

REPUBLIC OF SOUTH AFRICA



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

Case Number: 18544/2023

In the matter between:

**JULIAN VAN DER WESTHUIZEN AND
SIXTEEN (16) OTHERS**

Applicants

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

Coram: Wille, J

Heard: 4 March 2025

Delivered: 15 April 2025

JUDGMENT

WILLE, J:

INTRODUCTION

[1] This is a challenging and complex matter. As is the further application launched by the third and fourth respondents following discrete application proceedings, over which I also presided. At the outset, I express my gratitude to the legal teams involved for how they presented their cases and the eloquent arguments made by all the counsel involved.¹

[2] The applicants are made up of sixteen cancer patients. I have been informed that one of these patients has since passed away, and I extend my condolences. All these patients receive treatment at the facilities controlled by the second respondent and owned by the first respondent (the hospital respondents). These patients are treated and cared for by the third respondent.²

[3] The third respondent boasts an impressive record as an accomplished oncologist and is a leading stereotactic and brain tumour oncologist. He was responsible for bringing cutting-edge technology in cancer treatment to the hospital, controlled and managed by the hospital respondents.³

[4] The hospital respondents have a very specialised and unique cancer treatment machine. This machine permits non-invasive radiotherapy technology that can adapt to a patient's treatment plan based on their type of cancer. In addition, the second respondent is one of a few hospitals in our country with an additional specialised type of machine also used in the treatment of cancer patients.⁴

¹ The second matter was heard on the day following this application

² The third respondent is Dr Kathan.

³ This is not disputed.

⁴ This is the only hospital in Sub-Saharan Africa with an "Ethos" machine. Some other hospitals do have "Novalis" machines.

[5] The third respondent is one of the most, if not the most, experienced oncologists operating these specialised machines. He is regarded as head and shoulders above other oncologists at the facilities managed by the hospital respondents. He is highly skilled in the operation of these machines.⁵

OVERVIEW

[6] About eighteen months ago, the hospital respondents terminated the third respondent's practising privileges (the decision). The termination did not take place with immediate effect but was delayed by a few months.⁶

[7] The decision was made because the third respondent allegedly made certain homophobic, racist, and sexist remarks while at the hospital managed by the second respondent. The effect of the termination decision was that the applicants would not be able to receive lifesaving medical treatment at the facilities managed by the second respondent. The applicants challenged this termination decision because they said it was irrational and unlawful. This is then what this case is about. Other than some limited factual disputes, it raises complex legal issues.⁷

[8] In summary, it is contended that the hospital respondents did not correctly apply their policies when terminating the third respondent's practising privileges. The third respondent says this because they did not take corrective measures before terminating his practising privileges, including adopting a rehabilitation plan.⁸

[9] In response, the hospital respondents argue that adopting less restrictive measures was unnecessary and that one of their discrete policies permits termination as a matter of first and not last resort.⁹

[10] In reply, the third respondent says that the latter policy finds application only when a practitioner's privileges are in place and when they are guilty of serious

⁵ This was not disputed. A supporting affidavit was filed in this connection which was not the subject of dispute.

⁶ It was delayed until the end of December 2023.

⁷ Most of the factual issues were common cause, alternatively not materially engaged with.

⁸ This following their "Management Policy"

⁹ This following their "Privileges Policy".

misconduct. Then, termination may be immediate. Thus, this would apply where a doctor engaged in conduct that seriously threatened the hospital and its patients. In these circumstances, he or she should not be allowed to continue practising. Hence, the conduct complained of would necessitate immediate removal, which would apply as a matter of logic to protect the hospital and the hospital's patients.¹⁰

[11] In this case, the hospital respondents elected not to remove the third respondent immediately in terms of this guillotine clause, and the enforcement of the termination decision was delayed for several months.¹¹

[12] Simply put, the third respondent advances that the first and second respondents should be bound by their election not to proceed with immediate termination.¹²

[13] Some of the critical legal issues for determination are these:

- (a) The hospital respondents say their termination decision did not amount to administrative action (as defined).
- (b) In the alternative, they argue that if their decision amounted to administrative action, the applicants do not have standing to challenge their decision.
- (c) Further, they say that the law of contract does not allow the applicants to enforce compliance with the hospital respondents' policies regarding unacceptable conduct and practising privileges.
- (d) Also, they argue that even if the applicants are entitled to compel compliance with their policies, they are not binding on the hospital respondents. They say their policies may be used against doctors

¹⁰ The hospital respondents did not terminate the third respondent's privileges with immediate effect.

