



Minister of Health and Social Services v. Lisse

[2005] NASC 8

Country: Namibia

Region: Africa

Year: 2005

Court: Supreme Court

Health Topics: Health care and health services, Health systems and financing, Hospitals, Informed consent, Medical malpractice, Water, sanitation and hygiene

Human Rights: Freedom from discrimination, Right to due process/fair trial, Right to work

Facts

Dr. Lisse, a private medical practitioner, challenged the Minister of Health and Social Services'sTM (Minister) decision to deny him authorization to conduct surgeries at the Windhoek State Hospital.

Lisse was a registered medical practitioner and specialist obstetrician and gynecologist authorized to practice under the Medical and Dental Professions Act, 1993. He opened a private practice in 2004, after practicing in the public health system for 14 years. Although Dr. Lisse conducted much of his practice in his own office, he also conducted surgical procedures at hospital facilities, including in State hospitals. Half of his patients were members of the State Medical Aid Scheme and half of the medical procedures he performed were in State hospitals.

Under the Hospital and Health Facilities Act, 1994 (the Act), private practitioners could use public hospital facilities to conduct medical procedures if they sought authorization from the Minister beforehand. Dr Lisse made an application to the Minister under this Act. The Minister, on recommendation of the Permanent Secretary, refused Dr. Lisse'sTM application.

The Permanent Secretary had recommended refusal on the basis of certain complaints made by staff of the State hospital against Dr. Lisse. The staff had complained that Dr. Lisse was disrespectful and unprofessional, and had harassed hospital staff and was extremely difficult to work with. Other evidence, however, suggested that Dr. Lisse had merely complained about the staff'sTM incompetence, inability to maintain standards of hygiene or stock inventories of medicines, and attitude problems, known to be common problems in Namibian hospitals at the time, and that staff had taken badly to his complaints. The Minister had not investigated either of these sets of claims before denying authorization to Dr. Lisse.

Lisse sought judicial review of the decision of the Minister, and successfully had the decision set aside by the High Court. The High Court judge found that the Minister had not afforded Dr Lisse a hearing before the decision was taken; that the Minister had failed to apply his mind properly to the matter when making the decision; and that the decision was unfair, unreasonable and in conflict with Article 18 of the Namibian Constitution. The Minister appealed.

Decision and Reasoning

The Court found that the Minister was required to act fairly and reasonably when making the decision to authorize private practitioners to use public health facilities. It upheld the lower court'sTM decision, and dismissed the appeal.

The Supreme Court held that the Act conferred on medical practitioners a right to make an application in terms of section 17 and to be granted the necessary authority unless there were reasonable grounds for refusal. Further, an applicant was entitled to administrative justice in the course of the application, which encompassed substantive as well as procedural fairness, including at least a legitimate expectation of a fair hearing.

The denial of Dr. Lisse'sTM application breached these obligations under the Act. The Minister'sTM refusal of the application on the basis of complaints without establishing the truth or correctness of complaints and without hearing Dr Lisse'sTM response to the complaints was contrary to the principle of audi alterem partem, or the requirement to "hear the other party". Further, the judge held that the indications of problems with competence

work ethics/attitude, maintenance and hygiene of the hospital contained in Dr Lisse's written reply to the allegations against him should have been investigated further rather than ignored and held against him in his section 17 application.

The Court also noted that the decision to prevent Dr Lisse from practicing in public hospitals effectively ignored the interests of Dr Lisse's patients, 50 percent of whom were state patients who would be unable to afford the tariffs of private hospitals. While the Permanent Secretary had stated that there would be no prejudice to these patients, as they could choose another doctor, this discounted the right of a patient, within reasonable limits, to be treated by a medical practitioner of her or his own choice.

Aside from ignoring the patient's right to choose a medical practitioner, the decision further breached the right of a medical practitioner to exercise his profession. The Minister and the Ministry unduly hampered the doctor's freedom to practice his profession by refusing his application without good reason and thus causing him prejudice without good reason. It was held that under the circumstances, Dr Lisse's right to dignity was therefore breached by the Minister's and the hospital officials' conduct in relation to the section 17 application.

The Supreme Court upheld the lower court's findings, and ordered the Minister grant the authorization under section 17 to Dr Lisse within 30 days of the court order. It upheld the lower court's decision not to send the matter back to the Minister for reconsideration, on the basis that both Dr Lisse and his patients had already suffered substantial prejudice by the delays in obtaining section 17 authorization. It also ordered Windhoek State Hospital to make available a code of conduct for private medical practitioners using its facilities and hospital staff.

Decision Excerpts

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. Para. IV.3.i

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. Para. IV.3.ii

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. Para. IV.5