

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case Number: 18544 / 2023

(and with Case Number: 9940 / 2023)

In the matter between:

JULIAN VAN DER WESTHUIZEN	First Applicant
ELEONORE VAN DER HORST	Second Applicant
GAVIN GOWER WOODS	Third Applicant
ANDILE NOMLALA	Fourth Applicant
KATE HOULISTON	Fifth Applicant
HARDY MARITZ	Sixth Applicant
JORGE SIERRA RUBIA	Seventh Applicant
PATRICIA NOBLE	Eighth Applicant
LISA HEILBRON	Ninth Applicant
ROSHNI RATANJEE	Tenth Applicant
GREGORY LEX BLANK	Eleventh Applicant
SHERBANOE TALIEP	Twelfth Applicant
JACQUES ZOGHBY	Thirteenth Applicant
JOANNA WRIGHT	Fourteenth Applicant

MICHAEL FULLER	Fifteenth Applicant
WILMAY DAVIS	Sixteenth Applicant
JOACHIM CARLS	Seventeenth Applicant
and	
LIFE HEALTHCARE HOLDINGS GROUP (PTY) LTD	First Respondent
LIFE VINCENT PALLOTTI HOSPITAL (PTY) LTD	Second Respondent
LOUIS KATHAN	Third Respondent
DR LOUIS KATHAN INC	Fourth Respondent

In the matter between:

LOUIS KATHAN	First Applicant
DR. LOUIS KATHAN INC	Second Applicant
and	
LIFE HEALTHCARE HOLDINGS GROUP (PTY) LTD	First Respondent
LIFE VINCENT PALLOTTI HOSPITAL (PTY) LTD	Second Respondent

Coram: Wille, J

Heard: 9 November 2023

Order: 13 November 2023

REASONS

WILLE, J:

Introduction

[1] In this application for interim relief pending a review, a singular fundamental question was simple to formulate but challenging to answer. The core issue was whether private groups were (for legal application) able to perform ‘public’ responsibilities. This was the primary subject of the hotly contested debate. Two urgent applications found me that required resolution on an urgent interim basis.¹

[2] More than a dozen individuals afflicted with cancer served as the applicants for the original interim application, requesting temporary alleviation while the review underwent final evaluation. The applications highlighted concerns over the dire consequences of the first and second respondents' decision to withdraw the third respondent's privileges to practice in a private medical institution.²

[3] The third respondent is a renowned and respected oncologist regarded as this facility's most skilled and well-informed neuro-oncologist. This, at least, is not disputed. Furthermore, his work has been regarded as exceptional by other medical experts. His patients and professional oncologists confirm the efficacy of his work in saving lives.³

[4] Undoubtedly, the third respondent is among the foremost oncologists in our country specializing in brain tumours and stereotactic therapy. In summary, he saves people's lives in difficult and trying circumstances and enjoys a unique and trusting relationship with his cancer patients.⁴

[5] Some months ago, the first and second respondents decided to revoke the third respondent's practicing privileges at their medical facility. This decision was to be implemented at the end of last year.⁵

[6] The decision prohibited the third respondent from entering the oncology unit and utilizing its treatment facilities owned and controlled by the first and second respondents. In summary, the third respondent was to be ‘kicked out’ of the respondents’ private medical institution.⁶

¹ It was agreed that the temporary fate of the second application would be determined by the fate of this application.

² The main issue for determination was whether the hospital respondents performed “public” responsibilities.

³ It was not seriously disputed that the patient applicants were receiving lifesaving treatment from the third respondent.

⁴ This could not be seriously disputed by the hospital respondents.

⁵ By the end of December 2023.

⁶ When reference is made to the decision, it means the decision to terminate the third respondent's privileges at the hospital.

