IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

Case no. 38008/06

Judgment reserved: 31 January 2008
Judgement handed down: 21 February 2008

REPORTABLE

In the matter between:

LIMPOPO MEDI-CLINIC	Applicant
and	
THE MEC FOR HEALTH AND WELFARE, LIMPOPO PROVINCIAL GOVERNMENT	1st Respondent
THE HEAD OF DEPARTMENT, DEPARTMENT OF HEALTH AND WELFARE, LIMPOPO PROVINCIAL GOVERNMENT	2nd Respondent
POLOKWANE PRIVATE HOSPITAL	3rd Respondent

JUDGMENT

LEGODI J,

A. INTRODUCTION

1. In this matter, a private hospital, known as Limpopo Medi-Clinic Ltd, in Limpopo province, sought to review two decisions alleged to have been taken by the second respondent, being the Head of the Department of Health and Welfare, Limpopo, in terms of which the second respondent allegedly turned down the applicant's application for additional beds at its hospital and secondly, the decision by the second respondent to approve an establishment of a new private hospital by the third respondent in Polokwane. The permission to establish a new hospital is said to have been granted to the third respondent as a consortium consisting of Clinix Health Group Limited, Keystone Development CC and Kopantsho (PTY) Ltd. In addition, the applicant sought to have its failure to exhaust internal remedy and failure to timeously bring the review application be condoned. The reliefs sought were being opposed by the respondents.

B. BACKGROUND

2. Before 17 July 2003, the applicant, Clinix Health Group Ltd, Keystone Development CC and Kopantsho (PTY) Ltd submitted various respective applications to the second respondent in terms of the regulations

promulgated in terms of the provisions of the Health Act 63 of 1977 under Government Gazette notice 158 dated the 1 February 1980.

3. The applicant for example, applied on 17 May 1999 for the extension of its existing facility by erection of 40 beds, and on the 28 May 2001, it applied for decrease of its general beds and increase of its intensive care beds by the decreased number of the said general beds. On the 25 May 2001 Keystone Development cc applied for establishment of a private hospital for a total of 200 beds. On the 10 October 2001 Polokwane Private Clinic (PTY) Ltd/Community hospital Group/Kopantsho (PTY) Ltd applied for establishment of a private hospital for total of 165 beds. Clinix Health Group Ltd also applied for a new hospital with about 106 beds.

4. By the 17 June 2003, none of the above-mentioned applications were considered by the second respondent. On the 17 June 2003, Kopantsho (PTY) Ltd, Keystone and Clinix, signed a document termed “HEADS OF AGREEMENT”. In terms of this agreement, the three entities decided not to proceed with their respective applications in competition with each other, but to join forces. A consortium was to be formed to be known as Kopantsho Medical. The licence was to be issued to Kopantsho Medical and

the agreement was subject to the approval by the Department. The consortium was envisaged after the three entities apparently had heard that the Department was inclined to grant a licence for a further private hospital in Polokwane.

5. Subsequent to the 17 June 2003, Keystone Development cc on the 17 July 2003 addressed a letter to second respondent in terms of which it was advised that the three entities, that is, Clinix Health Group Ltd, Keystone Development CC and Kopantsho (PTY) Ltd had decided not to proceed with their respective applications in competition with each other, instead to join forces in the format as per Heads of Agreement which document was then annexed to the letter.

6. On the 9 October 2003, the Technical Committee of the Department chaired by one Dr. Buthelezi sat to consider various applications brought in terms of the applicable regulations. According to the report or minutes of the meeting of the 9 October 2003, at least about nine applications were laid before the committee. Of importance, the applications by the applicant for extension of its facility by 40 beds and Polokwane Private Clinic/Kopantsho for establishment of a new facility for 165 beds were considered. Both these applications were not recommended. It was

found, the granting of such applications would have a negative impact on existing levels 2 and 3 services. Levels 2 and 3 are said to relate to specialised services.

7. On the 4 November 2003, Dr Nkadimeng in his capacity as a senior general manager, Health Care Services for the Department, addressed a letter to Keystone Development CC. In his letter, he informed that the application for a private hospital licence has been provisionally approved and that Keystone Development CC would be contacted in due course to take the matter forward.

8. On the 8 January 2004, Dr Nkandimeng further addressed a letter to Keystone Development CC in terms of which it was called upon to submit such technical or architectural plans for review and consideration by the department’s technical team.

9. On the 20 January 2004, Dr Nkadimeng addressed a letter to the applicant in terms of which it was indicated that the application dated the 28 May 2001for approval to plan, erect and operate a private health facility that is, a request to decrease general beds and increase intensive care beds at Polokwane private hospital has not been successful. On the 17 March 2004, the applicant addressed a letter to the

second respondent in terms whereof an application was submitted for 47 extra beds, that is, seven maternity wards and 40 general wards. A further similar application dated 10 February 2005 was submitted to the department. The application for extension was refused in November 2005 after the technical committee on the 29 July 2005 refused to recommend the application.

10. On the 23 February 2006, the applicant caused a letter to be addressed to the department in terms of which a request for information regarding the refusal for extension of the applicant's facility and approval of licence to third respondent. When this information as requested was not forthcoming, the applicant instituted PAIA proceedings for the information. On the 14 August 2005, information was then furnished to the applicant. Subsequent thereto, the applicant instituted the present proceedings. In the amended notice of motion, the applicant confined itself to those decisions that were allegedly taken during 2003, that is, the refusal of the applicant's application and the approval of the third respondent's application for establishment of a new private hospital in Polokwane.

11. The three respondents regarding refusal, in main, took the point that the applicant did not exhaust

internal remedies as provided for in the regulations read together with the provisions of PAJA. It was further contended that any application for condonation in this regard should be found to have no substance. Regarding the decision to approve, the first and second respondents took the point that the applicant has no *locus standi*, alternatively that the applicant failed to bring the review proceedings within 180 days as provided for in PAJA. In the further alternative it was contended that there are no merits in the applicant's application to upset the decision by the second respondent approving the third respondent's application to establish a new hospital in Polokwane.

C. ISSUES RAISED

In my view, the following issues have been raised:

12.1 WHETHER OR NOT THE APPLICANT'S APPLICATION DATED 17 MAY 1999 WAS REFUSED BY THE SECOND RESPONDENT? AND IF SO,

12.2 WHETHER OR NOT THE APPLICANT SHOULD BE EXEMPTED FROM EXHAUSTING INTERNAL

REMEDIES?

12.3 WHETHER OR NOT THE APPLICANT HAS *LOCUS STANDI* TO CHALLENGE THE SECOND RESPONDENT'S DECISION TO GRANT PERMISSION TO THE THIRD RESPONDENT TO ESTABLISH A PRIVATE HOSPITAL?

12.4 WHETHER OR NOT THE APPLICANT HAS BROUGHT THE APPLICATION FOR REVIEW WITHIN 180 DAYS AS REQUIRED?

12.5 WHETHER OR NOT THE DEPARTMENT'S ADJUDICATION COMMITTEE EVER SAT TO CONSIDER THE RECOMMENDATION BY THE TECHNICAL COMMITTEE?

12.6 WHETHER OR NOT THE TECHNICAL COMMITTEE DID CONSIDER AN APPLICATION BY A CONSORTIUM?

12.7 WHETHER OR NOT THE LETTER OF 4 NOVEMBER 2003 WAS MEANT TO BE AN APPROVAL OF AN APPLICATION BY A CONSORTIUM? AND IF SO, WHETHER OR NOT SUCH A DECISION WAS TAKEN BY A COMPETENT AUTHORITY?

