(2) A medical scheme may impose upon any person in respect of whom an application is made for membership or admission as a dependant, and who was previously a beneficiary of a medical scheme for a continuous period of up to 24 months, terminating less than 90 days immediately prior to the date of application—
- (a) a condition-specific waiting period of up to 12 months, except in respect of any treatment or diagnostic procedures covered within the prescribed minimum benefits.”

Analysis

Procedural fairness of the hearing before the Appeal Board

[76] The Appeal Board was legally duty bound to ensure that the proceedings before it were conducted in a procedurally fair manner.⁵⁶ It was required to have “an open mind and a complete picture of the facts and circumstances within which the administrative action is to be taken. In that way the functionary is more likely to apply his or her mind to the matter in a fair and regular manner.”⁵⁷

[77] A fair administrative procedure is fact-dependent.⁵⁸ There must be a reasonable opportunity to make representations.⁵⁹ It was expressed thus in *Turner*:⁶⁰

“The principles of natural justice do not require a domestic tribunal to follow the procedure and to apply the technical rules of evidence observed in a court of law, but they do require such a tribunal to adopt a procedure which would afford the person charged a proper hearing by the tribunal, and an opportunity of producing his evidence

⁵⁶ *Janse van Rensburg N.O. v Minister of Trade and Industry* [2000] ZACC 18; 2001 (1) SA 29 (CC); 2000 (11) BCLR 1235 (CC).

⁵⁷ *Id* at para 24.

⁵⁸ Section 2(1) of PAJA; *Masethla v President of the Republic of South Africa* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 at para 190.

⁵⁹ Section 3(2)(b)(ii) of PAJA.

⁶⁰ *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A); [1974] All SA 52 (A) (*Turner*).

and of correcting or contradicting any prejudicial statement or allegation made against him The tribunal is required to listen fairly to both sides and to observe ‘the principles of fair play’”.⁶¹

[78] In *De Lange*,⁶² this Court stated:

“Everyone has the right to state his or her own case, not because his or her version is right, and must be accepted, but because, in evaluating the cogency of any argument, the arbiter, still a fallible human being, must be informed of the points of view of both parties in order to stand any real chance of coming up with an objectively justifiable conclusion that is anything more than chance.”⁶³

[79] The Appeal Board dismissed Ms Steyn’s objection to Profmed’s reliance on the hip arthroscopy for two reasons, the first one was that Profmed only became aware of the information later, from Ms Steyn’s application to another medical scheme; and, secondly, that in any event, the Appeal Board had before it a wide appeal. Both these grounds of dismissal are misconceived. First, on the common cause facts before the Appeal Board, Profmed raised Ms Steyn’s “hip problems” already in the letter of termination dated 7 November 2016. Secondly, as far as the wide appeal is concerned, despite Ms Steyn’s request to do so, the Appeal Board denied her an opportunity to lead evidence pursuant to her objection to the evidence introducing the hip arthroscopy. This was a serious procedural irregularity, in contravention of the PAJA fair procedure requirement.⁶⁴

[80] Despite its initial reliance in its letter of 7 November 2016, amongst others, on Ms Steyn’s non-disclosure of her “hip problems”, no mention at all was made of this in Profmed’s letter of 13 December 2016 in response to Ms Steyn’s referral to the Registrar. Unsurprisingly, the Registrar in his ruling made no reference at all to these

⁶¹ Id at 646E-G.

⁶² *De Lange v Smuts* [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) (*De Lange*).

⁶³ Id at para 131.

⁶⁴ Section 3(1) and (2), read with section 6(2)(c) of PAJA.

“hip problems”, plainly because Profmed had abandoned further reliance on it. Ms Steyn alluded in her founding affidavit before the Council to this abandonment of the hip problems by Profmed, who did not file any opposing papers. Ms Steyn’s averments thus remained unchallenged. Before the Council, Profmed, having failed to address these allegations on affidavit, chose to deal with the hip problems issue in oral argument only. Strangely, though, the Appeal Board considered this aspect adversely to Ms Steyn without any evidence being led before it. What was therefore a non-issue before the Registrar, uncontested before the Council and absent any further evidence before the Appeal Board, ended up being decided against Ms Steyn.

