



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

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

Case number: 3484/2016
3516/2016

In the matter between:

DE VRIES AND ASSOCIATES

Applicant

and

MEC: FREE STATE DEPARTMENT OF HEALTH

Respondent

JUDGMENT BY: DAFFUE, J

HEARD ON: 24 NOVEMBER 2016

DELIVERED ON: 2 MARCH 2017

I INTRODUCTION

- [1] The central theme of the litigation between an association of radiologists that provide professional medical service to public and private patients at the Universitas Academic and National Hospitals in Bloemfontein and the Free State Department of

Health is the alleged harassment of or interference with the practice of the radiologists by officials of the Department. The focus throughout the proceedings before me was the alleged illegal action at the Universitas Academic Hospital (herein later referred to as “the Universitas Hospital”) in terms whereof the Department confiscated the radiologists’ equipment and endeavoured to eject them and staff members from the hospital premises where they have been practising for many years. A certain Dr Basele Ali Benganga, assisted by security personnel, played a leading role during the altercations that took place in July 2016 which led to the present proceedings.

II THE PARTIES

[2] Applicant in the two applications mentioned *infra* is De Vries and Associates, an association of radiologists that provides professional medical service to patients at the Universitas and National Hospitals in Bloemfontein. Until recently it also provided similar services at the Pelonomi Hospital. Applicant is also the respondent in a counter-application filed by the MEC: Free State Department of Health, but for purposes of clarity, I shall refer during the course of this judgment to De Vries and Associates as the applicant. Adv C Ploos van Amstel SC appeared before me with Adv J Y Claasen SC on behalf of the applicant.

[3] The respondent in the two applications is the MEC: Free State Department of Health who also filed the counter-application mentioned *supra*. I shall throughout this judgment refer to

respondent as the Department and if I need to refer to specific officials in its employ, I shall make it clear. The Department was represented by Adv N Dukada SC assisted by Adv S Motlounq.

III THE RELIEF SOUGHT

[4] The relevant portion of the relief sought in application 3484/2016 reads as follows:

“4. That a rule *nisi* be issued calling upon the respondent to show cause, if any, to the above Honourable Court on 25 August 2016, at 09h30 or as soon thereafter as counsel for the applicant may be heard, why an order in the following terms should not be granted:

4.1 Prohibiting the respondent or anyone on its behalf from entering the premises of the applicant at the Universitas and National Hospitals and harassing the applicant's personnel and/or preventing or hindering any employee, partner, medical practitioner or associate in the employment of the applicant to conduct the practice of a radiologist; and to perform their duties in the treatment of private and public patients;

4.2 Prohibiting the respondent or anyone on its behalf from hindering or preventing the applicant from using the diagnostic radiology equipment rented from the Department of Health, at the Universitas and National Hospitals;

4.3 Prohibiting the respondent or anyone on its behalf to attach, remove or take possession of any of the equipment, including but not limited to the applicant's operational systems, billing systems, reporting systems and personal computers;

- 4.4 Prohibiting the respondent or anyone on its behalf from preventing the personnel and patients of the applicant to enter the hospital premises;
- 4.5 Ordering the respondent to honour the rental agreement dated 6 March 2009 entered into by and between the applicant and the Department of Health;
- 4.6 That the prohibition placed upon professor Coert Stephanus de Vries to undertake any remunerative work outside the public sector and to treat private patients, unilaterally placed upon him by Dr D Motau in his capacity as Head: Health of the Department of Health in a letter dated 27 July 2016, be set aside;
- 4.7 That Dr BAF Benganga, the Acting Head: Clinical Services: Universitas Hospital and Mr Tlhogo, a member of the Executive Council of the Universitas Hospital, furnish reasons on the return day by means of sworn affidavit, why they should not be ordered to pay the costs of this application in their personal capacities *de bonis propriis*: alternatively that respondent be ordered to pay the costs of this application.
5. Granting an interim order, in terms of prayers 4.1, 4.2, 4.3, 4.4, 4.5 and 4.6 above, pending the return date.
6. That the respondent or any entity or person on their behalf, be interdicted and restrained, as aforesaid pending a final determination of the action in case number 1651/2016 between the same parties in the above Court;” (emphasis added)

[5] On 28 July 2016 Rampai J granted the application and I merely quote the relevant parts of the order as contained in paragraphs [7] and [8]:

“7. Pending the final adjudication of the application, the *status quo ante* to be maintained in accordance with prayers 4.1 – 4.6 on the following understanding and undertakings:

- 7.1 Professor C.S. de Vries will be allowed to treat his private patients pending the final adjudication of the application;
 - 7.2 For this purpose, he may attend his practice at De Vries and Associates at the Universitas Hospital till Thursday the 4th day of August 2016 at 23h00;
 - 7.3 The respondent will return all, equipment, systems and computers of the applicant, removed by the respondent's employees on or about Wednesday 27 July 2016 and Thursday 28 July 2016, without delay and no later than Friday 29 July 2016 at 10h00.
8. Costs of the application to stand over.”

[6] On the very next day, i.e. 29 July 2016 applicant obtained a further *interim* interdict against the Department under application number 3516/2016 on an urgent basis based on further alleged acts of illegal conduct committed by officials in the employ of the Department. Fischer AJ granted several orders by agreement, but I quote only paragraphs [4], [5.1 - 5.5], [6] and [13] which are relevant hereto:

“4. A rule nisi is issued calling upon the respondent to show cause, if any, to the above Honourable Court on Thursday, 11 August 2016, at 09h30 or as soon thereafter as counsel for the applicant may be heard, why an order in the following terms should not be granted:

- 5.1 That the respondent takes immediate steps no later than 18h00 today 29 July 2016 to unlock the door of the office and medical practice rooms of Professor Coert Stephanus

de Vries in the Universitas hospital, and to reinstate the locks removed and changed by employees of the respondent and to return all keys confiscated; or to supply Professor de Vries with new keys to the changed locks and further to ensure that the said Professor de Vries has full, free, unhindered and undisturbed access to the said office and rooms in terms of the Order of Court issued in the matter between the parties on Thursday 28 July 2016;

