**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

Case No: 594/2010

In the matter between:

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| **PHODICLINICS (PTY) LTD** | **APPELLANT** |
| **and** | |
| **PINEHAVEN PRIVATE HOSPITAL (PTY) LTD** | **FIRST RESPONDENT** |
| **COMMUNITY HOSPITAL GROUP (PTY) LTD** | **SECOND RESPONDENT** |
| **COMMUNITY INVESTMENT HOLDINGS (PTY) LTD** | **THIRD RESPONDENT** |
| **GAUTENG PROVINCIAL GOVERNMENT** | **FOURTH RESPONDENT** |
| **MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, GAUTENG** | **FIFTH RESPONDENT** |
| **THE CHAIRPERSON OF THE APPEALS ADVISORY COMMITTEE OF THE DEPARTMENT OF HEALTH, GAUTENG** | **SIXTH RESPONDENT** |
| **THE HEAD OF DEPARTMENT, GAUTENG DEPARTMENT OF HEALTH** | **SEVENTH RESPONDENT** |

**Neutral citation:** *Phodiclinics (Pty) Ltd v Pinehaven Private Hospital (Pty) Ltd* (594/2010) [2011] ZASCA 163 (28 September 2011)

**Coram:** Mthiyane**,** Maya, Cachalia, Bosielo and Seriti JJA

**Heard:** **22 August 2011**
**Delivered:** **28 September 2011**

**Summary: Proper construction of regulations 7 and 55 of the Regulations Governing Private Hospitals and Unattached Operating Theatres promulgated in terms of the Health Act 63 of 1977 ─ Review ─ Orders of substitution and remittal discussed.**

## ORDER

**On appeal from:** South Gauteng High Court, Johannesburg (Saldulker J sitting as court of first instance):

1. The appeal is upheld with costs, including the costs of two counsel.

2. The order of the high court is set aside and replaced with the following:

‘2.1 The appeal decision of the second respondent dated 28 June 2007, is reviewed and set aside.

2.2 The matter is remitted to the second respondent for reconsideration of the fifth respondent’s appeal.

2.3 The second respondent is directed to invite the first, second and third applicants, and also the fifth respondent, to make such written representations as they deem appropriate on the appeal. Such submissions shall be sent to the other parties involved in the appeal.

2.4 The first, second and third applicants, jointly and severally, are ordered to pay the costs of the fifth respondent in the application, such costs to include the costs of two counsel.’

## JUDGMENT

**MTHIYANE JA (MAYA, BOSIELO and SERITI JJA CONCURRING):**

Introduction

[1] At issue in this appeal is the proper construction of regulations 7 and 55 of the Regulations Governing Private Hospitals and Unattached Operating Theatres (the regulations).[1] The appeal is from the decision of the South Gauteng High Court (Saldulker J) in which the court set aside a decision of the fifth respondent (the MEC) and his Appeal Advisory Committee. In his turn the MEC and his appeal body had set aside a decision of the Head of Department (the HoD) in which the latter had approved the applications of the first, second and third respondents (the respondents) under regulation 7 to establish a private hospital in Mogale City and rejected that of the appellant. The MEC set aside the decision of the HoD and remitted the matter to him for the reconsideration of both applications. The appeal is brought with leave granted by the high court.

[2] According to regulation 7(2)(i) an applicant who intends to establish a private hospital and an unattached operating theatre (a private hospital) is required to first obtain 'permission in writing' from the HoD. In this matter both applications were considered by the HoD but he approved the respondents' and refused that of the appellant.

[1]The regulations were promulgated in terms of the Health Act 63 of 1977 and were published under GN R696, *GG* 6928, 3 April 1980.

[3] In terms of regulation 55 the appellant lodged an appeal with the MEC who upheld the appeal, revoked the approval granted to the respondents and directed that the parties re-submit their applications to the Department of Health for the adjudication of each application. There was no service of the appeal on the respondents and they were therefore not afforded an opportunity to be heard in the proceedings before the MEC and the appeal body. The process followed by the MEC was procedurally unfair and the decision flowing from it fell to be set aside on that ground alone. The respondents were however not content with the remittal of the matter to the HoD for re-consideration as ordered by the MEC and were intent on pressing for the reinstatement of the approval of their application by the HoD – in effect an order of substitution.

The Application in the High Court

[4] The respondents then instituted an application in the South Gauteng High Court to review and set aside the decision of the MEC, revoking the approval by the HoD of the respondents' application to establish a private hospital and approving the appellant's application. As already indicated, the respondents sought an order of substitution as opposed to an order remitting the matter to the HoD for reconsideration. An order of substitution effectively meant upholding the initial approval of the respondents' application.

[5] The review application is based principally on four grounds. They contend that: (a) it was incompetent for the appellant to appeal against the decision approving the respondents' application; (b) the MEC and his appeal body failed to appreciate that 'necessity' is the sole criterion for the approval of the application to establish a private hospital under regulation 7; (c) there had to be identified premises on which the private

hospital was to be built; and (d) there was no ‘lodgement’ of the appeal by the appellant as required by regulation 56 in the absence of service of the appeal papers on the respondents.

