Court Of Appeal

Judges

THE HON. CHIEF JUSTICE SILVIO CAMILLERI
THE HON. MR. JUSTICE TONIO MALLIA
THE HON. MR JUSTICE JOSEPH AZZOPARDI

Sitting of Friday 28th of April 2017

Number: 42

Application Number: 948/09 RCP

Johanna Van't Verlaat MD, Ph.D.

v.

Kunsill Mediku Malti

The Court:

Having seen the sworn application brought forward by the plaintiff on the 30th September, 2009, whereby it was claimed that:

> "A.1 The facts of the case refer to an intended combined medical operation consisting of the first part of an orthopaedic intervention, and in the second part of a neurosurgical intervention. The operation resulted from a referral by plaintiff to orthopaedic surgeon Mr Frederick Zammit Maempel. The referral was based on a clinical examination and an MRI carried out on the patient in 2005. The operation was scheduled and planned by Mr Zammit Maempel, for the 24th March 2008. The first part of the operation was duly carried out

by Mr Zammit Maempel. The second part of the operation which was due to be carried out by applicant was not carried out.

"A.2 As a result an inquiry was held by, and a decision was given by the Medical Council on the 9th September 2009, whereby the following was stated:

> "*Hence, considering the above, the Medical Council finds Or Johanna Van't Verlaat's conduct in breach of the* ***Article 6 (iv) of the General Notice for the Guidance of Practitioners and Article 5 of the Ethics for the Medical Profession*** *and finds her guilty* ***of*** *professional and ethical misconduct in terms of Article 32(l)(b) and (c) of Chapter 464 of the Laws of Malta. Consequently, it is imposing a suspension of three (3) months and a penalty of ten thousand (10,000) Euros. The suspension will come into effect one month from the date of the delivery of this judgment." (Doc "A")*

"A.3 The present application considers two issues (i) whether applicant's decision not to carry out the operation was justified or not; and (ii) if contrary to the applicant's submission it is deemed to be unjustified whether such non justification merits the punishment meted out by the Council.

"B. The present application is filed in the contention that Ms Van't Verlaat was justified in not carrying out the operation and therefore it is submitted that the punishment should be removed *in toto* or alternatively if contrary to this submission her decision is deemed to be in breach, that there were however circumstances which induced her to reasonably think that she need not carry out the operation, and that therefore her responsibility is not to the extent as decided by the Medical Council, so that the penalty should accordingly be thereby reduced.

"C.I The need for surgery was identified by Ms Van't Verlaat after neurological examination of the patient and reading the MRI in October 2005. Ms Van't Verlaat referred the patient to Mr Zammit Maempel. It was agreed that a combined operation be held. The slot in the operating schedule of Mater Dei Hospital was for the 24th March 2008. In agreeing on the combined operation Ms Van't Verlaat who referred the patient to Dr Zammit Maempel requested as a condition that this operation would be the first operation on that day. This had been agreed upon.

"*C.2* On the day in question (24.3.2009) Ms Van't Verlaat was waiting at Mater Dei Hospital to be informed at what time she could come to the operating theatre. She was informed at 12 o'clock that she could attend at 13.30. It also transpired that this operation was not the first operation, as Mr Zammit Maempel had held another prior operation: an arthroscopy case. This meant that there was a delay of approximately 1 hour 30 minutes. The issue here is as to whether applicant was justified in not carrying out her intervention in view of

the time lag -which had not been agreed upon and which however had been imposed upon her because a prior operation had been undertaken - contrary to what had been agreed upon. There is no doubt (and this was stated by appellant in her evidence) that had the operation been carried out in accordance with the time schedule agreed upon and that had an emergency arisen whilst under operation, then she would have waited and helped out. The applicant however had competing responsibilities. She had a very very sick husband to attend to and a clinic at 2.00 o' clock at St Philip Hospital. Further, as set out below, applicant had formed the view pre-operatively that her intervention was not strictly necessary. She therefore concluded after careful consideration that the balance of her responsibilities weighed in favor of her husband and her other patients and against proceeding with an intervention that was unlikely to be of any benefit to the patient.

"C.3 Under the circumstances applicant felt both from a medical viewpoint and from an organizational viewpoint that she need not intervene. Further to what has been stated above from a purely timing point of view it was not proper and fair upon her that due to a procedure which had not been agreed upon, but which none the less had been undertaken she (and her sick husband and other patients) had to thereby suffer. Ms J Van't Verlaat left hospital at about 12.45.

"C.4 This attitude is of course also a cultural attitude. Both sides. Plaintiff graduated MD at Utrecht University in 1974 and registered as a neuro surgeon in the Netherlands in 1981, Plaintiff worked in the Netherlands until Jan 1997 - when she came to Malta.

