IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION,

PIETERMARITZBURG

CASE NO: AR205/2019

In the matter between:

JOINT MEDICAL HOLDINGS (PTY) LTD **APPELLANT**

and

DR VEENA RAMSON **RESPONDENT**

ORDER

The following order is granted: -

1. The appeal succeeds.
2. The order of the court below is set aside and substituted with the following:
3. ‘The application is dismissed with costs.

JUDGMENT

D. Pillay J (NKOSI J et OLSEN J concurring)

Background

[1] The appellant is Joint Medical Holdings (Pty) Ltd, a hospital in KwaZulu-Natal. The respondent is Veena Ramson an anesthesiologist. This appeal lies against the judgment of Masipa J who granted an order in the following terms on 26 October 2018:

> '1. The suspension of the applicant's right to practice at the respondent's facilities on 22 March 2016 is null and void and of no force and effect.
> 2. The applicant's suspension is uplifted immediately, and the respondent is directed to permit the applicant to continue practicing at its facilities as she had prior to the suspension of her privileges.
> 3. The respondent is to pay the applicant's costs of the application.'

The appeal proceeds with the leave of the court below.

[2] The facts were that in about January 2016 allegations surfaced that the respondent was abusing Cyclimorph, a schedule six drug. On 27 January 2016 her attorneys notified the hospital manager, Mr Parekh of these allegations emanating from a Sister Brenda Sikhosana. Mr Parekh undertook to investigate the respondent's complaint. On 2 February 2016 the respondent's attorneys pressed Mr Parekh for a response, adding that nursing staff were following her into the toilets; they enquired whether this was on the instructions of the appellant.

[3] On 23 February 2016 the Standards and Ethics Committee of the appellant met with the respondent. In response to the appellant's concerns about her alleged abuse of Cyclimorph, the general manager Mr Vishnu Rampartab undertook to provide the respondent with a schedule of patients to enable her to show the dosages she had prescribed and administered to them.

[4] The information Mr Rampartab supplied apparently did not assist in the respondent's investigation. Her practice management company advised him accordingly

on 24 February 2016. The following day Mr Parekh informed the respondent's attorneys that Sister Sikhosana retracted her allegations purportedly because she had made a *bona fide* mistake.

[5] On 25 February 2016 Mr Rampartab forwarded to the respondent another schedule of patients. The respondent requested further information. Professor Mariam Adhikari, the chairperson of the appellant's Ethics Committee, wrote to the respondent on 11 March 2016 to point out that she should already have in her possession the information she was requesting the appellant to provide. Professor Adhikari also brought to her attention that the staff complained that she was abusive. She put the respondent on terms to furnish her response about her use of Cyclimorph on patients by 16 March 2016.

[6] On 15 March 2016 the respondent tendered her explanation but continued to request further documentation to finalise her response. The following day Mr Rampartab was asked to assist her.

[7] On 22 March 2016 the appellant notified the respondent of its suspension of her right to practice in its facilities until she provided a satisfactory explanation. By email dated 23 March 2016 to Professor Adhikari and Mr Rampartab the respondent objected to her suspension. Nevertheless, she continued to offer explanations in response to the allegations against her.

[8] On 24 March 2016 the respondent's attorneys objected once more to her suspension alleging that as it was arbitrary and capricious, the appellant should withdraw it, failing which the respondent would approach the court urgently. This she did successfully in the court below.

Submissions

[9] Mr Mullins for the appellant conceded that a contract existed between the parties, the material terms of which were that the appellant would allow the respondent access to perform anaesthetic services and to use its facilities for that purpose. The appellant bore no other obligation to the respondent. It could grant, refuse, withdraw or suspend such access at will. The appellant disputed that there were any tacit terms of the contract that required it to show good cause before it interrupted or terminated the respondent's access.