¹¹ The termination decision was taken but the enforcement thereof was delayed for several months.

¹² Manifestly, the own policies did not support their decision.

with practising privileges, but the policies may not be used against the hospital respondents.¹³

BACKGROUND

[14] The third respondent started his business relationship with the second respondent about fifteen (15) years ago. He has received training as an oncologist both domestically and internationally. He is considered a leader in his field. He has been described as a forward thinker in cancer treatment.¹⁴

[15] It is conceded that the third respondent often finds solutions that have saved the lives of many cancer patients. His expertise is best described as personalised precision oncology care.¹⁵

[16] About two years ago, the hospital respondents received resignation letters from two employees in the radiology unit. They complained that the third respondent made working at the hospital intolerable. The hospital respondents investigated these complaints and concluded that there was evidence that the third respondent had made racist, homophobic and sexist remarks. The allegations were that the third respondent had uttered the words '*nigger*' and '*moffie*' and made sexually inappropriate comments to female staff members.¹⁶

[17] The third respondent denied these allegations and explained that these unfortunate comments regarding '*nigger*' and '*moffie*' were taken out of context and that, as a gay man of colour himself, he is neither racist, homophobic or sexist. In addition, he says that the evidence connected to these remarks demonstrates that these remarks were never intended to be racist, homophobic or sexist speech. It goes without saying that the use of the word '*nigger*' is unacceptable and repulsive. The key point is whether the third respondent intended his actions to be threatening, abusive or insulting or whether he knew they might have been.¹⁷

¹³ The so styled "one-way" street argument.

¹⁴ It was not disputed that the third respondent is an innovative cancer specialist.

¹⁵ He has also been hailed as a neuro-oncologist.

¹⁶ No context was given in connection with these alleged remarks.

¹⁷ This was never demonstrated or engaged with by the hospital respondents.

[18] A disciplinary hearing followed, and the third respondent was found guilty of unfair discrimination, harassment, sexual harassment, bullying, and creating a hostile working environment. He was acquitted on several other charges, including acting in conflict with the best interests of the business of the hospital respondents or other patients and/or placing his patient and practice needs ahead of the hospital respondents' operations. Because of these findings, the hospital respondents terminated the third respondent's employment contract but did no more than that, and he continued to work as an oncologist at the hospital.¹⁸

[19] This termination, however, did not detract from the third respondent's entitlement to practice as an oncologist at the facility managed by the second respondent. He remained entitled to do so because of his practising privileges at the hospital.¹⁹

[20] Thereafter, the hospital respondents communicated with the third respondent and informed him of their decision to inquire about his admission rights and practising privileges at the facilities managed by the second respondent.²⁰

[21] A flurry of legal processes followed, and the parties agreed to a private mediation. No agreement was reached to resolve their differences. An attempt at conciliation also failed, and eventually, the matter was referred to arbitration.²¹

[22] What followed was a request by the hospital respondents to the third respondent to provide them with written representations on whether (or not) the hospital respondents should terminate his practising privileges.²²

[23] About a month later, the hospital respondents terminated the third respondent's practising privileges. What is telling is that the hospital respondents delayed the implementation of their termination decision by about five (5) months.²³

¹⁸ They did not move for the termination of the third respondents practising privileges.

¹⁹ They terminated his employment only as the "Chief Medical Officer".

²⁰ In the interim the third respondent continued to practice as an oncologist.

²¹ On 20 June 2023.

²² The third respondent made representations on 3 July 2023.

