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

***Reportable***

CASE NO: 22384/2016

In the matter between:

**K2014119283 (PTY) LTD t/a CARDIOVASCULAR CENTRE, DURBANVILLE** Applicant

and

**MINISTER OF HEALTH WESTERN CAPE PROVINCE** Respondent

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**JUDGMENT: 22 December 2017**

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**DAVIS J**

**Introduction**

[1] This application is in a form of a review of the respondent's decision ('the Minister') decision in which she dismissed an appeal by the applicant against the refusal of the Head of Department of Health in the Western Cape Government ('HOD') to grant an application for a license together with the registration for a private health establishment in the Northern Sub-District of Cape Town. The decision was taken in terms of the provisions of the Regulations Governing Private Health Establishments published in Provincial Notice 187/2001 of 22 June 2001 ('the Regulations').

**The factual matrix**

[2] Applications for the registration of private health establishments in the Western Cape are dealt with in terms of the Regulations. Regulation 3 provides that a person may not establish a private health establishment unless such establishment has been registered with the HOD and that person has been issued with a certificate of registration.

[3] The regulations then proceed to deal with the procedure relating to the application for registration in terms of Regulations 4 - 11.

[4] A decision in respect of an application was taken in terms of Regulation 11 by the HOD. Regulation 11 provides that the HOD must, upon receipt of a recommendation from an advisory committee appointed in terms of Regulation 10, decide the application by:

1. confirming the committee's recommendation; or
2. reversing the committee's recommendation if there is sufficient reason for doing so;
3. in the event that the committee has recommended that the application should be approved, subject to conditions, confirm the recommendation but may amend the recommendation.

[5] The HOD must inform the applicant in writing of his or her decision and, if the application is refused, give written reasons for the refusal and inform the applicant of a right to appeal in terms of Regulation 12.

[6] Regulation 12 (1) provides that an applicant may, upon being notified of a refusal, lodge an appeal in writing within seven days with the Minister, in which

application the grounds of appeal must be included. Regulation 12 (5) provides that the Minister may uphold or refuse an appeal and may, in the event that the appeal is upheld, replace the decision of the HOD with any decision to grant the application which the HOD could have taken. Regulation 12 (6) provides that the Minister must communicate the decision on the appeal in writing to the appellant and, if the appeal is refused, give reasons therefor.

**The application**

[7] During June 2015 applicant delivered an application for the registration of a private health establishment to be named "Cardiovascular Centre, Durbanville".

[8] On 13 July 2015 a representative of the Department of Health requested further information from the applicant, including the identity of the operational manager or management group of the proposed establishment. Suffice to say that the applicant showed extreme reluctance in this regard. For reasons, which will presently appear, it is not necessary to deal with this issue any further.

[9] A written objection to the application was received from Dr LA Macgregor a senior cardiac surgeon on 01 September 2015. In summary, Dr Macgregor objected to the establishment of the proposed centre on the basis that scientifically proven and internationally accepted research indicated that low volume cardiac units inevitably lead to high risk units with unacceptable higher mortality and morbidity. In his view, the cut off of 250 cases per year was necessary to maintain the necessary skills and expertise to ensure favourable outcomes.

[10] Dr Macgregor then set out what he considered to be the current situation regarding cardiac surgery cases done in the private practice in the Northern Suburbs of Cape Town:

(a) Kuilsriver Hospital: ± 180 cases per year

(b) Melomed Hospital, Bellville: ± 15 cases per year

(c) N1-City Hospital: ± 60 cases per year

(d) Panorama Medi-Clinic: ± 400 cases per year

(e) Vergelegen, Somerset-West: ± 180 cases per year

[11] On the basis of this information he went on to say:

'According to international guidelines it is clear that only one private hospital is justified in this area. Licenses have already been issued for future cardiac units in Blaauwberg as well as in the Tygervalley Waterfront area. To add another unit cannot therefore benefit the population.'

[12] This letter was forwarded to the applicant for comment. The applicant responded to this objection by way of a detailed letter penned by its attorney Mr DJ Rossouw. Mr Rossouw commenced his letter by attacking the motivation of Dr Macgregor, in particular suggesting that Dr Macgregor's objection was no more than 'a guise for anti-competitive behaviour which masks a concern for the patient population'. After referring to certain international literature, he stated:

'We affirm our conviction that the growing burden of disease cannot be met by existing centres limited by expansion potential and positioning. Instead, it must be met with the establishment of carefully-planned centres that *inter alia* create ease of access and (in so doing) reduce inordinate delays caused by excessive travel times to large treatment centres that are functioning at maximum capacity.'