- 5.2 That the respondent takes immediate steps in terms of the Order of court issued in the matter between the parties on Thursday 28 July 2016, to return all equipment of the applicant, including but not limited to the applicant's operational systems, billing systems, reporting systems and personal computers removed by the respondent's employees on or about Wednesday 27 July 2016 and Thursday 28 July 2016 by no later than 18h00 today, 29 July 2016;
- 5.3 That Dr BAF Benganga, the Acting Head: Clinical Services: Universitas Hospital and/or any security personnel be prohibited from entering the Vascular and Intervention Theatre or any work place in the Universitas Hospital utilised by Professor de Vries and Dr E Loggenberg of the applicant, while medical or clinical interventions are in process;
- 5.4 That Dr BAF Benganga, the Acting Head: Clinical Services: Universitas Hospital furnish reasons on the return day by means of sworn affidavit, why:
 - (a) an order should not issue that the said Dr BAF Benganga is in contempt of the order of the above

Honourable Court dated 28 July 2016, issued in application number 3484/2016;

- (b) the said Dr BAF Benganga should not be committed to imprisonment for a period of ninety (90) days or such other period as the court may deem fit;
- (c) the aforementioned term of incarceration should not be suspended for such period as the above Honourable Court may determine, on the condition that the said Dr BAF Benganga complies with the aforementioned order of Court;

5.5 That Dr BAF Benganga, the Acting Head: Clinical Services: Universitas Hospital furnish reasons on the return day by means of sworn affidavit, why he should not be ordered to pay the costs of this application in his personal capacity *de bonis propriis*: alternatively that respondent be ordered to pay the costs of this application

6. Granting an interim order, in terms of prayers 5.1, 5.2, 5.3 above pending the return date.

13. This order is to be served on Dr BAF Benganga personally.”

[7] As is apparent from paragraph [5.4] of the order of 29 July 2016 applicant also obtained an order for Dr Benganga to advance reasons why he should not be convicted of contempt of court.

[8] The Department filed a counter-application in application 3484/2016 in terms whereof it seeks the following relief:

- “1. Condoning the delay by the applicant to institute these proceedings within the time limits prescribed by the Uniform Rules of Court.
2. An order declaring:
 - 2.1 The lease agreement entered into between the Applicant and Respondent on 6 March 2009 invalid *ab initio*, of no force and legal effect.
 - 2.2 The decision of the Applicant not to extend the lease agreement entered into between the Applicant and the Respondent valid.
3. Interdicting and restraining the Respondent from
 - 3.1 using the diagnostic radiologic equipment of Applicant in Universitas and National Hospitals;
 - 3.2 treating private patients in Universitas and National Hospitals.
4. An order evicting the Respondent and its members from Universitas and National Hospitals.
5. Directing the Respondent to pay costs of the application on an attorney and client scale.”

[9] The parties requested me to consolidate the aforesaid applications and to deal with all issues raised therein simultaneously. Such an order was made.

IV THE CLAIM AND COUNTER-CLAIM FILED IN CASE NUMBER
1651/2016

- [10] Action was issued by applicant as plaintiff against the Department about three months prior to the issue of the first order referred to *supra*. In terms thereof it filed two claims, one in respect of the Universitas and National Hospitals and the other in respect of the Pelonomi Hospital. It seeks a declaratory order pertaining to the first two hospitals confirming that the lease agreement in respect of equipment concluded with the Department on 6 March 2009, as extended, continues to be in force and effect; alternatively damages are claimed as a result of the Department's repudiation of the agreement. The claim pertaining to the Pelonomi Hospital is for damages only based on the Department's repudiation of the lease agreement and the resultant termination thereof.
- [11] On 22 June 2016, more than a month prior to the first *interim* order granted on 28 July 2016, the Department pleaded to the claim and also filed a counter-claim. Applicant filed its plea to the counter-claim on the 29th August 2016. The following relief is claimed in the counter-claim:

- "1. An order declaring the lease agreement entered into between the Plaintiff and the Defendant on 6 March 2009 invalid, of no force and legal effect;
2. An order declaring the decision of the Defendant to refuse to extend the lease agreement for a further 5 years valid;
3. An order dismissing the Plaintiff's claim with costs."

It will immediately be realised by the reader that exactly the same relief is claimed in both the counter-application and counter-claim.

- [12] The pleadings have been closed and bearing in mind the awaiting trial list in this province, there is no reason why trial dates cannot be obtained for hearing of the action during the third or fourth term of 2017.

V BACKGROUND

- [13] It is not my intention to deal in detail with the factual background and I shall endeavour to refer to the most relevant aspects only. In terms of the Department's Policy on Remunerative Work Outside the Public Sector ("the RWOPS system") adopted in 1992 medical practitioners in the employ of the State are permitted to treat private patients in addition to their public patients. Therefore many medical practitioners in the employ of the State are allowed to perform their normal duties as State employees, but to run private practices as well subject to certain limitations.

- [14] After several processes, which also included a tender process which I do not deem necessary to explain in any detail as this is a matter to be dealt with at the trial action between the parties in case number 1651/2016, the applicant was established and it entered into an agreement with the Department in terms of which

the radiology equipment of the Department was leased to applicant. The underlying principle of this lease agreement was to enable the applicant's radiologists to treat private patients for their own account without having to pay huge amounts for their own radiology equipment by using the very same equipment to treat public patients as well.

- [15] On 5 April 2013, twenty one years after adoption of RWOPS, the Department took a decision to withdraw from RWOPS during office hours, but *interim* orders were obtained from this court to suspend the decision pending finalisation of a review application to the Labour Court.
- [16] Applicant duly acted in accordance with the lease agreement and gave notice of extension thereof for a further period of five years, but on 2 September 2013 Dr D Motau in his capacity as HOD: Department of Health indicated that the Department did not wish to proceed with the agreement. Several letters followed between the applicant and the Department over a period of 2½ years.
- [17] Notwithstanding the *interim* interdicts obtained, the Department again took a decision that RWOPS would be suspended and no treatment of private patients be permitted. It is apparent that the Department launched a two-pronged attack against applicant by firstly "terminating" the lease agreement and secondly by placing a prohibition on any private practice work.