CONSIDERATION

[24] The hospital respondents contend that their termination decision originates from the contractual nexus and nature of the relationship between them and the third respondent. Further, they say that because their termination decision was contractual, they are, as a matter of law, entitled to deviate from their policies, which may not be enforced against them. The argument is that the hospital respondents do not and did not in any manner exercise any form of public power.²⁴

[25] The hospital respondents argue that following the approach they adopted, administrative and constitutional law principles are incapable of disciplining their decision. The applicants and third respondent contend that this approach is impermissible. They say it is the approach often adopted by bodies that exercise considerable power with public implications to avoid accountability and scrutiny for their actions.²⁵

[26] In summary, by way of legislative intervention, administrative action is defined as having the following features:

- (a) Any decision taken or a failure to decide by an organ of state when exercising a power (or exercising a public power) or performing a public function in terms of any legislation, and/or
- (b) Any decision taken by a natural or juristic person, other than an organ of the state, when exercising a public power or performing a public function in terms of an empowering provision which adversely affects the rights of any person and which has a direct, external, legal effect.²⁶

²³ This termination was to take effect on 31 December 2023.

²⁴ They contend that the Promotion of Administrative Justice Act, 3 of 2000 (PAJA) finds no application.

²⁵ This is then the real issue and legal dispute between the parties.

²⁶ These are the features of administrative action set out in the definition section of PAJA.

[27] As a matter of pure logic, it must be so that private bodies may exercise public power even where there is no statute empowering the exercise of that power. The issue for scrutiny is whether this may even be the case where a contractual regime exists and where to draw the judicial line in the sand.²⁷

[28] It is insufficient to merely explore the nature of the relationship between the parties in isolation, contractual or otherwise. Instead, regard must also be given to the consequences of the decision. Thus, where the exercise of power by a private body has public consequences, it may (depending on the circumstances, the context and the factual matrix) be regarded as an exercise of public power. I also say this because I am guided by the binding and leading jurisprudence formulated in *Ndoro*.²⁸

[29] In this case, it was held that the decision made by an arbitration tribunal in connection with an aspect of football in this country constituted administrative action. This was so because it concerned a matter in which the public had a legal interest even though there was no empowering provision for exercising the specific power at play. Nevertheless, the public may have a legal interest in exercising a particular public power because, among other things, of the consequences of the decision taken, especially where constitutional rights may be at play.²⁹

[30] More recently, consideration had to be given to whether the decisions of an advertising regulatory board (a private body) constituted administrative action. The outcome was that it did because the procedural guidelines made by the board served as the empowering provisions through which it made decisions.³⁰

[31] The hospital respondents concede that their business is not the business of a regular commercial enterprise. This must be so because the hospital respondents provide healthcare services to the public, implicating human rights and placing a duty on them to act ethically, transparently and with accountability.³¹

²⁷ *Dawnlaan Beleggings v Johannesburg Stock Exchange* 1983 (3) SA 344 (WLC) at 364 B-G

²⁸ *Ndoro v SAFA* 2018 (5) SA 630 (GJ) at paragraph [31].

²⁹ The reasoning was because the private association that regulated football exercise a public function because they oversee a public good and do not simply regulate private interests.

³⁰ *Advertising Regulatory Board v Bliss Brands* 2022 (4) SA 57 (SCA).

³¹ This is in terms of their own Code of Conduct.

[32] Thus, the hospital respondents must observe, advance and support human rights. In addition, they must act rationally and reasonably in their decisions. The instruments that govern and regulate the conduct of the hospital respondents serve as their empowering provisions.³²

[33] The hospital respondents do not deny that the public has an interest in them acting lawfully, ethically and rationally, and they correctly appreciate that their patient's well-being may be affected by their decisions. Thus, the public interest here concerns fundamental constitutional rights. Self-evidently, the hospital respondents have a negative constitutional obligation not to undermine the right of access to healthcare.³³