[10] For the respondent, Mr Pitman submitted that it must be implied from the circumstances that a tacit term of the contract was that the appellant had to show good cause before suspending or withdrawing the respondent's access to its facilities. The particular circumstance he was referring to was that the respondent was dependant on the appellant and other hospitals to practice her profession as an anaesthesiologist. By barring her from access to its facilities, the appellant prevented her from earning a living not only from her working at the appellant, but also at other hospitals as her reputation would be tarnished. Her reputation has indeed suffered as a result of the complaints and the publicity surrounding her suspension.

Issues in dispute.

[11] The ambiguity about whether the application was premised on contract or privilege fell away once the appellant conceded that a contract, or more precisely, an agreement existed between the parties. Then the main issue in dispute was whether it was a tacit term of the agreement that the appellant must show good cause before it suspends or withdraws its access to its facilities to practice as an anaesthesiologist from the respondent. If the appellant had a duty to show good cause, then did it fulfil this obligation? What was the content of the obligation?

Analysis

[12] The context in which the dispute arose is highly relevant to its determination. The appellant is a hospital. It bears a high-level duty of care to members of the public who use its facilities. The nature of its business as a hospital and the practice of the profession of anaesthesiology by the respondent give rise to a unique relationship. The appellant does not employ the respondent. Nor does it collect her fees from patients to pay over to her. Usually surgeons choose the anaesthesiologist who would work with them in each case. All that the appellant required of the respondent was that she be qualified as an anaesthesiologist and registered with the Health Professions Council before it registered her on its panel of anaesthesiologists. There were no other express terms of the agreement.

[13] Furthermore, as professionals registered with the Health Professions Council, anaesthesiologists are subject to that supervisory organisation's discipline and moral and ethical codes. That elevated the relationship between the parties to something more than a commercial transaction. Both parties individually and collectively had a duty of care to the members of the public who were their patients.

[14] In my view the arrangement gave rise to a service agreement of mutual interest. Against this backdrop, would a bystander impute a tacit term to it to the effect that the appellant could not suspend or withdraw access from the respondent to use its facilities without just cause?[1]

[15] A tacit term may be imputed to an agreement only 'if the court is satisfied that the parties would necessarily have agreed upon such a term if it had been suggested to them at the time.'[2] Furthermore, the tacit term 'must be capable of clear and exact formulation.' [3] It need not be capable of 'concise formulation.'[4]

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[1] G B Bradfield Christie's Law of Contract in South Africa seventh edition at 199-205.
[2] *City of Cape Town (CMC Administration) v Bourbon-Leftley* [2006] 1 All SA 561; 2006 (3) SA 488 (SCA) at 19.
[3] G B Bradfield Christie's Law of Contract in South Africa seventh edition at 203.
[4] G B Bradfield Christie's Law of Contract in South Africa seventh edition at 203.

[16] The appellant's business is a high-risk health service to the public. For these services it depends on a variety of health professionals. For the appellant to bear the obligation of showing good cause before suspending or withdrawing access to its facilities, it would assume a risk that could impede its duty of care to its patients. Without defining the remit of such an obligation precisely, the appellant would expose itself to unforeseeable risks. Consequently, if it were to assume any risk arising from its service provider's conduct, it would have to agree expressly to accepting specific obligations. Otherwise it would not manage its risks effectively.

[17] From the facts I find that a bystander would not infer a tacit term of the agreement. That would impose an obligation on the appellant that would increase its risks. The appellant would not accept such risks without expressly and adequately covering itself against possible liabilities arising from trying to comply with an obligation to show good cause.

[18] Therefore, I find that the respondent failed to discharge the onus of proving that the agreement embodied a tacit term which imposed a duty on the appellant to show just cause before it suspended or withdrew access to its facilities from the respondent. That finding accords with the appellant's version of the agreement. I merely add that questions as to terms of an agreement, other than terms implied by law, are questions of fact. In my view the appellant's version of the agreement could not be rejected without the issues and disputes of fact affecting the importation of a tacit term having been resolved in favour of the respondent after hearing oral evidence. For completeness, I consider the further submission for the appellant that it had good cause to deny the respondent access to its facilities.