[6] The appellant conceded that the decision of the MEC fell to be reviewed and set aside but submitted that the most appropriate relief was a remittal of the matter for the two applications to be considered afresh by the HoD. The appellant disputed that the respondents were entitled to a substitution order. The appellant also submitted that in the event of the respondents being unsuccessful its counter-review application should be granted, setting aside the HoD’s refusal to approve its application to establish a private hospital.

[7] Before discussing above grounds it is as well to briefly set out the broad scheme of the regulations. Regulations 2 to 6 deal with the acquisition of a certificate of registration. In terms of regulation 2, the applicant (or a ‘prospective proprietor’ as the applicant is described in the regulations) may not establish a private hospital unless he or she or it has been registered and is in possession of a valid certificate of registration. Certificates of registration must be reviewed annually.

[8] Regulation 7 (the focal point of the present appeal) requires a prospective proprietor, before applying for the registration certificate, first obtain a certain ‘prior approval in writing’. Only after obtaining such approval may the prospective proprietor proceed to apply for a registration certificate. The relevant provisions of this regulation will be discussed in detail later in the judgment.

[9] Regulations 8 to 11 govern an application for registration by a prospective proprietor who has received the required 'prior approval in writing'. Regulations 12 to 20 further regulate applications for registration. Regulations 21 to 50 prescribe conditions with which private hospitals must comply. Regulations 50 to 54 provide for inspections.

[10] Regulations 55 to 58 confer a right of appeal on a proprietor or prospective proprietor and describe the procedure for pursuing the appeal.

A discussion of the grounds of review

[11] Against the above background I turn to a discussion of the respondents' grounds of review which were upheld by the high court and I do each in turn. Ground (a), dealing with the competence or otherwise of the appellant to lodge an appeal against the decision of the HoD granting approval to the respondents is based on the assumption that two decisions were made by the HoD. The essential disagreement between the respondents and the appellant is whether the HoD made two decisions in respect of the two applications or whether he made one composite decision. The appellant appealed both against the decision to refuse its application and against the decision granting approval to the respondents. This led directly to the respondents' approval being revoked by the appeal body. The respondents argue that the MEC and his appeal body were faced with two separate applications for approval and made two separate decisions and that it was wrong of the appellant to assume that it was entitled to appeal against both decisions, as one composite decision.

[12] The appellant submits that the HoD rendered a composite decision in respect of the two applications for approval and that it was entitled to appeal against the decision in so far as it touched on its own application,

as well as against the part of the decision relating to the awarding of the approval to the respondents.

[13] The respondents do not dispute the appellant's right to appeal to the MEC against the refusal of its own application a right which, it submits, is provided for in regulation 55.

[14] The issue which then falls to be determined by this court under this ground is whether the appellant was entitled to appeal not only against the refusal of its own application but also against the decision of the HoD granting approval to the respondents in terms of regulation 7(2).[2] The answer to this question depends of course on the proper construction of regulation 55. It reads as follows:

'The proprietor of prospective proprietor of a private hospital or unattached operating-theatre unit 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 proprietor or prospective proprietor*, as the case may be, of a private hospital or unattached operating-theatre unit.' (My emphasis.)

[15] The high court concluded that there were two separate and distinct applications. Two separate records were kept and both applications had to be considered on their own merits with each driven by their own application. The court said considering them together would amount to a competitive adjudication process which was not envisioned in regulation 55.

[16] The high court accepted the respondents' submission that the appellant was entitled to appeal against the decision refusing its own application but not against the approval of the respondents' application. It

[2]This regulation will be discussed fully when dealing with the second ground, of review (ie (b)).

held that on a proper analysis of regulation 55 the words in emphasis, (*in respect of such proprietor or prospective proprietor*) are specific, in the sense that a 'proprietor' may only appeal against his or her own application. The appellant had its own application turned down. The court said, the granting of the respondents' application did not establish a direct relationship required by regulation 55. In this sense when the HoD had to make a decision in respect of the appellant, it was not a decision 'in respect of a proprietor or prospective proprietor', which denotes some level of specificity. This is so as there was no 'direct effect' as required by the definition of administrative action in the Promotion of Administrative Justice Act (PAJA).[3] Also the granting of the respondents' application did not have the capacity to affect legal rights as no right was implicated in an application that was not theirs. For this conclusion the court relied on *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) para 23.

[17] The court also held that the recommendation of the Appeal Advisory Committee and its endorsement by the MEC was not provided for in the regulations. In the court's view, third parties (such as the court considered the appellant to be) cannot bring an appeal, otherwise regulations 55 to 58 would have read differently. In the light of the above the court set aside the decision to revoke the granting of the application to the respondents. It held that the MEC and the Appeals Advisory Committee had no authority to adjudicate the appellant's appeal as the latter had no right of appeal against the approval of the respondents' application.