[13] On 09 October 2015 the application was placed before the Private Health Establishment Advisory Committee ('PHEAC') established in terms of Regulation 7. At this meeting it was decided to request further information from applicant, which was provided in terms of a letter of 16 October 2015. Finally, on 04 December 2015 the PHEAC met again to consider and make recommendations on the application in terms of Regulations 9 and 10. It recommended that the application be refused. After examining the private population bed increase in the Western Cape 2015-2018 (Northern) the PHEAC concluded:

> 'The Northern sub-district has a surplus of 432 private beds for 2015 and 424 for 2016. The sub-district has 427 approved, un-commissioned beds. This application will not promote equitable distribution and rationalisation of health services due to the oversupply that exists in the northern sub-district. Alternative sources of health are available. The committee could not establish a need for this service as the Northern Sub-district has a gross oversupply of beds and services.'

[14] Pursuant thereto, it recommended that the application be rejected in its entirety. On 11 February 2016 the HOD, having considered the application, decided that it should be refused. This was communicated to the applicant by means of a letter of the same date.

[15] In this letter, Dr Engelbrecht, the HOD, set out statistics for the Population of Western Cape and the Private Population and Bed Increase in the Western Cape 2015-2018 (Northern) and then concluded: 'the Northern sub-district has a surplus of 432 private beds for 2015 and 424 for 2016. The sub district has 427 approved uncommissioned beds. This application will not promote equitable distribution and rationalisation of health services due to the oversupply that exists in the Northern sub-district. Available sources of health are available. The committee could not establish a

demonstrated clinical need for the service as the Northern sub-district has an oversupply of beds and services.' Based on this reasoning, Dr Engelbrecht informed applicant that she had decided that the application 'be turned down in its entirety'.

[16] Following this decision, the applicant lodged an appeal on 18 February 2016. It was signed by Mrs AE da S Bews, who described herself as "Executive Assistant".

[17] The appeal letter is a lengthy document running to three pages of single spaced text. In this letter, issue was taken with the manner in which Dr Engelbrecht had accepted the breakdown of the category of beds because 'no link was provided between the alleged over supply and the provision of quality cardiovascular patient care in the sub-district'. It was claimed that the private health sector was failing to meet the needs of patients that require cardiovascular diagnostics, intervention and rehabilitation intervention, despite the availability of numerous private hospital beds in the sub-district. The suggestion was made that the approach taken was prohibiting an equitable distribution of healthcare, contrary to the applicant's approach which was committed 'to lowering the cost of cardiovascular care in the sub-district through the introduction of a more accessible, cost-effective alternative to the current oligopoly enjoyed by cardiac facilities in the sub-district'.

[18] It was further suggested that no other existing health facility 'offers integrated cardiovascular diagnostic treatment and rehabilitation of services to the extent as envisaged by the proposed facility.'

[19] In short, a comprehensive and wide-ranging appeal was noted. Upon receipt, the Minister requested a response from the Department, in particular, regarding the following question: 'the prevalence of standalone cardiovascular facilities such as the one that the applicant's applying for; are there any dangers associated with

such standalone cardiovascular facilities?' To this request, Ms Kim Lowenherz replied on 04 May 2016:

> '1. There are no standalone cardiovascular-cardiology facilities licensed in this Province. Within other private health establishment license facilities cardiac theatres are part of the same building or infrastructure.
> 2. Below please find an extract for the National Health Services Framework for coronary heart disease.'

[20] Having then considered the appeal, the Minister dismissed it and communicated this decision to the applicant on 20 May 2016. In her letter to applicant, the Minister wrote:

> 'I have decided to dismiss the appeal. I am not convinced that a need exists for the beds and services that you applied for given the oversupply of beds and services in the sub-district and the fact that there are still 427 approved beds that must be commissioned. I accept the view that the establishment of your unit may lead to low patient volumes at cardiac units which would translate in a failure to maintain the necessary skills and expertise of doctors, theatre staff and ICU personnel.'

[21] In her answering affidavit, she dealt more fully with her reasons for dismissing the appeal. She stated that she considered all of the documentation placed before her and took into account all relevant facts and circumstances. In particular, she took account of the contents of the application, the document in terms of which applicant had lodged its appeal, and a further document submitted on its behalf together with the letter of objection of Dr MacGregor, the recommendations of the PHEAC, the decision of the HOD and the requested response to the appeal.