- [18] It needs to be mentioned that the four radiology specialists who are associates of applicant, to wit Prof De Vries, Dr Loggenberg, Dr Janse van Rensburg and Dr Otto received written approval from the Department on 6 July 2016 to treat private patients for the period until 31 March 2017.
- [19] Notwithstanding the applicant's allegation that it has been in peaceful and undisturbed possession of the leased equipment and its private practice at the Universitas Hospital since 1 March 2009, the Department rejects this version based on the communication between the parties since September 2013 and its refusal to accept that a valid lease agreement or extension thereof came into being. However, the Department kept on receiving rentals and did not take any legal action to set aside the lease and/or to eject applicant from the premises.
- [20] Notwithstanding the pending action, case number 1651/2016, and a letter of applicant's attorney dated 26 July 2016, the Department and its officials with Drs Benganga and Nathan having assumed leadership roles, decided to act as prosecutor, judge and executioner on the legal issue, i.e. the existence of a valid lease agreement still to be decided and thereby taking the law into their own hands.
- [21] I wish to make it clear that very few aspects are in dispute in these applications. It is common cause that when further orders were obtained by agreement under case number 3516/2016 on 29 July 2016, the Department acknowledged its unlawful action and the acts of spoliation complained about by applicant. Such

concession is apparent from the relief granted in paragraphs 5.1 and 5.2 of that court order. I shall deal with the events of 27 to 29 July 2016 in more detail *infra*.

- [22] On 20 July 2016 Dr Nathan in her capacity as the acting CEO and Head of the Clinical Department: Clinical Services at the Universitas Hospital directed a letter to Prof De Vries in his capacity as Head of the Clinical Department: Clinical Imaging Sciences and a senior associate of the applicant, requiring him to confirm that the applicant has ceased its activities as per the instruction from Dr Mzangwa. Mr Jordaan, the applicant's Bloemfontein attorney intervened by addressing a letter to Dr Nathan on 21 July 2016; however, on 22 July 2016 Dr Nathan instructed Prof De Vries to ensure that all medical services rendered by the applicant to private patients be stopped immediately, that applicant's personnel, i.e. the private practice members, had to leave the Universitas Hospital immediately and that the Head of Security would assist with the expulsion if needed. What is apparent from this is that Prof De Vries in his capacity as a State employee was instructed and expected by the employer to take the law into his own hands and to evict applicant from the Universitas Hospital without legal process. This led to the letter of 26 July 2016 by applicant's George attorney referred to *supra* and the consequent harassment and intimidation which escalated exponentially to a point where it became unbearable for the associates and employees of applicant to do their work. The Department was actually carrying out its threats.

- [23] The four specialists who are associates of applicant have appointments in the X-Ray Radiology Department of the Universitas Hospital as well as appointments as lecturers at the Radiology Department in the Medical Faculty of the University of the Free State and are on a joint establishment with the Department. They have developed and possess rare skills in their specific fields which cannot be delivered by general radiologists. Applicant's practice sees about fifty private patients per day, but in contrast thereto approximately two hundred public patients per day.

VI THE PARTIES' CONTENTIONS

- [24] It should be clear from the background provided with reference to the litigation between the parties that there is a pending action between them under case number 1651/2016 regarding the validity of the agreement of lease of diagnostic radiology equipment concluded on 6 March 2009 as well as the validity of the extension of the lease for a further period of five years.
- [25] The Department's case is that the lease agreement entered into between applicant and the Department is invalid *ab initio* as there was no compliance with mandatory official procurement processes and therefore there could not be a valid extension of the lease as contended for by applicant. In fact the Department refused to extend the lease agreement.

- [26] The Department believed, based on its refusal to extend the lease agreement, that it was entitled to prohibit applicant from rendering medical services at the Universitas and National Hospitals and in the process it, through its officials took the law into their own hands as will be explained *infra*.
- [27] The Department contended that the terms of the court order of 28 July 2016 under case number 3484/2016 has the “effect of nullifying the entire counter-claim”. According to it, confirmation of the rule *nisi* would mean that by the time the action in case 1651/2016 is heard, the Department “will be without a defence”. This impression is clearly wrong as the orders obtained are of a temporary nature pending finalisation of the trial action.
- [28] The Department’s stance is that this court should not grant the relief in paragraph 4.5 of the notice of motion in application 3484/2016 because the issue therein is the subject of litigation between applicant and the Department in the pending main action. As indicated, the relief obtained is of an *interim* nature.

VII A HYBRID APPLICATION: AN *INTERIM* INTERDICT AND RELIEF IN TERMS OF THE MANDAMENT VAN SPOLIE

- [29] The relief sought by applicant is in the form of an *interim* interdict pending the outcome of the action instituted under case number 1651/2016, although some relief is sought based on the mandament van spolie.

[30] It is to be noted at this stage already that the Department's counsel incorrectly submitted that applicant seeks a permanent interdict and therefore the requirements relating to permanent interdicts apply. I do not agree. The relief obtained is intended to interdict and restrain the Department or any person acting on its behalf pending final determination of the action in case number 1651/2016.

[31] In the heads of argument applicant's counsel tried to label the claim as a mandament van spolie, although it was eventually acknowledged that an *interim* interdict was sought as well and that the requirements for *interim* interdicts have to be met.

[32] The requisites for *interim* interdicts are well-known, but it is apposite to quote them again, to wit:

- "a. A *prima facie* right;
- b. A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;
- c. A balance of convenience in favour of the granting of the interim relief; and
- d. The absence of any other satisfactory remedy."

See Van Loggerenberg, *Erasmus: Superior Court Practice*, 2nd edition at D6-17 and numerous authorities referred to.