[81] The prejudice that Ms Steyn suffered is manifest – she was deprived of the opportunity to lead evidence on the hip arthroscopy issue. Ms Steyn indicated in her papers in the High Court that, had she been afforded the opportunity, she would have led evidence that the hip arthroscopy did not constitute treatment for any ailment and that it was merely a diagnostic tool. Ms Steyn’s objection to the introduction of the evidence relating to her alleged hip problems and the Appeal Board’s failure to afford her an opportunity to lead evidence in response, must be assessed against the backdrop alluded to earlier. She had been guided by her husband and a representative of Profmed, Ms Susan Brits, in filling in the application forms.

[82] The answer by Profmed to Ms Steyn’s complaint of prejudice, that Profmed’s oral argument was based on an annexure to Ms Steyn’s own affidavit and that there can accordingly be no possible prejudice, does not bear scrutiny. First, section 50(4) provides that any person who lodges an appeal under subsection (3) shall submit with his or her appeal written arguments or explanations of the grounds of appeal. Ms Steyn filed written argument where she, in the alternative to her written submissions, applied for leave to lead additional evidence with regard to new grounds raised by Profmed or to lead evidence with regard to any other submissions and allegations made by Profmed. This was refused.

[83] Secondly, Profmed’s argument also flies in the face of the *audi alteram partem* (hear the other side) principle. That principle is encapsulated in the procedural aspects of the MSA before a matter reaches the Appeal Board. Section 47(1) requires a Registrar, where a complaint has been lodged with the Council, to furnish the party complained against with full particulars of the complaint and to request that party to furnish the Registrar with written comments within 30 days of such notice or on such time as the Registrar may allow. Section 48(1) requires any person who is aggrieved by any decision relating to a settlement of a dispute or complaint in terms of section 47(1), to appeal to the Council. Section 48(3) provides that an appeal to the Council shall be in the form of an affidavit directed to the Council whereas an appeal to the Appeal Board in terms of section 50(4) of the MSA is lodged by filing written argument or explanations of the grounds of his appeal. Unlike section 47(1), sections 48 and 50, dealing with appeals to the Council and to the Appeal Board respectively, are silent on whether a respondent (medical scheme) is obliged to file a response in the form of an answering affidavit to the grounds of appeal lodged in terms of section 48(3) or written submissions in response to the grounds of appeal filed in terms of section 50(4). However, both sections empower the chairpersons of these institutions to determine the procedure for the hearing.

[84] The Appeal Board’s approach appears to be grossly unfair – not only was Ms Steyn faced with an unpleaded case, but she was also denied her express request to be granted an opportunity to adduce evidence to meet the new unpleaded averments regarding her alleged non-disclosure of hip problems. The Full Court concluded that—

“the [High Court] erred in its finding that the appellant raised new facts during argument without giving the first respondent an opportunity to respond. . . . this is fortified by the fact that the first respondent was not called on to answer a case which had not been pleaded”.

[85] But, as explained, that conclusion is not borne out by the evidence. It is also not correct, as the Full Court found, that Ms Steyn had “manifestly failed” to set out her argument and the grounds of appeal. This finding does not accord with the facts that I

have outlined – Ms Steyn did in fact set out her grounds of appeal, which included the fact that the proceedings before the Council were procedurally unfair.

[86] The Full Court cited *Lambert* that, “as a general proposition, administrative bodies are generally not required to comply strictly with the rules of evidence and there is also usually no onus of proof applied”.⁶⁵ There can be no quarrel with that general statement concerning the incidence of the onus of proof in respect of proceedings before administrative bodies. The difficulty though is that, here, the passage was cited by the Full Court as part of its discussion regarding the procedural unfairness challenge by Ms Steyn. Self-evidently the passage in *Lambert* has no bearing on that particular challenge.