12.8 WHETHER OR NOT THE DECISION AS

CONTAINED IN THE LETTER OF THE 23 NOVEMBER 2003 WAS TAKEN BY A COMPETENT AUTHORITY AND IF SO,

12.9 WHETHER OR NOT THE HEAD OF THE DEPARTMENT PROPERLY TOOK THE DECISION TO GRANT THE PERMISSION TO ESTABLISH A PRIVATE HOSPITAL? OR TO PUT IT DIFFERENTLY, WHETHER THE HEAD OF THE DEPARTMENT HAD SUFFICIENT INFORMATION TO MAKE THE DECISION?

D. APPLICABLE PRINCIPLES, LEGISLATION AND REGULATIONS

RELEVANT PROVISIONS OF THE REGULATION

13. As indicated earlier in this judgment, applications for establishment of private hospitals are made in terms of the regulations promulgated under Government Notice 158, in Government Gazette 6832 and dated 1st February 1980 subsequently amended by Government notice R2687 of 16 November 1990. In terms of regulation 2, no person shall erect, establish, extend, conduct, maintain,

manage or render any service in a private hospital or unattached operating theatre unit or permit or arrange for treatment to be provided therein, unless such private hospital or unattached operating-theatre unit or proposed private hospital or unattached operating theatre unit has been registered in accordance with the provisions of these regulations and the proprietor is in possession of a valid certificate of registration issued to him in respect thereof by the Head of the Department of Health Services and Welfare Administration and certificate is reviewable every year.

13.1 In terms of regulation 7(1) no person shall erect, alter, equip or in any way prepare any premises for use as a private hospital or unattached operating-theatre unit, without the prior approval in writing of the Head of Department. Sub-regulation 2(i) thereof provides that any person intending to establish a private or unattached operating unit, shall first obtain permission in writing from the Head of the Department, who after consultation with the Director, shall satisfy himself as to the necessity or otherwise for such a private hospital or unattached operating-theatre unit, before granting or refusing permission. Sub-regulation

2(ii) of Regulation 7, provides that having obtained such permission, the applicant shall complete Form 1 (annexure B) and submit plans for approval by the Head of Department together with the necessary information and shall supply any additional information which the Head of Department may require. Sub-regulation (3) provides that permission and approval in terms of regulation 7 are not transferable. Regulation 8 provides that in the case of a private hospital or unattached operating theatre unit of which the buildings are still to be erected or converted, plans of the buildings or proposed buildings shall accompany the application for registration. The plans should show clearly the nature and construction of the proposed buildings or the nature of the conversions as the case may be. Room names, dimensions and square measurements shall be attached to the plans in the form of a schedule.

13.2 Regulation 14 provides that upon the receipt of an application, the Head of the Department shall after consultation with the Director decide to register the proposed private hospital or unattached operating theatre unit and issue a certificate of registration in respect thereof, subject to such conditions as he may deem fit,

or to refuse registration in which event he shall not issue any certificate of registration or to review the registration of the private hospital or unattached operating theatre unit and issue a certificate of registration in respect thereof, subject to such conditions as he or she may deem fit or refuse the renewal of registration shall be issued. In terms of regulation 16 any applicant whose application for registration or renewal has been refused or dismissed, may at any time reapply for such a registration or renewal after the appeal shall have been dismissed.

13.3 Regulation 55 deals with internal appeals and it provides that any applicant for a private hospital or unattached operating theatre may appeal in writing to the Minister against any decision made by the Head of Department in terms of any provision of these regulations in respect of such an applicant or proprietor or prospective proprietor of a private hospital or unattached operating-theatre unit. Such an appeal shall in terms of regulation 56 be lodged within seven days of the decision appealed against, having come to the knowledge of such an applicant or proprietor or prospective proprietor of private hospital as the case may be, and shall clearly

state, against which decision such appeal is lodged and the grounds on which such appeal is lodged. Such an appeal shall further in terms of regulation 57, be lodged with the Head of the Department who shall then submit same to the Minister together with his reasons for the decision against which the appeal is been lodged.

RELEVANT PROVISIONS OF PROMOTION OF ADMINISTRATIVE ACT 3OF 2000

14. Section 6 (1) provides that any person may institute proceedings in a court or a tribunal for the judicial review of administrative action. Of relevance, a court or tribunal has the power to judicially review an administrative action of the administrator who when took it, was not authorised to do so by the empowering provision, the action was procedurally unfair, the action was taken arbitrarily or capriciously and the action was not rationally connected to the information before the administrator. (**See subsection (1)(a)(i)(c), (e)(vi) and (f)(ii)(cc) of section 6)**.

14.1 In terms of section 7(1) any proceedings for judicial review in terms of subsection (b)(1) must be instituted without unreasonable delay

and not later than 180 days after the date:

a) *subject to subsection (c) on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded or,*

b) *where no such remedies exists 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.*

c) *subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.*

d) *a court or tribunal may, in exceptional circumstances and on application by the person concerned, except such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice*

14.2 In terms of section 8(1)(c)(i) the court or tribunal in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable including orders, setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directives.

RELEVANT PROCEDURE ADOPTED BY THE DEPARTMENT IN EVALUATING APPLICATIONS FOR DECISION BY HEAD OF THE DEPARTMENT

15. As it would appear from the answering affidavit and other supporting papers, the department established two committees to assess applications made in terms of the regulations under Government Notice 158, referred to in the papers as regulation 158. A technical committee which evaluates the applications as submitted on the prescribed form and then submits to the second committee, referred to during the discussion as adjudication committee. This committee would then make recommendations to the Head of the department. The Head of the department would then evaluate and or assess the applications, and recommendations. The Head of the Department would then make a decision whether or not to refuse or approve.

SOME RELEVANT CASE LAWS TO THE ISSUES RAISED

16. Dealing with the decisions of the State Tender Board and recommendations by its committee or committees, it was held that members of such tender board are entitled to have recourse to the technical committee's advice relating to a particular task at hand. It is for this reason that it is not uncommon for a tender board to refer matters to the technical committee for reports. Having received a report from a technical committee, it is obviously also not imperative for the members of the tender board not to follow the advice of its committees. They are at liberty to make their own decisions after having assessed the report of such a technical committee. However, if the tender board should refer any particular issue or issues to a technical committee, they are duty bound to consider that report fully in all its aspects and to give due weight to it. If they wish to differ from it, they may do so. However, it is to be remembered that the technical committee arrives at its finding on that which is contained in the tender documents. It seems perfectly inconceivable that a board can differ from its technical committee without having recourse to the very information that the technical committee relies upon for its recommendations. To do so, would be tantamount to simply negating the very purpose of the committee

which they have appointed to advise them. For the tender board to differ with the advice of its committee, it has to appraise itself of the same facts and information that the technical committee had, so that their decision with the recommendations of the technical committee could be properly motivated. Where the tender board just simply roughshod the recommendations of the technical committee, without proper motivation, the court would take this into consideration. (**See Cash Paymaster Services (PTY) Ltd v Eastern Cape Provice 1999(1) SA CKHC 324 at 352 D-I**).

DISCUSSIONS, SUBMISSIONS AND FINDINGS

17. I now turn to deal with the matter with specific reference to the issues raised as set out above.

WHETHER OR NOT THE APPLICANT'S APPLICATION OF MAY 1999 WAS REFUSED BY THE SECOND RESPONDENT?