[33] The mandament van spolie is a possessory remedy and it is also regarded as an extraordinary and robust remedy. The essential characteristic thereof is that the legal process whereby the

possession of a party is protected, is kept strictly separate from the process whereby a party's right to ownership or other right to the property in dispute is determined. The object of the order is to restore the *status quo ante* the illegal action, it being an accepted principle that no one is entitled to take the law into his own hands. See Van Loggerenberg *loc cit* at D7-1 and authorities quoted.

- [34] The mandament van spolie is designed as a speedy remedy and the following facts must be averred and proved by the applicant:
- (a) that the applicant was in peaceful and undisturbed possession of the property; and
 - (b) that the respondent deprived him/her of the possession forcibly or wrongfully against his or her consent,

or as more aptly put by Van Blerk JA in *Yeko v Qana* 1973 (4) SA 735 (A) at 739G with reference to Voet who declared that even a thief or a robber is entitled to a spoliation order: "All that the *spoliatus* has to prove, is possession of a kind that warrants the protection accorded by the remedy, and that he was unlawfully ousted."

VIII APPLICABLE TEST WHERE FINAL RELIEF IS SOUGHT

- [35] I indicated *supra* that insofar as *interim* orders are sought by applicant in respect of some of the relief, excluding the spoliation orders, the test to be applied in the adjudication of *interim* interdicts is not as severe as in the case of final relief. In considering the final relief sought by the parties and in particular

by the Department in the counter-application it is necessary to consider the requirements enunciated in *Plascon-Evans*.

- [36] I also wish to refer to the following *dictum* by Heher JA in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA)*, quoting from para [13]:

“[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say ‘generally’ because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should

come as no surprise that the court takes a robust view of the matter.”
(emphasis added.)

- [37] In motion proceedings the affidavits constitute both the pleadings and the evidence and the issues and averments in support of the parties’ cases should appear clearly therefrom. See *Minister of Land Affairs and Agricultural v D & F Wevell Trust* 2008 (2) SA 184 (SCA) at 200D. It is trite that the applicant in application proceedings must make out his or her case in the founding affidavit. That affidavit must contain sufficient facts in itself upon which a court may find in the applicant’s favour. An applicant must stand or fall by his or her founding affidavit. See *Director of Hospital Services v Mistry* 1979 (1) SA 626 (AD) at 635H – 636D.

IX COUNTER-APPLICATIONS IN SPOILIATION PROCEEDINGS

- [38] Mr Ploos van Amstel argued that this court could not consider the counter-application based on the authorities applicable to the mandament van spolie. Although it is strictly speaking not necessary to deal with this aspect, bearing in mind the conclusion arrived at in respect of the counter-application, it is clear that applicant went further than merely relying on spoliation and consequently this court would be entitled in principle to adjudicate the counter-application. I refer to *Street Pole Ads Durban (Pty) Ltd and Another v Ethekwini Municipality* 2008 (5) SA 290 (SCA) at paras [14] to [18] and especially the following *dictum* in para [18]:

“It would in my view be obstructively formalistic to hold that, rather than waiting for trial, the municipality could not join issue immediately on that dispute - as it did - nor join the university in the proceedings for that purpose, as it did. The High Court, which had all the relevant information and contentions before it, chose instead to decide the issue immediately: a just and sensible approach.”

- [39] The facts *in casu* differ from those in *Street Pole Ads* in that action was instituted more than two months prior to the first interdict being granted and by that time the Department had already filed a plea and counter-claim. There was therefore a pending *lis* between the parties when the orders of 28 and 29 July 2016 were sought and obtained. In *Street Pole Ads* the applicant applied for an order in terms of the mandament van spolie, but also sought more comprehensive relief, including a temporary interdict pending determination of an action still to be instituted. The Supreme Court of Appeal found in that case that the court *a quo* was fully entitled to deal with the remainder of the issues as all information and contentions were before it, which is not the case *in casu*.

X ADJUDICATION OF THE COUNTER-APPLICATION

- [40] The Department seeks in essence the review and setting aside of the decision to enter into the lease agreement with applicant in that a declaratory order is sought in terms whereof the lease agreement is declared invalid *ab initio* and of no force and legal

effect. The further relief claimed should follow as of course once a declaratory order is made in favour of the Department.

- [41] No doubt an organ of State is entitled to apply for the review and setting aside of administrative action taken on behalf of that entity. See *MEC for Health, EC v Kirland Investments* 2014 (3) SA 219 (SCA) at paras [27] to [30].
- [42] During oral argument it was conceded on behalf of the Department that the lease agreement between the parties would remain valid until set aside by the court, a concession which reflects the present state of our jurisprudence. See *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) at para [37], *Kirland Investments supra* at para [65] as well as *Kwa Sani Municipality v Underburg/Himeville Community Watch Association and Another* [2015] 2 All SA 657 (SCA) at paras [14] and [15].
- [43] In order to adjudicate the merits of the counter-application it is expected of the Department to present what is commonly referred to as its Record of Decision ("ROD"). It should have disclosed the entire process followed prior to the signing of the lease agreement and all relevant collateral and/or pre-existing agreements entered into and other applicable documents. The reasons for the decision, or the lack thereof, to enter into the lease agreement should have been provided as well. In the process the Department as an organ of State seeking to repudiate its own administrative action *prima facie* failed to prove

the essential requirements for a review application in order to succeed on the merits in the counter-application. The Department had to prove invalidity. More will be said in this regard *infra*.

[44] I have already referred to relevant authorities pertaining to applications for review by organs of State and do not intend to repeat any of those again. It is unnecessary to consider the merits of the counter-application in the light of my conclusion arrived at *infra*, save to mention the following. Applicant provided a detailed version in the answering affidavit, relying on numerous documents supporting its defence to the claim that an invalid lease agreement was entered into. I refer *inter alia* to the allegation that applicant's doctors/ associates are at this stage the only radiologists in State/university employ who can render the services required by the Department. Applicant also relies on the Public/Private Partnership entered into between the Department, itself and Netcare, a relationship that started at the beginning of the 21st century, and several further agreements entered into before the lease agreement of 6 March 2009 was eventually concluded. Applicant's version must be accepted, bearing in mind *Plascon Evans* and *Wightman supra*, and especially insofar as the Department failed to file a replying affidavit, denying applicant's version.

