

REPUBLIC OF SOUTH AFRICA



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

Case number: 9940/2023

In the matter between:

LOUIS KATHAN

First Applicant

DR LOUIS KATHAN INC

Second Applicant

and

**LIFE HEALTHCARE HOLDINGS
GROUP (PTY) LTD**

First Respondent

LIFE VINCENT PALLOTTI HOSPITAL (PTY) LTD

Second Respondent

Coram: Wille, J

Heard: 5 March 2025

Further documents filed: 17 April 2025

Delivered: 14 May 2025

JUDGMENT

WILLE, J:

INTRODUCTION

[1] This is the second judgment involving the applicants and the first and second respondents in this unfortunate matter. I refer to the respondents collectively as the hospital respondents. This judgment was somewhat delayed, as I indicated to the parties shortly after the delivery of the first judgment that my *prima facie* view was that the *lis pendens* shield raised by the respondents was good in law. The applicants thereafter delivered a notice of withdrawal of the action proceedings, which euthanised the *lis pendens* shield.¹

[2] In summary, the applicants seek the following relief against the hospital respondents: (a) declaring that the cancellation of the first applicant's admissions and practising privileges to be null and void, and of no force and/or effect and, (b) ordering the hospital respondents to restore to the applicants their admissions and practising privileges.²

[3] I must stress that this application has no bearing on an employer-employee relationship between the applicants and the hospital respondents. The first applicant enjoyed practising privileges for about fifteen years at facilities controlled by the hospital respondents. These privileges concern the right to practice and rent office space and the entitlement to refer patients to the hospital respondents for treatment.³

OVERVIEW

[4] Firstly, the application concerns a contractual relationship between the applicants and the respondents, with the terms of this relationship outlined in the hospital respondents' policies. Secondly, this application concerns the parties' differing interpretations of these policies.⁴

¹ The notice of withdrawal of the action was dated 17 April 2025.

² As they existed as at 1 August 2023.

³ This application is also about a lease agreement.

⁴ The privileges policy and the conduct policy (which will be defined later in this judgment)

[5] Finally, this application concerns the alleged misconduct of the first applicant, but also, as the first applicant claims, the misconduct of the hospital respondents in their dealings with the first applicant, which ultimately led to the termination of the relationship between the applicants and the hospital respondents.⁵

CONSIDERATION

CONTRACT

[6] The first applicant relies on several contracts concerning his privileges to practice at the facilities administered by the hospital respondents. Initially, the hospital respondents seemed to contend for a contractual regime with the applicants. There are two policy documents at play. The applicants and the hospital respondents refer to two policy documents concerning the contractual regime argument. I agree that these documents are significant and I will refer to them. In addition, I will refer to the lease agreement (the 'lease') between the first applicant and the second respondent.⁶

[7] The first policy document to which I will refer has two relevant annexes. For reference purposes, I will refer to the first policy document as the 'privileges' policy.⁷

[8] I will refer to the second policy document as the 'conduct' policy. This document details the procedures to be followed concerning alleged unacceptable conduct and may be loosely described as a human resources policy document.⁸

[9] The hospital respondents initially relied squarely on the conduct policy, as their primary complaint was that the first applicant's conduct was unacceptable. However, the applicants say that the first applicant's alleged unacceptable conduct is more clearly defined in an annexure to the privileges policy, which they rely on. The applicants say that it is impermissible to rely on the conduct policy when dealing with

⁵ This "termination" is the issue to be determined in this application.

⁶ I am of the view that the lease agreement is also significant.

⁷ The "Policy governing the Admission and Practising Privileges of Doctors within Life HealthCare Hospitals and Associated Facilities".

⁸ The "Management of Unacceptable Conduct by a Medical Practitioner".

the privileges enjoyed by the applicants. I suggest that one must also consider the lease agreement between the first applicant and the second respondent.⁹

[10] Initially, the argument was that these two policies were accepted as contractual and binding on all the parties. The position now taken by the hospital respondents was that both policies, although valid, were and are only guidelines. While binding on the first applicant, they are not binding on the hospital respondents.¹⁰

[11] The applicants argue that the privilege policy addresses unacceptable conduct by a doctor with practising privileges. I will address the privileges policy first. The arguments and debates here are these. In some part the hospital respondents seek to rely on the overarching provisions of the conduct policy which in summary records that they reserve the right to suspend or terminate admitting privileges immediately on written notice to this effect should a doctor make himself or herself guilty of unacceptable behaviour, unprofessional conduct or participate in activities which the hospital respondents consider as detrimental to their reputation or business interests, or which shows a trend of patient care which falls short of standards accepted of a doctor in that discipline.¹¹

