



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 701/2019

In the matter between:

MANGAUNG HEALTH CARE CENTRE (PTY) LTD Applicant

and

THE HEAD OF THE DEPARTMENT:

FREE STATE PROVINCIAL GOVERNMENT 1st Respondent

THE MEC: FREE STATE PROVINCIAL

GOVERNMENT: DEPARTMENT OF HEALTH 2nd Respondent

CORAM: MHLAMBI J, *et* MOLITSOANE J

HEARD ON: 02 SEPTEMBER 2019

DELIVERED ON: 21 November 2019

MHLAMBI, J

Introduction

- [1] The applicant wants to build a hospital, Mr Grobler SC submitted on behalf of the applicant. Fair enough, but follow the proper channels, was the subtle response in the respondents' papers and the submissions by their counsel Mr Cassim SC.
- [2] The applicant approached this court by way of application for an order in the following terms:
- "1. The First Respondent is ordered to within five days after date of the order, enter the Applicant's name into the Register for Private Health Facilities in all accordance with the Second Respondent's determination of **28 May 2018**, and related to the Applicant's request for such registration as a private hospital with 200 acute beds and 120 sub-acute beds, such duty befalling the First Respondent in terms of Regulation 3, 16, 17 of the Provincial Regulations published in the Free State Provincial Gazette on **09 September 2014**, issued further in terms of section 16(1)(i) of the Free State Hospitals Act, 13 of 1996.*
 - 2. The First Respondent is ordered to within 5 days after date of the order adjudicate upon the Applicant's request of 27 November 2018 from relocation of its licence referred to in prayer 1 from Plot 22, Cnr Rudolf Greyling & AW Louw Avenue, Estoire, Bloemfontein to Erf 29573 and 29574, Extension 18, Bloemfontein, and inform the Applicant of the outcome.*
 - 3. The Respondents are ordered to pay the costs of the Application jointly and severally, payment by one the other to be absolved.*
 - 4. Further and/or alternative relief."*
- [3] For the sake of brevity and convenience, the first and second respondents will be referred to collectively as the "Department";

the first respondent as the “HOD” where necessary and the applicant as the “Centre”.

- [4] The Department opposed the application on the grounds that the successful internal appeal on which the application was based, was unlawfully and invalidly dealt with. It filed a counter-application for review, contending that the former MEC did not comply with the applicable laws and regulations when determining the Centre’s appeal, and accordingly, under the principle of legality, that decision stood to be reviewed and set aside by this court. In relation to the second part of the relief sought by the applicant (as contained in prayer 2 of the notice of motion), it submitted that the correct administrative processes in applying for the relocation of its licence were not followed by the Centre and the Centre was therefore not entitled to the relief sought.
- [5] At the inception of the hearing of the application, it was agreed between the parties that if the court found in favour of the Department and granted the relief in the counter-application for review, the mandatory relief sought by the Centre in its main application must fail; conversely, if the review application was unsuccessful, then the *mandamus* application should succeed. Consequently, the Department had a duty to begin as the outcome of the review application would be dispositive of the whole application. The Centre conceded that it had a hurdle to cross in respect of its claim for the relocation of the licence as sought in prayer 2.

[6] The following relief is sought in the counter-application/ review:

- “1. *To the extent necessary, condoning the respondents/applicants’ departure from the provisions and time periods provided for in rule 53.*
2. *The decision of the former MEC of the Free State Provincial Government: Department of Health, BM Khompela dated 8 May 2018 to uphold the applicant/respondent’s appeal and to permit it to register a private health establishment as applied for, is hereby reviewed and set aside;*
3. *The applicant/respondent is permitted, should it so wish, to file with the second respondent/applicant a fresh appeal within (5 days) of this court’s order, which appeal the second respondent/applicant will consider in accordance with the provision of Regulation 17 of the Private Health Establishment Regulations, 2014, read with the 2017 amendments thereto.*
4. *That there is no order as to costs.”*

[7] The Centre opposed the review on the basis that there was an inordinate delay in the institution of the review proceedings and that the application lacked substance as it “*second-guessed*” the former MEC’s decision. The Department failed to place the review record before this court. It was therefore not possible to adjudicate whether the former MEC’s decision was reviewable. The relief sought by the Department in the review (which they allege to be just and equitable), divested the Centre of its rights and did not alleviate any prejudice at all.