[22] In summary, it appears that the main reasons which flow from her answering affidavit are the following:

1. A need did not exist for the beds and services which formed the subject matter of the application.
2. This were particularly the case given the oversupply of beds and services in the Northern sub-district and the fact that there were further beds that had been approved in terms of applications made pursuant to Regulations which were still to be commissioned.
3. The establishment of the applicant's facility might lead to low patient volumes at cardiac units which would result in a failure to maintain the necessary skills and expertise of doctors, theatre staff and ICU personnel.

**The applicants ground for review**

[23] Mr Coetzee, who appeared on behalf of the applicant, summarised applicant's case as follows: It was based on four grounds, all of which flowed from the provisions of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). In particular, the grounds were the following:

1. Respondent had committed material procedural irregularities in terms of s 6 (2) (c) of PAJA.
2. Respondent had taken into account irrelevant considerations in arriving at a decision in terms of 6 (2) (e) (iii) of PAJA.
3. The decision of the respondent was arbitrary in terms of s 6 (2) (e) (vi) of PAJA.

4. In terms of s 6 (2) (f)(dd) of PAJA, the decision was not rationally connected to the reasons given by the Minister.

[24] After debate, it appeared that the critical questions raised by Mr Coetsee concerned material procedural irregularity and irrelevant considerations. The remaining two grounds were based on a similar set of facts and were thus conflated in the argument with regard to the two key questions.

**The case with regard to material irregularity**

[25] Mr Coetsee submitted that the Minister had acted irregularly and in breach of an express provision, Regulation 12 (4), in requesting an opinion from Ms Lowenherz, who was at all material times a member of both the advisory committee and an employee of the Department. In his view, Regulation 12 (4) expressly prohibited the Minister from seeking advice from employees of the Department or members of the advisory committee. Furthermore, neither of the aspects on which Ms Lowenherz was requested to provide an opinion formed part of the HOD decision to refuse the application or the applicant's appeal against the decision.

[26] Mr Coetsee also submitted that a reason advanced by the Minister for dismissing the application, namely that the respondent had accepted that 'the establishment of your unit may lead to low patient volumes at cardiac units which would translate in the failure to maintain the necessary skills and expertise of doctors, theatres, ICU personnel', had been a factor which the advisory committee, in its recommendation to the HOD, had considered. By implication, the advisory committee had negated the comments of Dr McGregor. Furthermore, the HOD did not rely on such allegations in her decision to refuse the application. Accordingly,

Mr Coetsee submitted that the Minister, in considering the applicant's appeal, had failed to advise the applicant that she intended to rely upon information that the advisory committee had not considered relevant in its recommendation to the HOD and further that the HOD did not rely upon this reason when the application was refused. None of these arguments were then raised with applicant which would have given applicant a basis to respond thereto on appeal.

[27] Turning to irrelevant considerations, Mr Coetzee submitted that the respondent had taken into account irrelevant information, namely the number of beds without seeking to categorise these beds for cardiovascular purposes which, in his view, was a critical factor in a decision of this kind. Secondly, the respondent had taken account of permission granted to the Life Tygervalley Hospital to establish a cardiovascular unit, which would provide further beds, and which fact was employed to further justify the conclusion that the proposed facility was unnecessary to meet demand.

[28] Mr Coetsee further submitted that the record of proceedings contained no indication that either the advisory committee, the HOD or the Minister had made any inquiry to establish whether there had been compliance with Regulations 13, 14 and 15 by the particular applicant involved in the Life Tygervalley Hospital or whether the approval had lapsed as a result of non-compliance. On the available evidence, he contended that there was no visible building work in respect of the construction of this hospital. Thus, the probability was that this proposed hospital would not be constructed and would not add to the available beds, a conclusion which consequently further supported the argument of applicant that its facility was needed.

**Evaluation**

[29] It bears emphasis that what is before this court is a review of the decision of the Minister, not the HOD nor the advisory committee. Two questions therefore require an answer, namely the nature of the appeal to the Minister in terms of Regulation 12 and, secondly, the proper approach to an application for judicial review in a dispute of this nature.

**The nature of the appeal**

[30] In *Tikly v Johannes NO* 1963 (2) SA 588 (T) at 590-591 Trollip J (as he then was) set out the applicable legal position to appeals as follows:

> 'The word "appeal" can have different connotations. In so far as it is relevant to these proceedings it may mean
>
> (i) an appeal in the wide sense, that is a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information...
>
> (ii) an appeal in the ordinary strict sense, that is re-hearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination was whether that decision was right or wrong;
>
> (iii) a review that is a limited rehearing with or without additional evidence and information to determine not whether the decision under appeal was correct or not but whether the arbiters had exercised their powers and discretion honestly and properly.'

