



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO. D4992/2018

In the matter between:

GODFREY MNISI

APPLICANT

and

HIBISCUS PRIVATE HOSPITAL (PTY) LIMITED

FIRST RESPONDENT

**MEC FOR DEPARTMENT OF HEALTH,
KWAZULU-NATAL**

SECOND RESPONDENT

UMDONI DISTRICT MUNICIPALITY

THIRD RESPONDENT

ORDER

The following order shall issue:

1. The application is dismissed with costs, including those consequent upon the employment of senior counsel.
2. Costs to include the reserved costs of the application in case number D3222/2018 (the application for an interim interdict) as well as the costs reserved on 20 August 2021 when the review was adjourned.

JUDGMENT

Steyn J:

[1] The applicant has brought an application seeking the following relief:

- '1. That, in terms of Section 9 of Act 3 of 2000, the time period contemplated in terms of Section 7 of the Act be and is hereby extended in respect of this application;
2. That the second respondent's approval of the first respondent's application in terms of section 7 (1) of Regulation 158 of 1980, read with section 44 of Health Act 1977 be and is hereby reviewed and set aside;
3. That the second respondent's approval for the registration of the first respondent's private health establishment in terms of Section 7 (2) (ii) read with Section 2 of the said Regulation, be and is hereby reviewed and set aside;
4. That the second respondent's approval of first respondent's plans for its private health establishment, in terms of section 7 (2) (ii) of the said Regulation, be and is hereby reviewed and set aside;
5. That the second respondent be and is hereby to pay the costs of this application save that, in the event of the first respondent opposing the application, both respondents be ordered to pay the costs of the application jointly and severally'

[2] The application is based on the fact that the applicant obtained approval 'in principal' to establish a private hospital in Scottburgh. He contends that Scottburgh is not large enough to make it economically viable for two private hospitals to function. It is submitted on his behalf that the second respondent should not have approved the development of the first respondent, the Hibiscus Private Hospital (Hibiscus Hospital) facility. Presently, the first respondent has partially completed the construction of a private medical facility (a day surgery and sub-acute care facility) on immovable property in Scottburgh.

[3] The first respondent opposes the review application on the following grounds:

- (a) The applicant failed to prosecute the review application timeously in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA); and
- (b) There is no merit in the review application since it is primarily based on an incorrect legal assumptions.

[4] Before dealing with the merits of the review it is necessary to set out the background facts to this application. The applicant had previously obtained an interim

order directing the first respondent to cease all construction or building-related activity on ERF 599 Scottburgh, pending an application to review the decision to grant permission to develop a private health facility. This order was discharged by Mnguni J, and written reasons were delivered on 13 March 2020. The background facts are comprehensively summarised in paras 4 to 13 of Mnguni J's judgment and I do not intend to summarise them again. I repeat the relevant paragraphs below:

[4] The background facts in this matter are for the most part not in dispute. In 2010 or 2011 the applicant made an application to the second respondent for the approval to construct or develop a private hospital in Scottburgh. Because of the moratorium in place at the time his application was not considered. Sometime in 2014 the moratorium was lifted. The applicant then made a fresh application for construction of such facility. On 30 June 2015 he received written confirmation of the "in principle" approval for the development of a private hospital comprising 240 beds, seven obstetric unit rooms, nine theatres and one casualty department on certain conditions outlined in that letter.

[5] By notice dated 6 February 2015 the first respondent published in a local newspaper its intention to establish a day and sub-acute hospital in Scottburgh. The notice stipulated that a copy of the application and its accompanying documents would be open for inspection by interested persons who were invited to lodge written representations or objections to the application, and that if they did not do so, they would be disqualified from participating in the process. On 11 September 2015 the first respondent made an application to the second respondent for the establishment of a private health facility called "day beds" and "sub-acute beds".

