REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 19/15448

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE SIGNATURE

In the application of:

A E Applicant

and

CHIEF EXECUTIVE OFFICER HELEN JOSEPH HOSPITAL First Respondent

HELEN JOSEPH HOSPITAL Second Respondent

MEC FOR HEALTH: GAUTENG PROVINCE Third Respondent

GAUTENG PROVINCIAL DEPARTMENT OF HEALTH Fourth Respondent

MINISTER OF HEALTH Fifth Respondent

DIRECTOR-GENERAL: DEPARTMENT OF HEALTH Sixth Respondent

J U D G M E N T

MAKUME, J:

[1] In this application the Applicant seeks interdictory and mandatory relief. It is about the provision of kidney analysis.

[2] The application was brought by way of urgency. In Part A the Applicant seeks in substance that first, second and third Respondents be interdicted from refusing to administer emergency healthcare to her whilst in Part B the Applicant seeks an order declaring that fifth and sixth Respondents policy of refusing placement of a asylum seekers and or refugees into the chronic renal treatment programme, kidney analysis, kidney and renal transplant to be inconsistent with the Bill of Rights in the constitution.

[3] The Applicant is an Ethiopian National. She arrived in this country during the year 2010, and applied for asylum. She was issued with asylum seekers temporary permit which expired on the 6th March 2019.

[4] On the 7th July 2010 the Applicant was informed by letter that her application for asylum had been rejected. She thereupon immediately filed an appeal with the Refugee Appeal Board on the same day. The outcome of the Appeal is still being awaited 9 years down the line. It is no clear what has caused the delay and since the Department of Home Affairs is not a party to these proceedings this court is unable to make any finding thereon safe to say that an appeal once lodged stays execution of any order. This is perhaps the

reason amongst others why the Applicant has not as yet been deported despite her temporary asylum permit having expired.

[5] At the time that the Applicant applied for asylum it would appear that she lived in Manguzi in the KZN Province. She and her family later moved to Gauteng Province.

[6] During January 2019 the Applicant was admitted at Helen-Joseph Hospital for emergency treatment. She presented with signs of a life threatening condition which required emergency treatment with dialysis in order to prevent her imminent demise.

[7] On the 28th February 2019 the Doctors at Helen Joseph Hospital performed a kidney biopsy the purpose of which investigation was to accurately determine the probability of the Applicants recovery of renal function.

[8] On the 1st March 2019 the Applicant signed an agreement with the Hospital and agreed to be placed on temporary dialysis until further investigations shall have been done to asess eligibility for the chronic renal replacement program.

[9] Doctor Davies who deposed to the answering affidavit on behalf of the first and second Respondents testifies that the kidney biopsy which was done on the 28th February 2019 revealed that the Applicant's condition had reached

irreversible end stage of kidney failure and that this now required long term chronic outpatient dialysis until such time as a transplant organ is available.

[10] On the 2nd March 2019 the Applicant was discharged as an inpatient to continue treatment as an outpatient. On the 3rd April 2019 the hospital handed to the Applicant a Termination of Temporary Dialysis notice to the effect that in view of her ineligibility for transplant in accordance will rational legislation dialysis would be terminated on the 9th April 2019.

[11] There were further negotiations and discussions between Dr Davis the Applicant as well as with the Applicant's brother which negotiations resulted in her last treatment being shifted to the 1st May 2019.

[12] On the 30th April 2019 the Applicant launched a Rule 6(12) application to interdict the Respondents from terminating her treatment as well as to challenge the Policy of the Department and the hospital on the basis of it being discriminatory against asylum seekers and in violation of the right entrenched in the Bill of rights.

[13] At the hearing on the 3rd May 2019 an interim order was granted in terms of which the Respondent undertook to continue providing temporary treatment to the Applicant pending the finalisation of the application.

[14] On the 5th July 2018 before my brother Mabesele J this matter was postponed for hearing to the 19th August 2019. The parties were allowed to file further affidavits to supplement their original affidavits.

[15] After the third and fourth Respondents had filed their answering affidavit the Applicant brought an application in terms of Rule 30A objecting against the filing of those affidavits

[16] At the commencement of the hearing before me on the 23rd August 2019 the Applicant withdrew her application in terms of Rule 30A. The judgment which follows hereunder deals only with Part A of the notice of motion.

[17] This matter raises a number of constitutional issues. The Applicant relies on the bill of rights which guarantees everyone the right to dignity, equality and healthcare on the other hand the hospital is bound by a policy document as well as Section 6 of the National Health Act 61 of 2003 to restrict provisions of such medical services as required by the Applicant to South African Nationals only or to people who have received refugee status.

[18] The Applicant contends that for as long as she is in the country she must not be treated differently irrespective of whether or not her presence is lawful or not. She relies not only on the constitution but also on International agreements of which South Africa is not only a member but a significant signatory.