[34] It must be that when the hospital respondents exercised their discretion involving public interest, they were performing a public function. When they took the termination decision, this must have been an administrative action, which, in turn, fell to be disciplined by the intervening legislation.³⁴

[35] Put another way, this was so because the hospital respondents must have appreciated that the public may be affected by the consequences of their decision. Thus, when it exercised discretion, it, to an extent, performed a 'public' function.³⁵

[36] I say this also because of the peculiar facts of this matter. The termination decision adversely affected the rights of patients to access and receive the best possible treatment they could afford. Further, the hospital respondents are exclusively responsible for the public having access to these facilities. A negative duty not to impair their right to access healthcare thus rests on the hospital respondents.³⁶

[37] The termination decision directly and negatively affected the applicants because it deprived them of the treatment they had received for many years. The

³² Their Code of Conduct together with the Management and Privileges Policies.

³³ *Governing Body of the Juma Musjid Primary School v Essay NO and Others* 2011 (8) BCLR 761 (CC) at paragraph [31].

³⁴ Administrative action governed by PAJA.

³⁵ It gave effect to the rights of patients and access healthcare.

³⁶ The decision they took was not in my view an out and out commercial decision.

hospital respondents exercised a 'monopoly' regarding this specialised cancer treatment. Thus, relying on a sanitised contractual approach to avoid constitutional and administrative law principles is impermissible in these circumstances.³⁷

[38] Now, I am turning to the applicants' grounds for review. Here, we have a technical argument about two different instruments that regulate the conduct of the hospital respondents and the third respondent. The argument is that the privilege instrument trumps the provisions of the management instrument.³⁸

[39] The management policy does not permit a termination as a matter of first instance. Instead, it contemplates a process of rehabilitation in the following manner:

- (a) If the unacceptable conduct is not serious and has occurred for the first time, the hospital manager must discuss the matter with the practitioner and emphasise that the conduct should not re-occur. The practitioner may also be requested to apologise for his or her conduct.
- (b) If the unacceptable conduct reoccurs or if it is a first offence but of a serious nature, the hospital is required to implement a rehabilitation plan for the practitioner. The obligation to do so is not discretionary. It is an obligatory process.
- (c) If the unacceptable conduct poses an imminent danger to the health of an individual or individuals and/or constitutes a serious offence, then the offending practitioner may be suspended immediately.³⁹

[40] In connection with the alleged conduct of the third respondent, the suspension of his practising privileges would happen only if the following occurred:

- (a) If the conduct posed a threat to the health of individuals and/or

³⁷ The hospital respondents exercised a public power when they made the decision.

³⁸ The contention is that the privileges policy allows a deviation from the management policy.

³⁹ This was not implemented against the third respondent.

- (b) If the conduct constituted a serious offence under the management policy.⁴⁰

[41] It is common cause that the hospital respondents did not immediately suspend the third respondent's practising privileges. The hospital respondents do have the power to terminate a practitioner's practising privileges. Still, it may only do so immediately after the practitioner is found to have engaged in unacceptable conduct. The third respondent's practising privileges were not terminated immediately but were delayed for a few months.⁴¹

[42] I adopt a common-sense approach to this debate. Immediate suspension is reserved for serious conduct where a practitioner's presence threatens the hospital and its patients. Put another way, the continued presence of a practitioner would harm not only the hospital but also the lives of its patients. In this case, the hospital respondents made an election, and that election binds them.⁴²

[43] They are not entitled to blow hot and cold simultaneously if this would prejudice the third respondent. It would be manifestly unfair to the third respondent in this case.⁴³

[44] Thus, the applicants contend that the termination decision was not rationally connected to the purpose of the privileges policy, which is to remove a practitioner with immediate effect for unacceptable conduct.⁴⁴

[45] This brings me to the proportionality and rationality argument and debate. It is trite that a decision-maker must not impose a severe sanction when a less severe sanction will achieve the same purpose, as this prevents the abuse of power.⁴⁵

⁴⁰ The third respondent's practicing privileges were not immediately suspended.

⁴¹ There was a delay of about eight months.