17.1 This issue was raised during discussion by the court after having considered the letter of refusal dated 20 January 2004. The applicant initially sought to have a decision allegedly taken by the second respondent in August and or October 2005 to refuse its permission to

extend the Limpopo Medi-Clinic be reviewed and set aside. The applicant at the time of the institution of the review proceedings meant to refer to its applications dated the 17 March 2004 and 25 February 2005 which were refused during 2005. However, upon receipt of the record relating to the decisions taken by the second respondent and furnished to the applicant in terms of Rule 53 (1)(b), the applicant delivered amended notice of motion in terms of which it sought to have the decisions allegedly taken in November 2003 refusing the applicant a permission to extend the Limpopo Medi-Clinic to be reviewed and set aside. This decision relates to a letter dated the 20 January 2004 addressed to the applicant by Dr Nkadimeng referred to earlier in this judgment. The first paragraph of the letter states as follows:

> *"Notice is hereby given that your application dated the 28 May 2001 for approval to plan, erect and operate a private health facility (a request to decrease general beds, increase intensive care beds at Polokwane) has not been successful"*

17.2 However, as it would appear from the amended

notice of motion, the challenge is against *the refusal to permit the applicant to extend the Limpopo Medi-Clinic"*. This move by the applicant seems to have been acerbated by the fact that the second respondent furnished to the applicant minutes of the meeting of the technical committee of the 9 October 2003 in terms of which the applicant's application for 40 beds extension, was not recommended. Further, in the reconstructed reasons for the decision to refuse, in a document titled "REASONS FOR THE DECISION BY THE HEAD OF THE DEPARTMENT IN 2003", it is noted as follows; *"A2.To decline the application of Limpopo Medi-Clinic for an extension of their existing facility*:

17.3 The result of all of these, made the parties to be under the impression that the applicant's application of May 1999 for extension of its facility by 40 beds has been refused by the second respondent and that the letter of refusal dated 20 January 2004 addressed to the applicant was in connection with the application for extension of its facility by 40 beds. For two reasons and other reasons that will follow later in this judgment, I do not agree. Firstly, indeed the applicant did submit an application to the

second respondent on the 28 May 2001. Secondly, this application was for conversion of certain general beds into intensive care beds. The letter of the 20 January 2004 clearly refers to a specific application and for specific purpose. This application is specifically refused in the letter of the 20 January 2004. Such refusal cannot be replaced for anything else than for refusal to turn general beds into intensive beds. To equate this, to extension of the applicant's existing facility by 40 beds cannot be correct.

17.4 A further suggestion by counsel for the applicant was that I should in any event deal with the matter on basis that the 1999 application by the applicant should be presumed to have been refused. I understood counsel for the applicant in this regard to suggest that both parties were in agreement that such an application has been refused, and that this should also be seen in the light of the fact that the department took a long time in considering the application. Remember, the applicant, apparently after having been notified of the refusal as per the letter of the 20 January 2004, and after having apparently understood this to relate to the application of 1999 for

extension, in its submission as per letter of and the application of 17 March 2004, applied for extension of its facility by 47 beds. Apparently, the applicant in lodging this application, sought to act in terms of regulation 16, in terms of which an applicant whose application has been refused and appeal dismissed could at any time re-lodge the application. This further application for extension was turned down during 2005. However, I cannot find that the applicant's application submitted in May 1999 was ever refused by the second respondent. Therefore, there was no decision of refusal for extension to be appealed against in terms of Regulation 55 read with Regulation 56. The letter of the 20 January 2004 relates to a specific application which is refused in specific terms. Similarly therefore, there can be no refusal decision for extension to be reviewed in terms of Rule 53. Further reasons in this regard will follow when dealing with other issues. This should then bring me to immediately deal with the alternative to the issue just disposed of.

WHETHER OR NOT THE APPLICANT SHOULD BE EXEMPTED FROM EXHAUSTING INTERNAL REMEDIES?

18.In its amended notice of motion, the applicant prays

that if necessary, the applicant should be exempted from any obligation to exhaust any internal remedy in terms of section 7(2)(c) of PAJA. Such internal remedy is found in Regulations 55 and 56. That is, an appeal to the Minister in respect of any decision by the head of the department. Such an appeal to be lodged within seven days after the decision complained of or appealed against came to the knowledge of such an appellant or applicant. I need to deal with this aspect despite the fact that I had found effectively that there was no decision to be appealed against regarding extension of the applicant's facility.

18.1 A party who did not follow existing internal remedies and who wishes to review administrative action ought to satisfy the court that there are exceptional circumstances justifying a departure from exhausting such internal remedies. Remember, in terms of section 7(2), no court shall review an administrative action in terms of this Act, unless any internal remedy provided for in any other law has first been exhausted. The onus is therefore, on a party who did not comply with internal remedies available to him. In my view, the purpose of internal remedy which is made peremptory in terms of subsection (2) of

section 7 is two fold, first to provide speedy and inexpensive remedy. Secondly, to avoid unnecessary clouding of our courts with matters which could be internally, resolved by the parties. A party seeking direct relief to courts is asking for indulgence. He or she must satisfy the court that failure to exhaust internal remedies in time was no fault on his or her part. In his submission, counsel for the applicant sought to rely on existence of exceptional circumstances as follows:

18.1.1 Firstly, that to refer the matter for internal remedies will serve no purpose as the empowering authority, that is, the Minister has no discretion to condone the late filing of the appeal. Remember, the applicant was allegedly informed as per letter dated the 20 January 2004 that its application has been refused. In terms of regulation 55 read with regulation 56, the applicant ought to have lodged an appeal with the Minister seven days after it became aware of the decision. Obligation to lodge the appeal within seven days is couched in a peremptory manner. Counsel further relied on the general rule that an administrative authority has no inherent power to condone failure to comply with a

peremptory requirement. It only has such power if it is has been afforded a discretion to do so. (**See Minister of Environmental Affiars & Tourism V Pepper Bay Fishing 2004(1) SA 208 SCA at 320G**).

In my view, lack of authority by empowering authority to condone failure to comply with a peremptory requirement, would not alone establish exceptional circumstances as envisaged in section 7(1)(c) of PAJA. If this was to be the case, it would easily be subject to abuse by litigants who would deliberately fail to comply with a peremptory requirement for exhaustion of internal remedies. The whole purpose for exhausting internal remedy would be defeated and it would make the mockery of the process. Reasons have to be advanced for non-compliance with imperative requirement of exhausting internal remedies. In my view, it would not be sufficient to allege and argue academic effect of remitting to the authority which does not have the power to condone non-compliance with the provisions of regulations 55 and 56 as in the instant case. This should then bring me to consider the second reason advanced and argued on behalf of the applicant for not exhausting informal remedies.

18.1.2 Counsel for the applicant in his oral submission, sought to argue the point that the applicant despite having known of the alleged decision to refuse the applicant's application for extension of its facility by 40 beds in or about January 2004, it did not appeal because it was misled. It was made to believe that the basis for refusal was merely that the applicant's application was alleged not to have complied with the requirements of regulation 158, whereas the true reason was that the third respondent was allegedly granted permission to establish a new private hospital with 200 beds. In the applicant's supplementary heads of argument and also as argued by its counsel, the applicant only became aware that the decision in respect its application was taken simultaneously with the decision in respect of the approval after the present proceedings were instituted. It was therefore contended that even if it had appealed timeously, it would not have had any information at its disposal that would have enabled it to appeal, on the grounds which are persisted in this application. I have serious difficulties in understanding what was meant to be conveyed to the court.

Regulation 56 refers to an appeal within seven days of the decision appealed against. Such a decision having come to the knowledge of the proprietor, the applicant in the instant case. In the appeal, it must be stated clearly, the decision sought to be appealed against and the grounds of the appeal. Apparently, counsel for the applicant sought to confuse the provisions of regulation 56 with the provisions of section 7 (1)(b) which provides that *where no external remedies exists*, review proceedings should be instituted not later than 180 days after the date on which the person concerned was informed of the administration action, became aware of the action and the reasons for it or might reasonably expected to have become aware of the action and the reasons (my own emphasis). Becoming aware of the reasons in section 7(1)(b) relates to a situation where there are no internal remedies.