THE LAW AND THE POLICIES

[19] The impugned documents which form the basis of this application are attached to the Applicant's founding affidavit marked ABE2 and ABE3. Their wording is similar. The relevant portion reads as follows: "This letter serves to inform you of the termination of your acute haemodialysis at Helen Joseph hospital. Due to the limited numbered of acute and chronic haemodialysis slots on renal unit and the increasing population in need of dialysis we can no longer offer you dialysis at our hospital due to the following:

b) You are not a South African citizen and you do not possess verified documents pertaining to refugee status or permanent citizenship awarded.

[20] This letter of termination clearly has its genesis and origin from the "Guidelines for Chronic Renal Dialysis" as published by the National Department of Health and signed by the Minister of Health on the 3rd March 2009. In the foreword the Minister says the following:

> "The main objective of these guidelines is to assist the Clinicians when making decisions particularly on older patients and those affected by HIV taking into consideration the resources available to them."

[21] The Minister goes on in the document to refer to what is probably the main reason for exclusion of the Applicant she says the following:

> "In South African RRT (Renal Replacement Therapy) is not freely available, patients who can afford it or who have medical insurance maybe able to receive these expensive therapies in the private sector. For the majority however this service is not freely available and is provided to a select few in some state hospitals. Patients are selected for dialysis based on state criteria for acceptance to a transplant program."

[22] The Health Professions Council of South Africa also produced guidelines as far back as May 2007 in which it deals with the situation of withholding treatment due to scarcity and allocation of resources. In the document council says the following:

> "There are circumstances when withholding treatment even if it is not in the best interest of the patient is permissible. This will apply to continued care in special Units such as critical care and chronic dialysis units for end stage kidney failure."

[23] Lastly it is perhaps the provisions of Section 61(3) of the National Health Act No. 61 of 2003 which finally determined eligibility of foreigners to such medical treatment as is required by the Applicants. The Section imposes a prohibition on transplant of organs into persons who are not South Africa citizens or have no permanent residence in the Republic.

[24] The second Respondent's Standard Operating Procedure for the Provisions of long term Renal Replacement Therapy (LTTR) provides as follows at clause 1.6.2:

> "All patients considered for LTTR must produce documentary proof of South African Citizenship or permanent residence prior to consideration for LTTR."

[25] It is common cause that according to Dr Davies a specialist, and Head of Nephrology at Helen Joseph Hospital the Applicant received full and appropriate care including empiric immunosuppression, haemodialysis, vertilatory support and management of intercurrent sepsis during her stay at the Helen Joseph Hospital. Eventually on the 28th February 2019 the Applicant was diagnosed as having reached an irreversible end stage kidney failure and that she now requires long term chronic outpatient dialysis until a kidney transplant becomes available.

[26] The Applicant maintains that what the Hospital is doing is nothing else but unfair discrimination as a result of which she continues to face prospects that her human dignity will endure denigration and this will result in her premature death.

[27] This statement cannot be the truth there are numerous South Africans who have been excluded from renal treatment of the same nature on the basis of scarcity of resources. It is unfortunate that the Applicant happens to

be hit by a further exclusion aspect in the National Health Act. The Constitutional case of **Soobramoney vs Minister of Health Kwa-Zulu Natal Case No. CCT 32/97** a judgment by Chaskalson P is to the point. Mr Soobramoney was a South African Citizen whose condition had reached an irreversible final stage of chronic renal failure just like the Applicant in this matter. Mr Soobramoney had sought regular renal dialysis from a hospital in Durban in order to prolong his life. He was informed that unfortunately the hospital could only provide dialysis treatment to a limited number of patients as the renal unit only had 20 dialysis machine. He was told that because of the limited facilities the hospital was unable to provide him with such treatment.

[28] Dr Malcom Davis the Head of the Department of Nephrology at Helen Joseph Hospital testifies that the Department of Nephrology at Helen Joseph has a Chronic shortage of dialysis slots and is unable to take new patients or patients who are not transferable and that the reason why she the Applicant was given a letter of termination of Temporary Dialysis was not only because of the Standard operation procedure for provision of long term renal placement therapy but also because the Applicant is not eligible for a kidney transplant. The hospital in my view is not discriminating it is applying the existing law that also affects South African Citizens.

[29] In his extensive affidavit Dr Malcom Davis sets out in paragraph 12 what emergency medical treatment the Applicant received. He emphasizes at paragraph 12.1.2 that the Applicant was put on temporary haemodialysis, in

an effort to stabilize her condition and for her family to make proper arrangements to have her moved to another facility. She and her brother were also given a letter to take to the Ethiopian Embassy with the view to assist her with repatriation to Ethiopia.

[30] The Applicant failed dismally to reply to have that evidence and could only say that she will in due course in Part B deal with the Constitutional repugnance of the Standard Operating Procedure. This in my view is avoiding the issue for in my view Part A is not interim it has definite characteristics of a final interdict. I shall therefore treat this as an application for final relief.