[87] In the very next paragraph of its judgment, continuing its discussion in respect of the procedural unfairness challenge, the Full Court stated:

“The administrative respondents are all administrators established with specific knowledge regarding the medical schemes industry, the challenges confronted by these schemes and mechanisms put in place to safeguard members of the schemes. These respondents are also familiar with the conditions and benefits which these schemes are obliged to provide.”⁶⁶

[88] That is fallacious reasoning and suggests that the Registrar, Council and Appeal Board must be trusted to, without fail, come to the correct conclusion regarding the materiality of non-disclosure. It is tantamount to saying that the decisions of those Appeal Bodies are the law of the Medes and Persians. For these reasons, I hold that the proceedings before the Appeal Board were unfair.

⁶⁵ Full Court Judgment above n 25 at para 32, citing *Lambert* above n 28 at 452A-B.

⁶⁶ *Id* at para 33.

Duty to disclose the hip arthroscopy and gastritis, and whether the non-disclosure was material

[89] Two issues must be addressed under this rubric – first, the duty of disclosure regarding the hip arthroscopy and gastritis and, secondly, whether the non-disclosure was material. In respect of the first issue as far as it concerns the facts – it bears repetition that Ms Steyn had been guided by a representative of Profmed, Ms Susan Brits, in filling in the application form. Furthermore, the hip arthroscopy was performed during June 2014, according to the applicant, some 17 months prior to the application for Profmed membership when the application form was completed. In terms of the MSA, an insurer may only require an insured to provide medical information within the 12 month period preceding the date of application.⁶⁷

[90] The next question is whether the non-disclosure was material. A duty of disclosure would only arise in circumstances where a medical condition can be regarded as material. The applicant's forceful contentions that some guidance can be obtained from cases concerning similar provisions in the now repealed Short-Term Insurance Act,⁶⁸ such as *Regent Insurance* and *Oudtshoorn Municipality*, are sound.

⁶⁷ Section 29A(7) of the MSA.

⁶⁸ 53 of 1998 (Short-Term Insurance Act). Section 53(1) of that Act reads:

“Misrepresentation and failure to disclose material information

(1)(a) Notwithstanding anything to the contrary contained in a short-term policy, whether entered into before or after the commencement of this Act, but subject to subsection (2)—

- (i) the policy shall not be invalidated;
- (ii) the obligation of the short-term insurer thereunder shall not be excluded or limited; and
- (iii) the obligations of the policyholder shall not be increased, on account of any representation made to the insurer which is not true, or failure to disclose information, whether or not the representation or disclosure has been warranted to be true and correct, unless that representation or non-disclosure is such as to be likely to have materially affected the assessment of the risk under the policy concerned at the time of its issue or at the time of any renewal or variation thereof.

(b) The representation or non-disclosure shall be regarded as material if a reasonable, prudent person would consider that the particular information constituting the representation or which was not disclosed, as the case may be, should have been

Both section 53(1) of the Short-Term Insurance Act and section 29(2)(e) of the MSA contain the words “material non-disclosure”. There is strong support in our case law for drawing analogy between cases on similar provisions in different statutes. In *Ferreira*,⁶⁹ this Court referred to such kindred statutory provisions (Sachs J called them “sibling statutory provisions”). There, it was noted that the Investigation of Serious Economic Offences Act⁷⁰ and the Insolvency Act⁷¹ provided for inquisitorial procedures not dissimilar to those in section 417 of the Companies Act⁷² which was under scrutiny.⁷³

[91] In general, it is understood that the *in pari materia* (on the same subject) rule is of some persuasion when an identical provision is found in a statute that is similar in object, purpose, and subject matter to the one being interpreted.⁷⁴ Statutory provisions *in pari materia*, unless clearly repugnant, are to be read together. Where different statutes deal with the same or kindred subject-matter, they should, in a case of uncertainty or ambiguity, be construed in a manner so as to be consonant and interdependent – the content of the one statutory provision may shed light upon the uncertainties of the other.⁷⁵ This accords with foreign jurisprudence. It has been held in the United States of America that the use of “the same language in two statutes having similar purposes” creates a “presum[ption] that Congress intended that text to

correctly disclosed to the short-term insurer so that the insurer could form its own view as to the effect of such information on the assessment of the relevant risk.”