[6] On 18 May 2016 the second respondent approved the first respondent's application for the development of 40 day beds, 40 sub-acute beds and two unattached minor theatres. Towards the end of 2016 the applicant became aware that approval for the development of the day surgery and sub-acute facility had been granted to the first respondent. He established further that the approval had also been granted to Netcare Umdoni to develop a private hospital facility within the third respondent's area of jurisdiction. In an undated letter addressed to the third respondent, and received on 15 July 2016, the applicant recorded his objection to the establishment of two private hospitals in the third respondent's jurisdiction pointing out that both could not function simultaneously and adequately.

[7] The applicant started communicating with the third respondent about these approvals on 1 October 2016. On 28 March 2017 the applicant gave a presentation of his proposed

development to medical practitioners. Similarly, Richard Mills (Mr Mills) of the first respondent did a presentation of its proposed development to the same audience.

[8] Concerned at the approval of two other applications in the same area, the applicant approached the then Head of Department Sifiso Mtshali (Mr Mtshali) to discuss these developments and to find out the basis on which two approvals were granted. The applicant asserted that Mr Mtshali pleaded ignorance stating that he had not been aware that he had approved more than one application for the area. Their meeting ended on the basis that Mr Mtshali would look into the matter and “would do something about it”. That “something” that Mr Mtshali said he would do was never explained in the applicant’s founding affidavit.

[9] After that meeting Mr Mtshali did not give the applicant any progress report on the matter. Consequently, the applicant decided to approach the then Member of the Executive Committee the second respondent, Dr Dlomo. The applicant and Dr Dlomo held a meeting on 20 January 2017. The applicant asserted that in that meeting Dr Dlomo indicated to him that he was not aware of any developments and had expressed his concern at the fact that more than one approval for the same area was granted. The applicant asserted that at the end of the meeting Dr Dlomo advised him that he should continue further approaches to Mr Mtshali.

[10] By letter dated 11 April 2017 addressed to the first respondent’s legal representative by the applicant’s then attorneys Buthelezi Inc, the applicant demanded that the first respondent call off a further presentation that it wants to present in respect of its development. I record that this demonstrates that by this time the applicant had the benefit of legal representation and the second respondent had already approved the first respondent’s application. By 12 April 2017 the applicant’s attorney knew that the first respondent intended to proceed with the construction of its day surgery and sub-acute facility and threatened an application to court. During September 2017 the applicant knew that the development of the first respondent’s day surgery and sub-acute facility was taking place in that the levelling of the land on the site was taking place and that there was an advertising board portraying the first respondent’s facility to be constructed on the site.

[11] Those developments caused the applicant to again consult with his erstwhile attorneys Anushka Maharaj and Associates on 19 September 2017. In January 2018 the applicant noticed renewed activity at the site and it became clear to him that the development was continuing. His enquiries with the third respondent’s office revealed that the first respondent’s plans for the construction of the day surgery and sub-acute facility had been approved by the third respondent. On 19 January 2018 the applicant again consulted with his erstwhile legal

representatives. As already stated, the application for review was however only brought on 7 May 2018.

[12] Although, more than two consultations were held between the applicant and his legal representatives, his explanation for the delay in bringing the review proceedings seemed to be anchored on the following. From the discussions he had had with the third respondent's representatives his impression was that the said representatives would take some action, although he does not explain what that action would be. He asserted that he was not aware of his rights and the procedure involved in challenging the decisions taken by the second respondent. Alarming, he asserted that his rights to review were also not part of the discussion he had with his erstwhile attorneys Buthelezi Inc and that at that stage attention was only given to prevent the first respondent's further presentation from taking place.

[13] It is common cause that the main reason upon which the applicant bases his application is that he had previously obtained approval "in principal" to establish a private hospital in Scottburgh. He contended that Scottburgh is not large enough to support or make economically viable two private hospital. On that basis, he contended that the second respondent should not have approved the development of the first respondent's facility.¹ (My emphasis.)