[31] In her heads of argument the Applicant says that there are four Constitutional rights that are implicated by the Respondent's decision to exclude her from further treatment namely: yi) Emergency healthcare; (ii) equality; (iii) human dignity; (iv) right to life. This is clearly indicative that the Applicant has based her claim in part on the terms of Section 27 (3) of the Constitution which provides that "No one may be refused emergency medical treatment" and section 11 which stipulates that "Everyone has the right to life."

[32] In their opposing affidavit the respondents have set out certain facts which in the main are either common cause or have not been seriously challenged by the Applicant. As an example at paragraph 12.3 Dr Malcom Davis says that on the 10th April 2019 he informed the Applicant and her brother that her kidney biopsy had demonstrated irreversible kidney failure

requiring long term chronic dialysis as a bridging treatment for transplantation but in view of her immigration status she did not qualify for a transplant.

[33] The learned Chaskalson P in Soobramoney (supra) in addressing the Constitutional right to emergency healthcare said the following at paragraph 11:

> [11] What is apparent from these provisions is that the obligations imposed on the state by Sections 26 and 27 in regard to access to housing healthcare, food, water and social security are dependent upon the resources available for such purposes and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already being referred to an unqualified obligation to meet these needs would not presently be capable of being fulfilled. This is the context within which Section 27(3) must be construed."

[33] The Applicant was never refused emergency treatment this is common cause and can never be disputed. Her condition was stabilised and steps were taken to assist her with expedited repatriate to Ethiopia so that when she arrives there she receives permanent treatment. She did not refuse the arrangement all that she now says is that she will not receive treatment in Ethiopia. In my view she is speculating the Health Department of Ethiopia has not said so she now wants to rely on her failed refugee status to force Helen Joseph to give her treatment under circumstances where Helen Joseph hospital is unable to due to lack of resources.

[34] Combrink J dismissing Mr Soobramoney's application in the High Court summarised it as follows:

> "The case made out by the Applicant mirrors what at present seems to be a popular conception that the rights in the Bill of Rights are absolute and can be exercised and enjoyed without limitation. This is of cause not so. The rights are by section 36(1) limited in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society."

[35] The hospitals Standard Operation Procedure which are based on the National Health Act may be regarded as unreasonable but they certainly justifiable. It is in the function of the court to decide who shall and who shall not receive the required medical treatment it is for the medical practitioners and the Health profession and authorities who make those decisions. This court will only interfere if it finds that the decision was exercised unreasonably. I could not find any such suggestion, instead what happened is that the Helen Joseph Doctors went out of their way to offer assistance up to where they could and no more.

[36] Dr Medupe Modisane the Deputy Director General in the Department of Health Gauteng Provincial speaking on behalf of both the Provincial and National Health Departments reiterates that they support the hospitals opposition to the granting of relief in Part A and B amongst others on the

basis that the hospital's Standard Operating Procedure has been formulated on the basis of national guidelines which requires that chronic long term dialysis be made available only to South African Citizen or permanent residents including Section 61(3) of National Health Act 61 of 2003 which section prohibits organ transplants into persons who are not South Africans or permanent residents of South Africa.

[37] What is more telling is what Dr Modisane says at paragraph 7 he says:

> "The Hospital has a waiting list of people who require chronic dialysis. Accordingly even if the Applicant were a South African Citizen on permanent resident and she persuaded this court that she qualifies to be given long term chronic dialysis at best for her she would be entitled to an order that she be put on that waiting list, not an order that she be granted dialysis."

[38] Dr Modisane tells the court that chronic kidney disease is not uncommon in South Africa it affects some 14% of the population. He continuous to tell the court that providing dialysis is expensive and given the limited financial resources the available dialysis facilities in state hospital are unable to accommodate the large number of people requiring dialysis. This results in hospitals denying dialysis to a large number of needy persons.

[39] In Soobramoney's case at paragraph 3 the Constitutional court accepted that the guideline for chronic dialysis is also based on the patient

being eligible for renal transplant. A patient who is eligible for a transplant will be provided with dialysis until an organ donor is found and a kidney transplant has been accepted.

[40] The Applicant is not entitled to the relief she seeks for the reasons set out above and in the circumstances the hospital Helen Joseph was and is entitled to refuse to provide further treatment to the Applicant.

[41] In the result I make the following order:

i) The application PART A is dismissed.

ii) I make no order as to costs.

DATED at JOHANNESBURG this the day of OCTOBER 2019.

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M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING	:	23 AUGUST 2019
DATEOF DELIVERY	:	07 OCTOBER 2019
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FOR 1st & 2nd RESPONDENTS	:	Adv N Makopo
INSTRUCTED BY	:	Office of the State Attorney
FOR 3rd & 4th RESPONDENTS	:	Adv V Sonic Sc

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