CASE NO. SA 23/2004

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

THE MINISTER OF HEALTH & SOCIAL SERVICES APPELLANT

And

EBERHARD WOLFGANG LISSE RESPONDENT

CORAM: O'Linn, A.J.A., Chomba, A.J.A. et Gibson, A.J.A.

HEARD ON: 22/06/2005

DELIVERED ON: 23/11/2005

APPEAL JUDGMENT

O'LINN, A.J.A.: This is a judgment on an appeal by the Minister of Health and Social Services against the whole of the judgment of Mainga J delivered on the 8th December 2004 in the Court *a quo*, being the High Court of Namibia.

For the purpose of convenience, I have divided this judgment into sections being:

I: INTRODUCTORY REMARKS.

II: THE REASONS FOR THE MINISTER'S DECISION AND ANALYSIS THEREOF.

III: THE LAW APPLICABLE.

IV: FINAL CONCLUSIONS AND REMARKS.

I: INTRODUCTORY REMARKS:

I will hereinafter refer to the appellant and respondent respectively as the Minister and Dr Lisse. The Hospital and Health Facilities Act 36 of 1994, will hereinafter be referred to as "the Act".

Mr Khupe appeared before us for the Minister instructed by the Government Attorney and Mr Corbett, instructed by Engling Stritter and Partners, for Dr Lisse.

The background to this appeal can be summarized as follows:

1. Dr Lisse is a duly registered medical practitioner, a specialist obstetrician and gynaecologist and he is authorized to practice as such in terms of the Medical and Dental Professions Act, 1993 (Act 21 of 1993).

Dr Lisse was previously in the employ of the ministry of Health and Social Services for a total period of 14 years, inclusive of three (3) years of study leave which was granted to him to specialize in obstetrics and gynaecology.

On 31 December 2003 Dr Lisse resigned from the Ministry and opened up a private medical practice in Windhoek. He as a result obtained a license, in terms of Section 31 of the Act, to operate consulting rooms as an obstetrician and gynaecologist. He commenced his private practice during the month of January 1994. Dr Lisse conducts a large part of his practice at SWAMED Building but when surgical procedures have to be performed, he makes use of hospital facilities such as the operating theatres and patients have to be hospitalised at the said hospitals.

Since January 2004, fifty (50) percent of the medical procedures he has performed have been in State Hospitals, particularly the Windhoek Central Hospital.

Half of his patients are members of the State Medical Aid Scheme referred to hereinafter as PSEMAS. A private practitioner, such as Dr Lisse, is in terms of Section 17 of the Act, required to apply to the Minister for permission to engage in the treatment of patients and perform a medical procedure at State Hospitals. Dr Lisse did apply.

3. When the Minister refused to grant the required authority, Dr Lisse applied to the High Court of Namibia to review and set aside the decision of the Minister; to direct the Minister to issue a written authorization to the applicant in terms of Section 17 of Act 36 of 1994; and to pay to applicant the costs of the application.

4. Dr Lisse first approached the High Court for interim relief on the basis of urgency, but this application was rejected by Silungwe J on 1 July 2004. The grounds for rejection of such relief were summarized by the learned judge in the following words:

> "In conclusion and weighing up all the necessary considerations, it is apparent that the applicant had neither established a clear right nor a *prima facie* right to entitle him to the interim relief sought". (My emphasis added)

The main application then proceeded before Mainga J who granted the relief claimed. Thereupon the Minister appealed to this Court against the said judgment of Mainga J.

5. This appeal is against the whole of the judgment but the following grounds were specified in the notice:

> "GROUNDS OF APPEAL
>
> 1. The Honourable Court below, with respect, erred in its decision to set aside, on review, the Appellant's decision refusing the above-named Respondent authority to practise at a State Hospital in terms of Section 17 of the Hospital and Health Facilities Act, No. 36 of 1994, because of the Court's findings that:
>
> 1.1 the Respondent was not afforded a hearing, alternatively, a proper hearing, before the decision was taken;
>
> 1.2 the Applicant failed to appreciate the Respondent's right, alternatively, his legitimate expectation to a fair procedure and decision making;

1.3 the Appellant failed to apply her mind properly to the matter at hand when making the decision and;

1.4 the decision was, in all the circumstances, unfair, unreasonable and in conflict with Article 18 of the Namibian Constitution.

2. The Court below, with respect, also erred in its decision refusing the remittal of the mater to the Appellant for a reconsideration of the Respondent's section 17 (of the Hospitals and Health Facilities Act, 1994) application with an order that the rules of natural justice be observed to the extent that the Court ruled that they had not been observed. This was a matter wherein a remittal was proper and the Court erred when it found otherwise.

3. The Court below, with respect, also erred in ordering costs of suit against the Appellant as the particular circumstances of this matter did not warrant such order. The Appellant, in making the decision she made, had performed a statutory and public duty that she was obliged to, in accordance with the relevant legislation. Even if the Court had found fault with the decision making-process because of the effect of the particular constitutional provision (Article 18 thereof), this still was not a matter wherein costs had to follow the event."

6. The aforesaid section 17 lies at the heart of the dispute and is consequently quoted in full:

"17. (1) Subject to subsections (6) and (7), no practitioner who is not in the full-time employment of the Public Service shall –

(a) engage in the treatment of patients; or

(b) perform a procedure,

in a State hospital or state health facility except with the written authorization of the Minister.

(2) An application for authorization under sub-section (1) shall -

(a) be in writing;

(b) be signed by the applicant;

(c) be submitted to the Minister through the superintendent of the state hospital or supervisor of the state health facility where the applicant intends to practise;

(d) contain an undertaking by the applicant that he or she will comply with this Act and any rules or regulations applicable to that state hospital or state health facility; and

(e) conform to any other prescribed requirements.

(3) On consideration of an application submitted under subsection (2) the Minister may -

(a) reject the application; or

(b) grant the application unconditionally or on any one or more of the conditions that the applicant shall restrict his or her practice in the state hospital or state health facility to –

(i) the specified part of that hospital or health facility;

(ii) the specified type of treatment

(iii) the specified period or periods; or

(iv) such other conditions as the Minister may specify in the authorization.

(4) The Minister may at any time -

(a) withdraw an authorization granted under sub-section (3);

(b) amend any of the conditions in the authorization; or

(c) impose additional conditions in the authorization,

and shall notify the practitioner concerned in writing, of such withdrawal or change in the conditions.

(5) A practitioner who is aggrieved by -

(a) a decision of the Minister rejecting his or her application for authorization under this section;

(b) a condition imposed under subsection (3) or (4); or

(c) the withdrawal of an authorization under sub-section (4),

may after the expiry of six months from the date of the decision complained of, reapply to the Minister for the grant of authorization or for the amendment or withdrawal of the condition complained of, as the case may be, and the provisions of subsections (2) and (3) shall apply to an application under this subsection.

(6) Notwithstanding subsection (1) the superintendent of a state hospital may in the case of a patient requiring emergency treatment, permit a private practitioner to treat that patient in the state hospital without the Minister's authorization.

(7) Notwithstanding the provisions of subsection (1) the Minister may, subject to the Public Service Act, 1980, (Act No. 2 of 1980) enter into an agreement with a practitioner, whether or not such practitioner is employed in the public service, whereby he or she may treat private patients for his or her own profit, at a state hospital or state health facility, upon such conditions as may be specified in the agreement."

7. It is necessary at the outset to note that an applicant for authority must undertake in his standard application form to "comply with this Act and any Rules or Regulations applicable to that State Hospital or State Health Facility…"

Furthermore subsection (3) provides that the Minister may make his approval subject to certain conditions specified in the section and such other conditions as the Minister may specify in the authorization.

Even after authorization has been granted, the Minister has wide powers in terms of subsection (4) to add or amend the conditions and even withdraw the authorization.

Subsection (7) further provides for the Minister to enter into an agreement with a private practitioner to practice at a State hospital.

II: THE REASONS FOR THE MINISTERS DECISION AND ANALYSIS THEREOF.

1. The reasons for the Minister's decision were only supplied subsequent to her final decision and only when requested to do so by Dr Lisse and/or his legal representatives.

2. The first set of reasons were supplied by Mr Khupe, purportedly acting for the Government Attorney, in a letter with the letterhead of the Attorney-General dated 7th April 2004.

Mr Khupe not only wrote the letter, but appeared for the Minister in this matter in the High Court as well as before us. The letter read as follows:

> "**RE: NON-AUTHORIZATION: DR. E. LISSE**
>
> Please note that the Ministry of Health & Social Services has referred the above-matter to us with instructions that we respond to your letter to them dated 7th of April 2004.

Our client instructions are as follows:

1. your client's application has not been approved by the Minister and that decision has been communicated to him. Your client is free to appeal against the decision if he wishes to in the normal course;

2. your client knows the reasons for the non-approval but suffice to say that they include, *inter alia*;

   2.1 his commencing to practice at the Windhoek Central Hospital without the prior authorization from the Minister;

   2.2 the numerous complaints levelled at your client by medical personnel at the Windhoek Central Hospital and which complaints your client refused to address when asked to do so.

3. there is no urgency in the matter (arising from the Minister's rejecting his application) as your client can always make alternative arrangements for his "schedule commitments". Your client has always known of the complaints against him and the possibility of the Minister not approving his application.

4. your client must respect and abide by the Minister's decision and forthwith cease to practice at the aforesaid hospital as the Ministry will not allow it.

Those are our instructions at this stage and we must mention that we still are yet to obtain the full instructions from our client on this matter".

3. These reasons were not supplemented by or on behalf of the Minister in accordance with the provisions of Rule 53(1)(b) of the Rules of the High Court and she only attempted to justify these reasons and other new ones in her answering affidavit.

4. The letter by Mr Khupe had some strange, unsatisfactory and unacceptable features. I need to mention the following:

(a) In the first sentence it states that the matter has been referred to the attorneys by the Ministry of Health & Social Services with instructions to respond given by the Ministry. It is not alleged in this letter that the Minister gave the instructions and that these are the Minister's instructions.

There is a clear legal distinction between the concept "Minister" and "Ministry. It is therefore important and indeed necessary for parties in litigation and their legal representatives to keep the distinction in mind to avoid confusion. The "Ministry" can be defined as a department of state under a Minister: When a law provides that a Minister shall decide or act, the decision or act will be *ultra vires* and of no force and effect if performed by the Ministry.

(b) In the following paragraph marked "1", it is stated *inter alia*: "Your client is free to appeal against the decision if he wishes to in the normal course". Whether it is meant to be an "appeal" to the Minister or some other entity or an appeal merely existing in the imagination of the writer, is not disclosed.

(c) Paragraph 2 starts of with the allegation: "Your client knows the reasons for the non-approval but suffice to say that they include *inter alia*…"

On what ground it is bluntly stated that "your client knows the reasons…", is not disclosed. If it was meant to suggest that those reasons were the complaints by staff, received by Dr Vries, it makes no sense because at no stage prior to the decision, was Lisse informed or otherwise aware that the said complaints by staff would be submitted to the Minister and would become a decisive reason for the rejection of his application.

