REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

14/3/14

CASE NO:32061/09

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

14/03/2014
DATE

SIGNATURE

In the matter between:

KHAMUSI SYDNEY MUDAU Applicant

and

MEC FOR HEALTH AND WELFARE LIMPOPO PROVINCE 1st Respondent

THE HEAD: DEPARTMENT OF HEALTH AND WELFARE, LIMPOPO PROVINCE 2nd Respondent

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JUDGMENT

MURPHY J

1. The applicant, a medical doctor conducting a medical practice in Thohoyandou, Limpopo seeks an order in the following terms:

"That the administrative action taken by the Second Respondent in failing to grant the Applicant approval in principle to establish a private hospital in Thohoyandou, Limpopo Province, be reviewed and set aside."

2. The first respondent is the MEC for Health and Welfare, Limpopo ("the MEC") and the second respondent is the Head: Department of Health and Welfare ("the HOD").

3. In addition to reviewing and setting aside the administrative action, the applicant seeks an order substituting the administrative action with an order of the court granting the applicant approval in principle to plan, erect and operate a private hospital in Thohoyandou.

4. Section 44(1)(a) of the Health Act 63 of 1977 ("the Act") provides that the Minister of Health may make regulations regulating, restricting or prohibiting the establishment of private hospitals where nursing is carried on for the benefit of patients accommodated therein and where fees are charged in respect of nursing services rendered to such patients or where contributions are made by such patients towards the cost of nursing services.

5. The relevant regulations (GNR 158 Govt Gazette 6832 of 1 February 1980) lay down a procedure to be followed to obtain approval to establish a private hospital. In terms of Regulation 7(2)(i) a person intending to establish a private hospital is requested to obtain permission in principle to establish it. If permission in principle is

granted, the applicant is then required in terms of Regulation 7(2)(ii) to submit the plans for the hospital for approval. Upon approval of the plans, the private hospital must be registered and a certificate of registration issued - Regulation 2. Since 1998 the power to grant permission to establish a private hospital, previously a national function, has vested in the relevant provincial HOD. The remedy sought by the applicant is an order by the court substituting the administrative action of the HOD with a grant of approval in principle as contemplated in Regulation 7(2)(i).

6. More than 12 years ago, on 16 October 2001, the Department of Health and Welfare, Limpopo, published a notice in the Sowetan newspaper inviting applications for licences to establish private hospitals in the province. The closing date for submission of applications was 31 October 2001.

7. On 29 October 2001 the applicant submitted an application for approval. The application signed by the applicant and dated 25 October 2001 is annexed as Annexure KM1 to the founding affidavit.

8. There is a dispute of fact regarding what happened to that application. The HOD maintains that a decision was taken by the Department during the latter part of 2001 or early 2002 to refuse the applicant's application to erect or expand a private hospital and that the decision was communicated to him in writing at that time. On account of the

lapse of time, the HOD is unable to locate the relevant correspondence. However, Dr Morwamphakga Nkadimeng, the Senior General Manager: Health Care Services in the Department has averred in the answering affidavit that she has personally informed the applicant of the refusal in numerous meetings with him since 2002.

9. It is common cause that the applicant has been running a maternity facility as part of his practice since 1996 before making the application in 2001. The premises were inspected in 1998 and again in 2000, and were found to be below standard. Attempts to get the applicant to desist from rendering maternity services have not been successful. It is the view of the Department that the applicant is running an unlawful facility. The applicant admits that he does provide maternity services at his practice but denies that he is unlawfully running a private hospital because the patients only pay fees for the delivery and do not pay fees for accommodation, meals and nursing.

10. The applicant claims that in July 2004, almost three years after he made the application in respect of which he now seeks relief, he submitted further documents in support of the application. He attaches a letter from his attorneys (Annexure KM5) dated 30 July 2004. The letter is headed: "Application Hospital Licence, Tshisaulu Day Care Centre and Maternity Home". The letter refers to an attached petition with 1089 signatures "requesting the approval and establishment of a private maternity ward with operating theatres in that area". The

applicant states that further letters were sent but that "no response was forthcoming to my application for permission to establish a private hospital".

11. On 15 June 2005 the applicant's attorneys addressed a letter (Annexure KM8 to the replying affidavit) to the Department referring to earlier correspondence of 2004 indicating that they had not received a reply in the course of the intervening year. They accordingly issued a demand on behalf of the applicant in the following terms:

> "Should we not receive your reply thereto within 14 (fourteen) days from the receipt of this letter, we would be forced to take our recourse to the court."