Overview

[7] The second respondent has cutting-edge specialized equipment that employs non-invasive radiation technology to modify patients' treatment regimens according to their specific cancer conditions. The second respondent is one of the entities that controls and administers just three facilities in our country that can do non-invasive stereotactic body radiation using particular and highly specialized equipment.⁷

[8] The applicant patients argued that the termination decision would have had a substantial and disastrous effect on them as it would, among other things, hinder the treatment of brain tumours by one of the nation's leading specialists and the use of specialized equipment for stereotactic chemotherapy.⁸

[9] These critical care situations could escalate to a mortality level as they (in some cases) entailed matters of life or death. The applicants argued that if the court rejected the interim relief proceedings interdict and they succeeded in the second part of their application, they would suffer and experience irreparable harm that could potentially never be the subject of remedy. In the correct context, irreparable harm could mean precisely that type of harm, as some applicants could die without their specialized treatment.⁹

[10] I say this because the applicants expressed that if the third respondent is not accessible to them at the second respondent's facilities, their lives would be in grave danger. The third respondent is the only option available to them. Also, this is the option that they have learned to trust. One of the oncologists stated under oath that she relies solely on the third respondent to provide her patients with the required specialized care and therapy. Simply put, she trusts the third respondent's work.¹⁰

[11] This notwithstanding, the hospital respondents asserted that the third respondent's relationship with their staff was the primary cause of the harm to them. They were concerned that if the third respondent was permitted to continue to practice, it would have had a detrimental effect on them and their employees. The hospital respondents' position on this issue bore further scrutiny.¹¹

⁷ The applicant patients largely depended on this type of treatment for their survival against cancer.

⁸ The applicant patients also formed a mental attachment to the third respondent regarding their treatment.

⁹ The second part (or Part B) of the application was and is the review application.

¹⁰ This is one of the oncologists that renders services at the facilities controlled by the hospital respondents (Dr.Hall).

¹¹ The suspension notice gave the third respondent a lengthy period (some months) to remain at the hospital.

[12] Thus, the applicants contended that the termination decision should be delayed for a few additional months until the second portion of their relief fell to be determined. They said this because there would be no real and inherent possibility of causing permanent harm to the hospital respondents by such a delay. Put another way, if this court ruled that the respondents were to delay the implementation of their termination decision for a few additional months, there would and could be no permanent damage caused to them.¹²

Consideration

[13] The envisaged relatively short delay was one of the factors that weighed heavily on me in deciding to grant the interim relief sought by the applicants. I found that the interim relief application satisfied the four specific predetermined requirements for the contended relief. These requirements will now be considered.¹³

[14] The hospital respondents decided to terminate the third respondent's employment due to his involvement in what they perceived as misconduct. This claim has its genesis in the third respondent's alleged improper use of the words - '*nigger*' and- '*moffie*' - as well as his alleged inappropriate sexually provocative remarks directed towards female staff. The third respondent advanced that the correct context did not appear from the papers of the hospital respondents. The relevant chronology was also absent from the papers filed on behalf of the hospital respondents.¹⁴

[15] The third respondent hotly contested that he engaged in any inappropriate behaviour. According to him, the context for the utterance of the word -'*nigga*' - was the following: (a) he was in discussion with a colleague in 2019 when this took place, (b) this occurred as far back as 2019, (c) his colleague expressed dissatisfaction with the lack of recognition for his contributions to his work and his difficulties in adapting to the professional environment, (d) the third respondent advised his colleague to focus instead on the importance of working diligently and, (e) the third respondent emphasized that professionals (of non-white ethnicity) must exert twice the amount of effort to receive recognition for their work.¹⁵

¹² I understood that the review application would be determined in the first quarter of this year.

¹³ Emphasis will be placed on the issue of "irreparable" harm.

¹⁴ The third respondent did not deny the use of these words. This happened, he says, as far back as 2019.

¹⁵ The third respondent conveyed that people of colour had to work harder than their white colleagues.

[16] He emphasized that the substance and purpose of these words were not racist and could never reasonably be determined to be racist in this context. Moreover, this was said more than three years ago, and nothing was said or done about this alleged inappropriate conduct. The third respondent is a person of colour and is homosexual. He has consistently demonstrated a lack of racism, homophobia, and any form of sexual harassment towards his fellow human beings.¹⁶

[17] One of the main points made by the third respondent was that the termination decision violated the hospital respondents' guidelines and protocols when dealing with alleged unacceptable behaviour. A specific procedure must be followed when dealing with alleged inappropriate behaviour in the context of a first offender.¹⁷