[12] A common-sense and logical approach must be adopted to interpret the privileges policy, and it must not be construed in isolation but in conjunction with the conduct policy. This ultimately means that only serious breaches could result in the hospital respondents summarily cancelling the privileges of the offending doctor.¹²

[13] In other words, the conduct policy outlines various types of misconduct. It makes internal provisions for addressing the consequences of this type of misconduct, should it occur. As a matter of pure logic, this must mean that the misconduct listed and contemplated cannot (by its very nature) be repudiatory.¹³

⁹ The “Code of Conduct” annexure and the lease agreement must also be considered.

¹⁰ This was a “shifting” of the case by the hospital respondents.

¹¹ The “Code of Conduct” and the “Granting of Admission Privileges” annexures to the privileges policy.

¹² This is so because a specific procedure must be followed.

¹³ Again, because an outlined procedure must be followed.

[14] Thus, I need to examine the nature of the misconduct complained about, but more importantly, analyse the remedial steps contemplated by the hospital respondents (if any). For this analysis, I must take into account the findings of the disciplinary enquiry, which was conducted and held against the first applicant by the hospital respondents.¹⁴

[15] As far as the use of the word 'moffie' is concerned the first applicant's guilt is determined without reference to a specific section of the prohibited misconduct. As far as the use of the word 'nigger' is concerned again, the first applicant's guilt is determined without reference to a specific section of the prohibited misconduct.¹⁵

[16] In summary, all the charges concern what the first applicant refers to as risqué banter. Clearly, in hindsight, we can all agree that this should not have occurred. Self-evidently, this demonstrates that the conduct policy for an employee relationship is undoubtedly the instrument for dealing with allegations of misconduct of the nature alleged to have been committed by the first applicant.¹⁶

[17] Crucially, this case is not about an employer-employee relationship. It may be completely unacceptable for an employee to engage in risqué banter with colleagues while in a leadership position. It follows that the conduct policy is the instrument that regulates the alleged misconduct of the nature that the first applicant is alleged to have committed in an employer-employee environment.¹⁷

[18] The conduct policy sets out the substance of what constitutes unacceptable conduct, the procedure that must be followed for allegations of unacceptable conduct and the contemplated sanction. Serious allegations must be immediately reported, and an inquiry must be held within ten days if the matter is sufficiently severe.¹⁸

[19] The conduct policy stipulates that if a practitioner has been involved in any form of harassment or a serious incident of unacceptable conduct (as a first offence),

¹⁴ This was conducted using only the conduct instrument.

¹⁵ Bearing in mind that the first applicant is a homosexual and a person of colour.

¹⁶ We are not dealing with the first applicant as an employee.

¹⁷ We are dealing here with the alleged misconduct under the privileges policy.

¹⁸ Again, this is in terms of the conduct policy.

a rehabilitation action plan for the practitioner must be implemented. Suppose the rehabilitation is unsuccessful and fails to prevent recurrences. In that case, the practitioner will be sent a final warning. If unacceptable behaviour recurs after this final warning, steps that may include suspension or termination of practice privileges may follow.¹⁹

[20] On a proper construction of the above policies, there must be an inquiry into whether there has been unacceptable conduct (of a serious nature) that could potentially result in a termination of the contract in terms of the privileges policy. This may only follow as a result if rehabilitation fails or recurs after a final warning has been given. The steps may then include a suspension or termination of practice privileges as a result.²⁰

[21] The hospital respondents gave the first applicant notice to attend a disciplinary enquiry concerning alleged unacceptable conduct listed in the conduct policy. Following a disciplinary enquiry, the first applicant was found guilty on some of the charges and was stripped of his status as an employee. Thereafter, the first applicant was sent another notice ostensibly following the provisions of the privileges policy (not the conduct policy), which mirrored the charges in the disciplinary enquiry.²¹

[22] What is of concern is that the procedure (such as it was) purports to adopt the findings made in the disciplinary enquiry, but now following the privileges policy. Thus, the hospital respondents relied on the misconduct outlined in the conduct policy to terminate the first applicant's privileges, as per the privileges policy. This was impermissible because it demonstrates a causal connection between the disciplinary process and the termination of the first respondent's privileges.²²

[23] When this procedural inconsistency was pointed out to the hospital respondents, they changed direction. They sought to rely now on their interpretation of a plethora of letters sent to them by several concerned patients. They suggested

¹⁹ This is in terms of the conduct policy.