[3]See s 1(b) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

[18] In my view the high court erred in holding that the appellant was not entitled to appeal against the decision granting the respondents' application. It was incorrect to hold that the HoD rendered two separate decisions instead of one composite decision. Nor was it legally sound to hold that only an original party who was part of the application before the HoD can appeal against a decision made by him.

[19] Both applications before the HoD were evaluated together as is evident from documents emanating from the Adjudication Committee of the MEC. For example in the minutes, the Adjudication Committee evaluates both companies' BEE scores, track records, social responsibility commitments together amongst other matters. A comparative evaluation is also to be found in the recommendations of the Adjudication Committee where the considerations in the minutes were endorsed. A comparative assessment of both applications is evident from the rejection letter as well. Therefore, since it was a composite decision, it was competent for the appellant to appeal.

[20] The appellant submits that it was directly affected by the decision to grant the respondents' application. I agree. It is, I think, inconceivable that the negative impact of the decision, which the high court admitted to be present, is inconsistent with a direct impact. During argument our attention was drawn to the yet unreported judgment of Legodi J in *Limpopo Mediclinic v MEC for Health and Welfare Limpopo Provincial Government & others* [2008] ZAGPHC 83 in support of its contention that it was entitled to appeal. There the learned judge was called upon to decide the question whether an unsuccessful applicant who was affected by a refusal of its application and by the granting of another's application, could appeal not only against the refusal of its own application but also

against the granting of the other party's application. The judge answered the question in the affirmative and rejected the submission that the applicant (Mediclinic) in that case 'only has an interest in its own application' and remarked as follows:

'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.'

I agree with the reasoning of Legodi J. To the extent that the judgment of the high court is at odds with the approach in *Mediclinic*, it erred.

[21] The narrow construction placed by the high court to the provisions in regulation 55 is not supportable. In my view the provisions are susceptible to a wide interpretation in the sense that the words 'in respect of' can indicate a causal relationship, and not only a direct one.[4] Also there may be 'direct impact' beyond the parties in this case, for example, in the case of an existing private hospital or a prospective proprietor of a private hospital in the same area who may want a hearing.

[22] Also the interpretation adopted by the high court is not consistent with the right to a fair hearing envisioned in PAJA and ss 33(1)[5] and 34[6] of the Constitution. Parties with an existing or prospective interest must be heard under regulation 55. This is also required in terms of s 39(2) of the Constitution. Therefore even if this court comes to the conclusion that

[4] *Greater Johannesburg Transitional Metropolitan Council v Galloway NO* 1997 (1) SA 348 (W) at 356D-G.

[5] 'Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.'

[6] 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

there were two separate applications which were considered separately, the appellant would have been entitled to appeal against both decisions. For the above reasons I hold that the HoD rendered one composite decision in respect of the two applications and it was therefore competent for the appellant to lodge and appeal against it.

[23] I turn to ground (b), in which the respondents argue that the MEC failed to appreciate that necessity is the sole criterion for determining whether approval should be the granted under regulation 7. The point of departure between the parties is that the appellant submits that in the consideration of the application for approval under regulation 7 necessity is not the sole criterion but other factors had to be considered, such as the provision of health care in all parts of the country, the efficient use of resources and other competing bids.

[24] Regulation 7 reads as follows:

'(1) No person shall erect, alter, equip or in any other 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.

(2)(i) Any person intending to establish a private hospital or an unattached operating-theatre unit shall first obtain permission in writing from the Head of 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.

(ii) 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.

(3) Permission and approval in terms of regulation 7 are not transferable.' (My emphasis.)

[25] The high court held that the words in the regulation make clear that when the HoD considers whether not to grant an application, the HoD's decision is based solely on the criterion of necessity. The court said necessity is also to be considered parallel to the requirements of regulation 4, which deals with registration. If regulation 7(2)(i) is read in a way that allows for other criteria to be considered, then this would be ultra vires and contrary to s 44(1)(*a*)(vi) of the Health Act 63 of 1977.[7] Therefore, the court concluded that the MEC and the appeal body did not give regulation 7(2)(i) the effect it envisioned when the respondents' application was revoked.

[26] On the question whether the appellant had met the criterion of necessity as set out in regulation 7(2)(i). The high court took the view that in respect of the appellant's application it was impossible for the Department of Health to decide that the requirement of necessity for a private hospital had been met because the appellant did not identify a specific site and motivate why there was a need to establish a hospital there. In respect of the respondents the court had no such difficulty in accepting that the requirement of necessity was to have been met because they were already in possession of premises, namely erf 253 Mogale City, which they identified as the site where the private hospital was to be erected. Therefore the court held that the Appeals Committee failed to appreciate that necessity was the sole criterion for determining the appeal

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[7] This section provides

'(1) The Minister may make regulations ─

(*a*) in respect of private hospitals, nursing homes, maternity homes or other similar institutions where nursing is carried on for the benefit of patients accommodated therein and where fees are charged by the owner or lessee of any such hospital, home or institution in respect of nursing services rendered to such patients or where contributions are made by such patients towards the cost of such services ─

. . .