According to the applicant there was no response to this letter. The HOD, however, has annexed to her founding affidavit a letter, Annexure J, dated 4 November 2005, addressed to the applicants' attorneys, in which it is stated that reasons were furnished to the applicant during an on site inspection of his premises. Moreover, as set out more fully below, Dr Nkadimeng also wrote to the applicant in September 2003 advising him that he was not entitled to operate a maternity home without a licence and that he had been informed as much.

12. It appears from both the founding and replying affidavits that the applicant took no further action in relation to his application during the next three years until his attorney addressed a letter (Annexure KM6 to

the founding affidavit) dated 10 September 2008 to the MEC in which it stated *inter alia*:

> "On 12 May 2004 (by way of supplementary documentation furnished pursuant to an application initially having been submitted during 2001) our client applied for the registration of the Tshisaulu Maternity and Day Care Centre as a private hospital .....
>
> Notwithstanding that the proposed maternity home meets the criteria ..... our client has to date not been advised of the decision regarding his application ....
>
> We are accordingly instructed (as we hereby do) to demand that the Department .... furnish a decision regarding our client's application within 30 (thirty) days of date hereof. In the event of no decision in this regard being forthcoming within such period, we are instructed to approach the High Court for appropriate relief (by way of seeking an order of *mandamus*, alternatively for the review of administrative action due to the failure on the part of the Department to take a decision regarding our client's application)."

13. The letter of 10 September 2008 concluded with a request that in the event of the Department not granting the applicant "a licence to establish a private hospital", that he be informed of the reasons for any intended decision and that he be afforded procedural fairness in the form of an opportunity to address any concerns the Department may have regarding his application.

14. The MEC did not respond to the letter of 10 September 2008.

15. Notwithstanding the lapse of the 30 day period mentioned in the letter of 10 September 2008, the applicant did not approach the court to make good on his threat to seek a *mandamus*. Instead, on 17 November 2008, the applicant's attorneys addressed another letter referring to the application made in October 2001 and the earlier correspondence with regard to it, and stated that "the failure by the Department to furnish a decision with regard to our client's application to establish a private hospital constitutes administrative action" and then demanded written reasons for the administrative action within 90 days in terms of section 5 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). The Department failed to furnish the requested reasons.

16. The applicant served this application for review on the HOD on 29 June 2009. The applicant contends that the Department has no good reason to refuse his application and makes out a case, with reference to the perceived need for a maternity facility and the public interest, justifying the grant of approval in principle on grounds of rationality.

17. The HOD filed its answering affidavit only one year later on 14 May 2010 without furnishing any explanation for its non-compliance with the rules. Her case may be summarized briefly as follows. The application for approval was considered and refused in late 2001 or early 2002 and the decision was communicated to the applicant. The applicant has

continued to run an unlawful maternity home since 1996 which does not meet the relevant standards. As a result of the refusal of the application for approval in principle to erect or expand a private hospital the applicant made application on 16 August 2003 for a licence to operate a sub-acute facility at his premises. A further inspection was conducted on 24 April 2003 which resulted in a finding that the premises were substandard and ultimately this application too was refused.

18. The applicant's letter of 16 April 2003 seeking permission to run a sub-acute facility reads:

> "I hereby wish to request your department to issue me with a licence for sub-acute facility for Tshisaulu Maternity home for the *time being*. This facility may be reviewed later on." (emphasis supplied)

19. On 29 May 2003 Dr Nkadimeng addressed the following letter to the applicant:

> "APPLICATION FOR SUB ACCUTE FACILITY
>
> Following an Inspection Team report, after visiting your premises to evaluate the premises' degree of compliance with relevant legislation to operate as a Sub Acute Facility, I regret to inform you that your premises do not meet the requirements of the legistlation.

Tshisaulu Maternity Home can thus not be granted permission to operate as a Sub Acute facility.

I have no doubt that the Team would have explained and pointed out the shortfalls. If this was not the case, I will be glad to forward you a copy of the report to you as soon as possible."

20. According to Dr Nkadiment, she learnt in September 2003 that the applicant was continuing to operate a maternity home. She accordingly addressed another letter to him on 10 September 2003 which reads:

"**RE: SUBACUTE FACILITY**

This office would like to remind you that you were made aware of the fact that maternity servies cannot be classified as sub-acute care.

You were further made aware of the fact that you were operating a maternity home without a license in contravention of Regulation 158 of Health Act of 1978.

Please ensure that you comply with the laws of the country to avoid legal steps being taken against you."

21. The applicant admits receiving this correspondence but seeks to draw a distinction between his application for approval in principle submitted in October 2001 and his application for permission to operate a sub-acute facility. With reference to the correspondence sent on his behalf by his attorneys in 2004, 2005 and 2008 he persists with his contention that the Department failed to take a decision on the 2001 application

for approval in principle to establish a private hospital submitted to the Department.