⁶⁹ *Ferreira v Levin N.O.; Vryenhoek v Powell N.O.* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) (*Ferreira*) at para 266. See also *Hoban v Absa Bank Ltd t/a United Bank* [1999] ZASCA 12; 1999 (2) SA 1036 (SCA) at para 20.

⁷⁰ 117 of 1991.

⁷¹ 24 of 1936.

⁷² 71 of 2008.

⁷³ *Ferreira* above n 69 at para 266.

⁷⁴ *Independent Institute of Education (Pty) Limited v KwaZulu-Natal Law Society* [2019] ZACC 47; 2020 (2) SA 325 (CC) at para 38 with reference to *Shaik v Minister of Justice and Constitutional Development* [2003] ZACC 24; 2004 (3) SA 599 (CC); 2004 (4) BCLR 333 (CC) at paras 17-8.

⁷⁵ *Arse v Minister of Home Affairs* [2010] ZASCA 9; 2012 (4) SA 544 (SCA) at para 19 with reference to *Petz Products (Pty) Ltd v Commercial Electrical Contractors (Pty) Ltd* 1990 (4) SA 196 (C) at 204H-I.

have the same meaning in both statutes”.⁷⁶ That presumption guides the interpretive analysis unless there is a good reason – grounded in context, history, or legislative purpose – to depart from that shared reading.⁷⁷

[92] In sum therefore, while not determinative, some guidance can be gained from section 53(1) of the Short-Term Insurance Act. The following principles can be distilled from cases that relate to the Short-Term Insurance Act.⁷⁸ The test is objective, that is, whether information should have been disclosed is judged, not from the point of view of the insurer, but from that of the notional reasonable and prudent person.⁷⁹ The question is thus whether the reasonable person would have considered the fact not disclosed as relevant to the risk and its assessment by an insurer. This brought the Short-Term Insurance Act in line with the common law.⁸⁰ The onus to prove materiality rests on the insurer.⁸¹ Furthermore, the insurer must prove that the non-disclosure induced it to conclude the contract – the insurer must show that the non-disclosure caused it to issue the policy and assume the risk. Applied to the present matter, the determination whether there should have been a disclosure is objective. Profmed bore the onus of proving not only the materiality of non-disclosure, but also that it was induced to conclude the agreement.

[93] Section 29(2)(e) of the MSA does not define what information is deemed material. It also does not explain how the materiality of information should be determined. The responsibility was left to medical schemes themselves to deal with this in their rules in relation to materiality. In this instance, rule 12.4,⁸² which refers to

⁷⁶ *Smith v City of Jackson* 544 US 228, 233 (2005), citing *Northcross v Board of Ed. of Memphis City Schools* 412 US 427, 428 (1973).

⁷⁷ *United States v Cleveland Indians Baseball Co* 532 US 200, 213 (2001).

⁷⁸ Non-disclosure in insurance contracts is governed by the materiality test, which is set out in section 9 of the Long-Term Insurance Act 52 of 1998 and section 53 of the Short-Term Insurance Act above n 68, which have been consolidated in the Insurance Act 18 of 2017.

⁷⁹ *Mahadeo* above n 6 at paras 17-8, cited with approval in *Regent Insurance* above n 17 at para 24.

⁸⁰ *Regent Insurance* above n 17 at para 23.

⁸¹ *Oudtshoorn Municipality* above n 18 at 435G-I and *Regent Insurance* above n 17 at para 23.

⁸² Rule 12.4 of Profmed Medical Scheme Rules.

material non-disclosure as a ground for the cancellation of membership, does not set out the standard to be applied in determining whether information is material. However, Profmed's application form does define material information as relating to disclosure of medical conditions.

[94] What requires determination is whether medical conditions would include both medical examinations and diagnostic procedures. Profmed argues that it does and the applicant answers that question in the negative – that mere diagnostic procedures are excluded. What is apparent from the authorities is that one only has an obligation to disclose material information. A mere diagnostic medical procedure which resulted in no material diagnosis of a condition cannot be classified as a material non-disclosure, and a prudent and reasonable person would not regard it as such.