PAJA

[5] I shall now return to the grounds of review in terms of PAJA. PAJA is premised on administrative action which is lawful, reasonable and procedurally fair.² Section 6(2) of PAJA lists the grounds on which administrative actions may be reviewed and s 7 regulates the time limits. Important to the application in casu is the time limit of 180 days from 'which the person concerned was informed of the administrative action. . . and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons'.³

¹ See pages 2-5 of Mnguni J's judgment delivered on 13 March 2020.

² See s 33 of the Constitution of the Republic of South Africa, 1996, that reads:

'(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must—

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and

(c) promote an efficient administration.'

³ See s 7(1)(b) of PAJA. Also see *Brashville Properties 5 (Pty) Ltd v Colmant & others* [2015] JOL 33555 (SCA) para 11 where it was held:

[6] In terms of s 9(1)(b) of PAJA, the period of 180 days referred to in s 7 ‘may be extended for a fixed period, by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned’. In terms of s 9(2) of PAJA, such extension may be granted where the interests of justice so require it.

[7] In *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality*,⁴ the Supreme Court of Appeal (SCA) envisaged a substantive application to be:

‘The respondent therefore required an extension of the period fixed by PAJA within which to bring the application for review. Section 9 contemplates a substantive application to the relevant court or tribunal, by the person or administrator concerned. That application ought to have been made by the respondent when it first approached the court for relief. It did not do so. Once the appellant had raised the issue of compliance with PAJA, the respondent was obliged to launch an application in terms of this section for an extension of the fixed period. This application could thereafter have been consolidated with the review application. The correct procedure would have ensured that the relevant facts were placed before the court a quo, to enable it to exercise its discretion properly.’⁵ (My emphasis.)

The Constitutional Court in the appeal of the same case, however, held that regard be had to the merits when the delay is considered.⁶

[8] In *Department of Transport & others v Tasima (Pty) Ltd*,⁷ the Constitutional Court confirmed that ‘when an applicant seeks condonation for delay, a full explanation that covers the “entire period” must be provided’.⁸ In addition, the onus rests on the applicant to explain why the delay should not be regarded as unreasonable or undue. The Constitutional Court emphasised the duties of a court considering a delay, and in para 160 of the judgment stated:

‘While a court “should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power”, it is equally a feature of the rule of law that undue delay should not be tolerated. Delay can prejudice the respondent, weaken

“Administrative action means any decision of an administrative nature made. . .under an empowering provision. . .by an organ of State, when exercising a power in terms of the Constitution. . . .”

⁴ *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality* 2017 (6) SA 360 (SCA).

⁵ *Ibid* para 8.

⁶ See *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) para 40.

⁷ *Department of Transport & others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC).

⁸ Footnote omitted. *Ibid* para 153.

the ability of a court to consider the merits of a review, and undermine the public interest in bringing certainty and finality to administrative action. A court should therefore exhibit vigilance, consideration and propriety before overlooking a late review, reactive or otherwise.’ (Footnotes omitted, my emphasis.)

Delay

[9] It is evident from the papers filed by the first respondent that a notice was published in a local newspaper on 6 February 2015, indicating the first respondent’s intention to establish a new day hospital in Scottburgh. The notice stipulated that the application and its accompanying documents would be open for inspection by interested persons, and invited those interested to lodge written representations or objections to the application. Those failing to lodge representations or objections would be disqualified from participating in the process.

[10] For sake of completeness this is what was published on 6 February 2015:
 ‘NOTICE Is hereby given of the intention to establish a New Day Hospital, located in Scottburgh, KwaZulu-Natal. The proposed facility will have 2 minor theatres, 20 day beds and 20 sub-acute beds for which an application will be lodged with the Department of Health KZN as set in terms of the National Health Act (Act No. 61 of 2003).

A copy of the application and its accompanying documents will be open for inspection by interested members of the public between the hours of 08h00 and 16h00 Mondays to Friday (excluding Public Holidays) at the offices of Hibiscus Private Hospital, George Street, Port Shepstone.