"C.5 Plaintiff has been working in Malta for 12 years and to date has not had problems of this nature although combined operations with others and indeed with Mr Zammit Maempel have been held. Had the operation been held as a first operation the delay would not have occurred. The applicant would have been asked to attend theatre at around 12 - 12.15 - which timing was perfectly acceptable to her.

"D.1 As previously stated there was another aspect to the case which made applicant take the decision that she in fact took. When seen in October 2005 Mr Hili had a Jumbo-sacral radiculopathy. As, for various reasons it took approximately *2* years 5 months for the operation to be arranged the applicant requested that a contemporary MRI be performed. This was duly carried out one week circa before the 24.3.2008, and it clearly showed that the planned neuro surgical intervention was now no longer indicated and required. Ms Van't Verlaat accepts that she should have informed the hospital and Mr Zammit Maempel about this development and that the decompression she was due to perform would not be necessary and/or carried out. However once the operation had been organized after such a long delay applicant felt that she should attend and inspect the operating site even though the MRI showed no neurological pathology. Such an

inspection would not have been of any detriment or advantage to Mr Hili. This consideration was also part of applicant's frame of mind on the 24.3.2008 when deciding whether to carry out her part of the operation or otherwise. For the avoidance of doubt, had the last visit in Jan 2007, showed that an operation was still indicated she would have deemed it her duty and responsibility to carry out the operation notwithstanding the delay.

"D.2 Reference is made to a specific question in the inquiry as to once a patient is open whether it would be prudent for a surgeon to make an inspection of the open wound rather than rely only on the clinical information obtained.

"The question is an important one. It can however be also logically misleading. The applicant comments as follows.;

"D.3 First, the fact is that when clinical examination supported by scans or x-rays shows no indication of damage (say a broken bone) it would be bad medicine (other than in exceptional circumstances) to open up the area to find out whether such an injury in fact existed. Hence if the clinical examination and MRI in Mr Hili's case showed that there was no neurological pathology Mr Hili would not have been opened up if that had been the only reason for the operation. Mr Hili was operated upon for other medical reasons, which indeed as reported by Mr Zammit Maempel, were duly carried out and which in fact happily produced the desired result seeing that Mr Hili's condition had subsequently improved substantially.

"D.4 The second logical query would therefore be : but once Mr Hili was in fact operated upon and opened up and not withstanding that the MRI showed that there was no pathology wouldn't it have been proper and prudent that a visual inspection be carried out? The reply is that of course this would have been prudent: but a further question is called for - was it necessary? And the answer is that it was not necessary. It was on this basis that applicant decided not to carry out the inspection and the neurosurgical part of the operation. Accordingly, whilst the opportunity to inspect the operation notwithstanding the absence of neurological pathology represented ideal practice it was not strictly necessary and it was not substandard practice not to perform it. As stated previously the balance of applicant's responsibilities meant that it would not be possible for her to carry out that inspection after all.

"E.1 Clearly Mr Hili had been told that an operation in two parts would be held; he expected that such a double operation be carried out. The hospital had contracted to carry out such a double operation, and yet a double operation was not carried out This in itself does not mean that there has been a breach of contract or indeed of ethical rules by the surgeon in question if it can be shown that the non carrying out (of the second part) of the operation was reasonably justified.

"E.2 Thus applicant feels that there were various circumstances which effected her decision at that time which decision had to be taken within a few minutes. There was no need for her to medically intervene. There was a delay for which she was not responsible and which it had been agreed upon would not have occurred which combined with her urgent duty to her sick husband and to other patients. Applicant regrets her failure to inform Mr Zammit Maempel her team and the patient that the decompression procedure would not be necessary. She appreciates that had she done so the misunderstanding surrounding her unavailability following the delay of the procedure would not have arisen.

"E.3 In view of the above it is felt that there exist sufficient reasons for applicant to decide that she need not intervene on the second part of the operation and if this reasoning is not accepted in toto it is submitted that it can be accepted partially as constituting a breach to a lesser extent than a full breach.

"F. Let defendant show why this Court should not declare and decide that applicant's reasoning under all the circumstances was justified and acceptable as one which can be reasonably taken by a medical person in that situation and therefore why the Court should not revoke the above said disciplinary measures in toto or if not in toto partially whether as to the type (i.e. suspension of license or payment of fine) or amount of fine".

Having seen the sworn reply brought forward by the defendant Medical Council of the 28th October, 2009, whereby the Registrar of the said Council stated as follows:

"That all plaintiff's pretensions are completely unfounded in fact and in law, and this for the following reasons:

"1.The **first part** of the plaintiff's request can in no case be upheld by this honourable Court – in particular where she requests this honourable Court to decide that her reasoning was, in the circumstances, justifiable and acceptable as one which can reasonably be expected of a medical person in that situation.