Issues

[8] The issues for determination are therefore narrowed to the following:

1. Whether the review was launched within a reasonable time;
2. Whether the former MEC's conduct was consistent with the applicable regulations and thus the rule of law;
3. The review record;
4. An appropriate remedy;
5. Costs.

Background

[9] The brief background: On 15 January 2018, the Centre filed an application in its own name with the department for the registration of a private health establishment for the licencing and registration of 150 sub-acute beds and 200 acute beds. The application was submitted to the HOD who in turn referred it to an appointed committee for adjudication.

[10] The appointed committee considered the application on 05 April 2018 and recommended to the HOD that the Centre's application for 200 acute beds be denied and the one for 150 sub-acute beds be partially granted and restricted to 80 beds. The HOD informed the Centre of the outcome of its applications on 20 April 2018. The Centre apparently submitted appeals to the MEC against both decisions on 26 April 2019. The MEC's response was

contained in two letters dated 8 May 2018 in which he advised the Centre that both of its appeals were successful.

- [11] On 27 November 2018, the Centre sent a letter to the hospital licensing committee demanding, firstly, guidelines as to the way forward as it had been waiting for a response and guidance from the department since the appeals were upheld by the then MEC, BM Khompela, on 8 May 2018. Secondly, it had acquired a big hospital property investor that owned erven 29573 and 29574, Extension 181. The investment was conditional to the successful relocation of the 200 acute bed licence to this site, for which the applicant (as per the contents of this same letter) applied *“in anticipation of the fulfilment of the stated demand and the eventual relocation being considered in parallel with the guidance awaited as mentioned.”*

- [12] The HOD advised the Centre as per his letter dated 13 December 2018 that he was aware of the former MEC's decision regarding the appeals, but that there were serious concerns regarding the regularity of the process followed by the then MEC. The department was therefore considering to take that decision on review to the high court. The Centre responded in writing on 27 December 2018, notifying the MEC that, should it not have received a court date for the review of the former MEC's decision by 9 January 2019, it would approach the High Court to compel her to do so. To this letter and a follow-up letter of 22 January 2019, no response was forthcoming from the Department. The Centre filed its application on 13 February 2019 and the Department filed its opposition on 8 March 2019.

- [13] On 14 March 2019 I gave an order postponing this application to 20 May 2019 for argument. I gave certain directions as to time limits for the filing of the Department's answering affidavit to the application and the review counter-application, the record of decision and further documents. The counter-application for review was filed on 1 April 2019.

The Parties' submissions

- [14] The Department contended in its review application that in legality reviews, the approach is that the court may employ the exercise of a broader discretion than that traditionally applied to section 7 of PAJA¹. When assessing the delay under the principle of legality, no explicit condonation application is required². The Department knew of the existence of the appeal on 27 November 2018 after it received the Centre's letter. The department's response of 13 December 2018 to the Centre was the only document received by the Centre from the department pertinent to the internal appeal and which advised the Centre of the stage of investigations relative to the envisaged review. In relation to the department's ability to review its own decision, the clock should start ticking from 27 November 2018 because:

"10.1 Instructions were given by the Department to the State Attorney to prepare the review in mid-January 2019;

10.2 On 30 January 2019 the office of the Premier confirmed that the Department was entitled to approach this court on review;

10.3 In early February 2019 the State Attorney requested additional documents from the Department to prepare the review;

¹ Buffalo City Metropolitan Municipality V Asla Construction (Pty) Ltd, 2019(4) SA 331 (CC), para 50

² Buffalo, supra, para 51

10.4 On 14 February 2019, the main application was launched; and

10.5 The counter-application for review was filed on 1 April 2019”

[15] The Centre contended that the delay was unreasonable and undue for the following reasons:

1. It was improbable that the HOD only became aware of the outcome of the appeals on 27 November 2018 and, as at that date, he was aware that the Centre had acquired a substantial investor, whose investment was conditional on the relocation of the licence;
2. Despite the HOD’s advices of 13 December 2018, relative to the consideration of a review application, such consideration should not be allowed to take months on end;
3. On 27 December 2018, the Centre advised the HOD of its rights being affected and the risk to its investments because of the significant delay that had taken place, and requested timelines within which the review application would be filed;
4. The department failed to give a satisfactory explanation for the entire period of the delay. The mandamus application was brought as a result of such unsatisfactory explanation.

[16] The explanation given by the department is that prior to the receipt of the Centre’s letter of 27 November 2018, neither the existence of the appeal nor its apparent success was known to it. The HOD deposed in the founding affidavit³ that he advised the

³ Para27

current MEC that, despite the contents of the former MEC's letters of 8 May 2018 that the latter directed him, as the head of the department, to enter the name of the Centre into the register for private health facilities, he had received no such direction from the said MEC. These events having been brought to the knowledge of the department, the HOD wrote a letter to the applicant on 13 December 2018 expressing serious concerns regarding the irregularities of the process followed by the former MEC and advising the Centre that the department was considering reviewing the appeal decision.⁴ It was apparent to him that certain material requirements of the regulations as regards an appeal, were not followed by the former MEC, rendering the decision he made contrary to the principle of legality and thus reviewable.⁵

Whether the review was launched within a reasonable time

[17] The question that arises is whether the Department delayed this matter for the period starting 8 May 2018 until 27 November 2018. Secondly, whether there was a delay for the period commencing 27 November 2018 until 1 April 2019 when the review application was filed. The answers to both questions, in my view, should be answered in the negative. In **Buffalo City Municipality vs. Asla Construction (Pty) Ltd**⁶, Theron J, writing for the majority, stated the following⁷

⁴ Para 28

⁵ Para 29

⁶ 2019 (4) SA 331 (CC)

⁷ Paragraphs 51 to 53

“[51] The second difference between PAJA and legality review for the purposes of delay is that when assessing the delay under the principle of legality no explicit condonation application is required. A court can simply consider the delay, and then apply the two-step Khumalo test to ascertain whether the delay is undue and, if so, whether it should be overlooked.”

[52] The second principle relating to delay under legality is that the first step in the Khumalo test, the reasonableness of the delay, must be assessed on, among others, the explanation offered for the delay. Where the delay can be explained and justified, then it is reasonable, and the merits of the review can be considered. If there is an explanation for the delay, the explanation must cover the entirety of the delay. But, as was held in Gijima, where there is no explanation for the delay, the delay will necessarily be unreasonable.

[53] Even if the unreasonableness of the delay has been established, it cannot be ‘evaluated in a vacuum’ and the next leg of the test is whether the delay ought to be overlooked. This is the third principle applicable to assessing delay under legality. Courts have the power in a legality review to refuse an application where there is an undue delay in initiating proceedings or discretion to overlook the delay. There must however be a basis for a court to exercise its discretion to overlook the delay. That basis must be gleaned from the facts made available or objectively available factors.” (My emphasis)

- [18] The department correctly pointed out that, despite the Centre’s apparent success on appeal on 8 May 2018, it waited more than six months to make any enquiries with the department as to how it ought to proceed as indicated in its request contained in the letter of 27 November 2018. In this letter it sought for the first time approval from the department to relocate its intended operations to another site. Any prejudice it is said to have suffered over the period from 27 November 2018 until the review proceedings were

launched, was of its own making. It was not entitled to the registration of the licences as a new site approval was first required and any planning and procurement in the intervening period was premature.