Members of the Public are invited to lodge written representations or objections to this application via registered mail with the applicant (address below) within 21 days of the appearance of this notice. Should you fail to lodge or forward comments by 24 February 2015, you should disqualify from participating in the process.’ (My emphasis.)

[11] The applicant avers that he became aware, towards the end of 2016, that approval for the development of the day surgery and sub-acute facility had been granted to Hibiscus Hospital. No specific date in 2016 has been disclosed by him. However, on 15 July 2016, the applicant wrote to the third respondent and recognised that approval had been granted to others to develop private hospital facilities within the municipal area. He then communicated with the Department of Health about the

three approvals. Importantly, on 28 March 2017, the applicant gave a presentation of his proposed development to a group of medical practitioners. At that time, he was aware of the fact that the first respondent was also making a presentation to the group about the Hibiscus Hospital's development.

[12] It is trite that the reasonableness of the delay is assessed by how long it took to institute proceedings once a party became aware of the action. In the assessment the court will conduct a factual enquiry and consider the circumstances of the case. In the well-known case of *Wolgroeiërs Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad*,⁹ the appellate division emphasised the factors to be considered in a review relying on *Hassan & Co. v Potchefstroom Municipality*,¹⁰ stating:

“In my opinion there are two factors to be considered as to whether or not to entertain an application for review, viz., (i) whether there has been unreasonable delay, and (ii) whether in the nature and circumstances of the case it is likely that the other side had been prejudiced, the more important factor being that of prejudice...”

I am mindful of the fact that this application is governed by PAJA, which has changed the administrative landscape since the *Wolgroeiërs* judgment, however, prejudice caused to the other party should still be considered.

[13] In *Madikizela-Mandela v Executors, Estate Late Mandela & others*,¹¹ prejudice to a party was re-affirmed. The SCA held:

‘[9] . . . First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Second, there is a public-interest element in the finality of administrative decisions and the performance of administrative functions. The application of the rule requires consideration of two questions. Namely, was there an unreasonable delay? If so, should the delay in all the circumstances be condoned?’

[10] In *Van Zyl* para 48 it was stated that the reasonableness or unreasonableness of a delay is dependent on the facts and circumstances of each case. It is a matter of a factual enquiry upon which a value judgment is called for in the light of all the relevant circumstances, including any explanation that is offered for the delay. It is an investigation into the facts of the matter in order to determine whether, in all the circumstances of the case, the delay was reasonable. In *Gqwetha v Transkei Development Corporation Ltd and Others* 2006 (2) SA

⁹ *Wolgroeiërs Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 28G-H.

¹⁰ *Hassan & Co. v Potchefstroom Municipality* 1928 TPD 827.

¹¹ *Madikizela-Mandela v Executors, Estate Late Mandela & others* 2018 (4) SA 86 (SCA).

603 (SCA). . . para 24 it was pointed out that a material fact to be taken into account in making that value judgment was the nature of the challenged decision, as not all decisions have the same potential for prejudice which may result from their being set aside. It was emphasised in *Van Zyl* [para 48] that, although this involved the exercise of a value judgment, it was not to be equated with the judicial discretion involved in the next question if it arose, namely whether a delay which has been found to be unreasonable should be condoned.’ (My emphasis.)

[14] I now turn to the facts. On 11 April 2017, the attorneys who acted on the applicant’s behalf, advised him of his rights. That much is clear from the correspondence that was sent to the medical doctors. It reads:

‘We act on behalf of Dr Godfrey Mnisi’, in this matter. Our instructions are to plead with your goodselves to stop convening the meeting of medical doctors at Scottsburg for the abovementioned presentation. The reasons for our client pleading with you to stop immediately and cancel this meeting are as follows:

1. Our client is the only legitimate licensed holder for the construction of a private hospital in Umdoni area issued by the Department of Health, KZN in 2015;
2. He is challenging the legitimacy and the authority of all other licenses that were subsequently issued without his knowledge and approval;
3. He has already taken the matter up with the relevant authorities of the Department of Health and the matter has not yet been finalized;
4. He strongly believes that any other operation intended for the construction of a private hospital in this area, infringes upon his rights as he has incurred huge amounts towards preparations for the construction of his private hospital;
5. This huge task has been presented and discussed with a number of medical doctors in this area and many of whom have pledged their support towards the construction of Dr Mnisi’s private hospital;
6. The local Municipal Council and other relevant authorities know and approve of Dr Mnisi’s plans and any actions outside his plans will cause irreparable financial loss and damage and frustrate all efforts towards the construction of the hospital for the benefit of this community.