(vi) providing for the refusal to register, or the removal from the appropriate register of, any such hospital, home or institution which the Minister or any specified person or class of person may consider unsatisfactory on specified grounds.'

decision and that the appellant had not met the threshold requirement. The court appears to have held that necessity was provable by reference to the possession by a particular applicant of a site or premises where the private hospital is to be erected or established.

[27] The appellant in its turn accepts that necessity must be considered prior to the granting of the application, that necessity is a jurisdictional fact for there to be an approval, but contends that necessity is not the only criterion and takes issue with the assertion that if other criteria were taken into account s 44(1)(a)(vi) of the Health Act of 1979 would be contravened and the department's action ultra vires. The appellant argues that this section deals with refusal to register and not with registration itself. Registration is not dealt with by regulation 7. The appellants also submit that its contentions are not out of sync with the regulations and s 44(1)(a)(i) of the Health Act.

[28] In my view the high court's conclusion that necessity was the sole criterion for determining the grant of the 'permission' as required by regulation 7(2)(i) was correct and should be accepted. However, I do not think that at the 'permission' stage of the application the applicant is, in terms of the regulation required to identify a precise location where the hospital is to be established though when the applicant does so, it should be considered and such information should be taken into account. It follows that the requirement of necessity is not determined by reference to a defined site or premises. Even if it were so the appellant and the respondents were in precisely the same position at the first phase of the enquiry into the question whether permission in writing should be granted. The appellant did identify an area in Mogale City in which it wished to establish a private hospital.

[29] Therefore on a proper reading of regulation 7 it is clear that the fact that the respondents had lodged an application to establish a private hospital first did not mean that the late application by the appellant should not have been considered by the HoD ─ which is the effect of the finding of the high court. The appellant argued with some force that the consequences of this approach would lead to absurdity. The appellant imagined a situation where there are two competing applications to establish a private hospital within the same area and there is only a need for one. On the court a quo's approach the first application, despite being granted, would obviate the need for granting the second one even if the losing party had a substantially better application and could establish a better resourced hospital.

[30] In sum I conclude that the high court was correct in its finding that necessity was the sole criterion for determining the grant of 'permission in writing' under regulation 7(2)(i). It however erred in concluding that necessity is determined by reference to a particular site or premises.

[31] Ground (c) is based on the submission that approval can only be granted in respect of an application that identifies a particular site. I have to some extent touched on this subject in the discussion of the requirement of necessity. Relying on the provisions of regulation 7 (underlined at the start of the previous ground of review), the high court held that since an applicant to establish a private hospital cannot prepare any premises for use as a private hospital without the approval of the HoD, this implicitly requires premises to be identified before approval may be granted. It stated that this is unequivocal and makes commercial sense. It is impossible, said the court, to assess the necessity of a private

hospital unless a property in a particular area is identified. The court held that since the appellant had not secured a property on which the private hospital is to be located, it had not complied properly with the regulations. In its view the appellant's application was therefore incomplete and this was also evidence of its unpreparedness to establish a private hospital. Saying as the appellant did, that the hospital property will have 450 parking bays and will serve the greater Mogale area was, in the court's view, not sufficient to comply with regulation 7(1).

[32] In this respect, I think, the court erred. The obtaining of premises is only to be dealt with under regulation 4[8] dealing with the registration process and not the regulation 7 approval process.

[33] The interpretation favoured by the court a quo does not make commercial sense. A prospective proprietor can only specify premises once it has bought it. It would make no sense to buy premises when there may not even be an approval. Acquisition should only take place once there has been approval. I do not think that it is necessary to specify premises on the application. Necessity is to be addressed for the general area in which the private hospital is to be located. It would stand to reason that a private hospital would have to be established in an area that honours the necessity identified in the application and by the HoD.

[34] Ground (d), is the conclusion that the appeal was not 'lodged' as required by regulation 56. The complaint here was that the appellant was

[8]Regulation 4(1) reads:
'A private hospital or unattached operating-theatre unit shall not be registered as such and no certificate of registration shall be issued in respect thereof, unless ─
(1) the premises on which a private hospital or unattached operating-theatre unit is or is to be conducted and the equipment which is used or is intended for use in such private hospital or unattached operating-theatre unit are suitable and adequate for the purposes of the said private hospital or unattached operating-theatre unit.'

required to serve a copy of its appeal on the respondents and the failure to do so meant that the appeal had not been lodged in accordance with regulation 56. This ground of review was upheld by the high court.

[35] Regulation 56 provides as follows:

'An appeal in terms of regulation 55 shall be lodged within seven days of the decision appealed against having come to the knowledge of the proprietor or prospective proprietor, as the case may be, and shall clearly state ─

(1) against which decision such appeal is lodged; and

(2) the grounds on which such appeal is lodged.'

[36] Regulation 57, in turn, provides as follows:

'Any appeal in terms of these regulations shall be lodged with the Head of Department, who shall submit it to the Minister together with his reasons for the decision against which the appeal is being lodged.' (My emphasis.)