22. Section 6(1) of PAJA provides that any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action. "Administrative action" is defined in section 1 of PAJA to include "any failure to take a decision" by an organ of state; while the term "decision" is defined to include any decision "required to be made" under an empowering provision, which includes a statute. The word "failure" is defined in relation to the taking of a decision to include a refusal to take a decision. In terms of section 6(2)(g) of PAJA, a court has the power to judicially review an administrative action if the action consists of a failure to take a decision.

23. As mentioned, the HOD denies that the Department failed to take a decision with respect to the application for approval in principle submitted by the applicant in October 2001. On the basis that it took a decision, it averred in paragraph 21.7 of the answering affidavit that the applicant had delayed unreasonably in instituting proceedings for judicial review. Section 7 of PAJA provides that any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date on which any proceedings instituted in terms of internal remedies have been concluded or on which the person concerned was informed of the administrative action, became aware of the action and the reasons for

it, or might reasonably have been expected to have become aware of the action and the reasons. Absent an agreement between the parties, a court may extend the 180 day period in section 7(1) where the interests of justice so require - section 9 of PAJA. The HOD submitted in paragraph 21.7.3 of the answering affidavit that an unreasonable period of approximately nine years had lapsed after the decision to refuse the application was made and communicated to the applicant, and that the application should be dismissed for that reason.

24. The delay rule has been part of our administrative law since before the enactment of PAJA. The discretionary remedy to review and set aside administrative action may be refused by a court if it is of the view that an applicant delayed too long in bringing the application. Under PAJA an applicant may not delay longer than 180 days after domestic remedies are exhausted, or where there are no domestic remedies, after the applicant acquires knowledge (actual or constructive) of the decision, unless the interests of justice permit condonation of the delay. The judicial discretion to apply the delay rule helps to ensure that finality is achieved in administrative matters; and finality is important not only because delay may cause prejudice to the respondent but also because of the public interest in certainty - Hoexter: *Administrative Law in South Africa* (2nd Ed) 532; and *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 41E-F.

25. The applicant's reply in paragraph 7.7 of the replying affidavit to the allegation of unreasonable delay is sparse and offers little explanation for the lull in instituting proceedings. It reads:

> "7.7 In terms of section 7(1)(a) and (b) of PAJA, an applicant is required to institute proceedings for judicial review not later than 180 days after finalization of any internal remedy or, where no such internal remedy exists, after he or she has become aware of the decision sought to be reviewed and the reasons thereof. Prior to the institution of this application by me for the review of the administrative action taken by the Head of Department (the Second Respondent), I was not aware of any decision on the part of the Second Respondent refusing approval in principle that I establish a private hospital (much less, of the reasons for any such decision). In any event, insofar as may be necessary, it is respectfully prayed that the Honourable Court extend the period of 180 days provided for in section 7 of PAJA, in terms of section 9(1)(b) and (2) thereof.

What is notable is that the prayer for an extension of the 180 day period is not supported by any facts or allegations from which it may be inferred that it would be in the interests of justice to extend the period.

26. The indications are that a decision refusing the application was taken and communicated to the applicant in 2002, particularly when one has regard to the letters sent by the Department in May and September 2003. Nonetheless, I am prepared to assume for the purposes of determining the question of unreasonable delay that no decision was in

fact taken or communicated and to adjudicate the issue on the basis that the administrative action consists of a failure to take a decision and is reviewable in terms of section 6(2)(g) of PAJA.

27. According to section 6(3)(a) of PAJA if any person relies on the ground of review referred to in section 6(2)(g) and the relevant law (as in this case) does not prescribe a period within which the administrator is required to take that decision, and the administrator has failed to take the decision it is duty bound to take, that person may institute proceedings for review on the ground that there has been unreasonable delay in taking the decision. And in terms of section 8(2) of PAJA he or she may seek an order directing the taking of the decision; or a declaration of rights in relation to the taking of the decision; an interdict aimed at doing justice between the parties. This legislative scheme is constructed on the recognition that a court faced with a failure to take a decision will not be in a position to assess the merits on the basis of rationality or reasonableness, because no decision will exist which can be subjected to scrutiny and review on those grounds.

28. Returning to the delay rule: where the complaint is a failure to take a decision the period of unreasonable delay usually will not be measurable from the date internal remedies are exhausted, or the date on which the person was informed or became aware of the action as contemplated in section 7(1) of PAJA. Absent an actual decision there

is nothing of which the person could be informed or any positive action of which he might become aware. A failure to take a decision nonetheless still constitutes administrative action as defined. It is moreover possible for a person to become aware of such a failure and to identify a point in time when a person "might reasonably have been expected to have become aware" of administrative action, in the form of a failure to take a decision, as contemplated in section 7(1)(b) of PAJA. In other words, it is possible for a person to have either actual or constructive knowledge of a failure to take a decision at a certain point in time and for the period of delay to be calculated from that time. Where the court is not able to pinpoint a moment of actual or constructive knowledge of the failure, it will be obliged, in terms of the common law, to enquire whether in the light of all the circumstances the application may be considered to have been brought within a reasonable time.

