



## Medical aid schemes, HIV status and 'material non-disclosure'

**To the Editor:** Section 29 of the Medical Schemes Act 131 of 1998 (the Act) states that: '(2) A medical scheme shall not cancel or suspend a member's membership or that of any of his or her dependants, except on the grounds of — ... (e) the non-disclosure of material information.'

This section gives medical aid schemes the power to cancel or suspend membership if they can establish that the member failed to disclose any information that may be regarded as 'material'. The Act, however, does not provide a definition of what constitutes material information. It is clear that in light of the Act the definitions developed by case law, dealing mainly with insurance, are no longer helpful. For insurance purposes, information is material if it would influence the decision of a prudent insurer with regard to the risk to be covered or premiums to be paid.<sup>1</sup> However, a recent decision by the Appeal Board of the Council for Medical Schemes (the Council) has thrown some light on what would not be considered material for purposes of the Act.

### Facts of the case

In January 2002, FA approached the AIDS Law Project (ALP) to assist him with a matter involving the termination of his membership of Compicare Medical Aid Scheme (Compicare). On 26 June 2001 he applied for medical aid membership with Compicare. His application was approved and he became a member of the scheme on 1 July 2001. On 17 July 2001 he consulted his doctor with a complaint of diarrhoea. It was suggested to FA that he be tested for HIV, and his test results came back positive.

During September 2001 FA was hospitalised for a chest infection, and he subsequently developed a herpes zoster infection, which affected his neck and part of his face. As a result, his hospitalisation was prolonged. During his stay at the hospital a representative of Compicare telephoned the hospital ward and was informed by a sister, unethically<sup>2</sup> and unlawfully,<sup>3</sup> that FA had HIV. On 15 October 2001, FA received a letter from Compicare terminating his membership with retrospective effect because of his alleged failure to disclose certain information at the time of joining the scheme. From the wording of a letter from Compicare dated 1 July 2002 and addressed to the Council, it was clear that the information referred to was FA's HIV status. In the letter, Compicare stated: 'It would appear to us that the member deliberately withheld material information from the scheme in order to avoid being levied with a 3 month general waiting period as well as a 12 month condition specific waiting period for HIV.'

FA maintained right from the start that he did not know his HIV status at the time of applying for membership of

Compicare — a fact that his doctor confirmed. Acting on behalf of FA, the ALP wrote a letter to Compicare advising them that FA was unaware of his status at the time of applying for membership and requesting that his membership be reinstated. Compicare failed to respond to this request. In May 2002 FA lodged a complaint against Compicare with the Council for unlawful termination of membership. By this time FA was becoming seriously ill and had incurred considerable medical expenses.

### Council for Medical Schemes ruling

At a mediation meeting held in August 2002, the Registrar of Medical Schemes found that Compicare could not prove that FA knew his HIV status at the time of application. Despite having access to all FA's medical records, Compicare was unable to produce any evidence that FA was aware of his HIV status. The Registrar directed Compicare to reinstate his membership.

Compicare appealed to the Council against the ruling of the Registrar. After reviewing the case, the Council found in favour of FA and again ordered his reinstatement to the scheme. Compicare lodged a further appeal to the Appeal Board of the Council for Medical Schemes in terms of Section 50 of the Act. In its appeal papers, Compicare argued that FA's failure to disclose: (i) his HIV status; and/or (ii) that he was treated for a sexually transmitted infection in December 1999; and/or (iii) that he had received medical treatment for sinusitis, bronchitis and a laceration to his eye weeks before applying for membership; and/or (iv) that he received medical treatment for a chest infection just 7 days before applying for membership with the scheme amounted to non-disclosure of material information in terms of Section 29 of the Act and therefore the scheme had acted lawfully in terminating his membership.

FA argued that the termination of his membership was clearly based on the scheme's belief that he had been aware of his HIV status before joining and that his failure to disclose this information amounted to a material non-disclosure. It was further argued on his behalf that he was not obliged to disclose information regarding conditions for which he had received medical treatment before applying for membership, as at the time of application he was not receiving medical treatment or expecting to receive further medical treatment for these conditions.

### Appeal Board ruling

The Appeal Board found that in fact FA's membership with the scheme was terminated on the basis of the scheme's mistaken belief that FA was aware of his HIV status.<sup>4</sup> The Board also



concluded that: (i) FA was under no obligation to disclose the fact that he had been treated for a sexually transmitted disease more than 12 months before applying for membership; (ii) information relating to the treatment of 'acute conditions treatable immediately' and not related to a chronic condition, is not material and need not be disclosed; and (iii) chronic conditions may be regarded as material for purposes of disclosure.

The scheme was therefore ordered to reinstate FA's membership retrospectively.

Although it is still not clear from this case what exactly does constitute material information for purposes of the Act, this decision makes clear what does not. Members cannot be penalised for not disclosing information about a condition that was diagnosed or treated 12 months before applying for membership and that is not present at the time of application. In effect, this ruling means that medical schemes can no longer require applicants to disclose full details of all medical conditions suffered by them at any period before joining the scheme. The Council does not appear to regard failure to disclose a medical condition present more than 12 months before joining the scheme, as material. Furthermore, acute conditions present at the time of application need not be disclosed if they are treatable immediately and do not relate to a chronic condition.

In terms of Section 29A(2) (a) of the Act, a scheme may only

impose a 12-month condition-specific waiting period on new members in respect of a condition for which medical advice, diagnosis, care or treatment was recommended or received within the 12-month period ending on the date on which an application for membership was made. It will not assist a scheme to argue, as Compicare did in the present case, that it is entitled to impose a condition-specific waiting period in respect of a particular condition unless there is clear evidence that the member received medical advice, diagnosis, care or treatment for that condition within the 12-month period ending on the date on which an application for membership was made.

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#### Endnotes

1. See for example the case of *Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 (A).
2. The South African Medical Association's *Human Rights and Ethical Guidelines on HIV: A Manual for Medical Practitioners* clearly states that: 'A patient's HIV status may only be disclosed to a person or group if that patient consents to it being made known to that person or group of persons....'.
3. In the case *Jansen van Vuuren and Another NNO v Kruger*, case no. 1993 (4) SA 733, the Appellate Division ruled that it is vital to keep a patient's HIV status confidential.
4. The judgement is available on the AIDS Law Project website: <http://www.alp.org.za>.