[37] There is nothing in regulation 56 and 57 to indicate that, for an appeal to be 'lodged', it must be lodged with the affected party. On the contrary regulation 57 explicitly provides that an appeal 'shall be lodged with the Head of Department', thus suggesting the exclusion of any duty on the appellant to serve on another party.

[38] In truth, the respondents' complaint is that they were not afforded a fair hearing ─ an issue that has already been conceded by the appellant. Because they were not heard the procedure adopted by the MEC and his Appeal Advisory Committee was unfair and the decision fell to be set aside on that basis.

[39] The appellant however disputes that this meant that the appeal, had not been validly 'lodged'. On the plain reading of regulation 57 the

appeal had to be lodged with the HoD who had to submit it to the Minister. It follows, I think, that the duty to ensure fairness rested on the MEC and his Appeal Advisory Committee to ensure service on the affected party, namely the respondents in this case.[9] In the result this ground, too, should not have been upheld.

The question of substitution

[40] The respondents asked that the high court should review and set aside the decision of the MEC and substitute its own decision, effectively reinstating the initial approval of their application.

[41] There can be no question that, if it is accepted that necessity is the only criterion at the prior approval or 'permission in writing' stage, then the respondents have at least prima facie met the threshold requirement and there would be no reason for the HoD not to consider their application if the matter is referred back to him for reconsideration. But, by the same token, if it is accepted that necessity is not determined by reference to the acquisition of an identified premises, the appellant itself has also established necessity and there will be no reason for its application not to be considered when the matter is referred back to the HoD. All what this says is that, on the question of necessity the playing field as between the appellant and the respondents, is level. No one has an advantage over the other. Both have met the threshold requirement of necessity. So the respondents have not succeeded on the first three grounds of review and have not achieved any significant success on the ground of necessity when their situation is matched against that of the appellant. The respondents have however succeeded on the ground of

[9]Cf *Biowatch Trust v Registrar, Genetic Resources & others* 2009 (6) SA 232 (CC) para 23.

procedural unfairness which entitles them to a remittal of the matter to the MEC for the two applications to be considered a fresh.

[42] I do not think that they are entitled to an order of substitution. The starting point is PAJA, which makes it clear that orders of substitution are only granted 'in exceptional cases'.[10] This is consistent with what this court has said in this regard:

'An administrative functionary that is vested by statute with the power to consider and approve or reject an application is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The court typically has none of these advantages and is required to recognise its own limitations. . . .That is why remittal is almost always the prudent and proper course.'[11] (My emphasis.)

[43] The high court considered that in this case remittal would serve no purpose as the result would be a foregone conclusion because the decision makers (HoD/MEC) will be placed in the same position, with regard to the same set of facts, as regards the two parties.[12] The appellant takes issue with this conclusion and contends that the present case involves no forgone conclusion at all. Relying on Hoexter as authority it argues that an administrative functionary is always better equipped than a court to make the right decision. The learned author concludes that 'remittal is almost always the prudent and proper course.'[13]

[44] There is also a further hurdle facing the respondents in their quest for an order of substitution. It is the type of relief that, according to PAJA

[10]Section 8(1)(*c*)(ii)(*aa*) of PAJA.
[11]*Gauteng Gambling Board v Silverstar Development Ltd & others* 2005 (4) SA 67 (SCA) para 29.
[12]Hoexter *Administrative Law in South Africa* (2007) at 489, relying on *Johannesburg City Council v Administrator, Transvaal & another* 1969 (2) SA 72 (T) at 76D-E.
[13] Fn 14.

is only granted in exceptional circumstances.[14] None have been shown to exist in this case.

Conditioned Counter Review application

[45] The appellant's counter-review application was conditional upon any of the respondents' four grounds of review succeeding. The respondents having failed on the grounds relied upon the appellant's conditional counter application for review falls away.

Costs

[46] The assessment of costs in this matter is something of a conundrum because each of the parties won and lost something along the way during the various stages of this litigation. Any costs order contemplated by this court must of necessity be tempered by those vicissitudes in the exercise of its discretion. What follows is an attempt to examine the respective positions of the parties and their entitlement or otherwise to costs. As to the first, second and third respondents, they were entitled to be heard in the internal appeal process before the Appeal Advisory Committee of the MEC. They were unfairly denied the right to be heard. It was common cause between the parties at that stage that the decision of the MEC and his appeal body could not stand because of procedural unfairness. However, the respondents' persistence in seeking to obtain a substitution order was ill advised as this judgment has demonstrated. It follows that they have to bear the costs incurred by the appellant.

[47] As to the costs of the appeal to this court, the appellant has succeeded in the main, and such costs must therefore be borne by the

[14] Fn 12.

respondents. Their quest to obtain an order of substitution was unsuccessful and, in that respect, the appeal exercise achieved nothing.

[48] In respect of the appellant, it was not to blame for the prejudice which the first, second and third respondents suffered as a result of the procedural unfairness meted out to them by the MEC and the Appeal Advisory Committee so the appellant's costs incurred up to the concession should be borne by the MEC.

[49] In the result the following order is made.