To go further and suggest that there are reasons other than those expressly stated in the letter, without disclosing those other reasons, is an abrogation of the principles relating to administrative fairness and justice, required by Art 18 of the Namibian Constitution, especially where this attitude is further demonstrated by the last sentence which reads: "Those are our instructions at this stage and we must mention that we are yet to obtain the full instructions of our client on this matter". (My emphasis added)

It appears from this reservation that the Minister and the Government Attorney representing her wished to use this *strategem* to keep the door open for other undisclosed reasons, as they may become necessary to bolster the case of the Minister. This attitude is also in conflict with the principles/and policy of transparency to which the Minister, the Attorney-General and Government Attorney are bound. The reasons, qualified in this manner and the attitude disclosed thereby, are also unacceptable to this Court,

particularly when, as in this case, no effort was made to supplement and/or correct the reasons in terms of the aforesaid Rule 53(1)(b).

(d) It appears for the first time from part of a record attached to the supporting affidavit of Dr Kalumbi Shangula, the Permanent Secretary of the Ministry of Health and Social Services, that Dr Vries, the under secretary and Dr Shangula had commented adversely on the application of Dr Lisse and that these adverse comments were submitted to the Minister for the purpose of deciding the Section 17 application.

It is clear that the Minister relied heavily on these adverse comments in making her decision. It follows that Dr Lisse at no stage prior to the Minister's decision had an opportunity to controvert the allegations and opinions of Dr Vries, Dr Shangula and the supporting opinion of the acting secretary. Furthermore, if Dr Lisse knew that the complaints of staff were submitted to the Minister and would be relied on by the Minister when making her decision, he would certainly have considered amplifying the written response he gave to Dr Vries.

It is consequently abundantly clear that the *audi alterem partem* rule was completely ignored.

5. The comments appearing on the application form preceding the signature of the Minister, reads as follows:

Dr J B Vries: "Dr Lisse is a very bad mannered person. Complaints by WCH staff were lodged against him and he was afforded the opportunity to respondent to them – being given a deadline. He never responded until he was stopped to use the facilities. He undermined authority. It is not recommended for him to be permitted to use the Windhoek Central Hospital facilities." This comment was dated 1/4/04.

Then followed the comments of the undersecretary whose name does not appear clearly from the record. He merely said:

"I concur", as if he was sitting in judgment in some Tribunal or other. The comment was dated 2/4/2004. There is no indication in his "concurrence" on what he relied. It seems that he blindly followed Dr Vries's comments.

Dr Shangula – the Permanent Secretary:

> "I concur with the recommendations of the Senior Medical Superintendent. These complaints have also reached my office. Dr Lisse can make use of private hospitals. He is not fit to work in a public hospital".

This comment was dated 2004/04/02.

The Minister on 5/4/04 signed the form after deleting the word "approved" and circling the words "not approved". She did not state any reason for her decision in the space provided. The reasons for the Minister's decision are stated by her for the first time in her answering affidavit.

It is clear from the documentation and her affidavit, that she did not have the views of Dr Obholzer before her and did not solicit such reasons at any time.

6. It is not in dispute that the application before the Minister was the second application by Dr Lisse, submitted through the office of Dr Vries, after Dr Lisse was told that the first application, submitted to the Minister through Dr Obholzer, got lost in the "Ministry's offices".

It is also common cause that the aforesaid first application was recommended by Dr Obholzer during the period in January – February when Dr Vries was on leave and Dr Obholzer acted in the place of Dr Vries as Superintendent of the hospital during the period when Dr Vries was on leave. It was never explained in the answering affidavit of the Minister how the first application got lost.

7. Nevertheless it is common cause, also confirmed in Dr Obholzer's answering affidavit, submitted in purported support of the Minister's case, as disclosed in such answering affidavits, that Dr Obholzer was strongly in favour of granting the application of Dr Lisse. He himself granted applicant leave to

commence using the hospital facilities immediately, pending authorization by the Minister.

Dr Obholzer is a senior official at the said hospital and is the Chief Medical Officer (Aneasthetics) at the hospital.

8. It follows from the above that even though a supporting affidavit was obtained from Dr Obholzer in the review proceedings in regard to the issue of Dr Lisse's authority to practice at the hospital, the Minister never consulted Dr Obholzer before deciding on the application. If and when Lisse's failure to first obtain the Minister's authority before practicing became a reason for the Minister's decision, Obholzer became a necessary witness. But the Minister never consulted Obholzer before she finally decided. The inference from this handling of the application is that either the ground that Dr Lisse practiced without the Minister's authority was an afterthought, alternatively the Minister's failure amounted to a grossly unreasonable and arbitrary action which was in total conflict with the provisions of Article 18 of the Namibian Constitution, as well as in total conflict with the principles which are part of Namibian common law. Such failure also demonstrates that the Minister failed to apply her mind as required by the common law.

The opinions and recommendations of Dr Vries, Dr Shangula and the Assistant Secretary which were relied on by the Minister and which were recorded on the

record of Dr Lisse's second application, as disclosed by Dr Shangula, were gravely defective. It will suffice to point out the following aspects:

9. Comments of Dr Vries in his "disrecommendation":

(i) "Dr Lisse is a very badly mannered person."

My comment:

It is assumed that this statement is based only on the written complaints by members of staff handed by Dr Vries to Dr Lisse on the 17 March 2004, because no other complaints were ever recorded; Dr Vries also did not indicate that he was also relying on his own experience and he did not refer to any specific incidents.

In the complaints the covering letter by A M Maswahu the Chief Matron, she herself says:

> "It would be more appropriate if an investigation would be carried out".

Neither Dr Vries nor the Minister ever acted on this recommendation and no "investigation was carried out".

The Chief matron further stated:

> "I would further mention that abuse of position, intimidation and manifestations of sexual harassment (more especially) at work are offences according to the Public Service Act (Act 13 of 1995)."

None of the specific complaints went so far as alleging or imputing "intimidation" or "manifestation of sexual harassment". No particulars were ever given of the author of such complaints, nor of when, where and in what manner these alleged "offences" were committed.

Mrs L Kaiyamo, described as "Principal Registered nurse" stated in the first paragraph of her complaint:

> "Dr A Lisse started working in our theatre during January 2004. Already at the beginning there was some doubt whether his registration for practice with our hospital was approved. We were instructed by the management to hold his list until further notice. Dr Lisse was not happy about that and wanted to book cases. He approached Dr Obholzer and Dr Obholzer gave him the go ahead until the registration papers were available. This was done orally and was communicated to us through management".

The issue of Dr Lisse practicing at the hospital without the Minister's consent was thus pertinently brought to the notice of Dr Vries and the Minister.

Nevertheless Dr Vries did not in his aforesaid comment on the application of Dr Lisse, refer at all to the issue of the failure of Dr Lisse to obtain the necessary authority to practice and the Minister did not at any stage give Dr Lisse the opportunity to explain this failure or any of the many allegations made against him relating to the allegation that he "is a very badly mannered person".

L K Kaiyamo, after setting out her complaints said:

> "Dr Lisse should understand that theatre staff at W C H Main theatre are now hesitating to help because he is a difficult person. If he can change his attitude it may lead to a healthy teamwork.
>
> We are still waiting for his preferences and will accord it to him if available and depends on what the hospital is providing". (My emphasis added).

Dr Lisse in his letter dated 29 March 2004 handed to Dr Vries as his response, replied in some detail to these and other allegations by Auguste Shaama, a registered nurse and Ms P N Langa respectively about an alleged "questionable prescription" and the sick leave authorized to a nurse Ms Mouton.

Dr Lisse *inter alia* stated:

> "With regard to Mrs Kaiyamo's letter I am not going to respond to details, since those allegations are stated generally incorrectly, distorted and are hearsay. I have however never been rude, not once raised my voice and am not provocative in my language or behaviour. I am of the opinion that I have the right to point out to the staff if I notice that there is a problem. And there are problems. Problems with competence, work ethics/attitude, maintenance and hygiene…" (My emphasis added)

In the last paragraph of his response Dr Lisse adopted a conciliatory tone when he said:

"All in all, I think one should not confuse Cause and Effect, but I wish to take this opportunity to assure you that I shall do my utmost to avoid future misunderstandings. In this regards I have decided to restrict moral communication with nursing staff as much as possible to the extent necessary to ensure patient care. You previously indicated to me that a meeting was to be held in the near future with all stakeholders with regards to list allocation and I would appreciate to be invited to this meeting with reasonable advance notice. I also would appreciate if you provided me with a complete written set of rules that private medical practitioners are expected to abide by at Windhoek Central Hospital. Can you perhaps provide me with a fax number under which my secretary can book my patients for the ward 3 East by fax?"

9. (ii) Dr Vries;

"Complaints by W C H Staff were lodged against him and he was afforded the opportunity to respond to them – being given a deadline. He never responded until he was stopped to use the facilities". (The emphasis is mine)

My comment:

It is necessary to distinguish between the actions of Dr Vries and the Minister. The Minister did not set a deadline. The deadline set by Dr Vries is from the date of his letter, i.e the 17th of March – 23 March. It is reasonable to calculate the time given for the response to run as from Thursday the 18th up to and including Thursday the 23, the time allowed would be six (6) days, including Saturday and Sunday and Monday the 21st, which was a holiday. This deadline for a busy professional to attempt to reply in writing to the large number of allegations, was grossly unreasonable. Furthermore it was not sanctioned by any law, regulation, code or practice.

Dr Lisse explained in his founding affidavit that he wished to reply as soon as possible but was very busy and tried to find time for examining any records and/or notes that may be available and to consider his response properly and could not meet the unilateral deadline imposed by Dr Vries.

On the 24th March he received a reminder. He only completed his response on the 29th March which was also the date of his written reply. He sent that reply to Dr Vries per registered post on the same day, i.e on the 29th March. The response was thus provided within seven (7) working days.

Notwithstanding the fact that the response was provided within a reasonable time, Dr Vries by fax notified Dr Lisse on the 31st March:

> "Please be informed that you are not permitted to use the Windhoek Central Hospital facility with immediate effect. You may continue to see your already admitted patients until their discharge.
>
> Please submit authorization by the Minister before permission will be given to you to again use the Windhoek Central Hospital facility."

It must be noted that after condoning the practice of Dr Lisse at the hospital during March 2004 after the return of Dr Vries from leave, Dr Vries also now allowed already admitted patients of Dr Lisse to stay until discharge, notwithstanding the

belated attitude of Dr Vries that only the Minister can grant authority for such practice.

But to return to Dr Vries's comment on the 2nd application by Dr Lisse referred to above. The allegation that Dr Lisse never responded until he was stopped to use the facilities was clearly untrue in view thereof that on the facts not in dispute, Lisse completed his reply on the 29th March, i.e two days before the fax from Dr Vries dated two days later, i.e the 31st.

This false allegation was used by Dr Vries to prove the allegation: "He undermines authority".

10. The allegations in the supporting affidavit of Dr Vries:

(i) "I stopped the Applicant for both his failure and/or refusal to respond to the complaints against him and his practicing at the State facility without the appropriate authorization. I considered his non-response to the complaints to be insubordination on the Applicant's part. I felt he was undermining my authority at the Hospital."

My Comment:

The allegation that Lisse was stopped on both grounds, is neither borne out by Vries's letter dated 31/3/04 nor by his "disrecommendation" dated 1/4/2004 to the Minister as it appears on the application form.

The letter of the 31st March 2004 is written under the heading of "non-authorization-yourself" and only deals with that subject whereas his recommendation dated 1/4/04, one day later, only deals with the complaints by staff and Dr Lisse's alleged non-response to the complaints.