[31] Turning from this *dictum* to the present dispute, according to Regulation 12, the Minister may uphold or refuse an appeal and may, in the event that the appeal

is upheld, replace the decision of the HOD with any decision which the HOD could have taken.

[32] It is noteworthy that Regulation 12 does not simply empower the Minister to confirm, vary or set aside the decision. It empowers the Minister to replace the decision with any decision which the HOD would have taken. This clearly indicates a wide appeal in which the decision maker on appeal is justified in taking account of all the information which is available, including evidence which may well have been available to the initial decision maker but did not form part of that decision. In short, it is clear that Regulation 12 envisages a fresh determination on the merits of the matter.

[33] From this conclusion, flows an answer to the second question, namely that there must be a recognition of the proper role of the executive in decisions of this kind. When the law entrust a functionary with a discretion, it represents a recognition of the expertise of the functionary to whom the discretion is entrusted. It is less open to a court to 'second guess' an evaluation taken by the decision maker, particularly when it concerns issues which require specialised knowledge and hold polycentric consequences.

[34] The role of the court in these cases is to ensure that a decision maker performs the function with which he or she is entrusted in a justifiable and plausible fashion. See in particular *MEC for Environmental Affairs and Development Planning v Clairison's CC* 2013 (6) SA 235 (SCA) 239-240.

[35] With this framework, it is now possible to evaluate the particular contentions raised by Mr Coetsee.

**The email of Ms Lowenherz**

[36] Much was made of respondent seeking advice with regard to a defined set of issues and whether this breached Regulation 12. Regulation 12 (4) provides that the Minister may appoint up to three persons who are not employees in the Department or members of the advisory committee to advise the Minister on an appeal. This wording does not appear to prohibit a decision maker, such as the Minister, from requesting further information from her Department in order to come to a justifiable decision with regard to an appeal. The question referred to Ms Lowenherz does not fall foul of any Regulation. In the event, the information requested was to the same effect as that provided by Dr MacGregor and, as indicated earlier, the applicant responded in detail to Dr MacGregor's objections.

[37] In summary, the Minister had the benefit of detailed representations made by applicant on the very issues which were contained, not only in Dr MacGregor's report, but also in the email of Ms Lowenherz. In my view, it is difficult to find any justification for the conclusion that the provision of this information to the Minister resulted in material procedural unfairness towards the applicant as contemplated in s 6 (2) (c) of PAJA. It must also be borne in mind, before concluding, that not every procedural irregularity is sufficient to justify the setting aside of a decision. A *dictum* in *Premier of Mpumalanga and another v Executive Committee, Association State Aided Schools Eastern Transvaal* 1999 (2) SA 91 (CC) at para 41 is instructive:

> 'In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognised in our common-law and that of other countries). As a young democracy facing immense challenges of

transformation, we cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly.'

[38] Absent an express prohibition in the Regulations or an absence of an opportunity afforded to applicant to have dealt with the substance of the email, which, in any event, was covered extensively by Dr MacGregor, there is no basis by which to uphold a review on this ground.

**Dr MacGregor's letter**

[39] A similar problem confronts the applicant with regard to its second argument with regard to material irregularity. As indicated earlier, Dr MacGregor's letter was sent to Mr Rossouw, applicant's attorney, on 07 September 2015 inviting comment. This invitation was eagerly accepted, culminating in an eleven page response. In addition, it is clear from a document prepared by the HOD as part of the decision against which the appeal was lodged by Mr Rossouw that 'comments were received from Dr L A MacGregor senior cardiac surgeon / Panorama Medi Clinic and were taken into consideration with the information provided below to determine whether there is a need for the proposed private health establishment'. Thereafter follows a table dealing with the population of the Western Cape in the Northern sub district for 2015-2018 and a further table dealing with the private population and bed status for the same district during the same period. These factors were thus considered by the HOD; that is the factors raised by Dr MacGregor. In addition the representations made by the applicant, pursuant to its receipt of Dr MacGregor's letter, were taken into account by the HOD and, consequently by the Minister, when she evaluated all the

documentation placed before her. Yet again there is no basis for finding any procedural irregularity in this regard.