[19] On 28 April 2016 the respondent's attorneys met with Mr Adhikari and Mr Rampartab. They agreed that they would each refer the respondent's treatment plans to independent medical professionals to investigate and report to the committee and the board. Furthermore, the respondent undertook to submit herself for blood tests at the instance of the appellant's general manager. The respondent obtained a report from Dr

Doubel who found nothing wrong with her treatment plan. She took it upon herself to have her blood tested, which showed no traces of drugs. The appellant's independent anaesthetist was concerned that the dosage that the respondent was administering was abnormally high. The appellant declined to lift the suspension. It refused to share its expert's report with the respondent under advice from its attorneys, intimating that it was contemplating a complaint to the Health Professions Council of South Africa.

[20] Information in the possession of the appellant that led to its decision to suspend the respondent, included the following:

20.1. The complaint by Sister Sikhosana, previously withdrawn, was reinstated on affidavit.

20.2. Numerous incidents suggested that the respondent might be stealing Cyclimorph from the hospital. An incident occurred at Westville Hospital on 18 March 2016 when the respondent anaesthetised a child who took some time to regain consciousness.

20.3. The real possibility existed that the respondent was administering inappropriate dosages of Cyclimorph to patients.

20.4. The Netcare Group had withdrawn access privileges or rights granted to the respondent to its facilities for reasons associated with the alleged misuse or abuse of Cyclimorph.

20.5. The possibility existed that the respondent was addicted to Cyclimorph. Dr Adhikari observed marks on the respondent's forearm which suggested that she might have been injecting herself.

[21] Cumulatively, this information put the appellant on its guard. As information, it was sufficient to suspect that the respondent was a risk. While such information did not amount to conclusive evidence that the respondent was a thief or drug addict who stole

Cyclimorph to feed her addiction, it was sufficient for the appellant's management to act to mitigate its risks and protect itself and the public. Knowing what it did of the respondent, the appellant had to act against the respondent to avoid being exposed to claims for negligence.

[22] The investigation that the appellant conducted was not and could not be expected to be of the same standard as an investigation conducted by a court, an arbitrator or a disciplinary hearing. Such investigation to establish facts on a balance of probabilities falls upon court to do. Aggrieved by the decision, the respondent instituted proceedings. She bore the onus of persuading the court that the appellant had no just cause to suspend her.

[23] The allegations were such that they fell peculiarly within the knowledge of the respondent. Whether she was an addict or not could not be determined without her cooperation. Even then, a blood test performed on the respondent would not have been conclusive proof that she was not abusing drugs. She could control her intake of drugs to avoid being tested positive. Overseeing what quantities of Cyclimorph she administered would have been difficult; if she was under or overdosing patients, she was doing so secretively. Furthermore, she compromised her credibility when she claimed that she had not replied to the damning answering affidavit filed in her application against Netcare because she was unaware of it.

[24] However, the allegations against the respondent were disputes of fact that could not be resolved on the pleadings. They should have been referred to oral evidence. She should have led oral evidence, for instance, about what her dosages were to patients, supported by patient and hospital dispensary records, and why they were justified. This was not done.

[25] Unfortunately, the argument in the court below turned on semantics. The spotlight fell on the difference in terminology between 'suspension' and 'withdrawal'.

Unambiguously, and on any basis, the appellant did not want to give the respondent access to its facilities for as long as their suspicions persisted. The substantive issue was whether it was justified in keeping her off its facilities.

[26] Consequently, the respondent failed to discharge her onus of proving that the allegations against her were irrational, unreasonable, malicious, and not made in good faith or fairly. The order of the court below granting specific performance to reinstate the respondent is overreaching generally but particularly so in circumstances where the suitability and ethics of respondent were doubtful.

Order

[27] The appeal succeeds.

[28] The order of the court below is set aside and substituted with the following:

[29] ‘The application is dismissed with costs.

D. Pillay J

Judge of the High Court of KwaZulu-Natal

NKOSI J

OLSEN J

APPEARANCES

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Date of Hearing	:	Friday, 13 March 2020
Date of Judgment	:	Thursday, 26 March 2020