Lisse prepared his written response dated 29th March 2004 and sent that to Dr Vries by registered post on the 30th March and gave a copy to Dr Vries on 1st April 2004. Lisse did not comment in his written response on the issue of his authority to practice because that issue had not been raised by Dr Vries up to that time.

Dr Lisse's written response read as follows:

> "**Confidential**
> Dear Sir,
> Your above letter refers.
>
> I note the form and dates of the attachments thereto and appreciate giving me sufficient time to formulate my response thereto.
>
> With regards to Mr Maswahu's letter I would like to state that besides that I object to the unfounded allegations and implications therein (and am reserving my options in this regards), I am not a member of the Public Service.
>
> With regards to Mrs Kaiyamo's letter I am not going to respond to details, since these allegations are stated generally incorrectly, distorted or are hearsay. I have however never been rude, not once raised my voice and am not provocative in my language or behaviour. I am of the opinion that I have the right to point out to the staff if I notice that there is a problem. And, there are problems. Problems with competence, work ethics/attitude, maintenance, and hygiene. Nonwithstanding that I do not believe that it is within the scope of practice of a Registered Nurse to

prescribe to a Specialist the choice of procedures he uses, the preferred procedure to treat ectopic pregnancies is by Video-Laparoscopy, i.e. Laparoscopy is not a daytime procedure only. It is quite incorrect that I have booked cases of ectopic pregnancy for Laparotomy only and then in theatre decided to perform a Laparoscopy, in fact I have booked every single case of ectopic pregnancy that I have performed in the last 3 months in Windhoek (in 3 of the 4 hospitals where this can be done) as Laparoscopy/Query-Laparotomy, and even managed to do remove an unruptured ectopic pregnancy by laparoscopic salpingostomy. I have yet to perform a single laparoscopy in Windhoek Central Hospital's theatre where all equipment is available, prepared, functional and where the staff working in my theatre is conversant with the procedure and the equipment. This is the case during and after hours, in the latter case however much more pronounced. In particular the floating nurse usually does not know the Insufflator, the light source and the video equipment. I don't know some of the machines either, which is why I did not want to modify settings. And, as it turns out, my approach is justified, since the camera apparently is broken since a month, causes unknown. In the same context I would like to point out that I am quite worried about the way the optics are being handled. Since the desinfectant solution and the CO2 are at room temperature, roughly 20 degrees below the patient's body temperature, the optic often condenses obstructing the view. It is common practice in theatre to boil water in a kettle and to use that water to warm up the optic. Nevermind that I have concerns about the effects this may have on the optics, I find this practice unacceptable from a hygienic standpoint, and have repeatedly requested to use sterile Normal Saline from the fluid warmers which are in theatre. With regards to my list, it was your very clear instruction not to take over Dr Baines' list, but let you decide which theatre list to allocate to me. You told me in no uncertain terms that this was your prerogative as a matter of principle. After my paperwork was completed I handed in the application to perform procedures at your office and was informed that you were on leave and to contact Dr Obholzer who was standing in. That Mrs Kaiyamo holds this against me is beyond my comprehension. However I would like to take this opportunity to point out that the current situation is difficult for me. I am to follow after Dr van der Colf on Tuesday and to finish before Drs Foertsch/Stellmacher. Not only is the list I have too short (since most of my patients are members of PSEMAS which are restricted to the Windhoek Central Hospital), the uncertainty of whether Dr van der Colf is going to do cases in a particular week can only be resolved one day before the actual list making scheduling difficult to impossible. The Windhoek Central Hospital is the only hospital I have ever worked in where it is difficult to book theatre cases. All other hospitals in Windhoek go out of their way to make available theatre time during and after hours to perform elective surgery. Probably since it is

> revenue generating. I am not asking to do hysterectomies on Saturday mornings, but D&Cs, Hysteroscopies, Laparoscopic Sterilizations and Dye Tests are cases which can be easily done outside working hours if there are no emergencies. Lastly it has come to my attention that there are bats in theatre.
>
> With regards to 3East, I have recently sent all my patients days to a week in advance to the ward with a typed letter so that all arrangements can be made in time. This apparently is not appreciated by the ward staff either so I don't understand what the problem is.
>
> With regards to Ms Langa, my recollection differs in several important aspects from her allegations, however I do not understand how this concerns your office.
>
> Lastly, my contemporary notes differ in several important aspects from Ms Shaama's allegations, and unless I am mistaken so do her own nursing notes in the hospital records. It is not my understanding that it is within the scope of practice of a Registered Nurse to approve of or interfere with a Specialist's management of premature contractions in a patient with incompetent cervix. I was however up to now unaware that another Specialist had interfered with the management my patient.
>
> All in all, I think one should not confuse Cause and Effect, but I wish to take this opportunity to assure you that I shall do my utmost to avoid future misunderstandings. In this regards I have decided to restrict my oral communication with nursing staff as much as possible to the extent necessary to ensure patient care. You previously indicated to me that a meeting was to be held in the near future with all stakeholders with regards to list allocation and I would appreciate to be invited to this meeting with reasonable advance notice. I also would appreciate if you provided me with a complete written set of rules that private medical practitioners are expected to abide by at Windhoek Central Hospital. Can you perhaps provide me with a fax number under which my secretary can book my patients for the ward 3 East by fax?"

Dr Vries may not have received the aforesaid written response per registered post by the time he wrote his "non-recommendation" dated 1st April on the Section 17 application to the Minister. But the aforesaid "non-recommendation" itself shows that he did receive the response before he made his non-recommendation because

he says in his aforesaid "non-recommendation": "He never responded until he was stopped to use the facility". It is common cause that this purported stopping took place on the 31st March 2004. The failure by Dr Vries to deal at all in his aforesaid "non-recommendation" with any of the points made by Dr Lisse in his defence, leads to the inference that Dr Vries probably ignored the response because it did not comply with his deadline. When he stated in his aforesaid "non-recommendation" that Dr Lisse only responded after being given notice on the 31st March that Lisse could no longer practice without the Minister's authorization, he misrepresented the facts, because he had received a copy dated 29th March 2004on the same day i.e 1st April 2004, on which he made his "non-recommendation".

10. (ii) The aforesaid misrepresentation was a serious misrepresentation. It was aggravated however when Dr Vries in paragraph 8 of his supporting affidavit to the Minister's answering affidavit in the application proceedings, alleged:

"Despite my reminder, the applicant did not respond."

In paragraph 9 Dr Vries stated:

> "I stopped the applicant for both his failure and/or refusal to respond to the complaints against him -------. I considered his non-response to the complaints to be insubordination on his part."

Not only was it a lie that Dr Lisse had failed or refused to respond, but the Vries conclusion that this amounted to insubordination is far-fetched if not plain nonsense. In this regard it must be remembered that Dr Lisse was a senior specialist medical practitioner and not a public servant or employee and had in fact responded in fair detail.

In paragraph 11 Dr Vries qualified his allegation in the preceding paragraphs 7, 8, 9 and 10 by now explaining:

"After I had stopped him he did submit his response to the complaints…"

Dr Vries however still misrepresented the position by alleging and/or insinuating that Dr Lisse only responded, after he was stopped to practice.

It is significant however that Dr Vries at least admits in his aforesaid affidavit that the response by Dr Lisse was delivered to his secretary the "day after he stopped Dr Lisse to practice, i.e on 1st April. But from then on Dr Vries knew that the response was dated 29th March, and must have been completed by the 29th and was thus prepared before the notice to stop practicing dated the 31st March, and not after such notice had been served.

10. (iii) In paragraph 15 Dr Vries once again as one of the two reasons for his disrecommendation states:

> "For the short period the applicant was at the hospital he gave the hospital and administrative staff many headaches."

He once again ignores Dr Lisse's side as set out in the written response of the 29th March and repeats his former misrepesentation and makes it even worse by alleging:

> "To aggravate the situation he refused to respond to the allegations against him when requested to do so."

Further in the paragraph Dr Vries says: "To me he did not deserve the privilege he was applying for."

Dr Vries here demonstrates a misconception also apparent from the attitude adopted and/or demonstrated by Dr Shangula and unfortunately also the Minister: The misconception is that Dr Lisse did not ask for favours and authority to practice was not a "privilege", but a right to obtain such authority in terms of Section 17, unless there were good reasons for not granting the authority.

10. (iv) In paragraph 16 Dr Vries says:

> "Despite his belated response, I felt he did not deserve a positive recommendation. His response was not satisfactory to me…"

Dr Vries fails to say why the response was "unsatisfactory" and one is left to infer that that may be the failure to comply with a deadline set unilaterally by him.

Dr Vries was not authorized by any law, regulation or code to ignore Dr Lisse's reply. There was no justification for the failure to consider the response of Dr Lisse in a reasonable and fair manner. Dr Vries adds insult to injury where he continues: "and my conclusion was that he had a serious behavioural problem and could not work properly with the staff at the Windhoek Central Hospital".

These insulting and grave allegations were again based on the written complaints of some members of the staff which were not on oath and not tested in any manner and made without considering Dr Lisse's reply. But worse than that:

10. (v) Apparently not even the conciliatory remarks of Mrs Kaiyamo and Dr Lisse's response were considered. Mrs Kaiyamo, a principal registered nurse concluded:

> "Dr Lisse should understand that theatre staff at Windhoek Central Hospital Main Theatre are now hesitating to help him because he is a difficult person. If he can change his attitude it may lead to a healthy teamwork. We are still waiting for his preferences and will accord it to him if available and depends on what the hospital is providing".

There is therefore no ground for saying or suggesting that all or most of the staff is unwilling to work with Dr Lisse. But without any proper investigation and hearing

of the complaints and the evidence against it, the blame cannot be properly established and apportioned.

It is also clear from the written reply of Dr Lisse, that notwithstanding his denial of the truth and/or substance of most of the complaints, Dr Lisse was willing to attempt to rectify the position. He said in the last paragraph of his written response of the 29th March:

> "All in all, I think one should not confuse Cause and Effect, but I wish to take this opportunity to assure you that I shall do my utmost to avoid future misunderstandings. In this regards I have decided to restrict my oral communication with nursing staff as much as possible to the extent necessary to ensure patient care. You previously indicated to me that a meeting was to be held in the near future with all stakeholders with regards to list allocation and I would appreciate to be invited to this meeting with reasonable advance notice. I also would appreciate if you provided me with a complete written set of rules that private medical practitioners are expected to abide by at Windhoek Central Hospital. Can you perhaps provide me with a fax number under which my secretary can book my patients for the ward 3 East by fax?"

The prejudice to appellant and his patients of the refusal, emerges *inter alia* from the content of the affidavit of Dr Vries where he says in paragraph 18.3 of his affidavit:

> "As a policy, the State Hospital does not turn away emergency cases whoever the patient belongs to. Applicants emergency cares will always be attended to as long as they are indeed emergencies except only that they will be attended to by other Doctors and not the applicant".

This prejudicial policy, subverts in advance the discretion vested in the Superintendent by subsection (6) of Section 17 of the Act, to grant the necessary authority, even to Dr Lisse. The said subsection provides:

> "Notwithstanding subsection (1), the Superintendent of a State Hospital may in the case of a patient requiring emergency treatment, permit a private practitioner to treat that patient in the State Hospital without the Minister's authorization."