**Irrelevant consideration**

[40] Turning to the regard to the oversupply of beds and services, the Minister, in her answering affidavit, stated that she dealt with all of the relevant statistical information available, particularly the availability of surplus beds when judged against a relative norm. She also pointed out in her affidavit that similar statistical information was not available in respect of the provision of specialist cardiac services. Significantly, this averment was not challenged in reply.

[41] The Minister confirmed that she took account of Dr MacGregor's representations because, in her view, he 'provided relevant detail in respect of existing prospective cardiac establishments in the relevant area. He also provided his professional views in respect of the application including the dangers associated with an oversupply of the relevant services. Dr MacGregor is a senior cardiac surgeon with relevant knowledge and experience.'

[42] The Minister noted that she had also read the response to Dr MacGregor's representations provided by Mr Rossouw. But, as Mr Rossouw had no relevant qualification nor experience in the area of cardiac treatment, it does not seem to be unjust nor unfair for the Minister to have concluded 'I therefore attach more weight to the professional views expressed by Dr MacGregor'.

[43] Much had been made by Mr Coetsee of the circumstances relating to the Panorama Hospital and, particularly that it was operating near to its capacity in respect of cardiac services. The Minister's observation is illuminating:

> 'I was also aware, as mentioned by Dr Macgregor and as recorded by the Head of Department, of the approval in respect of the Life Tygervalley Hospital, and the cardiac services which it would render. I was also aware of other cardiac facilities in the Northern Suburbs, as referred to in the letter of objection of Dr Macgregor.'

[44] The Minister was careful to note that the approval in respect of the Life Tygervalley Hospital was not the only reason or, indeed the main reason, for the decision at which she arrived. In addition Dr Engelbrecht had drawn her attention to the Life Tygerberg Hospital in the following paragraph in a letter of 26 March 2016:

> 'There is an oversupply of private beds in this sub-district as shown above with a total of 427 beds current commissioned. Included in these bed numbers is the approval for the Life Tygervalley Hospital with a total of 150 beds, 2 minor theatres and 6 major theatres, 1 cardiac catheterization lab, 1 emergency unit and 2 delivery rooms.'

**Conclusion**

[45] As indicated earlier in this judgment, the appeal lodged in terms of Regulation 12 by the applicant stands to be classified as a wide appeal; that is the Minister is required to consider all of the evidence available to her and thus to have engaged in a redetermination of the merits of the application. This she did, on the basis of all of the evidence that was made available to her, and which, save for the email of Ms Lowenherz, which traversed very similar ground to that of Dr

MacGregor, had been available to the advisory committee and the HOD. Furthermore, the objection to Dr MacGregor's letter, upon which considerable energy had been placed by Mr Coetsee in his argument, was sent to applicant's attorney and prompted an eleven page detailed response, the contents of which were also considered by the Minister. To the extent that there were any further objections, in particular relating to the Life Tygervalley establishment, this was raised only in reply.

[46] The complaint with regard to the Life Tygervalley establishment needs to be read within the context of the careful evaluation of the statistical information which had been provided to the Minister, both in respect of the population in the relevant area and the bed increase in the relevant area.

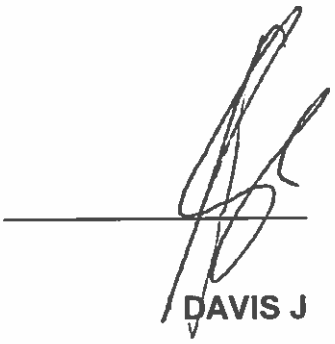
[47] When respondent concluded: 'I formed the view that the services in question were and would be adequately provided for and that a need had not been established for such services by the applicant', it is clear that this view was formed, after a careful evaluation of the statistical information which had been provided.

[48] As indicated, the decision taken by the Minister needs to be evaluated through the doctrine of deference, namely a judicial willingness to appreciate the legitimate scope of an administrative agency and to acknowledge the expertise of this agency in arriving at a policy laden or polycentric decision. A court should be sensitive to interests legitimately pursued by such an agency. See Cora Hoexter Administrative Law in South Africa (2nd ed) at 151.

[49] When the facts of this case are examined through this prism, there is no basis by which to conclude that the Minister took account of irrelevant considerations at arriving at her decision nor that relevant considerations were not

considered, nor that she had acted arbitrarily or capriciously nor that the decision taken was not rationally connected to the reasons given for it.

[50] Accordingly, for all of these reasons, the application is dismissed with costs.



**DAVIS J**

**LE GRANGE J and DAVIS AJ agreed**