- [19] It is evident from the submissions made on behalf of the Centre that the mandamus application was brought “*as a direct result of the inaction of the HOD and MEC and their discourteous refusal to respond to correspondence*”⁸. The correspondence not responded to are the letters of 27 December 2018 and 22 January 2019. It is also evident that the Centre was not satisfied with the department’s explanation of the steps it took since December 2018 surrounding the review application. I am satisfied with the explanation given for the delay and that it covers the entirety of the delay. The delay is justified and in the circumstances reasonable.

Whether the former MEC’s conduct was consistent with the applicable regulation and thus the rule of law

- [20] It is imperative to analyse the former MEC’s response upon which the Centre’s application is based in order to have an idea of the essence of the dispute⁹. The response is contained in two letters which read as follows:

“Dear Me Colbert

Your letter dated 03 May 2018 has been referred to the Head of the Department, Dr D Motau. Having considered all available information you provided to me and acting in terms of regulation 17(5), I have come to

⁸ Applicant’s heads of argument on page 17 para 7.6

⁹ Annexures GC3 and GC4 to the founding affidavit

decision to uphold your application for registration of a private health a successful.

I directed the Head of the Department (HOD) to enter the name of the registered for the private health facilities.

Regards.”

“Dear Mrs. G.S Colbert

You letter 2018/05/03 has been referred having considered all information you provided to me and acting in terms of regulation 17(5). I have come to decision to uphold your application for registration of a private health successful.

I direct the Head of the Department (HOD) to enter the name of the registered for private health facilities.

Regards,”

- [21] It is obvious that the former MEC, in his letters of 8 May 2018, referred to the Centre’s letter dated 3 May 2018 and not to the appeals apparently submitted on 26 April 2018¹⁰. In its opposing/ replying affidavit, the Centre, in addressing the aspect of the absence of the record of decision, stated that it was not in possession of the record that served before the former MEC. What it did was to place the application by means of a request before the former MEC in terms of the rights conferred upon it and *“By all accounts, it would seem as if this is what served before the former MEC.”*¹¹

¹⁰ Para 15.7 of the Founding Affidavit

¹¹ Paragraph 9.3 of the opposing/replying affidavit

[22] Regulation 17¹² deals with appeals and reads as follows:

“Appeal

- (1) An applicant may lodge in writing with the MEC against any decision made by the Head of Department and must include the grounds of the appeal. An appeal must be lodged within 14 working days of being notified of the decision of the Head of Department.
- (2) The MEC must, within 5 working days of receipt of a copy of an appeal, submit a copy thereof to the Head of Department and must request the Head of Department to respond to the appeal.
- (3) The Head of Department must within 5 days of receipt of a copy of an appeal, submit a response thereto to the MEC.
- (4) *The MEC may appoint a committee to advise him/her on the appeal.*
- (5) The MEC may uphold, partially uphold or refuse an appeal and may, in the event that the appeal is upheld, replace the decision of the Head of Department with any decision to grant the application which the Head of Department could have taken.
- (6) *The MEC must communicate the decision on the appeal in writing to the appellant and, if the appeal is refused, give the reasons therefore.*
- (7) If the MEC upholds an appeal, this fact must be communicated in writing to the Head of Department who must make the necessary entry in the Register of Private Health Establishment.
- (8) *If the MEC has refused an appeal, he or she must advise the applicant of his or her right to take the matter on review in the High Court.*

[23] It is evident from the MEC’s response that he reacted to the Centre’s letter of 03 May 2018 by the employment of the provisions of regulation 17(5), having allegedly considered all available information provided to him by the Centre. Nowhere in the said letter was it stated that the former MEC upheld the appeal and that he replaced the decision of the HOD, with any decision to grant the application which the latter could have taken.

¹² Private Health Establishment Regulation, 2014

The letter purports to uphold the Centre's application for the registration of a Private Health establishment. If it is accepted that the only "*application*" and "*request*" is the one dated 03 May 2018 to which a response was received on 08 May 2018, it would follow that there was non-compliance with regulation 17(2) in that a copy of the appeal was never submitted by the former MEC to the HOD, requesting the latter's response thereto. Furthermore, it is doubtful, in the light of the Centre's response as embodied in its replying affidavit, that an appeal, which is inclusive of the grounds thereof, was lodged in terms of regulation 17(1). This would then justify the Department's submission that the HOD was not afforded the opportunity to act in terms of regulation 17(3) to submit a response within 5 days to the MEC.