Dr Vries thus in effect wrongly purports to permanently ban Dr Lisse from treating a patient and for the patient to be treated in an emergency.

This distorted picture was also supported by the under-secretary, as well as the Permanent Secretary Dr Shangula and relied on by the Minister.

11. Comments of Dr Shangula in his disrecommendation:

> "I concur with the recommendations of the Senior Medical Superintendent. These complaints have also reached my office.
>
> Dr Lisse can make use of private hospitals. He is not fit to work in a public hospital."

My comment:

Dr Shangula does not specify when, where and by whom the complaints were made and precisely what were complained of. Dr Shangula, as Permanent Secretary, is obviously not resident at or working at the hospital. It seems therefore that he

relied on rumour and gossip. The comment that Dr Lisse "can make use of private hospitals" ignores the interests of patients of Dr Lisse, 50 percent of whom are state patients, who will be prejudiced by being unable to afford the tariffs of private hospitals. The medical care of State patients must be paid – wholly or partially, by PSEMAS, the Public Servants Medical Aid Service, which is financed not only from member's contributions but also from State coffers, which moneys in turn are obtained from the taxpayers of Namibia.

Dr Shangula's attitude completely also discounts the right of a patient within reasonable limits, to be treated by a medical practitioner of her or his own choice, and the right of any medical practitioner to exercise his/her profession, and to make use of State facilities for that purpose as other medical practitioners are doing, without discrimination, unless there are good reasons for not allowing a particular medical practitioner from so practicing.

12. Dr Shangula's, supporting affidavit:

> "7. In early March, 2004 several fairly serious complaints were levelled at the Applicant by some members of staff at the State facility. The complaints are those referred to in the Applicant's founding affidavit. The complaints focused mainly on the Applicants conduct at the State facility, which if true, was totally unacceptable.
>
> 8. The Applicant was given the opportunity to respond to the complaints by the substantive Medical Superintendent (Dr Vries) of the State facility but he failed and/or refused to do so in the time he was given.

> 9. Meanwhile, the Applicant's application for authorization was still proceeding along the relevant channels. On my part I disrecommended the Applicant's authorization because of the complaints against him, his refusal to address them (which, to me, amounted to insubordination) and his improper conduct in commencing to practice at the State facility without the necessary authorization by the Respondent. The Applicant's belated response to the complaints against him was not satisfactory to me and I still resolved that he was not fit to practice at the State facility. I therefore recommended that he not be granted the authority to practice at the State facility."

My comment:

(i) Ad Paragraph 7: Dr Shangula makes it clear in this affidavit that the complaints referred to are those referred to in appellant's founding affidavit. It is thus not complaints of which he became aware independently as may be inferred from his reliance thereon in his recommendation to the Minister dated 2.4.2004.

In paragraph 7 he describes these complaints as "fairly serious" but he nevertheless relied on these complaints, when he made his aforesaid recommendation to the Minister and for his allegation that Lisse is "not fit to work at a public hospital", notwithstanding that these complaints were untested hearsay and that Dr Lisse repudiated them.

In paragraph 7 Dr Shangula also says – the "complainants if true, was totally unacceptable". That may be so. But unfortunately Dr Shangula, as Permanent Secretary of the Ministry, did not establish whether these complaints were true or not and neither he, the Minister or any other person in the Ministry, took any steps

to establish whether the complaints were true or not. Whether he ever even saw the said response, is not stated.

(ii) Ad par. 8:

In paragraph 8 of his affidavit he relies on plain hearsay, probably the story of Dr Vries, that Dr Lisse "had failed and/or refused to do so (i.e. respond) in the time he was given".

There is no evidence whatever that Dr Lisse had "refused". If "failed" in this context means that the "time given" was provided by any law or regulation, and was thus legally binding and effective, then the answer again is that there was no such "failure".

But the fact is that Dr Lisse did reply in a properly typed response dated 29/3/2005. The fact that there is no reference at all to the written response, not even that it was rejected, justifies the inference that because it was late in terms of Dr Vries's unilateral deadline, it was out of time and not considered, irrespective of the nature relevance and merits of the contents.

(iii) Ad par. 9:

In paragraph 9 Dr Shangula states that his "disrecommendation" was not only based on the complaints by staff, but the facts that Dr Lisse practised at the State Hospital without the Minister's authority.

It is inconceivable that if this latter ground was a genuine ground at the time of his disrecommendation, that he would have failed to mention it in his disrecommendation to the Minister. I must infer from the above that it was not a ground for the disrecommendation in the mind of Dr Shangula but an afterthought to bolster the case for the Minister once litigation was instituted.

(iv) Ad paragraph 13 and 14:

> "13. I do not agree that the Applicant's problems at the State facility, in the short time he was there, were due to the alleged poor facilities and staff inefficiency at the State facility. Although the facilities and working conditions at the State facility may not be as perfect as at the private hospitals, they are still adequate to deliver the appropriate health service and have been so adequate all along. Other doctors, private ones included, have been using the State facility for a long time and the hospital administration has not had the problems it had with the Applicant in the three months he was practicing there. I am convinced that the problem is with the Applicant and not with the hospital's facilities and staff.
>
> 14. Paragraph 22 of the Applicant's founding affidavit is not correct in that it distorts the context of my said address in so far as:
>
> 14.1 this was an internal meeting with my staff wherein my aim was to motivate the staff to perform better;
>
> 14.2 the negative aspects I referred to were what I perceived to be "common complaints" or "criticisms" people levelled at State facilities in general. I did not say that was what was happening in fact;

14.3 the negative aspects were for all State medical facilities in the whole country in general. They did not relate specifically to Windhoek Central Hospital.

Therefore, what I said at the management meeting cannot bear out the Applicant on the problems that he had in the short time he was at the State facility. Why would the alleged problems result in complaints only against the Applicant and not the other doctors?"

This answer is made in response to paragraph 22 of Dr Lisse's founding affidavit in which Dr Lisse stated:

"22. However, it would be appropriate to give some background to the matter. I had been concerned for some time about the state of repair of the equipment in the Windhoek Central Hospital and the attitude of some of the nursing staff. As a medical practitioner I owe a duty to my patients to ensure that these issues are addressed promptly as they materially affect the quality of the medical attention my patients receive at Windhoek Central Hospital. In fact similar concerns were raised by the Permanent Secretary of respondent's Ministry, Dr K Shangula, at a managerial meeting of respondent on 10 February 2004. He stated:

'**The following are common complaints:**

- **The hospitals and their environments are dirty.**
- **The health workers are rude, arrogant, and lack compassion.**
- **The health workers are incompetent.**
- **There are no medicines in the health facilities, etc.**'

A copy of the Permanent Secretary's address is annexed hereto as **"EWL 6"**."

Dr. Shangula further said in his aforesaid statement:

> "Time and again, the Ministry's medical and nursing staff is criticised for a host of wrongdoings. Where do we go wrong? The following are common complaints:
>
> The hospitals and their environment are dirty. The health workers are rude, arrogant and lack compassion. The health workers are incompetent. There are no medicines in the health facilities etc.
>
> Though some of the complaints are exaggerated, there is no smoke without a fire. Some of the complaints result from misunderstanding, because we do not take a minute to explain to our patients, clients or their relatives.
>
> Most of the complaints have resulted in citizens taking legal action against the Ministry of Health and Social Services. Between 2000 and 2003, there have been 91 litigations against the Ministry……Out of the 91 cases, 51 cases were finalized of which the Ministry was made to pay in respect of 31 cases. Ten (10) of these are medical cases, where it was established that there have been negligence on the part of the nursing staff. The highest amount paid for a closed case was N$4, 488 641.16 and the lowest amount paid was N$1522.99".

It is clear from the aforesaid address by Dr Shangula himself that it is a notorious fact that many members of the public make these complaints and that there is often substance in these complaints. As he himself said in his address, there is no smoke without a fire".

Dr Shangula even gave examples of three case studies which read as follows:

> "*Case study No. 1*.
>
> A primigravida went in labour at midnight. She was brought to the hospital. The Registered nurse on duty examined her and told her in an unfriendly manner that she is not yet due to deliver and therefore she must go back home. The pregnant woman being in labour pains, refused to go home. She was eventually allowed to remain in one of the rooms. When she suggested that the nurse calls the doctor, the former became

more unfriendly and refused to call the doctor. The woman in labour, was eventually seen by the doctor the next morning during the rounds, who correctly diagnosed cephalopelvic disproportion and ordered immediate Caesarean Section. By then it was already too late and the baby died less than twenty-four hours after the operation. The question then arises: is this a matter of incompetence or negligence or both? Why then did the nurse refuse to call the doctor?

Case Study No. 2.

One day, in one of our big hospitals, one of our High Commissioners went to visit his relative who was admitted in the department of internal medicine. When he arrived at the nursing post, he found a nurse and a woman with her child. He greeted the nurse very politely. The nurse ignored him and started to engage in a conversation with the woman. The conversation focused on trivial things unrelated to the official work. The High commissioner repeated the greetings two more times. The visitor then asked her where Room No. X was. She responded in a rude manner and asked him whether he does not know how to read. She then told him to enrol in adult literacy programme, otherwise he deserve to be beaten up. Being a diplomat, the High Commissioner just left her alone and proceeded to the room where his relative was. He reported the incident to me personally.

Case study No. 3.

An elderly person was admitted in a hospital. This hospital is relatively new, not more than ten years old. The ablution facilities were not in working order. The attitude of the staff was generally hostile. The care was found wanting. The question is: "Why should staff get "worked up" by the mere presence of patients?"

At the time Dr Shangula even laid down certain rules and procedures in an attempt to improve the position. In this regard he said:

"I am sending out to you and through you to the entire staff of the Ministry the following message:

1. Keep the wards, the premises and the environment in and out of the hospitals clean.

2. You must instil in every one, patients and visitors, cleaners and all other staff members a culture of cleanliness. The cleaners must be made to feel proud of their trade.

3. We must establish a programme of support to our staff members. They need support and encouragement. They need counselling in order to cope with the ever-increasing work load and especially to cope with deaths of their patients.

4. Senior Medical Superintendents and Principal Medical Officers must institute compulsory ward rounds, at least once per week, focussing on the completeness of documentation, quality of care and cleanliness of the wards and surrounding territories.

5. Hospital Nursing managers and Chief Control Officers must do similar rounds. Nobody should be confined to the Office and not knowing what is going on.

6. Each hospital must develop a programme to deal with the negative attitude of some nurses. Each hospital must submit to my Office the programme of supervision by the SMS/PMO, the Hospital Nursing Manager and the Hospital Administrator for the next financial year. These programmes must reach my Office before the 1st April 2004". (My emphasis added)

In the light hereof, Dr Shangula's reply in paragraph 13 and 14 of his supporting affidavit, is an attempt to water down the allegations regularly made and to evade responsibility for a very serious and notorious problem.

It is pathetic that in such circumstances the allegations by Dr Lisse in his written reply that there are indeed problems with "competence, work ethics/attitude, maintenance and hygiene" were totally ignored, instead of investigating it further

and if found that these complaints have substance, then to act upon it and attempt to find solutions to the problems.

What makes it worse is that Dr Shangula never considered that this sort of action by Dr Lisse may have been the motive for unfounded and/or exaggerated accusations by members of the staff.