⁴² The purpose is to allow swift action in respect of unacceptable conduct.

⁴³ *Equity Aviation Services (Pty) Ltd v CCMA 2009 (1) SA 3909 (CC)* paragraph [54].

⁴⁴ This they say makes the decision reviewable under PAJA.

⁴⁵ *SanParks v MTO Forestry (Pty) Ltd and Another 2018 (5) SA 177 (SCA)* at paragraph [39].

[46] The third respondent stands accused of using the words '*nigger*' and '*moffie*' and making sexually suggestive remarks about blonde women. He explained that he was not racist or homophobic as he is a homosexual man of colour. The hospital respondents contend that his subjective intention when uttering these words is irrelevant and must be ignored.⁴⁶

[47] This is precisely the species of conduct that cries out for intervention and rehabilitation by the hospital respondents. I say this because the third respondent did not use these offending words in a racist or homophobic manner. The termination decision was arbitrary. This was also disproportionate because there was no justification for declining to implement a rehabilitation plan.⁴⁷

[48] The third respondent was not provided with reasons for his termination. The reasoning may have provided further insight into whether the termination decision was appropriate, whether an empowering provision authorised the decision contemplated and whether less restrictive means would achieve the same purpose.⁴⁸

[49] The hospital respondents seek to avoid the provisions of the privileges policy by contending that the applicants are not entitled to raise any challenge because they are not parties to the contract between them and the third respondent. As I understand our jurisprudence, third parties are entitled to raise challenges concerning the non-compliance of contracts where their constitutional rights may be implicated. The reasoning behind this is that private parties have a negative obligation not to interfere with the realisation of rights. In some rare cases, a positive obligation is imposed on private parties where constitutional rights are implicated.⁴⁹

[49] The consequences of the termination decision meant that the applicants would no longer be able to access these highly specialised facilities under the

⁴⁶ The hospital respondents say that context is irrelevant.

⁴⁷ This is not engaged with by the hospital respondents.

⁴⁸ Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries 2003 (6) SA 407 (SCA) at paragraph 40.

⁴⁹ AB and Another v Pridwin Preparatory School 2020 (5) SA 327 (CC) at paragraph [66].

treatment of the third respondent, the most skilled and experienced oncologist using these machines.⁵⁰

[50] This constitutes an interference with the rights to access healthcare services and a breach of the negative obligations imposed on the hospital respondents. The termination decision also impedes the rights of the applicants to make decisions about their healthcare.⁵¹

[51] This matter does not involve an ordinary commercial contract, as constitutional rights are implicated. It must be so that an agreement between a private hospital and a medical practitioner affecting the rights of patients to receive healthcare is subject to enforcement by the patients because their constitutional rights may be affected.⁵²

[52] Finally, I deal with the issue of the rights of the applicants and, to a limited extent, the issue of their standing in law. Although the hospital respondents did not vigorously pursue the 'standing' objection, it must be considered. The hospital respondents initially contended that the applicants were not entitled to submit representations concerning the termination decision and had no right to be heard.⁵³

[53] Further, the argument was made that the third respondent acted improperly by causing some of the applicants to submit representations to the hospital respondents.⁵⁴

[54] Over time, this stance softened. I say this because, thereafter, the hospital respondents contended that the representations submitted by some of the applicants were indeed considered. What is significant in this case is that the applicants were never invited to submit representations to the hospital respondents. Further, I gained the distinct impression from the papers that when these representations were

⁵⁰ This allegation was supported in a supporting affidavit filed by an independent medical practitioner,

⁵¹ A violation of the right to bodily and psychological integrity constitutionally protected.

⁵² *Darling Borough Council v Wiltsher Nothern Ltd and Another* [1995] 1 WLR 68 at 76 E-F.

⁵³ The point was that the applicants did not have '*locus standi*'.