1. The appeal is upheld with costs, including the costs of two counsel.
2. The order of the high court is set aside and replaced with the following:

'2.1 The appeal decision of the second respondent dated 28 June 2007, is reviewed and set aside.

2.2 The matter is remitted to the second respondent for reconsideration of the fifth respondent's appeal.

2.3 The second respondent is directed to invite the first, second and third applicants, and also the fifth respondent to make such written representations as they deem appropriate on the appeal. Such submissions shall be sent to the other parties involved in the appeal.

2.4 The first, second and third applicants, jointly and severally, are ordered to pay the costs of the fifth respondent in the application, such costs to include the costs of two counsel.'

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K K MTHIYANE

JUDGE OF APPEAL

Cachalia JA (Maya, Bosielo and Seriti concurring):

[50] I concur with the order of Mthiyane JA, but I reach that result through a different path.

[51] This appeal arises out of applications by the first to third respondents (to whom I shall for convenience refer to only as Pinehaven) and the appellant (Phodiclinics) to the Gauteng Department of Health to establish private hospitals in the Mogale City area. These applications were made in terms of the regulations[15] governing the establishment of private hospitals. The Head of Department (HOD) approved only Pinehaven's application. Phodiclinics appealed to the Member of the Executive Council and his Appeals Advisory Committee (the MEC). He upheld the appeal by revoking the approval granted to Pinehaven and withdrew the decision declining the Phodiclinics application. He also invited the parties to re-apply to the HOD to adjudicate their applications afresh.

[52] Pinehaven then launched review proceedings in the South Gauteng High Court Johannesburg, before Saldulker J to have the MEC's decision reviewed and set aside. It also sought an order that the MEC's decision be substituted with the HOD's approval of its application. In effect it sought an order reinstating the HOD's decision in its favour.

[53] When the matter came before the high court, it was common cause among all the parties that the MEC's decision fell to be reviewed and set

[15]The regulations were promulgated in terms of the Health Act 63 of 1977 and were published under GN R696, *GG* 6928, 3 April 1980.

aside on the ground of procedural fairness. This was because the MEC had not heard Pinehaven before revoking the HOD's approval of its application. The parties also agreed that the order which ordinarily would follow from the decision being set aside on this ground was a remittal to the MEC. However, Pinehaven pressed on with four further grounds of review because it was of the view that if the review was upheld on any of those grounds, this would entitle it to an order of substitution. Phodiclinics strenuously contested each of the four grounds, as it did the prayer of substitution.

[54] The high court upheld all the contested grounds of review and granted the substitution order that Pinehaven sought. It also dismissed a conditional counter-review application`n by Phodiclinics against the HOD's initial decision. Phodiclinics now appeals against the high court's order, with its leave.

[55] The four grounds of review were: first, Phodiclinics was not competent to appeal to the MEC against the HOD's decision to approve Pinehaven's application because the applicable regulation gave it no right to – in other words the appeal was invalid; the second ground, which is advanced as an alternative to the first, was that Phodiclinics did not 'lodge' or serve the appeal on Pinehaven as the regulations required, thus also rendering the appeal invalid; third, the regulations specified that 'necessity' was the sole criterion for determining the grant of an approval for a hospital, and the MEC failed to appreciate this when he took other considerations into account – notably the parties black economic empowerment credentials – in arriving at his decision; and finally, that only Pinehaven's application to establish a hospital was valid because the regulations required an applicant to identify a particular site or premises

for this purpose, which Pinehaven had done and Phodiclinics had failed to.

[56] As I have mentioned, Phodiclinics has already conceded the review on the ground of procedural fairness and also accepts that the matter should be remitted to the MEC to conduct a fair hearing. It seems to me, therefore, that the essential dispute in this case is less about whether there is any merit to any of the review grounds, but rather about whether substitution is the appropriate order if Pinehaven succeeds with any of its further grounds.

[57] The law on this point seems fairly well settled: The Promotion of Administrative Justice Act 3 of 2000 makes clear that orders of substitution are only granted 'in exceptional cases'.[16] This is consistent with what this court has said about substitution:

'An administrative functionary that is vested by statute with the power to consider and approve or reject an application is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The court typically has none of these advantages and is required to recognise its own limitations . . . That is why remittal is almost always the prudent and proper course.'[17] (Emphasis added.)

[58] So, Pinehaven has a high bar to overcome. Moreover, as Hoexter explains in reviewing the cases, '[f]airness to both sides has always been and will almost certainly remain an important consideration in this regard'.[18]

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[16] Section 8(1)(c)(ii)(aa) of PAJA.
[17] *Gauteng Gambling Board v Silverstar Development Ltd & others* 2005 (4) SA 67 (SCA) para 29.
[18] Hoexter *Administrative Law in South Africa* (2007) at 489, relying on *Johannesburg City Council v Administrator, Transvaal, & another* 1969 (2) SA 72 (T) at 76D-E.

[59] The crux of the high court's reasoning in granting the substitution order was that the result would be a foregone conclusion if the matter were referred back to the MEC. Whether the decision would be a foregone conclusion is clearly a relevant factor in determining whether to grant substitution. And I shall bear this in mind when considering each of the review grounds.