29. If I were to accept the version of the respondent that the applicant was informed of the refusal of his application in late 2001 or early 2002 there can be no doubt whatsoever that there has been an unreasonable delay and that the application was brought beyond the 180 day period. The application, on these facts, would be about 8 years late.

30. On the basis that no decision was taken, the question to be answered is when might the applicant "reasonably have been expected to have

become aware" of the failure by the Department to take a decision. The history of the matter indicates that a reasonable person in the position of the applicant would have become aware of the failure at various points in the almost nine year period between the submission of the application for approval in October 2001 and the delivering of the application for review in June 2009. The correspondence addressed to him by Dr Nkadimeng to the applicant in May and September 2003 should have left him under no illusion that his application would not succeed and that any ensuing silence or inertia on the part of the Department could and should have been construed as a failure to take a decision. And if that is not enough to infer knowledge on his part, then the response of the Department in November 2005, Annexure J, to the demand of the applicant's attorneys for a decision (Annexure KM8), could have left him in little doubt that either there had been a negative decision or a failure to take a decision. And finally, taking the most generous possible interpretation of the facts, the applicant was undoubtedly aware of the administrative action in 2008. The letter of the applicant's new attorneys dated 10 September 2008 (Annexure KM6) stated unequivocally that the applicant held the view that there had been a failure to take a decision and threatened to bring an application for judicial review or a *mandamus* within 30 days; something, for reasons which have not been explained, he failed to do.

31. Hence, regardless of whether one accepts May 2003, September 2003, June 2005, November 2005 or September 2008 as the date

upon which the applicant was in fact aware or might reasonably have been expected to be aware of the failure of the Department to take a decision (assuming there was a failure to decide), the applicant instituted proceedings for judicial review later than the 180 day period set down in section 7(1) of PAJA. It was therefore incumbent upon the applicant to make an application for an extension of the period in terms of section 9(1) of PAJA and to adduce evidence to show that an extension would be in the "interests of justice", as required in terms of section 9(2) of PAJA.

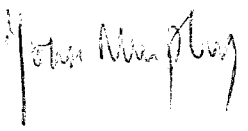
32. In *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] 2 All SA 519 (SCA) the Supreme Court of Appeal held that whether the interests of justice require the grant of such extension depends on the facts and circumstances of each case. The party seeking it must furnish a full and reasonable explanation for the delay which covers the entire duration thereof and relevant factors including the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the importance of the issues to be raised in the intended proceedings and the prospects of success.

33. Beyond what he stated in paragraph 7.7 of the replying affidavit as set out in full above, the applicant has made out no case whatsoever either in the founding affidavit or the replying affidavit explaining the delay. Accepting the later date of September 2008 as the relevant date, no

explanation has been proferred for why the applicant did not stay good to his promise to seek a *mandamus* if a decision was not forthcoming within 30 days. It is evident that the applicant at that time was aware of the possibility of bringing a review in terms of section 6(2)(g) read with section 6(3) of PAJA. No facts have been put forward justifying the delay after or before that date. But even if I were to attempt to glean facts favourable to the applicant from other averments in the affidavits, the history of the matter, the duration of the dispute for almost a decade and the consequent truth that the application is now predicated upon information which is 12 years old, are all compelling factors which support a finding that it will not be in the interests of justice to extend the 180 day period. Moreover, there is no explanation for the delay, or even any discussion of any facts, events or interaction between the parties after 2005 when it became abundantly clear that the Department refused permission for the facility to be categorized as a sub-acute facility. The applicant waited 3 years before appointing his new attorney, who sought to revive the issue by relying on the 2001 application. The affidavits give no insight into what transpired between the parties in the period between 2005 and 2008. The applicant would have done better by submitting a fresh application based on current information which takes account of the Department's concerns about the sub-standard nature of his facility. His prospects of success in obtaining an order from the court granting him approval in principle on such outdated information are nil.

34. In light of my finding it is not necessary to consider the other point *in limine* that the applicant failed to exhaust the internal statutory remedies before instituting proceedings.

35. For the stated reasons, the application is dismissed with costs.



JR MURPHY
JUDGE OF THE HIGH COURT

Representation for the Applicant:

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Instructed by Attorneys:	Mathivha Attorneys

Representation for respondents:

Counsel:	Adv R Bedhesi SC
	Adv M Mokadikoa-Chauke
Instructed by Attorneys:	State Attorney, Pretoria

Date Heard:	26 February 2014