[95] In light of the conclusion that an analogy may be drawn with section 53(1) of the Short-Term Insurance Act, plainly, there is no basis for a finding that the statutory test in section 29(2)(e) dispenses with the inducement element in the common law. Section 29(2)(e) does not elevate materiality into a condition that is sufficient for termination without proof of inducement. It must be interpreted such that it requires the common law inducement element to be satisfied before membership can be terminated. This interpretation is fortified by the broader scheme of the MSA, to extend medical cover as far as possible and to limit medical schemes' "election" not to contract with members. Further support for that interpretation is to be found in section 39(2) of the Constitution which requires a court to interpret legislation in a manner which promotes the spirit, purport and objects of the Bill of Rights. Medical aids are essential gateways to realising the right to access health care services under section 27(1)(a) of the Constitution.

[96] As stated, in terms of the common law and also under section 29(2)(e) of the MSA, an insurer has to prove that the non-disclosure of a material element induced it to enter into the contract. On Profmed's argument, proof of the objective materiality of the non-disclosure without a need for further proof of the additional element that it was

as a matter of fact induced by that non-disclosure, is sufficient. Plainly, Profmed was driven to resort to this line of argument that the test in section 29(2)(e) dispenses with the need to prove inducement, because it did not adduce any evidence to show that it was, in fact, induced to enter into the contract by the non-disclosure. This is a subjective test – was Profmed induced by the failure to disclose a material fact to issue the policy? In making the enquiry, “evidence that the insurer had a particular approach to risks of the kind in question would be relevant and could be cogent”.⁸³

[97] *Regent Insurance* is authority for the proposition that, as is the case with an insurer under section 53(1) of the Short-Term Insurance Act, proof of inducement is required on Profmed’s part in respect of the non-disclosure by Ms Steyn. As stated, no such evidence was adduced by Profmed. At the very minimum, Profmed had to adduce evidence relating to its membership acceptance practices in respect of applicants who make full disclosures and have similar health histories to that of the member they want retrospectively to terminate for non-disclosure. There is none.

[98] The Full Court misdirected itself by completely ignoring the fact that the uncontroverted evidence of Dr Swanepoel, a laparoscopic and vascular surgeon, about the nature of a gastroscopy was never considered by the Appeal Board. Ms Steyn’s version that she was not diagnosed with a gastric ulcer was also not considered. I accept that in some instances an administrator may not attach too much weight to a factor when making their decision and that would not necessarily imply that the administrator did not consider that factor.⁸⁴ However, in this case relevant evidence was not considered at all.

[99] In my view, a mere medical examination and diagnostic medical procedure which resulted in no material diagnosis of a condition cannot be classified as a material non-disclosure and a prudent, reasonable person would not regard it as such. The

⁸³ *Regent Insurance* above n 17 at para 27; the Court cites *Qilingele* above n 19 at 75C-D.

⁸⁴ *MEC for Environmental Affairs and Development Planning v Clairison’s CC* [2013] ZASCA 82; 2013 (6) SA 235 (SCA) at paras 20-2.

evidence that gastroscopy and colonoscopy are merely medical examinations and the explanation provided by Dr Swanepoel and the applicant regarding gastritis is not in dispute. The Full Court thus misdirected itself when it found that the applicant was required to disclose any of these medical examinations and diagnostic medical procedures.

[100] It seems to me that Profmed had terminated Ms Steyn's membership based on a misconception that she suffered from a gastric ulcer. The Registrar ruled that Ms Steyn should have disclosed that she underwent "gastroscopy and colonoscopy on 4 March 2015 for a gastric ulcer" when the question was not whether she had undergone a medical examination for a possible gastric ulcer, but whether she had actually suffered from any of the listed diseases or medical conditions or disorders, of which a gastric ulcer was an example, or received treatment for them. Plainly, on the uncontested evidence, the gastroscopy in fact revealed that she was not suffering from a gastric ulcer but gastritis, a common medical condition which presents as heartburn and can often be relieved by self-medication. The Registrar, Council and Appeal Board all overlooked the distinction between the two conditions.