18.1.3 In this case, the applicant having known of the decision in January 2004, thought it was in respect of the 17 May 1999 application for 40 beds. It elected not to fight the decision. It elected to launch another application for

extension, this time by 47 seven beds. The fact that the applicant did not know that "*not having met fully the requirements in terms of regulation 158"* as stated in the letter of 20 January 2004, was due to the granting of the application for a new hospital, in my view, cannot serve to constitute exceptional circumstances. You do not in terms of regulation 56 read with regulation 55 and section 7 have to know of the reasons before resorting to internal remedies. Therefore, the suggestion by the applicant's counsel that, it was misled into believing that the reason for refusal was based on not satisfying the requirements in terms of regulation 158 does not *make the applicant's case any better.* The applicant from the facts of the case consciously decided not the appeal against the alleged decision. The explanation for not following internal remedies in my view, is not properly set out in both the founding and replying affidavits. Consequently, the applicant should be found to have failed to establish existence of exceptional circumstances. All that was required was, for the applicant to know of the refusal decision. Having known about the decision, instead of exhausting internal remedies, it elected to

submit another application. The result of all of these is that, the applicant cannot be exempted from failing to comply with the provisions of regulation 55 read with regulation 56. I now turn to deal with the issues relating to the alleged decision by the second respondent to grant permission to the third respondent for establishment of a new private hospital.

WHETHER OR NOT THE APPLICANT HAS LOCUS STANDI TO CHALLENGE THE SECOND RESPONDENT'S DECISION TO GRANT PERMISSION TO THE THIRD RESPONDENT TO ESTABLISH A PRIVATE HOSPITAL?

19. The first and second respondents in their heads of argument raised the issue as follows:

"*The applicant only has an interest in its own application. Its alleged interest in PPH application is purely commercial. The applicant is a rival hospital and it is apparent that it only became dissatisfied when becoming aware that the PPH had been granted permission to erect a facility and its (the applicant's endeavours to ensure that its services instead of those of Medi-Care be used by the third respondent in the PPH during early 2006 was not successful. The Act and the regulations do not*

protect commercial interests of trade competitors". This might be so, however, the challenge against the decision was that to refuse the applicant's application for extension, was solely due to the fact that the third respondent had been granted permission to establish a new hospital in the area with 200 beds. The result of this is, had such permission not been granted, the applicant's application for extension could have been granted. Remember, when I initially dealt with the first issues, I found that the applicant's application dated the 17 May 1999 for extension of its facilities by 40 beds has never been refused. In its supplementary heads of argument, the applicant contends as follows:

"… the applicant is hereby directly affected by the fact that its application was considered simultaneously with that of the PPH and its outcome materially affected hereby in the light of the need criteria".

19.1 Surely, if the applicant's application for extension of its facility by 40 beds was refused and was refused because of the granting of permission to the third respondent to establish a new hospital with 200 beds, and the applicant has other grounds to challenge such a decision, it could not be said that the applicant's interest was purely economical or commercial. In the

light of this, the applicant should be found to be entitled to challenge the administrative action on any ground as set out in section 6 of PAJA.

19.2 The other issue which was raised by the counsel on behalf of the applicant was that, the applicant was entitled to be heard before a decision to grant permission to the third respondent was made. I understood the suggestion in this regard to have been, as the two applications were allegedly considered on same day, the applicant should have been told of the application by the third respondent or any other entity to establish a new hospital. This in my view, should not be confused with an open tender, where for example, tenderers are invited to make representations before a decision is made by the tender board or its committees. In case of applications, like in the present matter, each person makes an application as he or she feels interested in establishing a new hospital or extension. The department did not have to invite any other existing private hospital proprietor in the area for example, to make representations regarding such an application or applications. Such decision could however, later be attacked on any other ground as set out in section 6

provided the necessary locus standi is proved. I find however, that the applicant has a direct interest in the decision that was taken in favour of the establishment of a new hospital. The applicant was therefore at liberty to challenge such a decision on any ground as envisaged in PAJA. This should then bring me to consider the other issue which is dependent on the issue of locus standi.

WHETHER OR NOT THE APPLICANT HAS BROUGHT THE APPLICATION FOR REVIEW WITHIN 180 DAYS AS REQUIRED?

20. This relates to the review of the decision granting the third respondent permission to establish a new private hospital in Polokwane. The first issue is, when did the applicant know of the decision? Apparently, the applicant during 2002 became aware that there was a move by other entities to establish a new private hospital in Polokwane. As on the 23 February 2006, the applicant had known of an approval to establish a new hospital. This appears from a letter dated the 23 February 2006 addressed to the Department by the applicant's attorneys. In the letter, the applicant indicated that it has been brought to its attention that the department apparently approved an application for registration of

a private hospital to be operated by NETCARE Consortium and or Kopantsho Medical (PTY)Ltd with some 200 beds. The applicant further sought from the department, access in terms of section 18(1) of Promotion of Access to Information Act no 2 of 2000 to all records and documents relating to the decisions to refuse the applicant's application on the one hand and the approval of the Polokwane private hospital on the other. When such information was not forth coming, the applicant on the 12 June 2006 instituted the proceedings for access in terms of the provisions of Promotion of Access to Information Act (PAIA). The information was only furnished on the 14 August 2006. The present proceedings were then instituted during November 2006. Based on these set of facts, the applicant contends that it had complied with the provisions of section 7 (1) of PAJA. In its view, the computation of the 180 days should be reckoned from the 14 August 2006 when the requested information was made available to the applicant. However, counsel for the first and second respondents, felt that the 180 days should be reckoned from February 2006 and that the present proceedings should be found to have been instituted after the expiry of 180 days. Two reasons in this regard were raised by the counsel for the first two respondents. Firstly, that, clearly from the letter dated 23 February 2006, the approval of the decision

came to the attention of the applicant in February 2006. Secondly, that as it would appear from paragraph 4.11 of Dr Mabina's answering affidavit on behalf of the third respondent, the applicant's manager enquired from Dr Mabina as early as the beginning of 2006 if he was part of the doctors who attended meeting with NETCARE and whether Dr Mabina was part of the doctors who applied for establishment of a private hospital.

20.1 The applicant through its new manager was alleged to have enquired from Dr Mabina if, Dr Mabina and his group would be willing to use the services of the applicant instead of that of NETCARE. Based on these, it was argued that there was no doubt that the applicant had knowledge of the approval decision long before August 2006.

20.2 I do not think that the provisions of PAIA and that of PAJA are at odds with each other. In my view, they co-exist. The provisions of PAIA that is, request for access to information, is meant to enable a party to properly consider its position before any litigation is contemplated. Remember, the purpose of the request for information is to protect one's right or interest. It often serves no purpose to rush into litigation before one is

properly informed. Despite the knowledge in February 2006 and attempts to enter into discussions with the third respondent, the applicant still sought information from the first two respondents. The respondents delayed in furnishing the information. In fact, they refused to furnish the information until when access to information proceedings were instituted. Despite such proceedings, the second respondent continued to delay in furnishing the information.

20.3 I understood the suggestion by counsel on behalf of the first two respondents to be, the applicant should have instituted review proceedings in terms of Rule 53 instead of resorting to PAIA proceedings for information. The reasoning for this submission was that the respondents would have then been obliged to submit the record for their decision and the reasons thereof, had the applicant instituted the present review proceedings. This might be so, however, I cannot agree that the applicant was blatantly wrong in instituting access to information proceedings instead.