²⁰ Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA).

²¹ This was impermissible.

²² This was correctly pointed out in a letter by the first applicant's attorney of record (Mr Stansfield).

that the first applicant solicited these communications and ‘wrongfully’ campaigned to pressurise the hospital respondents not to terminate his privileges.²³

[24] The alleged campaign by the first applicant (even if it was true) is not misconduct (of such a nature) that would permit the hospital respondents to terminate his privileges. In summary, to the extent that any misconduct justifying an immediate termination of the first applicant’s privileges existed, this right was lost in the election to rely on the same disciplinary inquiry regarding the incorrect policy instrument.²⁴

[25] Put another way, the hospital respondents relied squarely on their conduct policy, thus foregoing any right to cancel under the privileges policy. When the hospital respondents belatedly realised they were bound to follow a rehabilitation procedure under the conduct policy, they attempted to impermissibly rely on the privileges policy to cancel the first applicant’s contractual privileges.²⁵

MISCONDUCT

[26] The hospital respondents relied on three affidavits supporting the first applicant’s alleged misconduct. The first applicant took the point about the lack of personal knowledge by the deponents of these affidavits. Self-evidently, the deponents to these affidavits did not have first-hand knowledge of the misconduct alleged. In an employer-employee setting, these hearsay allegations are sufficient to trigger the disciplinary process regarding the conduct in question.²⁶

[27] What is legally impermissible is reliance on these affidavits in motion proceedings to demonstrate as a fact that the first applicant has made himself guilty of unacceptable behaviour. Put another way, the ‘evidence’ relied on by the hospital respondents does not establish the fact of misconduct by the first applicant. This is important because the hospital respondents bear the onus of proving the truth about

²³ Now relying on the privileges policy.

²⁴ The hospital respondents incorrectly relied on the findings under the conduct policy.

²⁵ The hospital respondents then contended the policies were merely guidelines.

²⁶ This application has less to do with an employer-employee setting.

the alleged misconduct to rely on the privileges instrument for a repudiatory breach.²⁷

[28] Thus, no misconduct has been established as a breach of contract. Furthermore, no wrong was committed by the hospital staff or patients who addressed letters of concern in support of the first applicant. The hospital respondents failed to establish any repudiatory conduct that would justify a contractual termination.²⁸

NOVATION

[29] An intention to novate is not presumed and must be proved either by an express declaration of the parties or by necessary inference from all the circumstances, including the parties' conduct.²⁹

[30] The allegations against the first applicant regarding novation are inconsistent with the conduct by the hospital respondents. I say this because it cannot be seriously disputed that it was always the understanding that the first applicant would continue to see his existing patients after hours and on weekends, as he never intended to close his practice. It was always intended that the practice would be taken over.³⁰

[31] Undoubtedly, the practising privileges of the first applicant did not end when his employment contract was concluded. This is so because at all material times it was understood that whatever the agreement was, it was always subject to the right to wind down and exit his practice responsibly.³¹

²⁷ The hospital respondents impermissibly relied on the findings of the disciplinary committee.

²⁸ Thus no termination could be triggered under the privileges policy.

²⁹ National Health Laboratory Service v Lloyd-Jansen van Vuuren 2015 (5) SA 426 (SCA)

³⁰ The reliance on waiver on the part of the first applicant was challenging to follow.

³¹ By 1 March 2022.

[32] Because of what happened in these circumstances, the occasion for the first applicant to exit his practice responsibly never arose. Thus, the waiver and novation argument was contrived and raised more than three years after the alleged waiver.³²

[33] It is challenging to understand how it can be presumed that the first applicant ever intended to waive his privileges, or that his appointment as an employee novated his privileges.³³

AMENDMENT

[34] The applicants amended the relief that they sought at a relatively late stage. This was because the parties agreed to the filing of further affidavits. The hospital respondents were permitted to file a supplementary answering affidavit. However, the hospital respondents were not entitled to reply to the first applicant's replying affidavit, nor was this agreed between the parties. This was procedurally impermissible.³⁴

[35] It would have been inadvisable for the applicants to have proceeded with the matter and ignored the new material presented to the court by the hospital respondents by way of their reply to the first applicant's replying affidavit.³⁵

REMEDY

[36] It is indeed regrettable that a poor and irreconcilable relationship has developed between the first applicant and some of the hospital respondents' personnel. An allegation is made of pervasive problems caused by the presence of the first applicant at the hospital. Again, these allegations are advanced by a deponent who has no personal knowledge of the first applicant's relationship and interactions with the staff of the second respondent.³⁶

³² The contract of employment is dated 12 October 2021.