[45] Contrary to the direct and cogent evidence presented by applicant, supported by documentary evidence, the Department relies on the hearsay evidence of an HOD that was not involved

at all in any of the negotiations and transactions concluded prior to the conclusion of the 2009 lease agreement. It is just not good enough to say that the erstwhile HOD could not be located to obtain an affidavit from him, but in any event, I find it hard to believe that nobody with more information than the present HOD, such as the MEC at the time, the Deputy Director-General, or the Chief Financial Officer of the Department could not be requested to present the evidence that the Department required to prove that an invalid lease agreement was entered into.

- [46] On the Department's own version it decided in September 2013 that the 2009 lease agreement was invalid. Several letters were sent to applicant and/or its attorneys in this regard who responded in writing. It took the Department nearly three years since September 2013 to file a counter-application wherein it seeks the setting aside of the 2009 lease agreement as invalid. In terms of s 9(1)(b) of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA") the maximum period allowed is 180 days which means that the review application should have been brought in March 2014 at the latest.
- [47] The Department is under the impression that it should ask for condonation for the delay in instituting the proceedings within the time limits prescribed by the Uniform Rules of Court, but this is clearly not so. It should have asked condonation in accordance with the provisions of PAJA which it failed to do. The allegations contained in paragraph [11] of the founding affidavit in the counter-application are baseless. It is unnecessary to set out

these reasons and/or to deal therewith in any detail, save to state the following. It is apparent that the Department "...understood that the issue relating to the validity of the Lease Agreement and the obligation of the Applicant to extend the lease would be dealt with by the court hearing the action." The counter-claim in the action was also instituted way out of time. However this so-called reason for condonation emphasises that the trial court is indeed the correct court to deal with applicant's main claim and the Department's counter-claim in case number 1651/2016.

- [48] The Department failed to follow either the rule 53 procedure or the regulations promulgated in terms of PAJA and thereby it impinged upon applicant's procedural rights. See *South African Football Association v Stanton Woodrush (Pty) Ltd t/a Stan Smidt & Sons and Another* 2003 (3) SA 313 (SCA) at para [5]. In the words of Harms JA in the aforesaid passage, the Department could not hide "behind a parapet of silence." Applicant and the court who is requested to adjudicate the matter are entitled to the full history of the tender process, or lack of such a process, all relevant documents pertaining to the Private/Public Partnership, the agreements regarding outside work and all other agreements entered into prior to the conclusion of the 2009 lease agreement. Cameron J succinctly stated in *Kirland Investments supra* at para [64] that government "should be held to the pain and duty of proper process. It must apply formally for a court to set aside a defective decision, so that the court can properly consider its effects on those subject to it." He continued in similar vein at para [65] and I quote: "When government errs by issuing a defective decision, the subject affected by it is entitled to proper notice, and to be afforded a proper hearing, on whether the decision

should be set aside. Government should not be allowed to take shortcuts." I emphasise the last sentence and confirm that I shall deal with this aspect again *infra*.

- [49] I agree with applicant's counsel that the counter-application, in its present format, is an abuse of court proceedings, vexatious and ill-conceived. Insofar as the merits thereof have not been considered finally, it should merely be struck from the roll with costs on the scale as between attorney and client, including the costs consequent upon the employment of two senior counsel.

XI LIS PENDENS

- [50] The relief claimed in prayers 1 and 2 of the counter-application is identical to the relief claimed in the Department's counter-claim in case no 1651/2016. In fact, the Department's deponent admits in the founding affidavit to the counter-application that it is premised on the same cause of action between the same parties and that the same relief is sought as in the pending action, case no 1651/2016.
- [51] In my view applicant has met the requirements for a plea of *lis pendens*. See *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA) at para [2] of the majority judgment as well as *Caeserstone Sdot-Yam v World of Marble and Granite* 2000 CC 2013 (6) SA 499 (SCA) at paras [2] and [36]. I would have struck the counter-application from the roll for this reason as well.

XII CONTEMPT OF COURT

[52] Mr Ploos van Amstel placed it on record at the start of the proceedings that applicant was not insisting that Dr Benganga be convicted of contempt of court, but submitted that applicant was entitled to the remainder of the relief in application 3516/2016. It appears as if the primary reason for not proceeding with the contempt of court application is the fact that the court order of 28 July 2016 in application 3484/2016, (the first order granted), was served by the Sheriff on 1 August 2016 only. I take cognisance of applicant's attitude, but need to express my dissatisfaction with the manner in which the officials of the Department treated the court order. It is common cause that the Department was represented by an experienced counsel and attorney. Furthermore, Mr Finger, the Department's senior legal adviser and Dr Benganga were in court on 28 July 2016 when the matter was heard by Rampai J. Even if it is correct, as stated under oath by Dr Benganga, that he left earlier and did not await Rampai J's judgment, I find it extremely difficult to believe that a senior attorney in the office of the State Attorney such as Mr Mohobo would not have communicated the contents of the court order to the Department's officials during the evening of 28 July or immediately after 08h00 the next morning. Several undertakings were recorded in the order and applicant's property had to be handed back by 10h00 that morning. A simple SMS was all that was required if the attorney did not want to inconvenience the officials of the Department "due to the lateness of the hour." In any

event the senior legal advisor, Mr Finger, surely had a responsibility to inform the HOD and his colleagues, Drs Benganga and Nathan in particular. I shall again refer to relevant aspects *infra* when I exercise my discretion pertaining to costs.