⁵⁴ The argument was that the third respondent encouraged this to retrofit his opposition to termination.

submitted, this was interpreted as part of a strategy devised by the third respondent to exert pressure on the hospital respondents not to reach an adverse decision.⁵⁵

[55] Turning now to the issue of standing. The hospital respondents contend that even if their decision amounted to administrative action, the applicants have no legal standing to challenge it. The decision had profound consequences for the applicants, and because of these consequences, they have a direct and substantial interest in whether the termination decision was taken lawfully.⁵⁶

[56] Another significant factor was that the decision interfered with established relationships between the third respondent and the applicants who had developed trust and confidence in the third respondent's ability to treat them. The applicants averred that they acted in both the public interest and in their interest. I believe the applicants have adequately demonstrated that the decision affected a right or interest or a potential right or interest.⁵⁷

[57] I say this because the termination decision deprived the applicants of their right to access to healthcare, dignity, freedom of the person and the right to make medical decisions. Put another way, the termination decision's lawfulness (or otherwise) will have a detrimental effect on the treatment received by the applicants once (and if) implemented. Thus, the interest of the applicants is not academic nor hypothetical.⁵⁸

[58] What remains is the issue of the standing connected to public interest. The issue to be considered is whether the public (in general) has a legal interest in whether the hospital respondents in these circumstances acted lawfully. This is so because their decision may impact other patients who desire access to this specialised equipment and access to the third respondent's expertise in using this equipment.⁵⁹

⁵⁵ This was not materially engaged with by the hospital respondents.

⁵⁶ The applicants have a constitutional right to access to healthcare.

⁵⁷ *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* 2013 (3) BCLR 251 (CC) at paragraph [41].

⁵⁸ *Giant Concerts CC* at paragraph [50].

⁵⁹ This case was not only about the applicants but impacts the healthcare of other future patients.

[59] Because of the peculiar facts of this case and considering that this specialised equipment's availability is limited, the applicants have demonstrated a legal standing connected to the public interest. I say this because our law takes a generous approach to what is required to establish public interest standing in matters with a constitutional ingredient.⁶⁰

CONCLUSION

[60] For these reasons, the application must succeed. Further, it is essential to formulate the order comprehensively following the recent jurisprudence in *Ekapa*.⁶¹

[61] The following order is granted:

1. The decision by the first and second respondents to terminate the third respondent's admission and practising privileges at Vincent Pallotti Hospital, dated 1 August 2023 ("the termination decision"), is declared to be inconsistent with the Constitution of the Republic of South Africa, 1996, and is with this declared invalid.
2. The termination decision taken by the first and second respondents is reviewed and is, with this, set aside.
3. Further, it is declared that the termination decision is inconsistent with the first and second respondents' "Code of Conduct and Policy on Management of Unacceptable Conduct by a Medical Practitioner".
4. In addition, the first and second respondents' termination decision is, with this, set aside on the basis that it is inconsistent with the hospital respondents' "Code of Conduct and Policy on Management of Unacceptable Conduct by a Medical Practitioner".

⁶⁰ *Solidarity v Minister of Health and Others* 2024 (5) SA 563 (GP) at paragraph [4].

⁶¹ *Ekapa Minerals (Pty) Ltd v Sol Plaatje Local Municipality and Others* (CCT/119/23) [2025] ZA CC1(24 March 2025) at paragraph [80].

5. The costs of this application shall be paid by the first and second respondents (jointly and severally, the one paying the other to be absolved), including the costs of two counsel, following Scale C.

E D WILLE
(CAPE TOWN)

APPEARANCES

FOR THE APPLICANTS

ANTON KATZ SC
KESSLER PERUMALSAMY
INSTRUCTED BY CARLO TIMOTHY
TIMOTHY AND TIMOTHY ATTORNEYS

FOR THE FIRST AND SECOND RESPONDENTS

ANDREW REDDING SC
DANIEL SIVE
INSTRUCTED BY JOHAN BOTES
BAKER & MCKENZIE

FOR THE THIRD AND FOURTH RESPONDENTS

STEVE KIRK-COHEN SC
MARTINUS VAN DEN BERG
INSTRUCTED BY G STANSFIELD
MCACISO STANSFIELD INC