(v) Ad paragraph 15

In this paragraph Dr Shangula says *inter alia* in regard to an applicant and an application under Section 17 of the Act:

> "It is just like a person who applies for a job. If he fails to get it he cannot then ask for that decision to be reviewed".

This quotation amply demonstrates the mindset in which Dr Shangula approached the applicant and the application. The plain truth is that an application under Section 17 can never be equated with an application for a job.

In the case of a Section 17 application, an applicant, if suitably qualified, has a right to make an application and to be granted the necessary authority, unless there are reasonable grounds for refusal. An applicant is entitled to the benefits of Art 18 of the Namibian Constitution, which gives to persons in the position of applicant, the

right to administrative justice which includes the right to fair and reasonable administrative action and procedures.

When the Minister exercises his/her discretion under the aforesaid Section 17, the said Minister also has to take into consideration and apply Art 10 of the Namibian Constitution which in Art 10(1) provides for the fundamental right that:

> "All persons shall be equal before the law".

This fundamental right is relevant in so far as many other doctors have been granted the authority to practice in whole or in part at the hospital. Dr Lisse is the only known exception. Unless there are sound reasons to refuse such authority in his case, such refusal may also be in breach of the fundamental right of equality before the law. The action by the Minister and the reason given for such action are clearly also in breach of Dr Lisse's fundamental right to dignity provided for in Art 8 of he Namibian Constitution, unless of course such affront to his dignity was legally justified. Suffice to say, it can never be justified by allegations which are untrue.

The decision-maker must also consider and apply Article 21(j) which provides for the fundamental freedom to "practice any profession, or carry on any occupation trade or business". The refusal by the Minister obviously does not completely prevent Dr Lisse from practising his profession, but it severely restricts him in the exercise of his profession and unless there are sound reasons for so restricting him,

a Minister refusing his application under Section 17, violates the aforesaid Art 21(j) of the Namibian Constitution.

It is a total misconception of the Minister's duties under the aforesaid section, to claim that the Minister is merely deciding on "privileges" and not "rights" as explained above. It must be emphasized that the Minister is not dealing with his/her own property or that of the government of the day and is not dishing out "privileges" when deciding on a Section 17 application, but is dealing with State property in regard to which the Minister is required by the Constitution to exercise certain administrative functions, such as that provided for in Section 17 of the Act in accordance with the provisions of the Namibian Constitution and in the public interest.

13. The Minister's answering affidavit.

It is clear from the record of her decision and from the answering affidavit, that the Minister accepted the allegations and views of her advisers, Dr Vries and Dr Shangula uncritically and unconditionally. Consequently she made the same mistakes.

My comments on their views and actions as disclosed in their "disrecommendation" and in their supporting affidavits, are applicable *mutatis mutandis* to the statements by the Minister in her answering affidavit.

To attempt to avoid duplication and curtail the prolixity of this judgment, I will deal as briefly as possible with some of the many unsatisfactory features of the Minister's answer.

(i) Ad paragraph 13, 14 and 15 of the said answering affidavit.

My comment:

Neither the Minister, nor Dr Vries or any other official had informed Dr Lisse that the alleged improper practising and the written complaints would be communicated to the Minister and would be relied on by her in deciding Lisse's Section 17 application.

This was thus a clear case where Dr Lisse should have been informed beforehand and given the opportunity to respond. There consequently was no application of the *audi alterem partem rule.*

The Minister's argument that she applied the rule by considering the response to the complaints contained in Lisse's letter of the 29th March, is fatally flawed, *inter alia* because: The said letter only dealt with complaints by some members of the staff relating to his behaviour, not with the issue of his alleged improper practicing and he was never informed that the said alleged improper practicing and the said complaints by staff would play any rôle in the Minister's consideration.

(ii) The Minister admits the "authority" provided by Dr Obholzer, and the implied condonation by Dr Vries for approximately one month after his return. She however falls back repeatedly on the point that such authorization was improper because the law provides that the Minister is the only person that could approve.

She failed to consider that even apart from Dr Vries's aforesaid implied condonation, he even expressly purported to give limited authorization in his letter dated 31/3/04 wherein he said:

> "Please be informed that you are not permitted to use the Windhoek Central Hospital facility with immediate effect. You may continue to see your already admitted patients until discharge".

Furthermore the Minister failed to keep in mind that subsection (6) of Section 17 provides for limited authorization by the Superintendent in the case of emergencies.

The subsection reads:

> "Notwithstanding subsection (7) the Superintendent of a State Hospital may in the case of a patient requiring emergency treatment, permit a private practitioner to treat that patient in the State Hospital without the Minister's authorization".

Mainga J in his judgment said that the Minister was bound by the acts performed by Dr Obholzer and Dr Vries and relied for this proposition on the case of *Tettey and Another v Minister of Home Affairs and Another* where the Court held *inter alia*:

> "I do not think that the argument that Thomas did not have the authority would avail the respondents. Thomas was acting in the course and within the scope of his duties and therefore had the ostensible authority to act. Accordingly the first respondent would be bound by acts performed by Thomas in the course and scope of his duties…."[1]

(iii) Several of the Minister's contentions in the above paragraphs are ambiguous, inconsistent and on occasion patently superficial and one sided.

She says in paragraph 13:

> "For his own reasons, Dr Obholzer allowed the applicant to start practicing at the State facility, but such permission was improper in so far as it was without lawful authorization in terms of the Act".

Paragraph 15:

> "Even according to the applicant, Dr Obholzer told him expressly that <u>he was only recommending his application</u> and not authorizing him in terms of Section 17".

[1] 1999 (3) SA 715D & C.L.D at 727 F.

Surely, the statement that Dr Obholzer "told him expressly that he was only recommending his application" is a gross understatement compared to what Dr Lisse had said in his founding affidavit and his replying affidavit and what Dr Obholzer himself said in his supporting affidavit to the Minister's answering affidavit.

In his founding affidavit Dr Lisse explained:

> "12. In terms of section 17 of the Act, a private medical practitioner, such as myself, is required to apply to the respondent for permission to engage in the treatment of patients and perform a medical procedure at State hospitals.
>
> 13. For this reason, I filled out an application form in January 2004 for such authorisation but my application was delayed because I had to first obtain a practice number – annexure **"EWL 3"** – from the Namibian Association of Medical Aid Funds. In order to do so I was required to produce annexure **"EWL 2"** which I had applied for in November 2003 and such document was only furnished to me by the respondent in January 2004. The practice number was accordingly only forwarded to me in late January 2004.
>
> 14. On 27 or 28 January 2004 I personally took the application and all the required supporting documentation to the office of the superintendent of the Windhoek Central Hospital and handed it to his secretary. The superintendent, Dr Vries, was on leave at the time.
>
> 15. A few days later I was informed by the acting superintendent at the time, Dr Obholzer, that he had recommended that my application be approved and had forwarded the application to **"head office"**. Dr Obholzer led me to believe that the approval of my application by the respondent would be a mere formality and I would be advised accordingly. I assume that this was because I had been employed by the respondent's Ministry from 1990 and they were well acquainted with me. I enquired from Dr Obholzer as to what I should do in the interim and he expressly authorised

me to use the facilities of the Windhoek Central Hospital and to engage in medical procedures and the treatment of patients with immediate effect. I accordingly commenced doing so.

16. A week later when I was in theatre at the Windhoek Central Hospital one of the sisters enquired from me as to whether I had the necessary certificate in terms of section 17 to use the facilities. I immediately contacted Dr Obholzer and he said that he would **"take the matter up"**. Dr Obholzer phoned me back later to advise me that I could continue to practice and use such facilities. I accordingly continued to use such facilities for my patients.

17. At all times I assumed that Dr Obholzer, as a senior management member of the respondent's Ministry had the authority to authorise me to do so. I can only further assume that he discussed the mater with higher authority, such as with the Permanent Secretary or the respondent and that what I was doing was fully authorised by the respondent. It is my experience after having worked in the respondent's Ministry for many years that decisions are taken by the respondent but sometimes only communicated in writing some months hence due to bureaucratic delays.

18. The superintendent, Dr Vries, returned to work in the first week of March 2004. Dr Vries saw that I was using the facilities and treating my patients at Windhoek Central Hospital, but he did not indicate to me that my conduct was unauthorised by respondent nor did anyone from management at the respondent so advise me.

19. I continued to practice and perform procedures at the Windhoek Central Hospital throughout March 2004 without anyone informing me that I was not entitled to do so.

20. On 17 March 2004 I received a letter from Dr Vries advising me that certain complaints had been lodged against me and enclosing copies of written complaints by various staff at the Windhoek Central Hospital. I annex a copy of this letter and the attachments as **"EWL 4"**.

Dr Obholzer, in his aforesaid supporting affidavit, does not deny specifically any allegation by Dr Lisse. He explained in paragraph 5 the reasons why he allowed Dr

Lisse to begin practicing pending the decision by the Minister. This paragraph reads as follows:

> "5. I had known the Applicant for some time whilst he worked for the Government and also knew that he had recently completed his Obstetrics and Gynaecology specialization in Germany and then worked at Oshakati for about a year.
>
> The Applicant wished to start using the Windhoek Central Hospital facilities pending the decision on his application by the Respondent. In good faith, I allowed him to start using the hospital's facilities for the following practical considerations:
>
> 5.1 the Applicant was a senior doctor who had worked for the Respondent's Ministry for many years;
>
> 5.2 the Applicant had many Public Service Medical Aid patients who would benefit from his practicing at a State hospital;
>
> 5.3 I believe that authority for him to practice at the State facility ordinarily would not be a problem as long as he abided by the hospital's code of conduct. I was aware of the Applicant's abrasive personality and made his point to him diplomatically."

It must be noted that Dr Obholzer in paragraph 5.3 indicates that he believed "that authority for him to practice…ordinarily would not be a problem…" In paragraph 7 he says *inter alia*, "I just allowed him to start practicing in anticipation that his application would be successful".

In paragraph 9 and 10 of Dr Obholzer's supporting affidavit he manifests his own belief that the complaints by staff and not practicing without authority was the reason for the Minister's refusal. The complaints by staff that Obholzer refers to

must be taken to be the written complaints by staff directed to Dr Vries because in the same sentence in his paragraph 10 he says:

> "…which complaints he failed to address when asked to do so by the hospital's administration (Dr Vries). This, I believe, cost him the authorization he was seeking".

The remark by Dr Obholzer "which complaints he failed to address when asked to do so by the hospital's administration (Dr Vries)", is of course hearsay which he must have been told about by Dr Vries and/or Dr Shangula and which, as I have shown, was a distortion of the truth.

(iv) All indications are that the alleged unlawful practicing was an afterthought which did not play a rôle in the decision-making process.

If it was, then one would have expected that not only would Dr Lisse have been informed of such a factor by the Minister and/or Dr Shangula or even Dr Vries on behalf of the Minister, but Dr Lisse would have been informed thereof and given the opportunity to respond.

Even worse, Dr Obholzer, as the acting Superintendent who gave the express permission to practice and who recommended the initial application, should have been asked for an explanation. It is also obvious that he should have been asked before the decision was taken by the Minister and his explanation and reasons for

his actions and the positive factors which he considered in favour of Dr Lisse, should have been given some weight.

(v) The mysterious disappearance of the initial application, adds to the unsatisfactory handling of this matter by the officials concerned.