³³ As the Chief Medical Officer.

³⁴ It was thus permissible for the applicants to pursue an amendment.

³⁵ *Gold Fields Limited v Motley Rice LLC* 2015 (4) SA 229 (GJ) at 123.

³⁶ The evidence presented was of a hearsay nature and little weight must be attached thereto

[37] The hospital respondents contend that the appropriate remedy for the applicants is to seek damages in the ordinary course. It is not for the hospital respondents to dictate what election and remedy the applicants may wish to pursue. A party that is the victim of an alleged breach has the right to demand performance by the other party of its contractual obligations.³⁷

[38] In this case, specific performance is not only possible, but it would also not produce an unjust result. I say this because the first applicant has continued to exercise his privileges while the litigation has been ongoing, without any incidents since his dismissal as an employee. A damages claim would also be challenging to calculate.³⁸

LIS PENDENS

[39] This shield is no longer relevant as the applicants have since withdrawn the action proceedings against the hospital respondents. The notice of withdrawal did not include a tender for costs. While this remains an issue for determination between the parties in the action proceedings, it has very little influence (if any) on the issue of costs in these application proceedings.³⁹

LEASE

[40] The lease between the first applicant and the second respondent may only be terminated on three months' written notice. This notwithstanding, the lease may be terminated if the lessee's (the first applicant's) admission privileges are suspended or terminated by the hospital respondents. This, again, undoubtedly points to a procedure to be followed under the privileges policy and has nothing to do with a disciplinary process under the conduct policy. The fact that the employer-employee relationship between the first applicant and the second respondent was terminated following a disciplinary process and enquiry in terms of the conduct policy, and a

³⁷ Basson and others v Hanna 2017 (3) SA 22 (SCA) at paragraphs 22 to 24.

³⁸ This also because the first applicant has continued to care for his patients.

³⁹ This costs issue falls to be dealt with in the action proceedings.

finding was made against the first applicant, has nothing to do with his lease agreement with the second respondent.⁴⁰

CONCLUSION

[41] The first applicant unreservedly emphasised his commitment to upholding the standards and reputation of the second respondent. This notwithstanding, the dispute between him and some of the senior management of the hospital respondents is, regrettably, seemingly incapable of amicable resolution.⁴¹

[42] Most importantly, no further 'unpleasant incidents' have occurred for an extended period, and the first applicant is providing essential, life-saving care to many of his patients at the facility controlled by the hospital respondents. The first applicant was and is undoubtedly the most skilled and experienced oncologist at the facilities controlled by the hospital respondents. The hospital respondents are accordingly indirectly seeking to deprive many patients of receiving lifesaving treatment.⁴²

[43] The hospital respondents incorrectly interpreted the representations made by several patients as part of a strategy devised by the first applicant to exert pressure on the hospital respondents not to reach an adverse decision.⁴³

[44] The termination decision by the hospital respondents was not made to protect some of the staff members employed by the hospital respondents. Instead, it was impermissibly made by using the incorrect policy instrument.⁴⁴

[45] The hospital respondents incorrectly terminated the applicants' admission and practising privileges under the guise of protecting their business interests in circumstances where the first applicant unreservedly emphasised his commitment to upholding the standards and reputation of the second respondent. The hospital

⁴⁰ This involves the privileges policy and not the employee conduct policy.

⁴¹ In a hospital environment it is difficult to understand why this matter was not amicably resolved.

⁴² This was not materially engaged with by the hospital respondents.

⁴³ This was because they realised they were proceeding under the incorrect policy document.

⁴⁴ The hospital respondents should have followed the procedures in the privileges instrument.

respondents made a binding decision not to terminate the first applicant's admission and practising privileges immediately, and in so doing, waived their rights to make a termination decision under the privileges instrument. Thus, the hospital respondents impermissibly vacillated between making a termination decision and not immediately terminating the first applicant's admission and practising privileges, and they impermissibly sought to utilise the incorrect policy instrument.⁴⁵

ORDER

[46] For these reasons, the application must succeed, and the following order is granted:

1. The respondents' purported cancellation of the applicants' admissions and practising privileges is declared to be null and void, and of no force and/or effect.
2. The respondents are directed to restore to the first applicant and/or the second applicant their admissions and practising privileges as they existed as at 1 August 2023.
3. 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

⁴⁵ This was and is manifestly unfair to the applicants.

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