XIII EVALUATION OF THE AVERMENTS IN APPLICATIONS
3484/2016 AND 3516/2016

- [53] On 27 July 2016 Dr Benganga, Mr Tlhogo from management and Mr Khatola, the Head of Security as well as other security personnel entered applicant's premises. According to applicant's deponents the number of people was between ten and twelve. Dr Otto, a female who experienced similar behaviour by the Department's officials decided to send her female personnel home as she did not want them to go through the same traumatic events of two years earlier. Dr Benganga argued with Prof De Vries and also instructed him to ensure that applicant immediately stop working. They had to indicate which assets belonged to applicant so that it could be confiscated and removed. Dr Benganga denies this, testifying that nothing happened on the 27th, but only on the 28th.
- [54] Again, on 28 July 2016 about ten to twelve people entered the premises of the applicant at the Universitas Hospital which included Dr Benganga as well as the Head of Security. Like the previous day, Dr Benganga was very aggressive and indicated that it was his intention to confiscate the equipment that the

applicant uses in its radiology practice. Several of applicant's own equipment, such as personal computers, operational systems, billing systems, reporting systems and imagery of different fields of medical radiology were confiscated and removed. Dr Benganga testified that he was soft-spoken all the time and that he acted peacefully in conveying the message that applicant's members had to vacate the premises. He also testified that there were only four people in his group, including himself.

[55] Mr Jordaan, applicant's Bloemfontein attorney, arrived at the scene and showed Dr Benganga the letter of the George attorney dated 26 July 2016 to which I referred *supra*. Dr Benganga read the letter, but merely indicated that he was acting on instructions from the Department. Later the morning the medical practitioners of the Radiology Department were called to a meeting where Dr Nathan informed them that Dr Gerbremariam, a radiologist from Pelonomi Hospital had been appointed as acting Head of the Department of Radiology and at the Medical Faculty of the University of the Free State as Prof De Vries had been suspended.

[56] Photos were taken by a member of applicant and it is apparent from this objective evidence that there were more security guards present than the figure stated by Dr Benganga. I must mention that although the Department conceded that its officials were guilty of the acts of spoliation complained of, it denied that Dr Benganga or anyone else of the Department acted aggressively

and/or harassed any of the personnel of applicant. I shall deal with this issue *infra*.

- [57] The events of 27 and 28 of July 2016 led to the first urgent application on 28 July 2016 under application number 3484/2016. Notwithstanding the clear directives issued by the court, the Department did not adhere thereto, but in flagrant disregard of the court order Dr Benganga and his platoon of security officers visited the practice of applicant again on 29 July 2016, but failed to return the assets removed earlier. By then it appeared that the lock of Prof De Vries' office had been changed and that his office, which was open during the evening, was thereafter locked, making it impossible for him to obtain his protective gear and cell phone.
- [58] Although Dr Benganga denies that he entered the theatre where a patient was ready to be operated on by Prof De Vries, his version is difficult to believe in light of the evidence of several witnesses involved with the medical procedure undertaken that morning. Prof De Vries pointed out that he had been summoned to the vascular intervention theatre for a life threatening, intricate and complicated procedure to be undertaken on a patient, but notwithstanding this he was harassed all the way to the theatre. In the process a theatre sister locked the theatre door to prevent Dr Benganga and his team from getting into the theatre, but he eventually got access through another door, continuing to argue with Prof De Vries whilst the patient was lying exposed on the operating table.

[59] After this episode Dr Otto also received a letter in terms whereof she was requested to give reasons why she should not be suspended insofar as she displayed insubordination by refusing to carry out an instruction to stop applicant's activities at the Universitas Hospital as instructed by Dr Benganga. Several other allegations against her were made as well.

[60] As mentioned *supra* the applications before me have been consolidated. The first application issued on 28 July 2016 is application 3484/2016 whilst the second application, issued the next day containing also the contempt of court prayer, is application 3516/2016. I remind the reader that in the first application orders were granted by Rampai J during the evening of 28 July 2016. Paragraph 7.1 thereof stipulates that the Department will allow Prof De Vries to treat his private patients pending the final adjudication of the application and in terms of paragraph 7.3 the Department was ordered to return all equipment, systems and computers of applicant removed by its employees earlier, without delay and not later than Friday 29 July 2016 at 10h00. Clearly, the intention was that the return should be effected immediately and as soon as reasonably possible. 10h00 was set as the deadline. I also remind the reader that the Department was represented by an experienced legal team and that the senior legal advisor, Mr Finger and Dr Benganga were present during the proceedings although Dr Benganga alleges that he left before orders were eventually granted by Rampai J.

[61] The Department did not return the items mentioned in paragraph 7.3 of the order, but contrary to the terms of the order employees of the Department under the leadership of Dr Benganga went to applicant's practice during the morning of 29 July 2016 and continued with the harassment and intimidation of its personnel. As mentioned Prof De Vries' office was locked after the locks had been changed, preventing him access to his office. Further allegations have been made in respect of harassment of applicant's personnel, including the professional staff thereof, but it will not serve any purpose to summarise and evaluate all alleged unlawful behaviour, especially in view of the concession made by the Department's counsel. As mentioned, Dr Benganga was the main protagonist, assisted by several security officers in the employ of the Department. Although some details of Dr Benganga's actions as alleged by applicant have been denied by him, there can be no doubt that, based on the concessions made, he interfered with applicant's practice. I am satisfied that the Department failed to comply with the first court order and that a further order was required. Dr Benganga's version that he acted in a mild and meek manner, that he was soft-spoken and not aggressive, is so far-fetched and untenable and that it can be rejected on the papers which I do.

[62] I find that during the course of the morning of 29 July 2016, Dr Benganga really acted like a bull in a China shop, being assisted once again by his platoon of security guards. His intention was to

close down the applicant's practice as he was allegedly acting on instructions of his employer. He would do what was required to ensure that his mandate was fulfilled. Obviously, the mandate, if he can be believed, was to close down the applicant's practice, notwithstanding the undertakings by the Department which are contained in the order of Rampai J. It may be a fair question as to why the MEC or HOD of the Department did not depose to confirmatory affidavits. A reasonable deduction to be made, if Dr Benganga can be believed, is that they did not want to expose themselves to possible sanction by the court.

[63] As mentioned applicant has proved the unlawful actions relied upon to obtain the order of 28 July 2016. Dr Benganga and his co-employees acted wrongfully, high-handedly, with total disregard of the rights of applicant, its professional staff and its employees and in flagrant disregard of the laws of our country. The unlawful action did not stop after the first order was obtained, but the momentum increased during the morning of 29 July 2016 in defiance of the court order of 28 July 2016. As mentioned I am satisfied that the version put up by Dr Benganga and the deponents who filed confirmatory affidavits are far-fetched and untenable. Insofar as their versions are in conflict with that of applicant it should be rejected as improbable and false.

