IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: A936/2014

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED. ✓

16/9/15
DATE

SIGNATURE

16/9/2015

In the matter between:

ARWYP MEDICAL CENTRE (PTY) LTD	**APPELLANT**
And	
THE MINISTER OF HEALTH SERVICES IN HIS/HER CAPACITY AS HEAD OF THE NATIONAL DEPARTMENT OF HEALTH	**1ST RESPONDENT**
THE MEMBER OF THE EXECUTIVE COUNCIL IN HIS/HER OFFICIAL CAPACITY AS HEAD OF THE DEPARTMENT OF HEALTH AND SOCIAL DEVELOPMENT, GAUTENG	**2ND RESPONDENT**
THE DIRECTOR-GENERAL OF THE NATIONAL DEPARTMENT OF HEALTH IN HIS/HER OFFICIAL CAPACITY	**3RD RESPONDENT**

THE HEAD OF THE DEPARTMENT OF HEALTH AND SOCIAL DEVELOPMENT IN HIS/HER OFFICIAL CAPACITY	**4TH RESPONDENT**
THE CHAIRPERSON: APPEAL ADVISORY COMMITTEE IN HIS/HER OFFICIAL CAPACITY	**5TH RESPONDENT**
LEBONENG HOSPITAL (PTY) LTD	**6TH RESPONDENT**

JUDGMENT

Fabricius J,

1.

This is an appeal against the order granted by Phatudi J in this Court on 16 April 2014.

2.

During the argument we heard and debated certain points *in limine* which were raised on behalf of the Sixth Respondent, which I will deal with hereunder after I briefly set out the background to the proceedings.

3.

The Applicant launched a review application in which it sought the setting aside of the decision by the relevant Respondents granting the Sixth Respondent's application to erect a private hospital or unattached operating theatre unit known as Leboneng Hospital. The Applicant also sought an extension of the 180 days period referred to in ***s. 9 (1) (b) of the Promotion of Administrative Justice Act 3 of 2000.*** In the Founding Affidavit, the Applicant referred to certain time periods relating to either incomplete documentation available to it, and/or the availability of Counsel to draft the actual review application. It therefore requested the necessary extension referred to in the mentioned section of the ***Act.*** During argument before us however

Mr T. Strydom SC submitted that an actual condonation was not necessary inasmuch as the Applicant had brought the proceedings within time. In the light of my findings on the two other issues raised and debated, it is not necessary to deal with this issue any further.

4.

Background facts:

The Appellant is a holder of a hospital licence and conducts a hospital in the Kempton Park area, nearby Oliver Tambo Airport. The Sixth Respondent applied for a hospital licence for a private hospital to be situated near this airport (in fact 20km away in Boksburg), and after the application was initially not approved, the Appeals Advisory Committee of the Department of Health and Social Development: Gauteng, approved the hospital licence on 14 January 2010. After invoking the provisions of the ***Promotion of Access Information Act 2 of 2000***, and having complete documentation on 24 October 2011 (so it was argued), the Appellant approached the Court during February 2012 seeking the setting aside and reviewing of the

decision by the Appeals Advisory Committee awarding the hospital licence to the Sixth Respondent. Only the Sixth Respondent opposed this application. The application was heard by Phatudi J on 16 April 2014 who dismissed it on the sole basis that the Appellant did not have *locus standi*.

5.

Locus standi:

It is common cause in these proceedings that the Sixth Respondent was acting in its own interest when it applied for the licence in 2006. In the review application, it was contended that the decision of either the Appeals Advisory Committee, alternatively that of the other Respondents was administratively "unfair and unlawful", as it was put. In its Founding Affidavit, the Appellant stated that its Attorneys addressed a letter to the Second Respondent's MEC on 16 February 2007, requesting that the concerns of the existing stakeholders of private hospitals in the Kempton Park area be considered before granting of further hospital licences and/or operating facilities. It was pointed out that the Appellant's investments and the