20.4 Remember, the first and second respondents in their answering affidavits somewhat conceded that the applicant was under obligation to institute review proceedings as from August 2006 when the

information was furnished to it. In paragraph 13.1 of the first respondent's answering affidavit it was stated as follows:

> "... If the applicant was serious with its review application, it should have been launched immediately after the documentation requested by the applicant in the PAIA proceedings was made available to it on 10 August 2006. The applicant, however, waited for more than three months thereafter before launching its application". Judicial review proceedings, ought to be instituted within reasonable time but not later than 180 days, which is, six months and not three months. This in my view, cannot be said to have been unreasonable delay. The information furnished in August 2006 was obviously incomplete. The record for the decision had to be reconstructed which was done not chronologically and it consisted of many documents which had to be pieced through to make a sense out of them. About 325 pages of the said reconstructed record were involved. About 250 documents were seen for the first time by the applicant, many relevant documents did not form part of the furnished documents.

20.5 The applicant was not out of time in instituting the

review proceedings. Even if it was, the circumstances of the case are such that they should justify a condonation for late filing of the review proceedings. I may mention in passing, at one stage during the discussion, counsel for the applicant sought to argue that the applicant was under no obligation to launch a review proceedings in terms of section 7(1) read with rule 53 of the Uniform Rules regarding the approval decision. He sought to suggest that for as long as reasons for the decision are not furnished, the running of 180 days is not activated.

20.6 I cannot agree with this submission. Such non-activation of the 180 days, due to no reasons for the decision applies to the provisions of section 7 (1)(b). That is, where no internal remedies exist, the 180 days starts to run on the date on which the person concerned was informed of the administrative action, or became aware of the action and the reasons or might reasonably have been expected to have become aware of the action and the reasons. In the instant case, there are internal remedies as provided for in regulation 55 read with regulation 56. Therefore, the applicant did not have to be furnished with the reasons for the decisions before deciding whether or not to institute review proceedings. This should

then bring me to the other issue.

WHETHER OR NOT THE DEPARTMENT'S ADJUDICATION COMMITTEE EVER SAT TO CONSIDER THE RECOMMENDATION BY THE TECHNICAL COMMITTEE?

21. The department as empowering authority adopted the procedure of evaluating applications in terms of the regulation published under Government Notice 158 dated 1 February 1980. A technical committee must evaluate the applications submitted in a prescribed form, and should then submit its recommendation to the second committee, the adjudication committee. The adjudication committee in turn further peruses the applications, evaluates and then makes recommendation to the Head of the department for his finalisation, that is, for approval.

21.1 This procedure is further confirmed in the answering affidavit. Such a procedure is expressed as follows in paragraph 11.3 of the answering affidavit:

"*I wish to explain that a Technical Committee and an adjudication committee (also referred to as the Licensing Committee) were formed to assist in the evaluation of applications. The technical committee after evaluation of an*

application makes recommendations to the adjudication committee, of which Dr Nkadimeng was the chairman. The latter, then after investigation, makes recommendations to the HOD. The HOD after consideration and recommendations of the adjudication committee in consultation with Dr Nkadimeng, makes a decision to either approve or disapprove of any application"

The applicant in paragraph 108 of its supplementary founding affidavit took the point that there was no evaluation of the third respondent's application at all or applications of any of the members of the consortium by either the technical committee or the adjudication committee. Lastly, that the third respondent's application was also accordingly not evaluated or scored in terms of the criteria that on the Department's version, were applicable. To this allegation, the department just simply responded as follows:

"I deny the contents of this paragraph"

21.2 The letter of the 4 November 2003 does not refer to any meeting or evaluation where the application by the third respondent was recommended by either the technical committee or by the adjudication committee,

nor does the letter refer to any basis for differing with the recommendations made by the technical committee not to recommend the application by Polokwane Private hospital/Kopantsho as referred to in the minutes of the technical committee dated the 9 October 2003. The letter was addressed to the Keystone Development CC and of importance reference is particularly made to the company as follows:

> *"It is with great pleasure that you are informed that your company's application for a private hospital has been provisionally approved".*

21.3 The style of informing the Keystone Development CC of their application, completely differs from the letter conveying the decision regarding the applicant's application. In the matter of the applicant and in particular the letter of refusal dated the 20 January 2004, the applicant is informed as follows:

"The application together with many others went through two (2) committee stages and evaluated as prescribed by the regulation 158 as amended. The first committee (the technical committee) evaluated the application as submitted on the prescribed form and submits to the second committee*. In the case of your application both committees concerned agreed that your application did not meet fully*

the requirements to justify an approval in accordance with the regulation 158"

21.4 Clearly, in the case of the applicant, attempts were made to explain the process that was followed in evaluating the applicant's application. However, in respect of the letter dated the 4 November 2004, such explanation is conspicuous by its absence. What is worse, an allegation that no such evaluation by the adjudication committee did take place is met with a bare denial without facts.

21.5 One should further be worried as to when such evaluation by the adjudication committee did take place and who were present to evaluate the applications and in particular the recommendations by the technical committee. In paragraph 124 of the department's, supplementary answering affidavit, the respondents sought to suggest that the applicant was contradicting itself regarding the fact that there was no consideration of the third respondent's application by the adjudication committee. In this regard, the department was responding to the allegations made in paragraph 187 of the applicants' supplementary founding affidavit. Here, the applicant was not dealing with the evaluation for

recommendations to the Head of the Department, but rather the actual decision taken in approving the establishment of a new private hospital on the one hand and the refusal to approve the applicant's application on the other hand. There is therefore no contradiction whatsoever in this regard. In terms of the procedure adopted by the department, the adjudication committee if it had considered and evaluated the applications and recommendations by the technical committees, it would make its own recommendations to the Head of the department. Remember, on the 9 October 2003 both the application by Kopontsho/Polokwane Clinic and that of the applicant for extension were not recommended. The first issue is what recommendations were then made to the Head of the department by the adjudication committee, if any?

21.6 In paragraph 111 of the supplementary founding affidavit, the applicant states that there is further an inexplicable two months gap between the notification to PHH being Polokwane Private Hospital by the third respondent and the notification to the applicant in January 2004. The alleged approval and refusal on 4 November 2003 and then notification to the

applicant of the rejection of its application only in January 2004 is seen as a further indication that the applications were not considered together. Of interest, is the response to this allegation by the Department. The answer to this is, "*I deny the contents of this paragraph".* Remember, the letter of refusal dated the 20 January 2004 relates to the application for conversion as contained in the application of the 28 May 2001. This clearly was not even considered by the technical committee on the 9 October 2003. Still however, the Department found it fit to just give a bare denial to the allegation by the applicant as contained in paragraph 111. Secondly, the department elected not to give details as to when the application to establish a private hospital by the third respondent was considered by the adjudication committee. Whilst documents are alleged to have been lost, Dr Nkadimeng as the chairperson of such a committee, is the one who wrote the letters dated the 4 November 2003 and 20 January 2004 respectively. When met with this challenge as contained in paragraph 111 of the applicant's founding affidavit, one would have expected Dr Nkadimeng to give details about the date on which such committee sat for evaluation, how and why they differed

with the technical committee and what recommendations were made to the Head of the Department. But, even most importantly, the circumstances under which documents relating to this matter including the deliberations got lost. Related to paragraph 111 of the founding affidavit, is paragraph 112. In this paragraph, the applicant concluded by saying " *In the circumstances, it must be concluded and applicant contends that there was no evaluation by either the technical committee or the adjudication committee, nor indeed any other decision – maker of any application by the consortium in respect of the PHH"*. To this, the department gave a bare denial again as follows: "*I deny the contents of this paragraph and have already dealt therewith"*. This, is no challenge of any significant to the material and serious allegations made by the applicant. The allegations in paragraphs 111 and 112 in my view, were dealt with, in a cursory manner by the respondents. I am not satisfied that the adjudication committee ever sat to evaluate the application for establishment of a new private hospital in Polokwane, either it being by Koponstho or Keystone Development CC or by a consortium. Related to this issue, is the issue that follows hereunder.