[64] Insofar as *interim* relief is sought, applicant needs to prove the four requisites set out above. I do not deem it necessary to consider each of the requirements as the acceptable evidence is overwhelmingly in favour of granting relief. There is, however,

one aspect which I would like to point out and that is the balance of convenience. The RWOPS system has been in existence since 1992 and bearing in mind the short period of time until final adjudication of the pending action, there cannot be any prejudice caused to the Department if relief is granted as requested even if the Department ultimately succeeds. On the other hand, applicant and its associates will be seriously affected if they were to discontinue medical services to private patients.

- [65] Another relevant factor in respect of the balance of convenience, and in my view more important than the first factor, is the right of public (and private) patients to proper medical care. All associates of applicant have developed and possess rare skills. Patients from across the Free State and even as far afield as Northern Cape, Eastern Cape and Lesotho are being treated at the Universitas Hospital by *inter alia* applicant and its associates. There are only five specialists in the whole of South Africa, except Prof de Vries and dr Loggenberg, who can reverse a stroke and treat aneurisms in the brain by intravascular intervention. The Universitas Hospital cannot afford to forego these skills and experience, including the skills and experience of the other associates. Ultimately, the very public that the Department is supposed to serve, will suffer. Presently about two hundred public patients are treated daily by these professionals.

- [66] The Department's counsel conceded that its officials could not take the law into their own hands, a concession correctly made. Also, as Cameron J stated in *Kirland Investment supra*, government should not be allowed to take shortcuts. The Department was duly warned in a letter of applicant's George attorneys, Messrs Chimes Van Wyk Inc dated 26 July 2016 received by Dr Nathan and Mr Finger on the same date, i.e. two days before the first order by Rampai J. It was advised that there was a pending action in the Free State High Court for confirmation of the lease agreement as extended to be in force and effect and that no review application had been brought to set aside the composite tender agreement from which the lease agreement originated. The Department was warned that an interdict would be obtained if need be. This letter was written in response to a letter by Dr Nathan dated 22 July 2016 instructing applicant to cease its radiology practice with immediate effect.
- [67] The authorities relied upon by respondent's counsel to show that spoliation was not committed are clearly distinguishable on the facts. In *ATM Solutions (Pty) Ltd v Olkru Handelaars CC and Another* 2008 (2) 345 (CPD) the applicant tried to rely on the mandament van spolie which was found not to be permissible where it in essence claimed specific performance based on contract. In any event the facts in that matter indicate that the applicant was never in possession, not to speak of peaceful and undisturbed possession, of the particular ATM device. In my view the *dicta* of Flemming J in *Mbangi and Others v Dobsonville City Council* 1991 (2) SA 330 (W) at 336F and further relied upon do

not support the Department's case. At 336J Flemming J explained himself as follows: "It seems sufficiently logical to find the answer therein that it is appropriate to regard it as actionable to disturb possession only if the possession clearly exists, if the possession is sufficiently firm or established to be deserving protection with such a strong remedy." The communication between the parties and the Department's stance during the period of 2½ years prior to the events of July 2016 cannot be regarded as a factor indicating that applicant was not in peaceful and undisturbed possession. Applicant carried on treating public and private patients throughout this period by making use of its own as well as State equipment whilst paying the rental agreed upon which was accepted throughout this period by the Department. Applicant's possession was clearly established in March 2009.

[68] I wish to make it clear that even in the event of a finding that some of the relief claimed and granted herein could be regarded as final relief, I remain satisfied that applicant succeeded in proving an entitlement to any such orders.

[69] I am satisfied that applicant has made out a proper case for relief and that the rule *nisi* in application 3484/2016 should be confirmed. A proper case has also been made out for the relief claimed in application 3516/2016 and the rule *nisi* of 29 July 2016 can be confirmed on the basis that paragraphs 5.1, 5.2 and 5.3 thereof are made final.

[70] Mr Ploos van Amstel asked me to grant an order under "Further relief", interdicting the Department from withdrawing remunerative

work performed by applicant and its associates outside the public service. The issue is whether this aspect has been fully canvassed in the application papers. It appears to be the case. Applicant dealt with the issue in the founding papers in application 3484/2016 and Dr Benganga stated the following in his answering affidavit in application 3516/2016: "... at no stage has the Respondent prohibited any doctors of the Applicant from treating private patients provided that such doctors have the necessary approval of the department to do so." – see paragraph 13.2; "I again reiterate that the associates of the Applicant have not been prohibited from doing remunerative work outside the public sector hours." – at paragraph 17 and "... only Prof de Vries is prohibited from doing any remunerative work outside the public sector hours because he is currently under suspension. The other members of the Applicant are not prohibited from doing any remunerative work outside the public sector hours" – at paragraph 49.3.

XIV COSTS

- [71] The contempt of court application has not been proceeded with, clearly insofar as the court order of 28 July 2016 was only served on Dr Benganga on the 1st of August 2016. I have no doubt in my mind that Dr Benganga became aware of the contents of the court order much earlier. He attended the proceedings and knew exactly what applicant intended the court to order. It was his actions that were under the spotlight. Although I am prepared to accept that he left before the order was actually made, Mr Finger, a senior legal adviser of the Department as well as Mr Mohobo of the State Attorney's office and the Department's counsel attended

the proceedings throughout. These gentlemen knew that it was expected of the Department to act immediately and to return assets removed by not later than 10H00 the next morning. Also, that they had to comply with all the other orders issued, *inter alia* to honour the lease agreement dated 6 March 2009. No doubt, when the second order was issued by agreement on 29 July 2016, Dr Benganga and his colleagues, including Mr Finger, would have been alerted to the contents of the first order if they were previously unaware thereof as they allege.