Wherefore we are instructed, as we hereby do, to advise you to stop calling and convening the meeting of the 18th April 2017 immediately. Please communicate your intentions not to proceed with Dr Mnisi within 24 hours, failing which our client will be compelled to approach the court of law to enforce and protect his rights.¹² (My emphasis.)

¹² See annexure M page 58.

[15] In my view, the review clock started ticking towards the end of 2016, when the applicant was aware of the decision taken by the second respondent. In fact, the applicant delayed the review application for almost a year without giving a reasonable explanation for the extraordinary delay. Mr *Blomkamp* for the applicant had to concede at the time of arguing the application that the applicant's founding affidavit is silent on the reasons for the delay.¹³

[16] It is necessary to also deal with what the applicant stated in his supplementary affidavit. In the supplementary affidavit the applicant lists the following reasons for delaying the review:

- '33.1 Upon realising that the Second Respondent took a decision to award the First Respondent a license to operate a private hospital, I approached the members of the Second Respondent on the issue. This led to various engagements with the Respondents and later court battles.
- 33.2 This Honourable Court eventually granted an interdict in my favour stopping the First Respondent from developing a private hospital pending review.
- 33.3 On 18th October 2019, the interdict was discharged. Prior to that, there were various settlement proposals initiated by the First Respondent with the knowledge of the Second respondent. Unfortunately, the attempts failed to yield any results.
- 33.4 It is my humble submission that the delay of one year is not inordinate in the circumstances were (sic) the First Respondent has not operated.'¹⁴

[17] It is also necessary to focus on what was stated by the applicant in his replying affidavit to justify the delay in bringing the review application:

'Taking the factual matrix of this matter into consideration it can be said that the interest of justice justifies the extension of the time period within which this application was brought. This is because from the time that I was aware of the granting of the approval of the license of the first respondent, I took several steps to resolve the matter with the representatives of the second and third respondent.'¹⁵

¹³ See *Khumalo & another v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC) paras 49-51.

¹⁴ See para 33 pages 511-512.

¹⁵ See para 25 page 527.

[18] Further, in para 28 of the very same affidavit it is clear that the applicant conflates the concepts of being aware and being given reasons for the decision taken by the second respondent. This is what he says:

‘It is misdirected for the first respondent to seek dismissal of this application on grounds that it was after the expiry of 180 days. This is because the running of the 180 days was to begin when I was aware of the decision, its reasons and my right to appeal as a party with a legitimate expectation. There was no point where I was given the reasons for the decision, regardless of several attempts to have the matter resolved without resorting to bringing this application.’¹⁶

The applicant avers that he was not aware of his rights to review the second respondent’s decision despite the fact that he wanted to stop the development of the first respondent at all times. The last paragraph of annexure M, *supra*, most certainly shows that he was aware of his rights and would not hesitate to approach a court to enforce his rights.

[19] It is also necessary to focus on the prejudice caused to the first respondent when the applicant failed to institute review proceedings timeously. The first respondent states the damages incurred in anticipation of the outcome of the review application in its answering affidavit. This is what is stated:

‘24. Consequently, the First Respondent suffers damages, and will continue to do so pending the outcome of the review application, *inter alia* from:

- (a) a delay in the completion of the facility and the commissioning thereof, with a concomitant delay on exposure to finance costs and a delay in commencing with business to recoup its investments;
- (b) an exposure to additional claims by the contractor; and
- (c) additional building costs to repair damage to the works as a result of the buildings being exposed to the elements.’¹⁷

In addition, the first respondent estimated damages at R680 000 per month in delaying the review application.

