

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

Summary: Amendment - Grounds of Appeal - Application for Leave to Appeal -
Amendment amounted to a Reformulation of the Previous Grounds of Appeal
– Application refused – Leave to Appeal - Refused.

Coram: Wille, J

Heard: 26 February 2026

Delivered: 27 March 2026

JUDGMENT

WILLE, J:

INTRODUCTION

[1] Two applications were presented before me for determination. I directed that these applications be heard together due to the unfortunate delays occasioned by the first and second respondents. I will refer to the parties as they were cited in the main application. In addition, the first and second respondents will be referred to as the hospital respondents. The first application is the hospital respondents' application for leave to amend their application for leave to appeal, and the second is their application for leave to appeal. The hospital respondents filed a notice of intention to amend their application for leave to appeal on 24 December 2025. The applicants filed a notice of objection on 16 January 2026. The objection was that there was no *bona fide* amendment because the hospital respondents simply reformulated their original defective grounds of appeal.¹

¹ Both these applications are opposed by the applicants.

[2] It was demonstrated that the hospital respondents merely performed a superficial ‘cut and paste’ reformulation of the original application for leave to appeal.²

[3] Put another way, the application for leave to appeal was and still is pleaded without specificity, making it difficult to deal with appropriately. I say this because a court will not be inclined to grant an amendment in circumstances where the appeal itself lacks prospects of success.³

THE APPLICATION FOR THE AMENDMENT

[4] The hospital respondents contend that the amendment must be granted because they have sought to comply with my previous criticism levelled at the original application for leave to appeal. They argue that the proposed amendments refine their case and ‘clarify’ the issues in dispute.⁴

[5] In my judgment on the condonation application, I stated as follows:

‘...The unfortunate nature of the application for leave to appeal also makes it difficult, if not impossible, to apply the test under s 17 (1) (a) (i) or (ii) of the Superior Courts Act, 10 of 2013, due to the 63 randomly formulated errors in the judgment...’⁵

[6] No amendments or corrections have been made in this connection. There is simply no clarification as to whether leave to appeal is sought under section 17(1) (a) (i) or (ii) of the Superior Courts Act. To remedy this apparent defect, the hospital respondents contend that it is an issue to be pursued by way of legal argument at the hearing of the application for leave to appeal. I disagree.⁶

² No significant refinements were made to the original application for leave to appeal.

³ Waterford Estate Homeowners Association NPC v Riverside Lodge Body Corporate [2026] ZASCA 3 (14 January 2026) [10] and [12].

⁴ They no longer rely on 63 grounds of appeal but on 30 grounds of appeal.

⁵ This was set out in the judgment on condonation at paragraph [15].

⁶ This ignores the fact that the amendment application needs to be determined first.

[7] I also disagree because our jurisprudence dictates otherwise. I say this because of the following eloquent reasoning:

‘...Section 17(1) of the Superior Courts Act 10 of 2013 sets the standard when leave to appeal may be granted. The defendant does not state in its notice which of the grounds listed in section 17(1) it relies upon, and I agree with the plaintiff that the notice is to that extent defective. Notwithstanding, I consider whether the application meets the standard in section 17(1)(a)(i), the balance of that section being, in my view, obviously not applicable, considering both the defendant’s notice for leave to appeal and written submissions...’⁷

[8] By way of argument, the hospital respondents contend that there are compelling reasons to grant leave to appeal, without having stipulated any of them in their notice of application for leave to appeal or in the proposed amendment thereto. This goes directly to the issue of prejudice against the applicants.⁸

[9] Leave to appeal may only be granted where I hold the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons why the appeal should be heard, such as the interests of justice. If I remain unpersuaded on the prospects of success, I must still enquire into whether there is a compelling reason to entertain the appeal. It is trite that the test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. Prospects of success must not be remote, and there must exist a reasonable chance of succeeding. A sound and rational basis for the conclusion that there are prospects of success must be shown to exist. I can only formulate an informed opinion about whether a ground of appeal engages section 17 (1) (a) (i) or (ii), if (and when), the hospital respondents stipulate this and their reasons for the stipulation.⁹

⁷ Enkulisweni Pre School v Nedbank Limited [2025] ZAGPJHC 904 (10 September 2025) at para 4.

⁸ The court must also be apprised of the basis for the application for leave to appeal.