- [24] A striking feature of the contents of the first letter is that it is structured in a disjunctive manner. The one moment, the letter of 3 May 2018 (the contents of which are unknown) were referred to the HOD, in the absence of whose reply he was given certain directions to follow. Like a bolt from the blue, the former MEC arrived at a decision to uphold the registration application solely on the information provided by the Centre, with no indication whatsoever that the HOD's response was sought and obtained. Neither does it indicate which part of the appeal did it uphold or partially uphold in terms of Regulation 17(5). The period starting on 3 May 2018 until 8 May 2018 militates against a proper adjudication of the appeal by the former MEC as outlined in the set periods mentioned in Regulation 17. If the appeal was received on 3 May 2018, it is doubtful as to whether, taking into account the provisions of Regulation 17(2) and (3), the appeal

could have been finalised by the eighth of that month, five days later. A proper perusal and consideration of the former MEC's letter, indicates that whatever decision was taken, it was done so in haste.

- [25] The second letter is crisp and, needless to say, is very confusing and gives the impression of having been drafted in haste and signed without consideration of its contents as evidenced by the incomplete, illogical and inconsistent sentences. Both letters, in my view, disprove the existence of a written appeal having been lodged with the former MEC. No evidence of a written appeal was presented by the Centre. This is bolstered by the Centre's failure to rise to the Department's challenge to produce the letter of 26 April 2018 embodying its appeal. The Department denied in its opposition the existence of the letter of 26 April 2018 and called upon the Centre to provide copies of its alleged appeal as contained therein. The Centre failed to do so in its reply or in any other form. The Centre contented itself that the department, in requesting copies of the letter alleged to contain the appeal, wanted the Centre to assist it with proving a case for review which was improper and somewhat perverse.¹³ In the absence of such proof, it can, in my view, be safely accepted that no appeal was lodged in terms of the applicable regulation.

The Review Record

¹³ Paragraph 15 of the Centre's replying affidavit

- [26] The Centre contended that the onus was on the Department to provide the court with its record of decision, the reasons for the decision and all the relevant documents to enable the court to review the decision of the former MEC. The Department failed to do so and alleged that, despite a diligent search, it was unable to find a proper record of the appeal submitted to the former MEC. The evidence of the irregularity rested solely on the HOD's denial that he was asked by the former MEC for a report in terms of Regulation 17 or advised of the outcome and directed to register the Centre accordingly.
- [27] The Centre maintained that the court was kept in the dark and the HOD, unlike the circumstances in **MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd**¹⁴, attempts to have this court review and set aside the decision of the former MEC when the Department failed to procure the evidence of the former MEC. The failure to do so and to advise the court accordingly, can only be seen as an attempt to overturn his decision as the Department disagreed with the outcome.
- [28] The Department contended that the provision of a complete record in review proceedings is not a prerequisite and even where there is no record kept, the review was permitted to proceed¹⁵. The record of the decision is primarily for the benefit of the applicant in a review¹⁶. It would therefore not be in the interests of the applicant to conceal the documents relative to the former MEC's decision. The Centre did not answer paragraph 11 of the

¹⁴ 2014 (3) Sa 481 (CC)

¹⁵ Secretary for the Interior v Scholtz 1971 (1) SA 633 (C) at 637 A-D

¹⁶ Helen Suzman Foundation v Judicial Services Commission 2018 (4)

Department's founding/answering affidavit which stated that the review record contained all the available records as envisaged in Rule 53(1) (b).