"This is being submitted for the following reasons:

"(a)This honourable Court has no jurisdiction to decide the requests therein contained. **Chapter 464** of the Laws of Malta, the Medical Professions Act, clearly specifies and defines "**professional and**

ethical standards" as including *standards relating to the general conduct of a member of a health care profession, including the behaviour of such member towards his client or the patient under his care or being attended by him, during or consequential to the exercise of his profession, and the behaviour of such member towards other members of his profession and towards members of other health care professions and towards society.*

"(b) Furthermore, Article 10 (1) (d) of the same Act 464 specifies that among the functions of the Medical Council is *to prescribe and maintain professional and ethical standards for the medical and dental professions* – that goes on to mean that the "*ethical standards*" and "*the reasoning*" behind the actions of a medical person subject to the authority of the Medical Council, are not decided by the same medical person or by his or her 'culture'. A professional in the medical field must be subjected to the professional and ethical standards that are held and set by the defendant Council.

"(c) That, as results from Article 10 (2) of Act 464, it is the defendant Council that is authorised at law to set up committees for the purpose of enforcing professional and ethical standards applicable to the health care professions regulated by it and generally in order to better perform its functions. Thus, it is evident that our law vests the Medical Council with exclusive power, authority and responsibility to enforce professional and ethical standards.

"(d) The same Chapter 464, in Article 31, gives exclusive jurisdiction to the Medical Council to investigate any member of the Medical Profession, so much so that this same Article provides that the Medical Council *shall have the power, either on the complaint of any person or of its own motion, to investigate any allegation of professional misconduct or breach of ethics by a health care professional falling under its supervision.* With respect, this means that the legal jurisdiction to judge whether the 'reasoning' of a medical professional was acceptable or justifiable – that is, whether the person was correct in his ethical and professional standards – is vested absolutely and exclusively with the Medical Council. So much so that Article 32 of the same Chapter 464 stipulates the penalties that the Medical Council must impose on grounds of conviction or infamous conduct.

"(e) That, as results from the same paragraph 4 of the decision of the Medical Council of the 9th September 2009, plaintiff's conduct was investigated as it could and allegedly did, go against the provisions of Article 6(iv) General Notice for the Guidance of Practitioners and Article 5 of the Code of Ethics – an exercise that could only be carried out by defendant Council, as per Chapter 464 as above-mentioned.

"*2.* That likewise, the **second part** of plaintiff's request cannot be upheld – that is, where this honourable Court was requested to revoke

the disciplinary measures taken in plaintiff's regards, in toto or in parte. It is humbly submitted that this falls within the exclusive jurisdiction of the Medical Council, which jurisdiction was exercised in terms of the Law and within its parameters.

"**It is thus being submitted that this Honourable Court has no jurisdiction to hear and decide the requests put forward by plaintiff.**

"3. Without prejudice to the above-mentioned, in the merits of the case, plaintiff's request is also unfounded in law and in fact, in so far as plaintiff acted in breach of professional conduct and against ethical and professional standards when she failed to turn up for her part of the operation on a patient who was already incised, for reasons known to her – but particularly, as resulted by Medical Council itself, that plaintiff allowed her rage and her personal agenda take over the patient's interests at the moment when he was being operated. The Medical Council, justly concluded that such actions are unjustifiable and unacceptable and go against the patient's interests, which is a priority for the medical Profession. That, above all, in her sworn application, plaintiff herself submits that "*tammetti illi setghet tinforma l-isptar u Zammit Maempel fuq dan l-izvilupp*" (para. D.1) and "*jiddispjaciha li ma nformatx lil Zammit Maempel, lit-tim taghha u lill-pazjent li l-parti ta' l-operazzjoni .... hija tifhem illi kieku nformat dawn il-persuni ma kienx ikun hemm dan in-nuqqas ta' ftehim*" (para. E.2)

"4. Saving further pleas.

"With all costs against plaintiff".

By means of a decision dated the 29th May, 2012, the First Hall of the Civil Court delivered its judgement, by means of which the case was decided in the sense that, it accepted the first preliminary plea brought forward by the defendant Medical Council and consequently rejected and dismissed the plaintiff's demands as contained in her sworn declaration, in that the demands as presented in the said declaration were not held to fall within the competence and jurisdiction of that Court, with the costs of the case to be borne by the plaintiff.