[60] It is evident that whether or not substitution is an appropriate order depends upon the basis upon which a review is upheld. To cite an obvious example, if a review is upheld on the ground that a decision-maker had no power to consider the matter, or was biased, it would make no sense to refer the matter back to him to reconsider the matter. On the other hand, if he had the power to make the decision but adopted an unfair procedure in arriving at the decision, or failed to apply his mind properly, it would ordinarily be appropriate to remit the decision to him for reconsideration so that he applies his mind properly and decides the matter in accordance with a fair procedure.

[61] In the instant case, if we were to hold either that the Phodiclinics application to the Department, or its appeal to the MEC, was invalid an order for substitution would follow unavoidably. The reason is, again, obvious: if its initial application was invalid the Department would only have had to consider Pinehaven's application; if the appeal to the MEC was invalid because Phodiclinics was not competent to appeal, the MEC would not have had the power to entertain the appeal. In either case a referral back to the MEC would serve no purpose because the result would be inevitable – Pinehaven's approval by the HOD would have to be confirmed.

[62] So, subject to what I shall say about the second ground of review – the 'lodgement' point – if the first two grounds are upheld on the basis that the appeal was invalid, as Pinehaven contends it was, a substitution order would follow. Similarly, if the fourth ground – the Phodiclinics application did not identify a suitable premises – is good, this would also mean that Pinehaven's application was the only valid application before the HOD and, again, a substitution order would have to follow.

[63] I have some difficulty in understanding why Pinehaven persisted with, and the high court decided, the third ground of review – that when the MEC considered the Phodiclinics appeal, he failed to realise that the regulations required him to consider 'necessity' as the sole criterion for determining the grant of an approval for a hospital.[19] Because, once it was conceded, quite properly, that the appeal proceedings were unfair as Pinehaven had not been heard, and that the MEC's decision fell to be reviewed and set aside on this ground alone, it did not matter whether or not the MEC applied the regulations correctly. The proceedings were a nullity, and the appropriate order was a remittal to the MEC, which Pinehaven conceded before the matter was argued in the high court. This ground of review therefore falls away.

[64] I revert to the second ground of review, that Phodiclinics did not 'lodge' the appeal properly in terms of the relevant regulations because it failed to serve a copy of the appeal on Pinehaven. As indicated earlier, this ground was relied on only as an alternative to the first ground, the assumption being that if it were to be upheld it would follow that the Phodiclinics appeal would have been be invalid. But this assumption is not correct.

[19] The regulation in question – reg 7(2)(i) – is quoted at para 70 below.

[65] The regulation in question – reg 57 – requires an appeal to be 'lodged with the Head of Department, who shall submit it to the [MEC] . . . .' This Phodiclinics did. But, Pinehaven submits that the regulation ought to be interpreted in a manner consistent with the right to fair procedural action, which means that Phodiclinics ought to have served the appeal on Pinehaven too. Pinehaven's real complaint, therefore, is that it was not notified of the appeal, which means that the hearing was conducted unfairly in its absence.

[66] The clear language of the regulation does not appear to impose any duty on an appellant to serve the appeal on an interested party. Rather, it suggests that this duty rests with the HOD, or perhaps the MEC. For present purposes I need not decide this question and shall assume in Pinehaven's favour that its interpretation of the regulation is correct. It, however, does not follow that because Phodiclinics did not serve a copy of its appeal to the MEC on Pinehaven that its appeal was invalid, thus entitling Pinehaven to an order of substitution; it means only that the MEC's decision ought to be set aside because he did not adhere to a fair procedure, which has already been conceded. And, the usual order that follows would be a remittal to the decision-maker to conduct a fair hearing, which the parties agreed would be appropriate in these circumstances.

[67] What remains are the first and fourth grounds of review, which as I have said earlier would, if successful, entitle Pinehaven to an order of substitution. I proceed to the first ground, whether Phodiclinics was competent to appeal against the HOD's approval of Pinehaven's application. This turns on a construction of reg 55, which provides:

‘The proprietor or prospective proprietor of a private hospital . . . may appeal in writing to the [MEC] against any decision made by the Head of Department in terms of any provision of these Regulations in respect of such proprietor or prospective proprietor, as the case may be, of a private hospital . . . .’

[68] Phodiclinics submits that from a plain reading of the regulation its application to establish a private hospital made it a ‘prospective proprietor of a private hospital’, and the HOD’s adverse decision against it gave it a right to appeal to the MEC against that decision. Pinehaven, on the other hand, contends that Phodiclinics had a right to appeal only against the HOD’s decision refusing its application, but not the decision to approve Pinehaven’s application. This is so, the submission proceeds, because the regulation permits an appeal against a decision only ‘in respect of such . . . prospective proprietor’. Seen in this way it is contended that at best for Phodiclinics, it is a third party or objector – not a prospective proprietor – and the regulation gives no right of appeal either to a third party or to an objector against the HOD’s ‘prior approval’ of Pinehaven’s application.