[20] Evidently, the 180 day period in terms of s 7(1) of PAJA expired before mid-2017, and the applicant only launched the review on 7 May 2018. Absent any

¹⁶ See para 28 page 528.

¹⁷ See page 166.

reasonable explanation for the delay, the application for any condonation fails and so should the review application.

[21] Once the first respondent raised the issue of non-compliance with s 7 of PAJA, the applicant ought to have brought a substantive application explaining the inordinate delay and his reasons for electing not to bring it, shortly after he became aware of the first respondent's approval to develop a health care facility. Should I be wrong in my decision regarding the fact that the review is procedurally flawed because of the unreasonable delay, it is necessary to also deal with the merits of the review. I do so in light of the *Buffalo City* decision above.¹⁸

The merits of the review

[22] The applicant claims, inter alia, that the second respondent's decisions are reviewable on the following grounds:

- (a) The decisions constitute actions that are procedurally unfair (s 6(2)(c) of PAJA);
- (b) Relevant considerations were not considered (s 6(2)(e) of PAJA);
- (c) The decisions were taken arbitrarily (s 6(2)(e)(vi) of PAJA); and
- (d) The decisions were irrational (s 6(2)(f) of PAJA).

I shall now consider each of these grounds.

[23] What constitutes procedural fairness has been crystallised in a number of decisions, and generally includes the following factors:

- (a) The objects or administrative scheme of the statute;
- (b) The nature of the decision(s) to be taken and of the decision-making bodies involved;
- (c) The interests at stake and the impact of the exercise of powers on these interests;
- (d) The circumstances of the specific case; and
- (e) The urgency with which action has to be taken.¹⁹

¹⁸ See para 13.

¹⁹ For a more detailed discussion of procedural fairness, see JR de Ville *Judicial Review of Administrative Action in South Africa* (revised first edition) (2005) at 246-261.

[24] The applicant refers to procedural fairness in para 72.2 of his founding affidavit in the following terms:

'72. Each of these three decisions taken by the second respondent:

72.1 constitutes administrative action which materially affects my right or legitimate expectorations concerning the approvals I obtained from the second respondent;

72.2 should not have been taken without first:

72.2.1. giving me notice of these decisions intended to be taken;

72.2.2. providing me with a reasonable opportunity to make representations, this particularly in circumstances where I had confronted Dr Dhlomo and Mr Mtshali in relation to the other approvals granted and when they undertook to handle the matter with due consideration of my interests.²⁰ (My emphasis.)

[25] The applicant, in his submission that he should have been given notice and an opportunity to challenge any decision that allowed the first respondent to build a facility, is based on his interpretation of legislation. It appears that he is relying on reg 158 as published under Government Notice R158, dated 1 February 1980 as amended.²¹ This issue was however no longer vigorously argued when the matter was heard. I shall deal with the regulation briefly for the sake of completeness.

[26] In my view, the requirements in reg 158 are applicable to the registration of a private facility.²² It appears ex facie the papers that the applicant is of the view that the following actions are one and the same thing:

- (a) The provisions dealing with the construction or development of a private healthcare facility; and
- (b) The requirements pertaining to a licence to provide such services.

These two concepts are different in nature taking into account the legal provisions. As a fellow competitor for the provision of healthcare services the applicant has not established a right to receive notice or receive reasons to challenge the permission given by the second respondent that was granted to develop another facility. Assuming that I am wrong in finding that he need not have received notice then this challenge

²⁰ See pages 23 and 24.

²¹ GN R158, GG 6832, 1 February 1980 as amended.