(vi) It is correct that section 17 requires that a medical practitioner wishing to conduct his practice or part of his practice in the State Hospital, must obtain authority for doing so from the Minister, but the section itself provides for exceptions. Furthermore there were several mitigating factors in this case, *inter alia*:

(a) Dr Lisse was a senior practitioner, who had served the State for several years as a State doctor, before he had qualified as a specialist and started his private practice.

(b) Applications were in fact submitted by Dr Lisse for the necessary authority through the office of the Superintendent. The first one on the 27th or 28th January 2004 to the Secretary of the Superintendent. At the time Dr Obholzer acted as Superintendent in the place of Dr Vries who was on leave.

(c) Dr Obholzer recommended the application but this application went missing in the offices of the Ministry. Dr Obholzer told Dr Lisse that he could start practicing pending the outcome of the application.

(d) Later after the return of Dr Vries, a new application was submitted.

(e) Dr Vries allowed Dr Lisse to continue to practice, without objecting, until 31st March 2004.

(f) In the circumstances Dr Lisse practiced until 31st March 2004 under the impression that there was no objection by either Dr Obholzer or Vries for him practicing and that the necessary authority had been obtained to practice until final written authorization by the Minister. Even if the assumption by Lisse was wrong in the absence of a written authorization, there was no proof of any *mala fides* on the side of Dr Lisse in this regard.

It was not only Dr Lisse that suffered prejudice as a result of the refusal, but also his patients, a large percentage of whom were State patients who could not afford private hospitals.

(vii) The Minister:

"The failure and/or refusal to respond to the complaints when asked to do so was a symptom of a more serious problem of insubordination on his part".

My comment:

As I have shown, this is a serious misrepresentation of the facts. Dr Lisse did in fact respond within a reasonable time, even though he did not manage to do so within the time limit set arbitrarily by Dr Vries.

In view thereof that the first part of the allegation is a misrepresentation, the conclusion of "insubordination" is baseless. It also appears that the Minister and her officials ignored the fact that Dr Lisse was a qualified medical specialist who conducted a private practice and was not a public servant.

The accusation of insubordination is also for that reason inappropriate. The Minister also failed to distinguish between Dr Vries and herself in that the Minister never asked Dr Lisse for his response but Dr Vries did so. Neither Dr Vries nor the Minister gave any indication that these complaints will be sent to the Minister and used against him in his section 17 application.

(viii) The Minister:

> "I did consider the applicant's response to the complaints against him but had to weigh it against the applicant's utter disregard of the State facility code of conduct and rules. There was no way I could give such a medical practitioner authorization and I believe I acted correctly in not doing so because the facts before me warranted such decision".

My comment:

This statement is non-sensical. On the one hand the Minister said that she "did consider applicants response" but then says that "she had to weigh that against the applicants' utter disregard of the Code and Rules. But the problem is that the alleged utter disregard of the Code and Rules is a conclusion also based on the very complaints of members of staff. Before coming to a conclusion she had to consider the complaints and the applicant's explanation and could not regard the contents of the complaints as facts and then weigh the applicants explanation against those "facts".

At no stage did the Minister, or Dr Vries, or Dr Shangula pinpoint any transgression of any Code of Conduct or rules of the hospital. Dr Lisse said in his written response to Dr Vries; "I also would appreciate if you provided me with a complete written set of rules that private legal practitioners are expected to abide by at the Windhoek Central Hospital". Neither Dr Vries, Minister or any other official responded to this request. It is significant that the Minister at no stage indicated to Dr Lisse or the Court which provisions in the "Code" or Rules were contravened and no Code of Conduct or set of Rules were produced to the Court in the course of this litigation.

The inference on the probabilities is that at least no written code or set of Rules exist.

The Minister's statement that she took her decision because "the facts before me warranted such decision" shows a complete misconception of how facts must be established and what the difference is between "allegations" and "facts". Even though she did not inform Dr Lisse of the "facts" against him and gave him no opportunity to rebut the allegations by staff members, she arrived at a final conclusion that notwithstanding the applicant's written response to Dr Vries, Dr Lisse's conduct amounted to an utter disregard of the Code of Conduct and Rules, justifying the refusal of his section 17 application.

She came to this conclusion in a hurry, i.e the day after the last of the three officials had written their "non-recommendation" on the application.

She decided on the "facts" without any express finding that everything or anything said by members of the staff were the truth and that everything said by Dr Lisse was an untruth.

(ix) The Minister returns to this theme in paragraph 38 in this regard. He says:

> "Although the applicant did address the complaints levelled at him, I still felt that he did so too late (in this way showing insubordination to the head of the State facility Dr Vries) and whatever he said against the complaints was not satisfactory to me."

My comment:

The Minister in this statement refuses or fails to pinpoint even one item or aspect which was unsatisfactory and does not give any reason whatever for saying "whatever he said against the complaints was not satisfactory to me".

It is possible that the Minister acted in this way because in her view, the response did not conform to the deadline, and could therefore be ignored or rejected. The alternative possibility is that the Minister did not care what the applicant explained and was determined to ignore or reject whatever the applicant said.

(x) The Minister:

"In my view he deserves my refusal because of his overall behaviour".

My comment:

Here the Minister once again relies on the mere fact of complaints having been made, without doing anything to establish the truth or correctness thereof and demonstrating once again her extreme partiality to what her advisers and members of the hospital staff had to say. She did this and decided against Dr Lisse without even having any affidavits from them and relying on the mere say so in unsworn and untested statements.

(xi) Ad paragraph 20 of the Ministers affidavit

In this paragraph and the last paragraph of her paragraph 19, the Minister deals with the alleged conditions in the hospital raised by Dr Lisse in his written response regarding problems of staff competence, work ethics/attitude, maintenance and hygiene and in regard to which Dr Lisse in his founding affidavit in paragraph 22 and 23 had referred also to the authoritative statements by Dr Shangula himself on 10 February 2004 and the Medical Association of Namibia.
(See in this regard the quotations in Section II, 12(iv) relating to this subject and my comment thereon which is repeated for the purposes hereof).

The Minister follows the approach of Dr Shangula in attempting to water down the complaint not only of Dr Lisse, but the complaints of many others, as confirmed in Dr Shangula's aforesaid address, which was delivered during the very period that Dr Lisse used the facilities at the Windhoek Central State Hospital.

In paragraph 20 the Minister also rejects the minutes of the Medical Association of Namibia as "irrelevant" for the same reasons. The said Medical Association have *inter alia* medical practitioners as members. These members have apparently raised some complaints through their association.

The Minister says all this is irrelevant to the complaints by staff against Dr Lisse and again misdirects herself in this regard. If she did not decide in advance that the statements by members of staff in their unsworn form were the whole truth and nothing but the truth, and instead applied a more balanced and reasonable approach,

she would have realized that the complaints by Dr Lisse against conditions at the hospital, which included work ethics/attitude, maintenance and hygiene and even bats in the theatre, could have irked members of the staff and led to the campaign against Dr Lisse and to untrue and/or, exaggerated accusations against him.

The Minister does not indicate in the course of this litigation that anything has been done about the complaints which are common in respect of State Hospitals and confirmed as such by Dr Shangula in his aforesaid address.

In these circumstances the Minister's explanation of the admissions in Dr Shangula's address and her effort to evade the issue as he did once litigation was instituted, are nothing less than pathetic where she says in paragraph 19 of her affidavit:

> "It is clear from the speech that the complaints Dr Shangula referred to were not proven facts but what he called 'common complaints' against the Ministry. It does not follow from Dr Shangula's speech that the 'common complaints' are in fact true and cannot justify Applicant's behaviour for the two months (a very short period) he practiced at the State facility".

So according to the Minister, the complaints about the conditions at the hospitals are not "proven facts" but the complaints against Dr Lisse are assumed by her to be "proven facts" in its totality, without ever applying the same test to it of whether or not they are "proven facts". The Minister further misses the point that even if the

aforesaid common complaints were not in fact proven as true, those complaints were also never proved to be untrue.

(xii) Ad paragraph 24

In this paragraph the Minister replies to paragraph 27 of Dr Lisse's founding affidavit where he stated that he enquired about his first application which went missing in the Ministry's offices and was told *inter alia* that an application under section 17 normally ….took approximately three (3) days to process.

The Minister comments in paragraph 24:

> "They take anything between the short period applicant refers to and longer (several months) at times. The period depends on the availability of the persons entrusted with contributing to the decision on the application…"

The long period of months used at times in the Ministry could not be justified and reflects badly on the Minister and the Ministry in the light of the need to process section 17 applications expeditiously in the light of the importance thereof to a medical practitioner and his patients, who as members of the public, are entitled to the benefit of using the facilities of State Hospitals, unless there are reasonable grounds for refusing them the use of such facilities.

That an application can take several months because of the availability of the persons entrusted with contributing to the decision on the application shows that the Minister who was authorized and compelled by law to decide, placed undue reliance on persons not entrusted by law to contribute to the decision. The Minister does not explain who those persons are who may not be available for months and why they may not be available for months and by such conduct hold up her decision for months.

This again is a sad reflection on the administration of the Minister and her Ministry.

(xiii) Ad paragraph 37

The Minister here refers to the applicant's allegation of the prejudice to himself and his patients, about 50 percent of whom are State patients. The Minister replies:

> "The person who is losing out (financially) on the non-authorization is the applicant and not so much his patients."

In regard to the prejudice to patients the Minister says:

> "The patients have other choices and options. It is up to them to stay with the applicant who has no authority. The patients are not obliged to. Applicants…. was brought about by himself and he has no one to blame but himself…"

My comment:

The Minister here again follows the line of her apparent advisers such as Dr Vries and Dr Shangula. I have dealt *supra* with the apparent unqualified acceptance by the Minister and her officials of the guilt of Dr Lisse and need not repeat any of my previous comments in this regard.

The attitude of the Minister, as in the case of her aforesaid officials, shows no respect, for the fundamental freedom of a person to "practice any profession or carry on any occupation, trade or business".

Although this freedom was not prevented in the case of Dr Lisse, it was unduly interfered with and hampered by the Minister and the Ministry by refusing a Section 17 application without good reason and thus causing him prejudice without good reason. After all, the Minister as well as the officials of the Ministry are public servants.

Furthermore, the Minister and the said officials, apparently do not accept that a person in Namibia, requiring medical care, has the right to choose a medical practitioner of his/her choice, in whom they have confidence for their own reasons, unless there are reasonable grounds for not allowing this choice.

(xiv) Ad paragraph 40.5

In this paragraph the Minister refers *inter alia* to the applicant's allegation of prejudice to him and his clients in the case of emergencies. The Minister states:

> "If any of his patients become an emergency case, such patient can always be attended to at the State facility, but not by the applicant as he is not authorized to practice there".

This ban is in total conflict with subsection (6) of section 17 of the Act which I have referred to above and which provides that "the Superintendent of a State Hospital may, in the case of a patient requiring emergency treatment, permit a private practitioner to treat that patient in the State Hospital without the Minister's authorization".

One wonders whether it is possible that neither the Minister, nor any of her officials are even aware of this provision of the law which they have to administer? The Legislature that enacted this provision was obviously aware of the need for such an exception as provided in this subsection because it is not only in the interest of the private practitioner but also that of his/her patient as well as in the public interest. Apparently the Minister and her above-stated advisers are not aware of this need. That is why they insist that such emergencies have to be cared by medical practitioners, other than Dr Lisse.