The First Court delivered its judgement, after making the following considerations reproduced hereunder:

> "Having considered that in this sworn application, plaintiff is requesting this Court to declare and decide that the applicant's reasoning under the aforesaid circumstances, was justified and acceptable, as one which can be reasonably taken by a medical person in that specific situation, and thus in view of the same the applicant has requested this Court to revoke *in toto* the indicated disciplinary measures imposed on her by the Medical Council's decision of the 9th September 2009 *in toto* or in parte and this both in respect of the suspension and the actual amount imposed as a penalty and fine.
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> "Having taking cognisance of the fact that to substantiate her requests, applicant presented all the documentation relative to the inquiry held by the Medical Council in connection with the same proceedings and her alleged, the actual decision taken by the same Medical Council on the 9th of September 2009, and the sworn declaration made by plaintiff herself.
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> "Having also noted that the plaintiff during the sitting held on the 24th of February 2010, (page 102 of the court file) testified that she had started providing professional service in Malta in the Government Hospital on the 1st of March 1997, and apart from the indicated procedures before the Medical Council, the actual subject matter of this lawsuit, no other inquires or actions were ever initiated against her in connection with her medical profession so that her conduct was never called into question.
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> "Having also noted that the plaintiff stated that in connection with the incident decided upon by the Medical Council, she had testified that the first time she visited the patient in question was in October 2005, when he showed her an MRI, which he had undergone in August 2005. She then referred the patient to Surgeon Mr. Fredrick Zammit Maempel, to evaluate the possibility as to whether he was a potential candidate for surgery. Plaintiff explained that in these situations two operations are combined, the neurological operation and the orthopaedic operation, which take place on the same day and through the same opening but not simultaneously. In January 2007, the patient informed her that he had been accepted for the operation and that he had been placed on the waiting list by Mr. Frederick Zammit Maempel. She asserted that she had then examined him again and that at that moment, the patient had no neurological problems. On the 17th of March 2008, Dr. Zammit Maempel's house officer advised her that the operation was scheduled for the 24th of March 2008, and she

therefore verified her database and detected that the neurological problem had by then cleared up, and that the last MRI had taken place in August 2005. Therefore she told the house officer to repeat the MRI, which duly took place on the 18th of March 2008, and this confirmed that in fact the neurological problem had cleared up. Thus she maintained that the patient did not actually need her medical intervention, but since the operation had already been scheduled she was willing to do her part, but she stated that this was ready to perform her intervention only on the condition that the said operation was scheduled as the first case of the day.

“Having also taken note that the plaintiff stated that on the day of the operation, she received a phone call at 9.50 a.m. from the house officer informing her that the first operation had just terminated, as Mr. Frederick Zammit Maempel had in fact performed an arthroscopy operation on another patient and consequently that the indicated personnel were going to start preparing the patient for the combined operation in which the plaintiff was to take part. Here the applicant states, in no uncertain terms, that she was not happy with this arrangement because according to her version of events this was against the procedure that had been agreed upon with Mr. Frederick Zammit Maempel.

“Having also taken cognisance of the fact that the operation theatre’s log book showed that in fact there was an arthroscopy operation that had been performed and this intervention took place between 8.45 a.m. and 9.40 a.m. After that the medical intervention in question - i.e. the planned combined operation - lasted from 10.05 a.m to 13.30 p.m. and that therefore there was a delay of an hour and a half from the scheduled and given time for the plaintiff’s part in the said operation.

“Having noted that according to the plaintiff she sent her own house officer to find check on the state of the actual medical intervention in question, and when he returned he informed her that she had to wait for another hour before she could commence her part of the medical procedure. Due this state of events, applicant states that she decided to leave and go home in order to take care of her husband, who at that time had a terminal illness.

“Having also noted that the Medical Council, filed a sworn reply in which it raised a preliminary plea stating that this Court does not have the necessary competence and/or jurisdiction to decide on applicant’s actual demand in this case and this related to the actual declaration being sought by the plaintiff in relation to her professional in this incident, which she maintains was justifiable, and also with respect to the part of the demand where she asked this Court to revoke the disciplinary measures imposed on her by the Medical Council, and this in whole or in part as she indicated in the actual sworn application filed by her.

"Having taken notice of the fact that The Medical Council (composed of Dr. Josella Farrugia LL.D. as President, and Dr. Paul Soler M.D., Mrs. Anna Abela, and Dr. Ian Spiteri Bailey LL.D.) further submitted in its sworn answer that on the merits of the case the applicant's request on the facts of the case is unfounded in fact and in law due to the fact that applicant's conduct was incorrect and not in compliance with the professional and ethical standards of conduct expected from members of the medical profession. The respondent Medical Council, in support of its pleas referred to the inquiry documentation, which was exhibited by applicant as well as and on the cross-examination of applicant.