²² See ss 2-6 and s 14 of reg 158.

should fail in the light of the notice that was published on 6 February 2015 in the newspaper.²³

[27] The challenge under 6(2)(e) appears to be based on the applicant's contention that the second respondent should not have granted approval for two facilities in the same area. The record filed by the second respondent shows that the persons tasked with the consideration of applications were mindful of the fact that more than one application should be considered. The review record shows that the committee considered the fact that multiple licences were to be considered on 6 July 2015, 21 September 2015 and 5 October 2015. The record shows that there is no merit in the applicant's challenge in terms of s 6(2)(e).

[28] The challenge of the decisions being taken arbitrarily is equally not borne out by the review record. It is undisputed that:

- (a) Scottburgh is in need of a private facility;
- (b) The committee met on a number of occasions to consider the different applications; and
- (c) The members of the committee were aware of the various applications and considered them.

It cannot be said that any decision was taken arbitrarily. In fact, the committee considering the applications recognised and considered the fact that they had recently approved the Mnisi Seaview Facility when they dealt with the first respondent's application.²⁴ It is necessary to refer to the judgment of Mnguni J again to deal with this point, where it was succinctly stated:

'(b) [I]mportantly, the feasibility studies conducted for both projects reveal under the heading "Calculation of Estimated Private Beds for Ugu District" at pg 76 and pg 113 of the reports respectively state: "Based on the above population data from Stats SA 2013, the finding is that there is a potential need between 59 and 549 private beds in the Ugu District and surrounding municipality areas." This evidence seemed to contradict the applicant's contention that Ugu District is not large enough to support or make economically viable two private hospitals.

²³ See the publication above para 10.

²⁴ See review record page 302.

[36] In passing I am of the prima facie view that the review application is not only misguided but more realistically myopic because on the papers before me there seems to be a substantial difference between the first respondent's day surgery and sub-acute facility and that of the applicant's intended private hospital. As I see it, the applicant has not adequately explained why he sees the two facilities to be in direct competition with each other.²⁵ (My emphasis.)

[29] On the issue of rationality, the Constitutional Court held in *Pharmaceutical Manufacturers Association of SA & another: In re Ex Parte President of the Republic of South Africa & others*:²⁶

'Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful. The setting of this standard does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately. A decision that is objectively irrational is likely to be made only rarely but, if this does occur, a Court has the power to intervene and set aside the irrational decision. This is such a case. Indeed, no rational basis for the decision was suggested. On the contrary, the President himself approached the Court urgently, with the support of the Minister of Health and the professional associations most directly affected by the Act, contending that a fundamental error had been made and that the entire regulatory structure relating to medicines and the control of medicines had as a result been rendered unworkable. In such circumstances, it would be strange indeed if a Court did not have the power to set aside a decision that is so clearly irrational.' (Footnote omitted.)

[30] In light of the above, the applicant's contention that the second respondent did not consider that other approvals had been granted is not borne out by the record and has to fail. In fact, from the review record it is clear that the second respondent considered relevant facts and exercised its powers rationally when it decided to grant the first respondent permission to develop a private day surgery and sub-acute care facility in Scottburgh.

²⁵ See Mnguni J judgment supra at paras 35 and 36.

²⁶ *Pharmaceutical Manufacturers Association of SA & another: In re Ex Parte President of the Republic of South Africa & others* 2000 (2) SA 674 (CC) para 90.

Order

[31] The following order shall issue:

1. The application is dismissed with costs, including those consequent upon the employment of senior counsel.
2. Costs to include the reserved costs of the application in case number D3222/2018 (the application for an interim interdict) as well as the costs reserved on 20 August 2021 when the review was adjourned.

Steyn J

APPEARANCES

Counsel for the applicant	:	Mr PJ Blomkamp SC
Instructed by	:	Shehnaaz Patel & Co 145 Scott Street Scottburgh
Counsel for the 1 st respondent	:	Mr AV Voormolen SC
Instructed by	:	Cox Yeats Ncondo Chambers Vuna Close Umhlanga Ridge, Durban Ref:R Hoal/R Evans/ 07H134002
Date of Hearing	:	16 September 2021
Date of Judgment	:	23 September 2021