[101] The Full Court erred in its finding that gastritis requires an emergency visit to a hospital – no evidence was adduced in support of this proposition. It was common cause that gastritis does not give rise to material risk. Ms Steyn's evidence of the difference between gastritis and a gastric ulcer was supported by Dr Swanepoel's expert evidence. He testified that gastritis, commonly known as heartburn, or symptoms of indigestion, is an irritation and inflammation of the stomach lining and is a very common condition with about half of the population suffering from it. A gastric ulcer, on the other hand, is an open sore in the lining of the stomach and is a more serious condition. In light of this unchallenged evidence, a reasonable person in Ms Steyn's position could not have considered that gastritis should be disclosed and, moreover, its non-disclosure is immaterial. The Council, and later the Appeal Board, simply ignored this evidence and found that Profmed was denied the opportunity to make an accurate

assessment and mitigate its risk by imposing a statutorily empowered condition-specific waiting period. In doing so, they erred.

[102] The Appeal Board concluded that, because gastritis does not form part of the PMBs, it is to be treated as a material condition. The Appeal Board's rationale seemingly was that those conditions that are included in the PMBs need not be disclosed by an insured when she applies for medical cover, while those that are not included in the list must be disclosed. Gastritis is not included in the list. That rationale is fundamentally flawed. Section 29(2)(c) of the MSA makes no mention of PMBs as the test to be applied regarding materiality. It goes against trite principles of statutory interpretation for the Appeal Board to have read a requirement into section 29(2)(c) which is not mentioned there. If it was the Legislature's intention that the standard of materiality is to be linked to the PMBs, then such a reference would have been included in the MSA. PMBs are provided for in a completely different context in the MSA in section 29A – it has no bearing at all on the materiality or otherwise of non-disclosures.

[103] When one considers the PMBs themselves, it is noteworthy that they are largely made up of material, and not immaterial, conditions. Notable examples are HIV, an array of cancers and a number of conditions the list itself describes as “life-threatening”. The list also includes “gastric or intestinal ulcers” which the Appeal Board accepted is a more serious condition than gastritis. This demonstrates the flawed logic in the Appeal Board's reasoning. On that approach, it would mean that an insured who applies for medical insurance can circumvent section 29(2)(e) by not disclosing any of the plethora of material conditions listed in the PMBs. Conversely, if the insured fails to disclose an immaterial condition that does not appear on the list (such as the common cold), then the insurer may lawfully repudiate the insurance. This approach is untenable, as it will achieve exactly the opposite of what section 29(2)(e) expressly envisages, that the insured must disclose material information when she applies for medical cover.

[104] The Full Court erred when it held that “there was no indication in the decision by [the Appeal Board] that a non-disclosure (of a pre-existing medical condition) is linked to the enquiry of (or whether it relates to) a prescribed minimum benefit condition”. This completely ignores the fact that the Appeal Board, in its own written reasons, expressly mentioned the PMBs. The Full Court overlooked the fact that: Ms Steyn was not asked in the application form whether she had undergone diagnostic examinations; the gastroscopy established that she did not have a gastric ulcer, but merely gastritis; and Profmed presented no evidence whatsoever that gastritis gives rise to a material risk on Profmed’s part.

[105] There is no dispute that Ms Steyn underwent a hip arthroscopy prior to 2015 – she conceded this fact. The arthroscopy was, however, plainly a diagnostic procedure and not a medical condition. There was no evidence to suggest that there was something wrong with Ms Steyn’s hip and, as stated, she was denied an opportunity to adduce evidence to the contrary. There was no evidence before the Appeal Board to support its findings that the fact that Ms Steyn had undergone a hip arthroscopy implied that she suffered from arthritis, most likely osteoarthritis, affecting large joints such as knees, hips, and wrists. These findings of the Appeal Board erroneously assumed that there was something to be disclosed.