WHETHER OR NOT THE TECHNICAL COMMITTEE DID CONSIDER AN APPLICATION BY A CONSORTIUM?

22. The consortium in this regard refers to the alleged joint applications by Keystone Development CC, Clinix Health Group Ltd and Kopantsho (PTY) Ltd as contained in the letter dated the 17 July 2003 addressed to the department. On the 17 July 2003, Keystone Development CC wrote a letter to the department, notifying it of the intended joint venture by the aforesaid entities in their respective applications for establishment of a private hospital in Polokwane. It was indicated in this letter, the three had decided not to proceed with their respective applications in competition with each other, but instead to join forces. The critical issue is whether or not on the 9 October 2003, the technical committee did consider application or applications by these joint forces. The source of information for this critical issue is the report of the technical committee, subsequent to its meeting on the 9 October 2003. Firstly, there is nothing in the report to suggest that the committee received a letter dated the 17 July 2003 together with Heads of Agreement from Keystone, their minutes in this regard, as contained in the report is silent. Secondly, one would have expected the committee to indicate whether or not

the request by Keystone Development CC to join forces was accepted by the committee and if so, how the three applications were to be dealt with as one. Thirdly, in the report only one entity amongst the three is mentioned. This entity is recorded in the minutes as item 8 reflected as "*Polokwane Private Clinic/Kopantsho. New facility in Polokwane. Request for 165 beds in urban area will have a negative impact on existing services level 2 and 3. Not recommended = score 22*". This is reflected on page 5 of the report. On page 2 of the report, there is a list of the applications recommended and applications which were turned down. This list of the un-recommended applications overlapped up to page 3. Notably, there is no mention of Keystone Development cc or any mention of Clinix Health Group Ltd. Evaluation process was divided into two parts, that is: A. Synopsis of recommended applications and B. Synopsis of un-recommended application. Seven applications are listed as recommended and five applications as not been recommended.

22.1 Neither in the recommended list nor in the un-recommended list is there any mention of Keystone or Clinix. The first and second respondents sought to explain themselves that the three applications were considered as one

consolidated application. This averment by the respondents is not apparent from the report by the technical committee. Kopantsho is said to have initially joined forces with Community Hospital Group (PTY) Ltd in applying to erect a private hospital to be called as Polokwane Private Clinic. The department then in its answering affidavit concluded by saying, these applications were indeed considered as one consolidated application. This response, does not deal with the allegation that the report by the technical committee made no mention of Clinix and Keystone applications respectively. It also does not deal with the fact that the application by Kopantsho was not favourably considered by the technical committee.

22.2 In paragraph 24 of the department's supplementary affidavit, a suggestion is made that according to Mr Faul, a member of the technical committee, reference to Polokwane Private Clinic/Kopantsho on page 8 of the technical committee's report is a reference to the consolidated application of Kopantsho, Clinix and Keystone and that it was the application which was evaluated as advised in the letter of the 17 July 2003 to the Department. The department further in paragraph 24 states that,

having determined that there was no need for a dedicated private specialist hospital, the technical committee did not undertake any further evaluation of that part of the consolidated application. It is further stated that a full evaluation in respect of the 165 and 200 beds facilities were undertaken. This allegation, in my view is not borne by the minutes of the meeting of 9 October 2003. No mention of 200 beds and no mention of Keystone. Remember, 165 beds are as per application by Kopantsho which is reflected in the minutes of the technical committee. 200 beds is as per application of Keystone, which is not mentioned in the minutes.

22.3 The department suggests that it was not necessary to include in the report of the technical committee any reference to a non-recommendation of the application for a 200 bed facility. I find this suggestion without any basis regard been had to the minutes of the technical committee. Firstly, about five applications which were not recommended were evaluated despite the fact that the scoring was less. Secondly, why should the technical committee refer and deal with the evaluation of one entity, that is, Kopantsho which did not

meet the requirements and scoring and not with the other two applications by Clinix and Keystone? The further suggestion by the department was that it was within the knowledge of technical committee, the adjudication committee, Dr Nkadimeng and the Head of the department Dr Manzini that Polokwane Private Clinic/Kopantsho application was constituted of the three separate applications of Keystone, Clinix and Kopantsho. If this was so, why then deal with an application for 165 beds, being an application of one entity, that is, Polokwane Private Clinic/Kopantsho? This defeats one' sense of logic if one was to go by the suggestion. As I said earlier in this judgment, the report by the technical committee is the source which is contemporaneous unlike the apparent reconstructed information, for example, of what the adjudication committee had or did not have and what the head of the department had or did not have. Having said this, I cannot find that the technical committee ever evaluated the application by Clinix and Keystone as part of the consortium. I now proceed to deal with the next issue.

WHETHER OR NOT THE LETTER OF 4 NOVEMBER 2003

WAS MEANT TO BE AN APPROVAL OF AN APPLICATION BY A CONSORTIUM? AND IF SO, WHETHER OR NOT SUCH A DECISION WAS TAKEN BY A COMPETENT AUTHORITY?

23. The letter of the 4 November 2003 is said to be a letter conveying the Department's approval of the alleged consolidated application by Kopantsho, Clinix and Keystone. First, it is alleged that the consolidated application was considered by the technical committee on the 9 October 2003. I had already found that the evidence as a whole and in particular the minutes of the meeting of the 9 October 2003 does not support this assertion. Secondly, it is suggested that this application was considered and evaluated by the adjudication committee. There are no minutes of the adjudication committee to this effect. There is no indication as to when the meeting of the adjudication committee in this regard was held. Further, there is no indication or acceptable explanation as to what recommendation was made by the adjudication committee to the Head of the department. But even most importantly, why was the letter addressed to Keystone? Remember, the understanding, is alleged to have been, there was no longer an individual application by three entities.

23.1 In paragraph 24 of the supplementary

answering affidavit, it is alleged that it as within the knowledge of the technical committee, the adjudication committee and the Head of the department that Polokwane Private Clinic/Kopantsho's application which was considered by the technical committee on the 9 October 2003 constituted of three separate applications of Keystone, Clinix and Kopantsho. If this was so, why then, the letter was not addressed to Kopantsho or to all parties of the consortium? The suggestion that the letter was addressed to Keystone as part of the consortium because of the letter head of Keystone should further be seen in the light of the wording of the letter of the 4 November 2003. First, the letter makes no reference to the letter of 17 July 2003, no reference to permission being given to the consortium to establish a private hospital. The letter states "*...you are informed that your company's application for a private hospital herein has been provisionally approved'*. *If 'your company's application" was* meant to refer the consortium's application one would have expected a similar letter to be addressed to the other entities, that is, Clinix and Kopantsho. Further, it appears from the correspondence that was exchanged between the department and Kopantsho, that Kopantsho

was particularly not happy that the Department was corresponding with Keystone.

23.2 Kopantsho after the letter of the 4 November 2003 complained to the department and insisted that the department should correspond with Kopantsho and not Keystone. Secondly, it appears from the letter of 14 August 2006 addressed by the Department to Kopantsho, that the department issued a licence to Keystone or sought to do so. In this letter, it is indicated that the licence must be transferred from Keystone Development CC to Kopantsho Medical. Why the licence to Keystone, if right at the onset everyone knew that the application was by consortium and not by Keystone? Remember, any licence issued under the regulations is not transferable. Why then issue license to Keystone or seek to issue such a licence to Keystone instead of the third respondent whilst knowing that such a licence is not transferable? It is further alleged that the application as granted was for 200 beds. Exactly what Keystone applied for, and not what the consortium applied for. In any event, the issue is for how many beds did the consortium apply for if the letter of 4 November 2003 refers to the consortium? For the first time when the

reference was made to the letter of 17 July 2003 was on the 8 January 2003, when Dr Nkadimeng wrote to Keystone. Here it was indicated that following the approval in principle to health facility as referred to in the updated application dated 17 July 2003, Keystone was called upon to submit such technical/architectural plans for review and consideration by the department's technical committee. This, in my view was an after thought. Why similar letter was not sent to the other two entities? I find it difficult to accept that the letter of the 4 November 2003 meant to be a permission to a consortium and not Keystone as a separate entity. I now turn to deal with the next issue.