[18] The third respondent contended that he was not given prior notice, and no rehabilitation plan was implemented. Moreover, it was averred that there was no final notification and no temporary suspension. I considered these issues and arguments when assessing the prospects of success concerning the second part of the application chartered for review. It seemed to me that the hospital respondents opted for termination as their last option and primary means of defence and ignored their guidelines to the detriment of the applicants and probably to the prejudice of the third respondent.¹⁸

[19] This notwithstanding, the applicants advanced that the termination notice constituted an excessively severe and disproportionate penalty, rendering it unreasonable. Thus, the argument was that the hospital respondents did not adhere to the basic principles of administrative law.¹⁹

[20] In response, the hospital respondents argued that there are several other very capable oncologists at their hospital who could operate the devices and assist the patients who ostensibly rely on the third respondent for their treatment. This must be considered in the context of the allegations made by one of the more senior oncologists who carries on business at the medical facilities controlled and administered by the hospital respondents.²⁰

¹⁶ It was difficult to understand how these words in their proper context amounted to misconduct.

¹⁷ Firstly, intervention must take place and then a definitive written warning must be issued to the alleged offender.

¹⁸ According to the relevant guidelines only a final warning may result in the suspension or termination of "practice" privileges.

¹⁹ This is also where the "private law contractual" argument seeks to find its place in this debate.

²⁰ Dr. Hall is highly respected in her field and explicitly stated that she relied heavily on the expertise of the third respondent.

[21] These arguments by the hospital respondents had to be weighed up with and against the position advanced by the first applicant (among others), who explained that he had experienced health problems because of the treatment by another oncologist at the same hospital. The third respondent eventually rectified his previous incorrect (so he says) treatment regime, which cured his health issues.²¹

[22] As alluded to earlier, the issue of irreparable harm weighed heavily with me when considering the interim relief chartered for by the applicants. The applicants contended that if the third respondent was not available to treat them at the radiation unit housed by the second respondent, they harboured severe concerns about suffering irreversible damage to their health and treatment regimes.²²

[23] This potential damage needed to be balanced against the hospital respondent's claims about the poor relationship between the hospital staff and the third respondent. The hospital respondents submitted that revoking the third respondent's credentials was within their rights to protect their legitimate commercial interests. This is where the debate was engaged about the constitutional ingredient to this relief as opposed to the protection of private contractual and commercial rights.²³

[24] The hospital respondents also argued that the applicants had no right to review their termination decision. It was suggested that the applicants did not successfully prove the existence of a *prima facie* right. By elaboration, it was advanced that the applicants failed to establish a right requiring protection through an interim interdict.²⁴

[25] Based on the specific facts of this case, I determined that the termination decision was indeed an administrative action. The facts by the applicants on this issue were good, while the facts by the hospital respondents on this issue were not good. I say this because the preferred legal position when dealing with temporary relief drenched with an overwhelming constitutional ingredient has now been clarified. I saw no legal impediment in reaching the conclusion that *prima facie* there was enough pointing to the determination of this legal question in the applicants' favour. I thus granted interim relief primarily given the penchant reasoning adopted in the majority judgment in *Eskom*.²⁵

²¹ The oncologist who initially treated him was endorsed by the hospital respondents.

²² Where they have access to the specialized "Novalis" and "Ethos" machinery.

²³ It is argued that the constitutionally protected rights to life and dignity cannot be overridden by lawful commercial interests.

²⁴ It is trite that it is sufficient to show that such a right is *prima facie* established though open to some doubt.

²⁵ *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others* [2022] ZA CC 44 at para [251].

[26] This is so because our courts are enjoined to provide a remedy where there is some discrimination with no other remedy available. The potential discrimination against some of the applicants in this case was potentially life-threatening. I say this also because our courts are enjoined to develop the common law so that effect is given to discriminatory rights to the extent that legislation does not give effect to such rights.²⁶

[27] The reviewing court will thoroughly address all these aspects. The reviewing court will ultimately have to consider whether the termination decision was based on administrative action. It must assess if the termination decision should be subject to review and nullification due to its irrationality, illegality, and procedural unfairness. Put another way, it will be asked to determine if the termination decision was excessive and did not align with the respondents' guidelines on inappropriate behaviour.²⁷

[28] The hospital respondents submitted that the termination decision did not constitute administrative action since it was made by a private hospital, which is exempt from examination as an administrative action. The criteria for evaluating whether a decision qualifies as administrative action also encompasses decisions made by individuals and legal entities.²⁸