(xv) Ad paragraph 41.4

In this paragraph there are various serious distortions of facts. For the sake of convenience and comment I will split up the whole paragraph and then comment separately on each allegation.

(a) The Minister:

"After a short period at the State facility, the whole facility (from nurses up to his colleague doctors) were up in arms against the Applicant".

My comment:

The allegation that the "whole facility" was up in arms against Dr Lisse is a gross overstatement.

As far as his "colleague doctors" are concerned, it is not stated which doctors are referred to and what their complaints were, if any. Even Dr Vries, did not himself complain, but the members of staff who complained, submitted their complaints to him.

When Dr Vries made his disrecommendation to the Minister in the section 17 application he said that Dr Lisse "is a very bad mannered person" but even then did not refer to any incident experienced by himself, but only to the complaints by

some members of staff and the fact that Dr Lisse did not respond to these complaints within the deadline.

Dr Shangula also relied on the aforesaid complaints which "have also reached his office" and not on any incident which he himself experienced. Dr Shangula however was not a colleague at the hospital.

Dr Obholzer did in his supporting affidavit of the case for the Minister remark that:

> "I was aware of his abrasive personality and made this point to him diplomatically".

Dr Obholzer did not mention any incident and it not known what precisely he meant by the term "abrasive personality". Be that as it may, the said remark should not be taken out of context, because Dr Obholzer recommended that Dr Lisse's section 17 application be granted. He saw it as a routine matter and foresaw no problems. Consequently he specifically gave Dr Lisse permission to practice, pending the authorization by the Minister, which was expected in due course.

Dr Obholzer put it as follows in his aforesaid supporting affidavit:

> "I just allowed him to start practicing in anticipation that his application would be successful". (It was this application that had disappeared

> mysteriously, without explanation, from the office of the Secretary of Dr Vries).

Apart from Dr Vries and Dr Obholzer, there are a large number of other State medical practitioners as well as private practitioners practicing at the hospital as documented by the Minister in her answering affidavit. None of them are alleged to have complained against Dr Lisse and none of them have been shown to be "up in arms against Dr Lisse". As to members of the nursing personnel who complained there is no proof that whole body of nurses and other personnel were "up in arms against him."

(b) The Minister:

> "He himself confirms, that he had a difficult working relationship with virtually everyone at the State facility".

My comment:

I have carefully read through the written response of Dr Lisse as well as his founding affidavit and replying affidavit. I find no such confirmation.

(c) The Minister:

> "Granting him the relief claimed will adversely affect the morale and administration at the hospital. I refer to the attached affidavits of the State facility's doctors on the point".

My comment:

It is only Dr Vries who took up this attitude.

The morale should not be adversely affected by such granting, if attention is given to the common complaints about State hospitals which have become notorious and which do not originate or are not restricted to Dr Lisse. If serious attempts are made to rectify these complaints and to improve the standards and the discipline, instead of using Dr Lisse as scapegoat, much more would be achieved.

It must be kept in mind that Mainga J in his judgment in the Court *a quo* added to the notorious facts of such complaints in addition to those mentioned by Dr Shangula in his aforesaid address in January 2004 and the Medical Associations minutes already in 2003. Mainga J had this to say:

> "The applicant does not deny that he complained about the dirtiness of the hospitals and their environments, the rudeness arrogance and lack of compassion and incompetence of health workers and the lack of medicines in the health facilities and the state of repair of the equipment at the Windhoek State Hospital. These concerns were also addressed by the Permanent Secretary and the Medical Association of Namibia and he attaches 'EWL6 and EWL7' as proof thereof. In actual fact the complaints above are confirmed by an Article in the Namibian of Tuesday November 9, 2004, an article headed, 'Health Services not up to standard' on p7. A few extracts from the article are interesting to read and on point:
>
> > 'Windhoek – Standards in Namibia's health services are a point of concern for many and have been highlighted during recent campaigning by political parties.

It is often claimed that doctors are rarely available, clinics are poorly equipped and painkillers such as Panado are dished out as treatment for any condition.

"The medicine that is popular these days is Panado. That is proof that the medicine is not close to being enough," says Helena Haukongo, a casual worker at NDC. Haukongo says she has visited the Robert Mugabe clinic in Windhoek three times recently and each time she had arrived in the early morning and only left at 16h00 in the afternoon.

"I came at 08h00 in the morning to see the doctor and it's now 14h00 in the afternoon and I am still waiting", says Haukongo.

Haukongo also complains that nurses and security guards at health facilities often treat patients badly.

"If I don't know my way around then who am I supposed to get information from?" Haukongo asks. "But instead of answering nicely, they insult you and sometimes look at you and say nothing. They are supposed to answer in a polite way, not in a harsh way," she adds.

Katrina Rooinasie a Grade 10 student at Eldorado High School in Khomasdal says: "Yesterday I was sent back home from the Katutura clinic. They said the people were too many and we should come back on Wednesday," she adds.

Rooinasie, who lives in Okuryangava, says she only came to Katutura clinic because she was told her normal clinic in Donkerhoek was already full.

"Nurses should also be faster when rendering services so that everyone can be accommodated. I have a strong feeling that even doctors and nurses cause people's death, because people wait and wait and at the end of the day are sent back home without being treated," she says.

Stage manager at the National Theatre of Namibia, Erasmus Hamunjela, says he went to the Robert Mugabe clinic because it was close to his work. After sustaining an injury, he asked his boss if he could go to the clinic but when he got there he was sent home, because all the tickets for patients had already been handed out for that day.

> "Nurses and doctors are too used to their work and they just don't care anymore. They don't even work that fast anymore, they are terribly slow," he said.
>
> Attempts to obtain comment from the Namibia Nursing Association on claims that some nurses are unprofessional in their approach to patients proved futile, despite a series of attempts to contact the organisation over a period of three weeks.'"

It is also a notorious fact that similar complaints have continued to be made and have continued to be discussed in the recent past in the Namibian media.

(d) The Minister:

> "I cannot even guarantee that the applicant would get the cooperation of the State facility's staff if he went back there as it appears no one want to work with him".

My comment:

As I have pointed out in respect to Dr Shangula's standpoint, the position is not that grave and the allegations by the complainants have not been tested and weighed against the written explanation of Dr Lisse. And as Dr Shangula has admitted in one part of his affidavit before acting in contradiction thereof in another part, "the allegations have not been proved".

In one case the author of a complaint has written two letters of complaint. Both were dated 3.3.04. In the first letter she indicates on the heading that she is the Principle Registered Nurse at the Windhoek Central Hospital Main Theatre.

In this letter she states *inter alia*:

> "However Dr Lisse seems to be a difficult person to work with. He is always complaining that the staff is not competent enough….The way he is talking to the staff is provocative, he let the staff feel that they are not important workers…"

These remarks indicate that the complaints against Dr Lisse is at least to some extent, tied to his complaints against staff.

In the second letter with the same date, she purports to write on behalf of four others namely: Itewa, Neumbo, Sebetwane, Shaema and Cloete. Towards the end of this letter she strikes a conciliatory note which indicates that the relationship with Dr Lisse is not as grave as sketched by the Minister.

She says:

> "Dr Lisse should understand that Theatre Staff at Windhoek Central Hospital Main Theatre are now hesitating to help him because he is a difficult person. If he can change his attitude it may lead to healthy teamwork. We are still waiting for his preferences and will accord it to him if available and depends on what the hospital is providing".

Dr Lisse in his written reply denied and/or explained the allegations against him but said in conclusion:

> "All in all, I think one should not confuse Cause and Effect, but I wish to take this opportunity to assure you that I shall do my utmost to avoid future misunderstandings… In this regards I have decided to restrict oral communication with nursing staff as much as possible to the extent necessary to ensure patient care. You previously indicated to me that a meeting was to be held in the near future with all stakeholders with regards to list allocation and I would appreciate to be invited to this meeting with reasonable advance notice. I also would appreciate if you provided me with a complete written set of rules that private medical practitioners are expected to abide by at Windhoek Central Hospital. Can you perhaps provide me with a fax number under which my secretary can book my patients for the ward 3 East by fax?"

The way was thus open to find a satisfactory solution of the problems between some members of staff and Dr Lisse, but Dr Vries chose the hamfisted approach, unfortunately followed by Dr Shangula and the Minister. In the course of this approach, the sensible proposal by another staff member, the Chief Matron Maswahu that "it would be more appropriate if an investigation was carried out", was ignored.

III THE LAW APPLICABLE

1. Any argument that any exercise of administrative discretion is not reviewable, even if based on the provision of a statute, is without legal substance.

1.1 Whatever may have been the position prior to the coming into force of the Namibian Constitution on 21 March 1989 in conflict with art 18, has been

swept away by Article 18 of the Namibian Constitution which deals with "Administrative Justice". This article reads as follows:

> "18. Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal."

2. There are some other fundamental changes brought about by the enactment of Article 18 which need be emphasized.

2.1 So eg. prior to the implementation, administrative decisions could only be brought on review in terms of the specific provision of the statute providing for such review or on the grounds provided for in our common law. These grounds are:

(a) Lack of jurisdiction;

(b) Failure to follow any procedure required by the empowering statute;

(c) Failure by the decision-maker to apply his or her mind;

(d) When the decision-maker's action was *mala fide*, arbitrary or grossly unreasonable;

(e) When the decision-maker failed to apply the *audi alterem partem* rule, when in certain situations reason and/or practice dictates that the Rule should apply.

The following two situations are clear examples of the last ground:

(i) Where the decision-maker is privy to certain relevant information of which the applicant is ignorant and the said information is used against the applicant, the applicant must be informed by or on behalf of the decision-maker of such information[2].

(ii) When circumstances are such that the applicant would have a reasonable expectation or legitimate expectation of succeeding in the application, the *audi alterem partem* rule must be applied.

I agree with the manner in which Mainga J set out the law relating in regard to this principle, part of which I repeat:

> "*In Administrator, Transvaal and Others v Traub and Others* 1989 (4) SA 731 (A) at 756E-757C Corbett CJ said the following concerning legitimate expectation:
>
> *'…The concept of a legitimate expectation, as giving a basis for challenging the validity of the decision of a public body on the ground of its failure to observe the rules of natural justice was given the stamp of*

[2] The Chairperson of the *Immigration Selection Board v Frank: E E & A, 2001 NR 107* E-H

approval by the House of the Lords in O'Reilly v Mackman and Others and others cases [1982] 3 All ER 1124 (HL) at 1126j-1127'

It is clear from these cases that in this context 'legitimate expectations' are capable of including expectations which go beyond enforceable legal rights. Provided they have some reasonable basis (Attorney General of Hong Kong case supra at 350c). The nature of such a legitimate expectation and the circumstances under which it may arise were discussed at length in the Council of Civil Service Unions case supra. The following extracts from the speeches of Lord Fraser and Lord Roskill are of particular relevance:

'But even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the Courts will protect his expectation by judicial review as a matter of public law. – Legitimate or reasonable expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue…' Per Lord Fraser at 943J-944a.

"The particular manifestation of the duty to act fairly which is presently involved is that part of the recent evolution of our administrative law which may enable an aggrieved party to evoke judicial review if he can show that he had 'a reasonable expectation' of some occurrence or action preceding the decision complained of and that that 'reasonable expectation' was not in the event fulfilled."
Per Lord Roskill at 954e.