WHETHER OR NOT THE DECISION AS CONTAINED IN THE LETTER OF THE 4 NOVEMBER 2003 WAS TAKEN BY A COMPETENT AUTHORITY?

24. In terms of regulation 7, a permission to establish a private hospital has to be given in writing by the Head of the Department of Health, who must first consult in regard to the application with his Director. As on the 4 November 2003, the Head of the department was Dr Manzini, who at the time of the institution of these proceedings was no longer with the Department. The Director at the time of the

decision was Dr Nkadimeng, who was also the Chairperson of the adjudication committee.

24.1 The department is alleging in its answering affidavit that the letter of the 4 November 2003 was written by Dr Nkadimeng on the instructions of Dr Manzini, the Head of the department then. However, one must look at the wording of the letter. It makes no reference to the Head of the Department as the person who took the decision. All what the letter states, is to inform Keystone that the process for evaluation of private licences for the last sitting of the year 2003 has been completed and that, it was with great pleasure to inform that Keystone company's application for a private hospital licence has been provisionally approved. This letter is not informative. It does not tell Keystone when the decision was taken. It does not tell that the decision was taken by the Head of the Department. It does not indicate that the letter was addressed to Keystone on the instructions of the Head of the department. This letter should be seen in the light of the particulars which were given in the letter dated the 20 January 2004 and addressed to the applicant. In this letter, the process that was followed is explained, although no date is given

on which the decision was taken.

24.2 But, most importantly, to the issue under discussion, is paragraph 3 of the letter dated the 20 January 2004. It reads as follows:

"The first committee (The technical committee) evaluates the application as submitted on the prescribed form, and submits to the second committee (the licensing Committee) for further perusal evaluation and *finalisation, (my own emphasis).* Remember, licensing committee, refers to adjudication committee of which Dr Nkadimeng is the chairperson. Why should this committee be referred to as a licensing committee if it is not been used by the department as a committee which approves the licensing of private hospital? Of course, the regulation does not permit it to do so. But the question is, did the licensing committee adhere to the regulations? It does not appear so. For example, in the letter and the paragraph referred to above, the adjudication committee does not only peruse and evaluate the applications, but most importantly, it also finalises the applications. If in respect of the application by the applicant, the procedure that was followed till up to finality was as contained in paragraph 3 of the letter, what would have

stopped the department in following the same procedure in respect of the approval as contained in the letter of the 4 November 2003? In any event, on the department's version the two applications were considered on the same day. It does not look like everything was done above board. In the light of all these, I cannot accept the explanation that the letter of the 4 November 2003 was issued on the instructions of the Head of the Department. The result of this is that the decision was not taken by a competent authority. Alternative to this, another issue raised.

WHETHER OR NOT THE HEAD OF THE DEPARTMENT PROPERLY TOOK THE DECISION TO GRANT THE PERMISSION TO ESTABLISH A PRIVATE HOSPITAL OR TO PUT IT DIFFERENTLY, WHETHER THE HEAD OF THE DEPARTMENT HAD SUFFICIENT INFORMATION TO MAKE THE DECISION?

25. Remember, when a decision is taken by administrative authority, such decision or action must be procedurally fair, relevant considerations must be considered, the decision must not be arbitrary or capriciously taken, the decision or action must rationally be connected the information before

the decision maker or administer, etc.

25.1 Whilst this issue becomes academic, in the light of the finding which I have just made regarding the issue whether the decision granting permission to establish a private hospital was taken by a competent authority, I find it necessary to deal with issue.

25.2 It is not quite clear as to when the decision to grant permission was granted inasmuch as it is also not clear as to when the decision to refuse as contained in the letter of the 20 January 2004 was taken? But, for sure the decision as contained in the letter of the 20 January 2004 relates to an application which was not considered by the technical committee on the 9 October 2003. Similarly, if the letter of 4 November 2003 was meant to be permission to the consortium, I have already found that an application in this regard was not considered by the technical committee. Therefore, any such decision by the Head of the Department would have been contrary to the mandatory and material procedure adopted by an empowering authority, being the second respondent.

25.3 Secondly, there are no minutes of the

adjudication committee or a report by this committee regarding its perusal and evaluations of the application in terms of which the establishment of a private hospital was recommended. Papers did not reveal what information or documents were placed before the adjudication committee especially in the light of the recommendations by the technical committee on the 9 October 2003. Dr Nkadimeng, the chairperson of the adjudication committee, having filed a supporting affidavit to the answering affidavit, failed and or neglected to give more details about the meeting of his committee if it did take place.

25.4 Thirdly, it is alleged that documents or information regarding this matter got lost. This allegation is made as follows in paragraph 15 of the supplementary answering affidavit:

"I deny that the first respondent and I have declined to provide the details of the circumstances of the loss of file, its retrieval and or reconstruction. We were never called upon to do so. Nevertheless, the file was lost in circumstances of which the first respondent and I have no knowledge. The documents which constitute the record were retrieved from numerous other sources which include the

personal files of officials within the department".

25.5 Further in paragraph 123 of the supplementary answering affidavit, it is stated as follows:

"… The record of the proceedings is a reconstruction of various documents from different sources as the Department's file was lost as already stated. Minutes of the meeting of the adjudication committee regarding the consideration of the PPH application and recommendation to Dr Manzini were kept. No record was kept of the report by Dr Nkadimeng to Dr Manzini as to the adjudication committee's recommendation or on consideration and decision on the PPH application. Dr Manzini having been satisfied of the need of the PPH facility instructed Dr Nkadimeng to inform PPH accordingly, which he did".

25.6 I need to comment on these two paragraphs starting with "*minutes of the meeting of the adjudication committee regarding the consideration of the PPH application and recommendation to Dr Manzini were kept".* Firstly, the department is unable to produce such minutes. Secondly, it is not quite clear who kept the minutes and recommendation to

Dr Manzini. I assume they were allegedly kept by the adjudication committee. It is not clear from this averment that any such consideration and recommendation by the adjudication committee was ever forwarded to the Head of the Department before it got lost. It is not stated as to what recommendations regarding PPH were made by the adjudication committee. It is not clear what record of the report by Dr Nkadimeng which was not kept by him was made available to Dr Manzini.

25.7 Coming back to the lost record, one would have expected the chairperson of the adjudication committee, Dr Nkadimeng to be in a position at least to give a clue as to what documents did his committee have, what documents were forwarded to the Head of the Department for his consideration, but what is even worse, is for the fact that it is not set out how the reconstructed record was made. The Department is vague as to the people who were consulted or contacted in concluding the reconstructed record. What information was supplied by whom? The basis for such a person to be able to supply the required information is lacking? The reconstructed reasons for the decision based on this lack of information would in my view be

dangerous, to rely on for the purpose of deciding the issue. For example, one would have expected information to be placed on record as to all the documents which were at the disposal of Dr Manzini when she allegedly reconstructed the reasons for the judgment and the people she consulted in reconstructing those reasons.