[69] However, for Pinehaven to succeed in its submission it would have to show that the HOD made two separate decisions, one being the ‘prior approval’ of Pinehaven’s application, and the other, the subsequent refusal of the Phodiclinics application. It persuaded the high court that this is in fact what happened. But, I disagree that there were two distinct decisions. As Mthiyane JA has pointed out in para 19 of his judgment there was only one composite decision involving both applications. I concur with his reasoning. The effect of this conclusion is that the decision to grant the approval to Pinehaven and not to Phodiclinics made the decision one ‘in respect of’ both Pinehaven and Phodiclinics as

prospective proprietors. Phodiclinics, therefore, clearly had a right to appeal to the MEC, and this ground of review must fail.

[70] Pinehaven's fourth and final ground of review is that in its application to establish a hospital, Phodiclinics failed to identify the particular site or premises where it intended to establish its proposed hospital. This, it submitted, was what regs 7(1) and 7(2)(i) required. Its failure to comply with a peremptory provision in the regulation, therefore, invalidated the Phodiclinics application. Regulation 7 reads as follows:

'(1) No person shall erect, alter, equip or in any other 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.

(2)(i) Any person intending to establish a private hospital or an unattached operating-theatre unit shall first obtain permission in writing from the Head of 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.

(ii) 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.

(4) Permission and approval in terms of regulation 7 are not transferable.' (Emphasis added.)

[71] The regulations do not read easily. There was, however, no attempt before us to impugn them on the ground of vagueness. So, some sensible interpretation must be given to them. It seems, at first blush, that if one reads regs 7(1) and 7(2)(i) together, the *permission* relating to the *necessity* for a private hospital in reg 7(2)(i), and the *prior approval* to *prepare any premises for use as a private hospital* in reg 7(1) requires the

determination of the necessity for a hospital to relate to particular premises. This is the construction the high court gave to the regulations.

[72] But this interpretation, with respect, makes little sense because there appears to be no purpose in linking the determination of the need for a hospital to particular premises. Whether a hospital is erected at particular premises or some nearby premises can hardly be relevant to the question of whether or not there is a need for a hospital in some area or locality. The learned judge in the high court thought that the identification of particular premises made commercial sense.

[73] I hold a different view. I think it makes little commercial sense for an applicant intending to establish a hospital to first have to purchase premises or a site before its application can be approved. It seems that provided the applicant identifies the area or locality where it intends establishing the hospital with sufficient specificity, this would be sufficient to satisfy the ‘necessity’ requirement in reg 7(2)(i).

[74] A close reading of the regulations lends support to this construction. Regulation 4(1) also has a bearing on this exercise. It says that a private hospital cannot be ‘registered’ unless the premises on which the private hospital is situated is ‘suitable’. The suitability of premises is thus a matter dealt with in reg 4, not reg 7. According to reg 7(2)(ii), which is quoted above, it is only after permission is granted to establish a hospital under reg 7(2)(i), that the applicant must complete a form (Form 1) and submit plans for approval. Form 1 is concerned with the application for registration and, it seems, that registration is only possible if the ‘situation’ of the premises (street, locality, town) is described. The

plans for approval in reg 7(2)(ii) can only refer to the approval in reg 7(1).

[75] The scheme of the regulations therefore envisages the following process: first, an applicant for a private hospital must establish the need or necessity for such a hospital in a particular area. The area or locality must be described in the application with some specificity but need not identify, at this stage the exact site or premises; second, if permission is granted, the applicant applies for registration of the hospital and for this purpose the situation of the premises, and its suitability are relevant; finally if the Department grants the registration, the applicant may 'erect' or in some other way 'prepare' the premises if it obtains the 'prior approval' of the HOD.

[76] The Phodiclinics application described the area for the intended establishment of a private hospital, in Mogale City, as having a population of some 200 000 people, which is located close to freeways, the Hartebeespoort Dam and other developments in the area. In my view, this information was adequate to determine the necessity or need for a hospital in this area; if the Department deemed it inadequate, it could have called for more specific information to narrow down the location. So, I do not think that Pinehaven has shown that the Phodiclincs application was invalid because it did not identify particular premises. It follows that this ground of review also has no merit.

[77] In summary only two of the four grounds of review, namely the competence of the appeal (ground 1) and the invalidity of the application for failure to specify premises (ground 4), would, if successful, have resulted in an order for substitution. There was no merit in either. Ground

2, in truth, amounted to no more than the conceded failure by the MEC to adhere to a fair procedure, and ground 3 fell away. It follows that the appeal must succeed.

[78] Because the counter-review application by Phodiclinics was conditional upon Pinehaven obtaining a substitution order, which it has failed to, it is not necessary for us to entertain this matter any further.

[79] Regarding the costs of the appeal, the parties agreed that if either party enjoys substantial success, it would be entitled to its costs. This Phodiclinics has achieved and, therefore, should be allowed its costs.

**A CACHALIA**
**JUDGE OF APPEAL**

APPEARANCES

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|---|---|
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