[106] As stated, the hip arthroscopy was a diagnostic tool and not a medical condition. There was thus no duty to disclose it and, moreover, non-disclosure was not material. Furthermore, and in any event, the hip arthroscopy was performed during June 2014, approximately 17 months prior to Ms Steyn’s completion of the Profmed form. In terms of section 29A(7) of the MSA, an insurer may only require an insured to provide medical information within 12 months from date of application. This is a further reason why the hip arthroscopy did not have to be disclosed. In the premises, the PAJA review must be upheld. What bears consideration next is the appropriate remedy.

Remedy: substitution or remittal

[107] The question that arises is whether to remit the matter for reconsideration⁸⁵ or to substitute the impugned decision.⁸⁶ The test for substitution is well-established.⁸⁷ The primary factors that bear consideration are—

- (a) whether a court is in as good a position as the original decision-maker to make the decision;
- (b) whether the outcome, if remitted, is a foregone conclusion; and
- (c) other relevant factors like delay, bias, or the incompetence of an administrator.

[108] The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties and whether anything would be gained by remitting it.⁸⁸ It will be recalled that the High Court substituted the Appeal Board's ruling with one in favour of Ms Steyn. That appears to me to be the correct course of action in this instance. I agree with the applicant that the outcome is a foregone conclusion. Profmed is plainly, on all the facts and circumstances in no position to gainsay any of the evidence adduced by Ms Steyn or that which she would have been able to adduce in respect of the hip arthroscopy had she been afforded the opportunity to do so. Profmed had numerous opportunities to do so before the Appeal Bodies and the High Court but failed to do so. This Court is in as good a position as the Appeal Board, since none of its expertise is still required and this Court has before it all the pertinent information, none of which is contested.⁸⁹

[109] In considering what is just and equitable, I take the view that this is one of those exceptional cases where this Court will not be usurping the functions of the decision

⁸⁵ In terms of section 8(1)(c)(i) of PAJA.

⁸⁶ Section 8(1)(c)(ii)(aa) of PAJA.

⁸⁷ *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) (*Trencon*).

⁸⁸ *Id* at para 47.

⁸⁹ Compare *Trencon* above n 87 at para 48.

maker, the Appeal Board, and that substitution is warranted. A remittal will only run up costs unnecessarily for the deceased estate and cause further delay. The matter has already been before the three Appeal Bodies, and this is the fourth court that has been seized with the case.⁹⁰

Costs

[110] Costs must follow the outcome. An aspect that bears consideration in relation to costs is the conduct of the attorney/executor, Mr Swanepoel, in the substitution application. The timeline set out earlier speaks for itself insofar as the laxity on the part of Mr Swanepoel is concerned. The most disturbing aspect is that on 22 August 2023, in response to this Court's directives, written submissions were filed, citing the late Ms Steyn as applicant at a time when Mr Swanepoel had already been appointed as the executor of her deceased estate. As stated, the only explanation for this lapse is that Mr Swanepoel was under the *bona fide* impression that in terms of this Court's rule 7, substitution followed as a matter of course. At best for Mr Swanepoel, that displays a disturbing lack of insight into what the rule unambiguously provides.⁹¹

[111] I am prepared to give Mr Swanepoel the benefit of the doubt on this aspect. His conduct does not fall into the category of egregiousness that would warrant a personal costs order.⁹²

Conclusion

[112] The substitution application must succeed, leave to appeal ought to be granted and the appeal must be upheld with costs. The costs of two counsel is warranted. I make the following order:

1. The late filing of the application for leave to appeal is condoned.

⁹⁰ I add in this count the Supreme Court of Appeal, which has refused both the applications for leave to appeal and for reconsideration.

⁹¹ As set out in [40].

⁹² *Ex parte Minister of Home Affairs; In re Lawyers for Human Rights v Minister of Home Affairs* [2023] ZACC 34; 2024 (2) SA 58 (CC); 2024 (1) BCLR 70 (CC).

2. The application for substitution is granted and the executor of the deceased estate is substituted for Ms Mignon Adelia Steyn as applicant.
3. Leave to appeal is granted.
4. The appeal is upheld.
5. The order of the Full Court is set aside and substituted with the following:
“The appeal is dismissed with costs, including costs of two counsel where so employed.”
6. The respondent must pay the costs, including costs of two counsel.

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