[29] No doubt, the prescribed approach in this connection was also to consider the decision's impact. Moreover, in this case, the enquiry was whether the decision was connected to a public obligation's performance. The termination decision had a significant impact on the public (the applicants) and involved the infringement of rights held by the public.²⁹

[30] Determining whether a power or function is considered 'public' is a difficult task. It requires considering various factors, such as: (a) the extent of coercion or power held by the actor as a public institution, (b) the impact of the decision on the public; (c) the source of the power; and (d) whether the decision needs to be made in the public interest. There is no straightforward test to be applied in circumstances as those that were presented in this application under consideration.³⁰

²⁶ Section 8 (3) (a) of the Constitution of the Republic of South Africa.

²⁷ This because the third respondent was not provided with any warning or offered a rehabilitation program.

²⁸ Section 1 (b) of the Promotion of Administrative Justice Act, 3 of 2000.

²⁹ *Chirwa v Transnet* 2008 (4) SA 357 (CC) at [186].

³⁰ A court must use its "judgment" and consider the relative importance of these factors in their given context.

[31] In my view, the decision to terminate affected members of the public. It effectively denied these cancer patients access to a skilled specialist in stereotactic and brain tumour oncology, who was only available at this second respondent hospital with the required equipment. Furthermore, it undermined, among other things, the right to healthcare. Private hospitals must consider the public interest when making decisions that impact the public.³¹

[32] For the interim relief to be granted, I was not even obliged to decide if the termination decision amounted to administrative action. What was required from the applicants was to demonstrate only that the termination decision *prima facie* qualified as an administrative action. This they did.³²

[33] Even if I am wrong on the administrative action point, the termination decision should still be deemed unconstitutional due to its inconsistency with a *bona fide* implementation of the termination provision. I say this because the hospital respondents did not follow the policy regarding the potential non-compliance of medical practitioners with undesirable conduct. The incident of unacceptable conduct was the first occurrence and not of a nature that qualified for immediate termination.³³

[34] The hospital policy explicitly states that ‘firing’ is considered a final option only after multiple attempts to address the inappropriate behaviour have been exhausted. The rationale for this is self-evident because the policy acknowledges that a termination decision will significantly impact patients and their entitlements. It formalizes an equitable procedure that aims to safeguard the rights of both healthcare professionals and their patients. The termination decision lacked good faith as it opted for the most severe penalty instead of other corrective measures.³⁴

[35] Thus, the hospital respondents by engaging in an unjust procedure rendered the cancellation or termination decision illegal and unconstitutional, even within the realm of private contract law. This must be so because the termination decision was illegal due to its failure to adhere to a just procedure that included the rights of the applicants to the specialized medical care that they so desperately required from the third respondent at the facility controlled by the hospital respondents.³⁵

³¹ In my view private hospitals have both positive and negative obligations.

³² Having regard to the inherent probabilities, I held that the applicants should obtain final relief under their review process.

³³ An initial intervention should be conducted in a constructive manner following the hospital respondents' own protocols.

³⁴ It also failed to acknowledge and uphold the rights and well-being of patients.

³⁵ *AB v Pridwin Preparatory School and Others* 2020 (5) SA 327 (CC) at 209.

[36] I anxiously considered the potential outcomes that the applicants had in the review application, considering both the administrative law arguments and the contractual arguments. The prerequisites for obtaining an interim interdict were firmly established. Self-evidently, when the applicants' rights are clear, and all other requirements are met, there is no difficulty in granting an interim interdict.³⁶

[37] After that, I considered the prospects of success, the balance of convenience, and whether there was no other satisfactory remedy. There was no other satisfactory remedy. The stronger the prospects of success, the less important it is for the balance to have favoured the applicants. I found (on the facts) that the balance of convenience also favoured the applicants. If the interim interdict was not granted, the termination would have taken effect, and the well-being and survival of the applicants would have been jeopardized.³⁷

[38] These were then my reasons for the granting of the interim relief.

E D WILLE
(Cape Town)

³⁶ Conversely, if the applicant has no chance of success, the Court will obviously reject the interdict.

³⁷ The termination notice would have taken effect on 31 December 2023.