[72] I wish to echo the words of Dr Otto in the replying affidavit in case number 3516/2016 in this regard:

“I am shocked that these gentlemen (Messrs Finger and Mohobo) who were in Court when the order was granted, did not immediately relay the contents thereof to the affected officials in the Department, especially the MEC, the Head of the Department (Dr Motau), Dr Benganga, Dr Nathan and Mr Tlhogo.”

I also agree with her sentiments that there was a positive duty resting on the Department and its employees implicated in the application, especially Dr Benganga and Dr Nathan whose conduct was the subject matter of the court proceedings, to ascertain exactly what the rights and responsibilities were as pronounced by the court. Mr Finger who was in court all the time during the proceedings made the following unfortunate allegation which I am not prepared to accept as the truth:

"I wish to reiterate that none of the officials of the Respondent were aware about the contents of the order granted by the court on 28 July 2016 under case number 3484/2016 until the 1st August 2016 when I downloaded the order from my computer after I had received it from the Respondent's attorney."

[73] Mr Mohobo mentioned the following:

"Due to the lateness of the hour, I did not have the opportunity to discuss the contents of the order with the respondent or any of his officials." (emphasis added)

I find this highly untenable and unacceptable. Firstly, it is not stated that the contents of the court order were not communicated, but merely that no discussion in respect thereof took place. It would be expected of a senior attorney like Mr Mohobo who knew that he would not be at office the next morning to do anything in his power to ensure that the contents of the urgent court order, *inter alia* directing his clients to respond by not later than 10H00 the very next day and to honour the lease agreement, are being communicated to the responsible people, if not that evening, then early the next morning. I do not accept for one moment that a senior attorney would display such a lack of respect towards an urgent court order as I am requested to believe.

[74] The institution of further proceedings between the same parties relating to the same subject matter while the first proceeding is

still pending is *prima facie* vexatious. See *Painter v Strauss* 1951 (3) SA 307 (OPD) at 312E.

- [75] The Department as an organ of State should, as any other citizen, respect the Constitution and the laws of our country and adhere to the due process of the administration of the law. In *casu* Dr Benganga and his platoon of security officers acted in a high-handed, arrogant and aggressive manner. They showed no respect for the rule of law which is so crucial for a defensible and sustainable democracy. There is no room for self-help by anybody; especially not by the State and its officials. This rule is necessary for the protection of the individual against arbitrary and subjective decisions and conduct by an adversary. See *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC) at paras [17] and [18]. The Department and its officials bear a special obligation to ensure that the work of the judiciary is not impeded. There should be strict compliance with court orders. See *Nyathi v MEC for Department of Health, Gauteng and Another* 2008 (5) SA 94 (CC) at paras [80], [81] and [91]. Organs of State, institutions and people in general should not be allowed to bypass the courts and to usurp the inherent functions of the courts by deciding their own claims and relief. See *Metcash Trading Ltd v Commissioner, South African Revenue Service and Another* 2001 (1) SA 1109 (CC) at para [50].

- [76] Mr Ploos van Amstel requested me to grant costs in favour of applicant in respect of the two applications including the

opposition of the counter-application on an attorney and client scale, such costs to include the costs of three counsel. He also submitted that a further order should be made in terms whereof the particular officials be ordered to reimburse the Department in respect of such costs to be paid by the Department to applicant. The first question to be asked is who would be requested to monitor the situation in such a case. Surely it cannot be asked of the court to keep the matter in abeyance and to monitor whether there was compliance or not. Applicant could and should have applied for costs orders *de bonis propriis* against Drs Benganga and Nathan and thereby accepting the risk that these costs may not be paid by them in their personal capacities, leaving applicant with an empty judgment. In fact, Dr Benganga was called upon to advance reasons in application 3516/2016 why he should not pay the costs *de bonis propriis*, but Mr Ploos van Amstel did not insist on such order. I am not prepared to grant the extraordinary costs order requested by applicant at the hearing of the application. My personal view is that courts should be seen to let recalcitrant State officials pay for their actions or inactions in suitable cases in order to decrease the State's burden in respect of unnecessary incurred and/or wasted legal costs, but I cannot make an order not asked for. There is no reason why the costs of three counsel should be allowed. The matter is not that intricate and applicant had the benefit of the services of two senior counsel.

- [77] Having considered the matter and in particular the arrogant, foolhardy and recalcitrant attitude of the Department's senior officials such as Drs Nathan and Benganga in particular, who

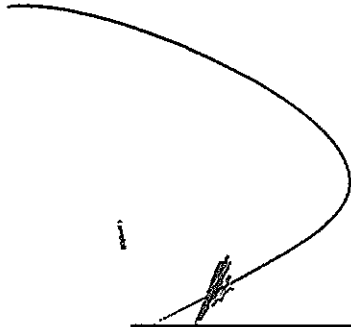
should have known better bearing in mind the luxury of legal assistance from Mr Finger, a senior legal adviser, as well as two experienced members of the bar and side-bar respectively, there is no reason why the Department should not be penalised with a punitive costs order.

XV ORDERS

[78] The following orders are made:

1. The rule *nisi* issued on 28 July 2016 in application number 3484/2016 is confirmed.
2. The rule *nisi* issued on 29 July 2016 in application number 3516/2016, with reference to paragraphs 5.1, 5.2 and 5.3 only, is confirmed.
3. It is recorded that the relief granted in paragraph 1 *supra* is of an *interim* nature pending finalisation of the disputes between the parties in case number 1651/2016.
4. The Free State Department of Health is interdicted from withdrawing from the RWOPS system in respect of Prof De Vries and Drs S Otto, E Loggenberg and J Janse van Rensburg pending the outcome of case number 1651/2016, alternatively the outcome of a fair, transparent and equitable process to have the RWOPS system set aside.
5. The counter-application in application 3484/2016 is struck from the roll.

6. The respondent, i.e. the MEC: Free State Department of Health, is ordered to pay the costs of the applicant, De Vries and Associates, pertaining to applications 3484/2016 and 3516/2016, including the costs of opposition of the counter-application in application 3484/2016, on the scale as between attorney and client, such costs to include the costs of two senior counsel.


J.P. DAFFUE, J

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