CONSTITUTIONAL COURT OF SOUTH AFRICA

Member of Executive Council for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute

CCT 77/13

Date of hearing: 12 November 2013
Date of judgment: 25 March 2014

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Today the Constitutional Court handed down a judgment dismissing an application for leave to appeal by the Member of Executive Council for Health, Eastern Cape (MEC) and the Superintendent-General of the Eastern Cape Department of Health (Superintendent-General). They sought leave to appeal against the decision of the Supreme Court of Appeal which overturned the decision of the Eastern Cape High Court, Grahamstown (High Court).

In July 2006 and May 2007, Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute (Kirland) applied for approvals to establish a hospital and two unattached operating theatres in Port Elizabeth as well as a hospital in Jeffreys Bay. A provincial Advisory Committee considered Kirland's applications and recommended that they be refused. On the strength of the recommendation, the Superintendent-General declined to approve the applications. The decisions taken by the Superintendent-General were reduced to writing. However, before he signed them, he was involved in a motor-vehicle accident and took sick leave for six weeks.

During his absence, an Acting Superintendent-General was appointed. The MEC, who was then in office, instructed the Acting Superintendent-General to approve the applications. The Acting Superintendent-General complied and Kirland was informed of this decision in writing. Kirland submitted building plans for approval and later sought to increase the capacity of the proposed hospitals. At that stage the Superintendent-General

had resumed his duties. He declined to approve Kirland's new applications and informed Kirland that the approval by the Acting Superintendent-General was withdrawn, and that, should Kirland wish to appeal this decision, it may do so in writing to the MEC. Kirland appealed to the MEC, who dismissed its appeal. Kirland then took the matter on review to the High Court.

The High Court set aside the Acting Superintendent-General's purported approval, the withdrawal of that approval by the Superintendent-General and the decision of the MEC that upheld the withdrawal. The state parties appealed to the Supreme Court of Appeal and Kirland cross-appealed the order setting aside the approvals. The Supreme Court of Appeal overturned the High Court's order setting aside the approval on the basis that the validity of the approval was not an issue before the Court. As a result, the Supreme Court of Appeal dismissed the appeal by the state parties, but upheld Kirland's cross-appeal.

The Constitutional Court affirmed the judgment of the Supreme Court of Appeal. The majority judgment, written by Cameron J and concurred in by Moseneke ACJ, Skweyiya ADCJ, Dambuza AJ, Froneman J, Mhlantla AJ and Nkabinde J, holds that the validity of the Acting Superintendent-General's decision was not before the courts. Kirland could not have known of the political machinations behind the decision when it brought its review application, and did not ask the Court to rule on its validity. And the state parties never filed a counter-application to have that decision declared invalid or set aside. To set that decision aside despite these considerations would mean that Kirland would have lost the opportunity to present its evidence on the validity of the decision, together with important procedural protections. In addition, the state parties would evade the requirement in the Promotion of Administrative Justice Act that a review application must be brought within 180 days; and the Court would have to exercise its discretion to set the decision aside without adequate evidence on the potential prejudice to Kirland.

Cameron J further held that our law does not regard an unlawful decision as a "non-decision", and that the state cannot simply ignore a decision that it considers unlawful. The decision of the Acting Superintendent-General, even if flawed, therefore remained effectual until properly set aside by a court.

In a separate concurrence agreeing with the majority judgment, Froneman J emphasised that even if it is accepted that in substance there was a review application before the courts, the Court is still obliged to determine whether the application was brought within the statutory time period.

The minority judgment, written by Jafta J, and concurred in by Madlanga J and Zondo J, would have set aside the Acting Superintendent-General's approval on the grounds that its validity was properly before the High Court and thus this Court had the jurisdiction to make an order setting it aside. In a separate concurrence in the minority judgment, Zondo J agrees that the validity of the approval was properly before the Court and finds that the approval was invalid and should be remitted to the Superintendent-General for the applications to be determined. Jafta J concurs in the order proposed by Zondo J.

In the result, the Constitutional Court dismissed the appeal with costs.