"The Court in view of the preliminary pleas raised by the Medical Council, that this case is not within its competence, has firstly to decide on this issue before going into the merits of the actual demand of the plaintiff. This plea is based on the sworn answer of the respondent Medical Council and submissions made by its legal representative Dr. Ian Spiteri Bailey that according to **article 31 of Chapter 464** it is the Medical Council who has the exclusive competence to decide any allegation of unprofessional conduct by a medical practioner or to decide on any claim of alleged breach of the code of ethics of the medical profession by one of its members and that there is an appeal from a decision given by the said Medical Council to the Court of Appeal only in the case that the Medical Council decides to cancel, suspend or striking off the relative professional practioner's name from the relative Register, as provided for in **article 36 (1) and (4) of the same Chapter 464.**

"The Court having taken note and given due consideration to the submissions of both parties to this lawsuit, where on the one hand respondent Medical Council states that the Court has no competence or jurisdiction to hear this case as this lies within the exclusive competence to the Medical Council and to confirm the same the said Medical Council refers to the judgment **"Dr. Frank Portelli vs Kunsill Mediku"** (A.I.C. (RCP) – 27th April 2010) which according to their submissions supports their view.

"The Court has also taken cognisance of the fact that the plaintiff however submits that this preliminary plea is to be rejected as according to her **Chapter 464 of the Laws of Malta, the Health Care Professions Act,** does not exclude the jurisdiction of the ordinary courts to revoke disciplinary measures. In fact according to applicant, the ordinary courts have jurisdiction to examine the decisions taken by the Medical Council and this on the basis of **article 36 (4) of Chapter 464.** In fact applicant also makes a reference to the already indicated judgment **"Dr. Frank Portelli vs Kunsill Mediku"** (A.I.C. (RCP) – 27th April 2010) contending on her part that in that case the court had decided that it did not have jurisdiction only because the case before it did not refer to the situation when the Medical Council decided to

erase a name from the Register but it referred to a situation where there was only to the possibility that a name could be struck off the relative Register.

“Having given due consideration to the above this Court first and foremost indicts that the decision referred to by both parties was actually given by the Court of Appeal in its Inferior Jurisdiction, and therefore it was given from an appeal purporting to have been made according to **article 36 (4) of Chapter 464.**

“Having considered that the said Court in the same decision had decided that by virtue of **article 32 of Chapter 464**, The Medical Council was given the exclusive competence to decide on any allegation made of incorrect medical professional conduct or breach of the relative code of ethics from a member of the medical profession and accordingly the Medical Council could take the necessary disciplinary actions as envisaged and contemplated in the said Act including those specified in **article 32 (1)**, however on the other hand the Act as provide in **article 36 (1),** provided a right of appeal from such a decision only in the case where the Medical Council actually decides to cancel a medical practioners name from the relative register according to **article 32** and **article 38 of Chapter 464**.

“Thus according to **article 32 of Chapter 464**, the Medical Council has the right to impose a penalty when after holding an enquiry, it results that the medical professional concerned is either guilty of professional or ethical misconduct or in any other manner has failed to abide by the professional and ethical standards applicable to him. The only instance where the right of appeal is mentioned in this Act is **in article 36,** and only in the instance where the Medical Council actually decides to erase the name of a professional from the appropriate register, and it is in this case that said professional has a right to appeal from such a decision before the Court of Appeal Inferior Jurisdiction. This Act also provides in **article 49,** for an Appeals Committee, which can be called upon mainly in three situations, that is, when a) the Medical Council refuses an application for the registration of a professional in the appropriate register; b) when the Medical Council refuses to give a specialist certificate to a healthcare professional and; c) the Medical Council does not decide upon an application for registration.

“Having considered that in this case the present application was filed by plaintiff before the First Hall Civil Court, in order to decide whether plaintiff’s reasoning in the abovementioned circumstances was justifiable and acceptable and this Court was also requested to revoke the disciplinary measures decided by the Medical Council. Thus the whole issue revolves on whether the ordinary courts have the right to examine and decide upon the decisions taken by the Medical Council. This is the issue – as clearly this application was not filed before the Court of Appeal Inferior Jurisdiction, but before the First Hall Civil

Court. Thus, contrary to what was submitted by plaintiff in her note of submissions, that this Court's jurisdiction emanates from **article 36 (4) of Chapter 464,** this is not so, due to the fact that this article regulates a right to appeal in a particular situation to the Court of Appeal Inferior Jurisdiction, and not the First Hall Civil Court, which is this Court.