25.8 I also find the document containing the reconstructed reasons particularly worrying. This, is a document consisting of one page. It is not dated and it is not signed. The reasons as reconstructed regarding the approval are contained in half a page and such reasons are then set out as follows:

25.8.1 *"A1.1 On a consideration of the population of Polokwane to the level of hospital beds evaluation and a comparison of the ratio of the availability of public facilities and private facilities, a need for additional beds was demanded".* This is just a statement of fact which is not supported by any information. One would have expected the actual figures to be given, especially if at the time these reasons were reconstructed, there was a document in front of Dr Manzini to substantiate the

statement. In paragraph 80 of the Department's supplementary affidavit, the deponent deals with a document referred to as SPS (Stradetic Position Statement), which deals with all health facilities in the Limpopo Province i.e. levels 1, 2, 3 and specialised. A statistic regarding public and private beds is given in the SPS. In paragraph 80.3 of the answering affidavit is then concluded as follows:

"*That number of private beds is far less than the benchmark of 20% of the number of public beds in the Capricorn district, which when the decision was taken amounted to 461*". Notably, it is not alleged in this paragraph that the document SPS was brought to the attention of the Head of the Department before the decision was taken. The supplementary supporting affidavit by Dr Manzini makes no reference to paragraph 80 of the answering affidavit. In paragraph 82 of the answering affidavit reference is made to the market research report (SPS). It is then concluded that this was only part of the information before the then HOD, Dr Manzini. The alleged part of the information is not specified. Whilst this is confirmed by Dr Manzini in her supporting affidavit, one would have expected Dr Nkadimeng in his supporting affidavit to refer to documents that were

submitted to the Head of the Department for the decision. This averment by the Department is denied by the applicant in paragraph 29 of the replying affidavit. Reliance on the suggestion that SPS report was placed before Dr Manzini should therefore be seen in the light of other factors relating to this matter as referred to earlier in this judgment.

"A1.2 A special development of Polokwane necessitate the provision of additional beds, especially in view of the economic growth and population growth" The minutes of the meeting of 9 October 2003 by the technical committee started by setting out the scene for the process. It tells one about the tool, that is, the documents or information that was relied upon in the evaluation of the application. SPS was one of the documents, heavily relied upon in their recommendations. It refused to recommend favourably the establishment of a private hospital with 165 beds, by Kopantsho, one of the alleged consortium. It found that the granting of permission in this regard would have negative impact on existing levels 2 and 3 services. This is the kind of service for which a permission of 200 beds has been granted. Secondly, the applicant's application for the extension by 40 beds was rejected by the technical committee, it having found the granting of such an extension will have negative impact on the existing levels 2 and 3 services. I take this was meant services provided

at public hospital and other existing facilities including the applicant's facility. Note, there is no reference to an application by three entities as a joint venture and yet the applicant's application is said not to have been favourably considered due to the third respondent's application. This should immediately bring me to consider the principle as expressed in **Cash Pay Master's case** referred to earlier in this judgment. Dr Nkadimeng failed to deal at all or satisfactory with the recommendation if any, which its committee allegedly made to the Head of the Department contrary to the technical committee decision regarding Kopantsho application.

25.8.2.1 The Head of the Department too, neglected and failed to deal satisfactory with the basis on which it differed with the recommendation by the technical committee. Surely, neither the adjudication committee nor the Head of the Department would necessarily be bound by the evaluation and recommendations of the technical committee. However, when it so happens that there is a departure from such a recommendation, proper motivation ought to be given. For example, what aspect was not taken into consideration by the technical committee which ought to have been taken? Unless this is done, the decision would be seen as being arbitrarily or capriciously taken or unreasonably

taken. Remember, when these decisions are taken, particularly by public institutions or organs of the state, they should be above board. They should serve to instill confidence in those who participate in the process and the general members of the public. Anything short of this can only serve to bring the process into a disrepute. I should however, be concerned whether in the instant case this was adhered to, that is whether everything was above board.

"A1.3 *The ratio of population to available beds in the area as a whole necessitated additional beds in line with the application of PPH"*. I find this statement to be general without any foundation. Again what documents did she have as she reconstructed this reasons. Did she have all the applications that were already considered by her, if any? Did she have the SPS document? From whom did she obtain the documents if any? Who assisted her to come to these reasons as reconstructed? Having left the Department at the time these reasons were reconstructed, what was used to refresh her memory? All of these questions unanswered and unexplained as they are, makes one to seriously doubt the extent to which reliance can be placed on this document containing the reconstructed reasons.

"A1.4 The private facility applied for (PPH) will compliment

the public facilities". Remember, it was the technical committee's view that such permission will negatively impact on the existing facilities. Secondly, it was common cause during the discussion that the area at the time of the alleged decision of the 4 November 2003 had a need of about 231 private beds. If this is so and the decision was not taken arbitrarily and capriciously, why the applicant was not at least granted the remaining 31 beds? Perhaps this explains the finding that the decision was not taken by the Head of the Department and secondly, that the letter of the 20 January 2004 addressed to the applicant has nothing to do with the extension of beds. The result of all of these is that the decision granting the permission to establish a private hospital in Polokwane ought to be set aside.

25.9 Lastly, my finding in this regard should not necessarily bring everything to an end for ever. It is incumbent on the department as to the speed at which it would want to revisit the process. This should immediately bring me to consider balance of convenience. I was urged by counsels acting for the respondents not to set aside the decision to approve, even if I was to find that it was not properly taken. Two reasons in this regard were raised. First, that the applicant has unreasonably delayed in bringing the application for review and

secondly, that both the third respondent and the public would suffer. I need to deal with all of these. If ever there was any delay, all the respondents are parties to it. Despite the request that was made for information in February 2005, despite PAIA proceedings instituted in June 2006 against the department for such information, the department only responded positively in August 2006. The third respondent on the other hand adopted the attitude that the applicant was not entitled to any information required or that the applicant was not entitled to some of this information required by the applicant. As in February 2006, the third respondent had not as yet submitted the final plans for approval. The construction of the proposed hospital started late. Lastly, even most importantly, the third respondent neglected to properly place before the court such information as might have enabled the court to establish the extent of the financial prejudice to the third respondent.

25.10 Attempts were made to informally introduce a document that would have sought to indicate the third respondent's expenses. I refused to have regard to the document as it was not proved.

26. Remember, the third respondent elected not to file further answering affidavit. It adopted the attitude that, the matter on merits was between the Department and the applicant. Attempts to want to introduce the extent of the financial prejudice only arising during argument was unwarranted. The third respondent took the risk by not challenging the matter on merits and in my view, it must live with it. Lastly, I should be concerned about prejudice to the public occasioned by the delay consequent to the setting aside of the approval decision. Two things should be considered in this regard. The public interest or prejudice as against the need to ensure that administrative actions as they are taken, would not invite attack as envisaged in section 6 of PAJA. In my view, to validate administrative action which is not properly taken in each case, can be subject to abuse and rendering the protection in terms of the Constitution read with the provisions of PAJA and PAIA academic. The facts of the present case do not justify the validation of a decision which is improperly taken.

F. COSTS OF THE PROCEEDINGS

27. The general rule is that a successful party should be entitled to an order for costs. The application for the

setting aside of the decision to refuse the applicant's application has been found to be in respect of the application for conversion and not extension. Secondly, in the alternative, it has been found that the applicant did not follow the internal remedies and that the evidence presented by the applicant did not justify exemption from complying with internal remedies. Consequently, the respondents should be found to have substantially succeeded in this regard.

However, regarding the application for the setting aside of the approval decision, the applicant should be found to have been successful. The result of this is that all the parties have substantially succeeded. Consequently, the appropriate order for costs should be that each party to pay its own costs.

G. CONCLUSION

28.I therefore conclude by making the following order:

28.1 The application to set aside the decision to refuse the applicant's application for extension of its facility is hereby dismissed.

28.2 The decision as conveyed in the letter of the 4 November 2003 addressed to Keystone Development CC is hereby reviewed and set aside.

28.3 Each party to pay his or her own costs.

M F LEGODI
JUDGE OF THE HIGH COURT

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