⁹ Ramakatsa v African National Congress and Another (724/2019) [2021] ZASCA 31 (31 March 2021) para [10].

[10] Regrettably, the amendments sought largely ignore the pleadings. Some of the amendments sought also contradict concessions made on behalf of the hospital respondents. By way of example. In the proposed amendment, the hospital respondents contend that the court erred in finding that the applicants had legal standing based on their pleaded cause of action. Yet this very same issue of standing is conceded in their answering affidavit.¹⁰

[11] In addition, the hospital respondents move for an amendment to the effect that the court erred in finding that the applicants' representations on behalf of the third respondent were impermissibly interpreted by the hospital respondents as a strategy devised by the fourth respondent to exert pressure on the hospital respondents not to reach an adverse decision. Again, this is challenging to understand, as their own pleadings positively assert that the third respondent engaged in a campaign to pressure the hospital respondents. Thus, these examples illustrate that there was no bona fide attempt to cure the prejudice that I alluded to in the judgment dealing with condonation.¹¹

[12] The current formulation of the application for leave to appeal and the proposed amendments seemed to be based on the premise of the 'more the merrier'. The exact opposite is true in matters of this nature.

'...The application for leave to appeal had listed 65 grounds on which the judge a quo was alleged to have "erred and misdirected himself". As the respondent's counsel justifiably observed, a number of those grounds were vaguely formulated as to be of little or no assistance in meaningfully defining the bases of the intended appeals... the manifestly indiscriminate formulation on the grounds on which the application for leave to appeal was brought brings to mind the observation of a US Appeals Court

¹⁰ In paragraph 150 of the answering affidavit in part A (at record page 181).

¹¹ A shotgun approach is still adopted.

judge that when he sees “an appellants brief containing seven to ten points or more, a presumption arises that there is no merit to any of them...”¹²

CONSIDERATION

[13] As a matter of common sense, I am unable to deal with the grounds of appeal as currently formulated (even in their proposed amended form). In recent years, there have been many technological advances concerning the reproduction of the written word. This must not be used to substitute volume for logic. Quality is the virtue to be extolled. Thus, I have only one option left. I am obliged now to focus on the orders that were granted.¹³

THE TERMINATION DECISION

[14] I did not find that the hospital respondents owed the applicants a positive constitutional obligation. Rather, I found that the hospital respondents (in this case) acted inconsistently with their negative constitutional obligations not to interfere with the realisation of rights. There is a marked difference. Put another way, because of the consequences of the termination decision, the applicants would no longer be able to access these highly specialised facilities for treatment by the most skilled and experienced oncologist using these machines.¹⁴

[15] The termination decision also impedes the rights of the applicants to make decisions about their healthcare. From the hospital respondents on this score, there remains a deafening silence. This is because the hospital respondents cannot argue that they owe no negative constitutional obligations. Our apex court has finally determined that juristic

¹² Hing and Others v Road Accident Fund 2014 (3) SA 350 (WCC) para 4.

¹³ Thus, I will deal with the orders that I granted.

¹⁴ The third respondent.

persons owe negative constitutional obligations not to interfere with the rights enshrined in our Bill of Rights.¹⁵

[16] The conduct and business of the hospital respondents (upon which they partially rely) recognise that they provide services that implicate human rights.¹⁶

ADMINISTRATIVE ACTION

[17] The hospital respondents contend that their internal policies cannot be regarded as an empowering provision. It must be so that if a contract affects services received by the public, this may constitute an administrative action.¹⁷

[18] The enquiry will depend on the facts of each case. In this case, the Code of Conduct is of necessity binding on the hospital respondents. I say this because it:

*‘...defines the framework of conduct we consider in our daily activities as we work towards delivering against our beliefs. It has been approved by the Board of Directors and is binding on every employee, officer, director, contractor and supplier of the Group and its various subsidiaries across all territories within which we operate...’*¹⁸

[19] Thus, I followed the jurisprudence as set out in *Ndoro*.¹⁹

[20] The hospital respondents say this is wrong. This is very difficult to understand because the applicants were reliant on the third respondent’s specialised cancer treatment, which was akin to a monopoly. It was common cause that the hospital respondents were in control of the only hospital in Sub-Saharan Africa with an ‘Ethos’ machine.²⁰

PRACTISING PRIVILEGES

¹⁵ *Governing Body of the Juma Masjid Primary School and others v Essay* NO 2011 (8) BCLR 761 (CC) para [60].