requirements of "certificates of need" as well as the density of the area should be taken into account. Receipt of this letter was acknowledged by the Second Respondent on 20 April 2007. The Second Respondent confirmed that one application had been received for a 200 bed hospital at the property in issue. It was Appellant's case that it was denied the right, as an affected party, to consider the Sixth Respondent's application or to make any representations in that context. ***Section 1*** of the ***Promotion of Administrative Justice Act*** defines "administrative action" as a decision which must "adversely" affect the rights of any person. ***Section 3 of the Act*** deals with procedurally fair administrative action affecting any person and s. 3 (1) states that: "Administrative action which materially and adversely (I underline) affects the rights or legitimate expectations of any person must be procedurally fair." The Founding Affidavit is completely silent on how the relevant administrative action materially and adversely affected the rights of Appellant. The only relevant facts referred to in the Founding Affidavit are that the Appellant is the holder of a hospital licence and operates a hospital in the Kempton Park area. In his judgment the learned Judge a quo referred to ***Giant Concerts CC vs Raynaldo***

Investments (Pty) Ltd and Others 2013 (3) BCLR 251 (CC), where it was said that "the own-interest litigant must therefore demonstrate that his/her interest or potential interest are directly affected by the unlawfulness sought to be impugned." The Court found, and correctly so, that the Applicant's medical centre and that in Leboneng were 20km apart, and further that Applicant in the proceedings before him had failed to demonstrate that Leboneng's 200 bed private hospital would adversely affect their business. On that basis he held that Applicant had not shown the necessary *locus standi*. In ***Giant Concerts CC*** supra, the Constitutional Court said (at par. 30) that the Supreme Court of Appeal had rightly suggested that "adversely affects" in the definition of administrative action was probably intended to convey that administrative action is action that has a capacity to affect legal rights, and that impacts directly and immediately on individuals. The effect of that was that ***Giant***, as an own-interest litigant, had to show that the decisions it sought to attack had the capacity to affect its own legal rights or its interests. It is also clear from the judgment that interest that must be shown must be real, and not hypothetical or academic. The conclusion that can be gleaned from the judgment is that an own-

interest litigant must demonstrate that his or her interests or potential interests are directly affected by the unlawfulness sought to be impugned. To this I may add that in ***Joseph and Others vs City of Johannesburg and Others 2010 (4) SA 55 (CC),*** the Court held that the phrase "materially and adversely affects" means that the relevant administrative action had a significant effect. There is no such evidence at all to be found in the affidavits before us, and as a result the reasoning and the order of the Court a quo cannot be faulted. I therefore find that the Appellant had no *locus standi* in the proceedings.

6.

Mootness:

Section 16 (2) (a) (i) of the Superior Courts Act No. 10 of 2013 provides that, when at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone. The parties were given an opportunity to present written representations in this context as required by the provisions of *s. 16 (1) and (2)*

(b). The Sixth Respondent said in the Answering Affidavit that "since the grant of the Sixth Respondent's permission to establish the hospital, significant work has been done. Doctors have been recruited, the hospital has been designed, and substantial costs towards architects, engineers and surveyors have been incurred. The architectural design has just about been completed. It is the intention to commence construction by 1 October 2013." In the Replying Affidavit the Appellant alleges that the Sixth Respondent has not yet rezoned the property from agricultural to residential in terms of the Boksburg Town Planning Scheme. If that is so, on the Appellant's own version, none of its interests or potential interests can be said to be directly affected by the unlawfulness sought to be impugned. On its own version therefore, none of its rights or interests had been affected at all by the decision that it seeks to set aside. It is therefore abundantly clear that our setting aside of the relevant decision cannot possibly have any practical effect. The Constitutional Court in the ***Giant Concerts CC*** decision supra, has stated that the interest relied upon must be real and not hypothetical or academic. The result is that the appeal can therefore be dismissed on this ground alone.

7.

Accordingly the following order is made:

The appeal is dismissed with costs including the costs of Senior Counsel.

JUDGE H.J FABRICIUS
JUDGE OF THE HIGH COURT GAUTENG DIVISION PRETORIA

And

I Agree

JUDGE M. W. MSIMEKI
JUDGE OF THE HIGH COURT GAUTENG DIVISION PRETORIA

And

I Agree

JUDGE P. M. MABUSE
JUDGE OF THE HIGH COURT GAUTENG DIVISION PRETORIA