"Having also considered that it is clear from **article 32 of Chapter 464,** that the Medical Council has the competence to investigate all allegations of professional and ethical misconduct, and that the Medical Council has the authority to take the necessary disciplinary measures according to **article 32 (1),** as contemplated in the same Act.

"Thus it results that in this case, since the decision of the Medical Council actually involved the suspension of the plaintiff's name from the relative Register, this can only mean that the plaintiff had a right of appeal from the said decision to the Court of Appeal according to **article 36 (1) and (4) of Chapter 464** and therefore the first defence plea raised by the respondent Council is hereby being accepted.

"This decision is thus based on an administrative decision taken by the Medical Council in order to discipline the professionals that are registered with one of the Registers of healthcare professionals which decision actually suspend the plaintiff for a period of three months and so according to decision in the names of **"Dr. Frank Portelli vs Kunsill Mediku"** decided on the 27th of April 2010, to which reference was made by the two parties is in this case, the applicant had at hand a remedy to try and impugn the decision taken by the Medical Council by means of an appeal to the Court of Appeal, as the suspension ordered in the said decision in this case is actually equivalent to striking off the name of the medical practioner from the relative Register and so the plaintiff had actually a remedy at law that she did not utilise. The competence of hearing of the same is within the competence of the Medical Council and due to the nature of the decision taken there was a right of appeal to the Court of Appeal in its Inferior Jurisdiction according to **article 36 (1) (4) of Chapter 464.**

"The Court also takes note of the consideration that even if for a moment it is for arguments sake taken as given (but not accepted and adhered to in any manner) that the Medical Council's decision does not fall within the remit of **article 36 (1) (4) of Chapter 464,** as suspension in this case is not equivalent to striking off the name of a member of the medical profession from the Registrar, so that in actual fact it is taken or given for arguments sake that in this case the plaintiff had no right of appeal as indicated per **article 36 (4) of Chapter 464** as her name was not struck off the Register, the present suit as presented by the plaintiff by means of the actual sworn application cannot in the actual circumstances and in the way that it is drafted be considered or constried to all under the provisions providing for judicial review according to **article 469 A of Chapter 12**

of the Laws of Malta as the sworn application as presented does not even purport to bring forward and therefore to bring to the consideration of this Court any of the indicated instances whereby such an action can be utilised by a party in such a case, so that it is correct in this instance to state that the plaintiffs action as presented together with the relative demands do not tally with the essential elements of such an action of judicial review.

“The Court also considers that the type of declaration that the plaintiff is seeking in this case falls within the exclusive jurisdiction of the Medical Council according to **article 31 of Chapter 464** which affords to the said Council the authority and competence to decide on all investigations therein contemplated in which the members of the medical profession are involved including those that allege inappropriate professional behaviour or conduct, and/or a breach of the relative code of ethics and in fact **article 32** provides the relative penalties in connection with same, so that the exclusive competence in these cases is afforded to the Medical Council. The action as presented contemplates that the Court substitutes its decision to that of the Medical Council, on the findings and the penalties imposed by the said Council on the plaintiff. It does not in any way bring forward any arguments based on **article 469 A** or on any of the sub-articles of the **article 469 A (1) (a) (b) (i) (ii) (iii) (iv)** and this applies not only to the sworn application but also to the note of submissions presented by the plaintiff. The purpose of such an action is to declare such a decision as null and void and if included in the demand to afford damages. In this case the plaintiff is asking the Court to substitute its discretion to that of the Medical Council and in this vein the Court is being asked to declare the plaintiffs action as justifiable, and so not in breach of the relative articles of the General Notice for the Guidance of Practitioners and/or the Ethics of the Medical Profession, and also to revoke, in whole or in part the disciplinary measures imposed by the Council on the plaintiff. This amounts to a demand for the Court to substitute its discretion to that of the Medical Council, when the exclusive competence of the same is by law vested in the same, and it is therefore not a demand for judicial review on the basis of **article 469 A of Chapter 12,** as no arguments or elements have been put forward by the applicant in the relative act justifying that a judicial review of the Council’s action be undertaken, and thus in the present case as presented the action cannot be entertained by this court, and is being dismissed since the Court has no competence by Law to decide on such and issue, and so the preliminary plea raised by the defendant Medical Council is being accepted in so far that it is consistent with these considerations and decision.

“Thus the first preliminary plea of plaintiffs is being accepted as this Court does not have the competence or jurisdiction to hear this sworn application as filed”.