¹⁶ This appears from their own mission statement and policy documents.

¹⁷ *South African National Park v MTO Forestry (Pty) Ltd* 2018 (5) SA 177 (SCA) para 54

¹⁸ The Code of Conduct as set out in the record.

¹⁹ *Ndoro and Another v South African Football Association and Others* 2018 (5) SA 630 (GJ) (24 April 2018).

²⁰ This is not the subject of any dispute.

[21] This seems to be the main complaint by the hospital respondents. The applicants contended for a rehabilitation programme for the third respondent, based on an interpretation of the hospital respondents' instruments governing his conduct. With this, I agreed.²¹

[22] The argument was that the hospital respondents were only entitled to terminate the third respondent's practising privileges if they did so immediately. This is common sense. The hospital respondents say that the word 'immediately' means termination need not be immediate. It must be so that within the health care environment the policy and instruments must have been designed to empower the hospital respondents to take immediate action for serious offences to protect the hospital and its patients. Put another way, termination is reserved for the most serious cases that pose a threat to the hospital and its patients.²²

STANDING

[23] The applicants in this case have a direct and substantial interest in the enforcement of policies and instruments that affect their rights. Our apex court has repeatedly recognised that so-called 'outsiders' to a contract may enforce it against the signatory parties. This is because it has the potential of implicating constitutional rights.²³

COMPELLING REASONS

[24] Here, the argument is about the apparent existence of conflicting judgments. The hospital respondents contend that my main judgment is inconsistent (and in conflict) with the reasoning by Manca, AJ, in the case of *Ramdhin*.²⁴

[25] The facts of this case were entirely different. In this case, it was held that the termination of the practising privileges (of the doctor concerned) did not constitute an

²¹ This issue was again raised with reference to mediation in this application for leave to appeal.

²² This must be so to protect the hospital respondents and their patients.

²³ *AB and Another v Pridwin Preparatory School* 2020 (5) SA 327 (CC) para 66 (per Nicholls AJ).

²⁴ *Ramdhin v Rondebosch Medical Centre (Pty) Limited* (18180/2024) [2024] ZAWCHC 287 (7 October 2024).

administrative action. This case was very case-specific, and the hospital's policies (in this case) were entirely different.²⁵

[26] I did not convey in my judgment (nor did I intend to convey) that all decisions by private hospitals constitute administrative action. As alluded to earlier, I found that the hospital respondents' specific policies established an empowering provision. Another difficulty is that the court in the alleged conflicting decision did not make a detailed reference to the actual content of the hospital's policies in *Ramdin* for the purposes of the judgment.²⁶

MEDIATION

[27] This issue was not before me, so I am not permitted to make any decision about it. I do not intend to do so. I mention it solely because the applicants raised it during the argument. The applicants (and the third and fourth respondents) placed on record their willingness to submit to mediation to finally resolve this litigation. The hospital respondents declined this invitation.²⁷

CONCLUSION

[28] I emphasise that a court may grant leave to appeal only if it concludes that an appellate court would reach a different conclusion. Put another way, the argument for compelling reasons on their own is insufficient to trigger the grant of leave to appeal. Even if the court is satisfied that there are compelling reasons, an applicant must still demonstrate that there are reasonable prospects of success.²⁸

COSTS

²⁵ No constitutional issue of a 'monopoly' was raised or considered in *Ramdin*.

²⁶ The facts and applicable policies of each case will determine whether a decision (in the circumstances) constitutes an administrative action.

²⁷ The legal representative indicated that he held instructions not to submit to mediation.

²⁸ *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development* 2016 (3) SA 317 (SCA) para [24].

[29] A respondent (may, in certain circumstances), in an application for leave to amend, be entitled to costs, even if the amendment ultimately succeeds.²⁹

ORDER

[30] For all these reasons, the following order is granted:

1. The application for leave to amend is refused.
2. The application for leave to appeal is refused.
3. The hospital respondents (the first and second respondent) jointly and severally, the one paying the other to be absolved, shall be liable for the costs of an incidental to both these applications on the scale as between party and party (as taxed or agreed), including the costs of two counsel on Scale C.

E. D WILLE
(Cape Town)

LIST OF 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

²⁹ Uniform Court Rule 28(9).

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