Just and equitable Remedy

[29] The Department contended that it would not be just and equitable for the court to order the review and setting aside of the former MEC's decision on appeal without affording the applicant an opportunity to submit a fresh appeal for consideration as failure to do so would be tantamount to refusing the applicant the right to an appeal. The Centre contended that such a step would divest it of the rights it acquired having followed due process. It had reasonable fears that any fresh appeal would be a mere effort of ticking a procedural box and presenting the Centre with a negative outcome and further delay in realising the healthcare facility. The present MEC could easily have left the position as is, but she does not want the hospital to be built and has all but out rightly said so¹⁷. It was submitted that courts have in the past declared a decision unlawful, but elected not to set it aside so as to avoid divesting a party of rights it accrued¹⁸.

[30] The Department contended that the present MEC had not had sight of the Centre's grounds of appeal nor had she had the opportunity of receiving a response from the HOD as to the

¹⁷ Paras 10.2 and 10.3: Applicant's heads of argument

¹⁸ Buffalo, supra, para 105; Oudekraal Estates (Pty)m Ltd vs. City of Cape Town 2004 (6) SA 222 SCA

grounds of the appeal relied upon. The current MEC never said that she did not want the health facility to be built. She would not be in a position to make such a determination without further information being presented to her by both the Centre and the HOD as to any deficiencies in the initial determination. The following quotation from **MEC for Health, Eastern Cape and Another**¹⁹ is appropriate:

“[60] Under our Constitution the courts do not have the power to make valid administrative conduct that is unconstitutional. What may be done by the courts is to regulate the consequences of their declaration of invalidity. This means that in deciding a constitutional matter, a court adopts a two-stage approach where an enquiry involves the determination of constitutional validity. During the first stage, once a court finds that the impugned conduct is inconsistent with the Constitution it must make a declaration of invalidity. This does not involve the question whether the order is just and equitable. The latter enquiry belongs to the second stage.

[61] Once a declaration of invalidity is made, the court may proceed to the second stage. At this stage the court considers the effects of the declaration of invalidity on parties or persons to whom the order applies. The interests of those parties are carefully examined for the purposes of making an order that is just and equitable in the circumstance of each case. It is only at the second stage that a court enjoys a discretionary choice. However, that choice does not include the reversal of what was done during the first stage at which there is no discretion but an obligation to make a declaration of invalidity. The two stages ought not to be conflated.”

Conclusion

[31] In the present circumstances it is clear that the former MEC’s decision was not only procedurally flawed but was irrational as it

¹⁹ supra

was made devoid of any reliance on facts or considerations as referred to in the regulations. The exercise of public power is required to be consistent with the rule of law and the constitution requires administrators to act lawfully, reasonably and procedurally fairly. Therefore, the former MEC's decision stands to be set aside as invalid and of no force and effect. The Centre's assertion that it had acquired a substantial investor following the former MEC's decision does not establish prejudice at all. The investment was conditional on the successful relocation of the licence. Beyond the declaration of invalidity there is nothing to preserve because nothing tangible was done by the Centre following the impugned appeal²⁰. The application for a mandamus order should therefore fail and the application for the review should succeed.

Costs

[32] It is trite that the successful party is entitled to an award to costs. However, the department, as the successful party does not seek such costs and prayed that there should be no order as to costs.

[33] I therefore make the following order:

Order

1. The applicants' application for mandatory relief is dismissed.
2. To the extent necessary, condonation is granted to the respondent/applicants' to file the counter application/review;
3. The decision of the former MEC of the Free State Provincial Government: Department of Health, BM Khompela dated 8 May

²⁰ MEC, *supra*, para 58

2018 to uphold the applicant/respondent's appeal and to permit it to register a private health establishment as applied for, is hereby reviewed and set aside;

4. The applicant/respondent is permitted, should it so wish, to file with the second respondent/applicant a fresh appeal within (5 days) of this court's order, which appeal the second respondent/applicant will consider in accordance with the provision of Regulations 17 of the Private Health Establishment Regulations, 2014, read with the 2017 amendments thereto.
5. There is no order as to costs in respect of both the main and the counter-applications.

MHLAMBI, J

I concur,

MOLITSOANE, J

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