Having seen the application of appeal filed by the plaintiff Johanna Van't Verlaat, requesting that for the reasons contained therein, this Court rescinds the above-said judgement delivered by the First Hall of the Civil Court and declare that the Courts of Malta have the competence to judicially review a disciplinary action taken by the Medical Council of Malta, and then either (a) decide on the requests filed in the application presented in the Civil Court and on the evidence produced in these relative hearings and proceedings and thereby itself reduce, if it finds in plaintiff's favour, the disciplinary action decided upon by the Medical Council, by either quashing it completely or reducing it; or (b) once again referring the issues under question to the First Hall of the Civil Court. With costs to be decided against the appealed defendant.

Having seen the reply by the respondent Council, by means of which, and for the reasons contained therein, while making reference to all the evidence already produced, and whilst reserving the right to produce any other evidence as deemed permissible by law, respectfully requested this Court to confirm in its entirety the decision delivered by the First Hall of the Civil Court on the 29th May, 2012, due to the fact that such decision is just and therefore merits confirmation, with the costs to be borne by the appellant.

Having seen that during the sitting of the 12th January, 2017, it was agreed that the case be adjourned for a decision, following oral submissions made by the respective parties' legal representatives.

Having seen all the acts of the case and the documents exhibited thereat;

Considers:

That in this case the plaintiff is seeking the judicial review of the decision of the 9th September, 2009, delivered by the Medical Council, following an inquiry held against her. She felt aggrieved by means of the said decision, whereby it was held that:

> "*Hence, considering the above, the Medical Council finds Dr Johanna van't Verlaat's conduct in breach of the Article 6 (iv) of the General Notice for the Guidance of Practitioners and Article 5 of the Ethics for the Medical Profession and finds her guilty of professional and ethical misconduct in terms of Article 32(l)(b) and (c) of Chapter 464 of the Laws of Malta. Consequently, it is imposing a suspension of three (3) months and a penalty of ten thousand (10,000) Euros. The suspension will come into effect one month from the date of the delivery of this judgment*".

Appellant contends that given the circumstances of the case, her reasoning not to operate the patient on the scheduled day was justified and acceptable, and was one which can be reasonably taken by a medical person in that situation, and therefore requested a review by the Court to revoke the disciplinary measures in full, or if not in full,

partially, whether as to the type (i.e. suspension of licence or payment of fine) or amount of the fine.

On the other hand, the defendant Council contends that the plaintiff does not have the right to pursue such a claim, given that the Court has no jurisdiction to decide on such a request, once the law regulating the Health Care Professions (Chapter 464 of the Laws of Malta) vests the Medical Council with the exclusive jurisdiction to investigate and enforce ethical standards applicable to the health care professions. Consequently, it is also argued by the Council that the second part of the plaintiff's request cannot be upheld. Finally, on the merits of the case the Council argues that the plaintiff's requests before the Court are unfounded in law and in fact, in that the Medical Council had rightly concluded that her actions were unjustifiable and unacceptable, as actually conceded by the plaintiff, in her sworn application.

The First Court upheld the defendant Council's preliminary plea, in that it held it did not have the competence and jurisdiction to hear the plaintiff's case, as requested, in her application.

The grievances put forward by the appellant are basically two-fold. The first complaint of the appellant is that in the First Court's consideration of Article 36 (1) and (4) of Chapter 464 of the Laws of Malta, it incorrectly

applied the disciplinary action therein mentioned of "erasure" to "suspension", thus equating suspension with erasure. While emphasising the substantial differences between "erasure" and "suspension", she also cites the following extract from the judgement to sustain her complaint:

> "*the applicant had at hand a remedy to try and impugn the decision taken by the Medical Council by means of an appeal to the Court of Appeal, as the suspension ordered in the said decision in this case is actually equivalent to striking off the name of the medical practitioner from the relative Register and so the plaintiff had actually a remedy at law that she did not utilise*".

This Court, after examining the provisions of Article 32 which provides for the various disciplinary measures which can be taken by the Council, including *inter alia* the <u>erasure</u> from the appropriate register and, where appropriate recommend that the professional's <u>licence be withdrawn</u> under sub-paragraph (i), and the taking off a name from the register, and where appropriate, recommend that the professional's <u>licence be suspended</u> under sub-paragraph (ii), and after perusing also, the provisions of Article 36 sub-articles (1) and (4), which specifically provide that a person should be served with the notification of the Council's decision to have a person's name <u>erased</u> from the register, within fourteen days from the day that the decision was taken, and may then <u>appeal</u> to the Court of Appeal within twenty-one days of the service of notification, the Court deems the first grievance put forward by the appellant to be well-founded.