After indicating that the phrases 'reasonable expectation' and 'legitimate expectation' were to be equated and having expressed a preference for the latter. Lord Roskill continued (at 954g):

'The principle may now be said to be firmly entrenched in this branch of the law. As the cases show, the practice is closely connected with 'a right to be heard'. Such an expectation may take many forms. One may be an expectation of prior consultation. Another may be an expectation of being allowed time to make representations…"'

See also Tettey and Another v Minister of Home Affairs and Another 1999 (3) SA 715 D & CLD at 726 C-D."

3. Article 18 does not restrict the duty of Administrative bodies or administrative officials to act fairly and reasonably only in regard to procedure.

It must be inferred that this requirement also applies to the substance of the decision. This inference is strengthened by the last part of the article, which provides that persons aggrieved by the exercise of such acts and decisions, shall have the right to seek redress before a competent Court or Tribunal".[3]

In South Africa, the Constitutional Court has expressed itself on item 23(2)(b) of Schedule 6 of the South African Constitution, which deals with administrative justice in South Africa.

The said item 23(2)(b) reads as follows:

> "Every person has the right to –
>
> (a) lawful administrative action where any of their rights or interest is affected or threatened;
>
> (b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;

[3] This view has been laid down in my decision in the High Court in *Aonin Fishing (Pty) Ltd v Minister of Fisheries and Marine Resources* 1998 NR 147 HC and confirmed by this Court in:
The Chairman of the Immigration Selection Board v Frank, 2001 NR 107 SC 109E-110B; 116F-121G; 170F-176I
Government of the Republic of Namibia v Sikunda 2002 NR 2003 SC at 226G-229F.
See also High Court decision 2001 NR 181.
Mostert v Minister of Justice, 2003 NR 11 at 22J-28H.
Cronje v Municipal Council of Mariental, 2004 (4) NLLP 129 at 175-182.
Bel Porto School Governing Body & Others v Premier Western Cape & Another 2002 (3) SA 265 CC at 291C –295H; 300C-316E.

(c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action had been made public; and

(d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected for threatened."

Article 18 of the Namibian Constitution on the other hand reads:

> "Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon it by the common law and any relevant legislation, and persons aggrieved by such acts and decisions shall have the right to seek, redress before a competent Court or Tribunal."

Whereas Chaskalson, CJ, who wrote the majority judgment, held that the aforesaid subparagraph (b), read with paragraphs (a), (b) and (c) did not extend the existing grounds for interference to include substantive fairness, the minority held that it did.

Chaskalson, CJ, said that if such extension "had been the purpose of item 23(2)(b), subpar (b) would not have confined itself to procedurally fair administrative action, but would have referred generally to "fair administrative action". (My emphasis added.)

But this is precisely what article 18 of the Namibian Constitution did by not confining itself to "procedurally fair administrative action", but provided generally that – "Administrative bodies and administrative officials shall act fairly and

reasonably … and person aggrieved by the exercise of such acts and decisions, shall have the right to seek redress before a competent Court".

4. The general principle of a duty to act fairly and reasonably, supplements the common law and any relevant statute law, but obviously any common law or statute law in conflict with this provision, will be unconstitutional.

5. The principle of legitimate or reasonable expectation has been overtaken by the aforesaid general principle in Article 18, but remains a specific concept which can and should be used as a tool in the implementation of the aforesaid wide and undefined principle of acting fairly and reasonably. The same applies to the principle of the common law discussed above that the *audi alterem partem* rule should be applied when an administrative Tribunal or official is privy to information of which an applicant would probably not have knowledge. The concept also applies when the Administrative institution or official adopt a new policy of which the applicant is unaware.

6. Article 18 makes no difference as did the common law between *quasi* – judicial and purely administrative decisions.

7. Mainga J in the court *a quo* found it necessary to attempt to explain the difficult concept of the exercise of discretion by referring to the dicta of Horwitz J in the case of *Van Aswegen v Administrator Orange Free State*.[4]

Since the enactment of our art 18, the quotations referred to have become even more appropriate and indeed even more helpful.

Horwitz J said *inter alia*:

> "Discretion must be exercised on grounds based on facts which are obtained in one way or another. Discretion is something more than a gut feeling…"

Mainga J then referred with approval to Halsbury's Statutes of England,[5] wherein the learned authors stated:

> "Discretion is a science of understanding to discern between falsity and truth, between right and wrong, between shadows and substance, between equity and colourable glosses and pretences, not to do according to the will and private affections…"
>
> "Discretion means when it is said that something is to be done within the discretion of the authorities that the something is to be done within the rules of reason and justice and not according to private opinion; according to law and not humour. It is to be not arbitrary, vague or fanciful, but legal and regular."(My emphasis added).

[4] 1955 (3) SA 60 OPD at 71 (C) and 71 D-E.
[5] 2nd edition, (1951) part 25, p16.

In the case of *Mostert v Minister of Justice*;[6] this Court dealt with the meaning of the term reasonable in the context of Art 18;

> "The word 'reasonable' according to the Concise English Dictionary, 9th ed., means:
>
> > 'Having sound judgment; moderate; ready to listen to reason; not absurd; in accordance with reason'.
>
> Collectively one could say in my opinion, that the decision of the person or body vested with power, must be rationally justified."

IV. FINAL CONCLUSIONS AND REMARKS:

The Court *a quo* held:

1.1 The Minister did not afford to applicant a hearing, alternatively a proper hearing, before the decision was taken;

1.2 The Minister failed to appreciate Dr Lisse's right, alternatively, his legitimate expectation to a fair procedure and decision-making.

1.3 The Minister failed to apply her mind properly to the matter at hand;

1.4 The decision was in all the circumstances, unfair, unreasonable and in conflict with Article 18 of the Namibian Constitution.

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[6] See footnote 3

2. The decision should not be send back to the Minister for a reconsideration of the application, but the Minister should be ordered to issue to Dr Lisse the authority required in terms of Section 17 of the Act.

The learned judge *a quo*, thoroughly considered the law and the facts on the issue of referral back and based his decision on such law and facts. It is appropriate at this stage to refer to his judgment in regard to the law. He first quoted from a judgment of Gibson J in the High Court of Namibia where the learned judge had this to say in the case of "*The Namibian Health Clinics cc v The Minister of Health and Social Services*.[7]

> "The submission on behalf of the Applicant that the Respondent's decision making was biased and hamstrung by policy considerations can't be dismissed lightly. That this is so is self evident from the Permanent Secretary's view that there has been an unacceptable proliferation of permit holders giving rise to a false impression that the scope of a nurse's profession has changed. What is implied in these words is that the Permanent Secretary clearly disapproved of the practice. Given this preconceived view, I do not consider it unreasonable to hold that a public official who subscribes to the views spelt out above was bound to pay only a lip service to the processing of the application, and would be far removed from being objective, reasonable, or fair. (the underlining is mine)
>
> In the result it is my finding that in these circumstances it would be unjust to return the application to the respondent for his consideration".

[7] Unreported judgment handed down on 10th September 2002.

Mainga J then referred to the decision of the Supreme Court of Appeal of South Africa in the case of *Erf 167 Orchards CC v Greater Johannesburg Metropolitan Council and Another*[8] where is was stated:

> "When setting aside such a decision, a Court of law will be governed by certain principles in deciding whether to refer the matter back or substitute its own decision for that of the administrative organ. The principles governing such a decision have been set out as follows:
>
> > 'From a survey of the…decisions it seems to me possible to state the basic principle as follows, namely that the Court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and that, although the matter will be sent back if there is no reason for not doing so, in essence it is a question of fairness to both sides.'
>
> (*Livestock and Meat Industries Control Board v Garda* 1961 (1) SA 342 (A) at 349G. See also, *inter alia*, *Local Road Transportation Board and Another v Durban City Council and Another* 1965 (1) SA 586 (A) at 598 D-F; and *Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation board, Durban, and Others* 1986 (2) SA 663 (A) at 680 E-F).
>
> The general principle is therefore that the matter will be sent back unless there are special circumstances giving reason for not doing so. Thus, for example, a matter would not be referred back where the tribunal or functionary has exhibited bias or gross incompetence or when the outcome appears to be forgone. (*Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban, and Others* (*supra* at 680 F-G).)"

Mainga J then set out the facts and applied the law to the facts. In this regard he gave his main reason for not sending the matter back to the Minister for reconsideration, as follows:

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[8] 1999 (1) SA 92 (SCA) at 109 C-G.

"The respondent *in casu*, exhibited bias against the applicant and it is not likely that she will change her attitude…"

3. I agree with Mainga J's reasoning. The following additional points can be distilled from my extensive analysis of the reasons:

(i) I regret to say that the consideration by the Honourable Minister and her three mentioned advisers, was a travesty of justice – biased, arbitrary and a failure to apply their minds; a failure to apply the most elementary rules of reason and justice such as *audi alterem partem* and in total conflict with Art 18 of the Namibian Constitution and the other articles I have referred to in this judgment.

(ii) It is obvious that Dr Lisse as well as his patients have already suffered substantial prejudice. A referral back for reconsideration, will cause additional further undue delay, particularly when this Court is not in a position to determine how long the deliberations may take this time and when the advisers of the Minister will become available. As the Minister herself indicated in her affidavit on the availability of persons entrusted with contributing to the decision on the application.

> "It may take longer – months at times. The period depends on the availability of persons entrusted with contributing to the decision on the application".

4. For these reasons, I agree with the Court *a quo* that there should be no referral back for reconsideration, but only a direction, ordering the authority in terms of Section 17 to be granted within 30 days of the making of this order.

5. I am also convinced that if a code of conduct and/or written rules exist at the Windhoek State Hospital, such code and/or rules should be made available to Dr Lisse to enable him as well as medical practitioners in the same position to comply with such code and rules, and thereby contribute to the orderly, more efficient and harmonious functioning of the hospital. Obviously such a code and/or rules should also be available to all personnel at the hospital and should be adhered to also by them.

If no such code and/or rules are in existence, urgent steps should be taken to prepare and finalize such code and/or rules. In this manner not only the interest of medical practitioners and their patients will be served, but also that of hospital personnel and the public interest in general.

6. I am disappointed to experience once again, such a deficient exercise of discretion by senior government administrators, notwithstanding the existence of the Namibian Constitution since 21 March 1990, and the many decisions by this Court and the Namibian High Court, interpreting the Constitution and setting out

the principles and procedures to be followed by administrative tribunals and/or officials.

I trust that serious efforts will be made from now on to drastically improve the knowledge, skills and understanding of such tribunals and officials in this regard.

In the result, I propose a slightly amended order reading as follows:

1. The appeal is dismissed.

2. The Minister of Health and Social Services is directed to issue to Dr Lisse a written authorization in terms of Section 17 of Act 36 of 1994 in respect of the Windhoek Central State Hospital within 30 days from the date of this order.

2.1 The Minister is further directed to supply Dr Lisse with a written Code of Conduct and/or Rules, at the time of the issue of the aforesaid direction, should such Code and/or rules have been in existence at the time the application by Lisse was decided.

3. The Minister is ordered to pay the taxed costs of Dr Lisse in this Court as well as in the Court *a quo*.

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O'LINN, A.J.A.

I agree.

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CHOMBA, A.J.A.

I agree.

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GIBSON, A.J.A.

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