The Council's decision pertaining to the case under examination, concluded that the appellant be suspended for three months and imposed a fine, not that the appellant's name be erased and licence withdrawn. Apart from the obvious distinction between the two, relating to the apparent more serious consequences in the latter case and the temporary nature of the former case, it is also important to note that the remedy of appeal to the Court of Appeal, as envisaged under Article 36, is limited to the case of erasure of a person's name from the register (and does not include suspension). It is thus held by this Court that the First Court gave an incorrect interpretation of the law when it concluded that due to the nature of the decision taken by the Medical Council there was a right of appeal to the Court of Appeal, in its Inferior Jurisdiction, according to Article 36(1) and (4) of Chapter 464. Clearly, the law in question does not provide for an appeal before the Court of Appeal in the case of the Council's decision for the suspension of a person's professional licence, as is the incident in the current case under review.

This stance was actually adopted in the judgement quoted by both parties and the court of first instance, decided by the Court of Appeal, in its Inferior Jurisdiction, on the 27th April, 2010, in the names **Dr. Frank Portelli v. Kunsill Mediku**, whereby it was held that:

> "*Illi minn qari akkurat tal-istess disposizzjonijiet jidher ghalhekk li filwaqt li permezz tal-artikolu 32 tal-Kap. 464, il-Kunsill Mediku inghata*

> *s-setgha li jinvestiga kull allegazzjoni hemm deskritta ta' mgieba hazina professjonali jew ta' ksur ta' etika minn professjonist fil-kura medika taht is-sorveljanza tieghu, u filwaqt ukoll illi l-Kunsill Mediku inghata s-setgha illi jiehu passi dixxiplinari varji (artikolu 32(1)) kif kontemplati fl-istess Att, minn naha l-ohra jidher li l-legislatur, permezz tal-artikolu 36 (1), li ikkwalifika d-dritt ta' appell quddiem din il-Qorti u effettivament illimita dan id-dritt ta' appell biss ghal dawk l-okkazzjonijiet fejn il-Kunsill Mediku iddeciedi li isem professjonist mediku ghandu jkun ikkancellat mir-registru skont l-artikolu 32 u l-artikolu 38 tal-Kap. 464.*
> ...
> "*Illi minn dan jidher car illi dan id-dritt ta' appell quddiem din il-Qorti skont it-termini tal-artikolu 36 tal-Kap. 464 jezisti biss fil-kaz u fl-eventwalita` illi l-Kunsill Mediku fid-decizjoni tieghu jiddeciedi li isem ta' persuna jithassar mir-registru relattiv indikat fl-istess Att.*
> …
> "*Illi dan ma jfissirx li l-appellant ma ghandux jew ma kellux rimedji ohra wkoll bhala dawk ta' stharrig gudizzjarju ai termini tal-Artikolu 469A tal-Kap. 12 tal-Ligijiet ta' Malta jew anke rimedji ohra li jista' jkun ghadhom disponibbli lilu quddiem organi gudizzjarji ohra…*".

In view of the foregoing, the appellant's first grievance in this sense, is deemed by this Court to be well-founded.

This leads to the consideration of the appellant's second grievance, which contends that in the absence of the right to appeal before the Court of Appeal, the other disciplinary measures meted out by the Medical Council should still be entitled to judicial review by the ordinary courts. It is argued that the said Council should be subject to judicial scrutiny, as it is not endowed with a totalitarian power. It is submitted by the appellant that the Courts of Malta cannot renounce to their competence to review acts which can be totally and completely unfair, both in the conclusion that has been reached, and/or in meting out the disciplinary measure in question.

The Council, on the other hand, submits that as pointed out by the First Court, the sworn application as presented does not purport to bring forward any of the indicated instances as outlined under the law, whereby such an action for judicial review can be utilised, and consequently plaintiff's pleas cannot be encompassed within the provisions of Article 469A of the Code of Organization and Civil Procedure. Furthermore, the Medical Council reiterates that in terms of Articles 31 and 32, the plaintiff's behaviour which led to her being sanctioned falls squarely within the sole and exclusive jurisdiction of the Medical Council.

Although it is true to say that the wording utilised in the plaintiff's first application is not ideal, however, it is held that the application filed, promoting this lawsuit, essentially contains a request for judicial review of the Medical Council's decision.

After deliberating on the arguments brought forward by the respective parties, this Court is of the opinion, that even the second grievance of the appellant plaintiff is well-founded. This statement is being made in the light of the fact that, although it is an uncontested fact that the Medical Council is the competent body to determine the complaint and to sanction the medical professional, as deemed necessary in term of

the relative law, it is also a well-established principle in terms of our jurisprudence, that the ordinary courts do have the power to review decisions given by other tribunals or quasi-judiciarly bodies. This power of the Courts is deemed applicable, whenever there results an allegation that, for example, there have been disregarded the fundamental principles of natural justice. Notwithstanding any legal provisions attempting to curtail the powers of the ordinary courts, time and again it has been authoritatively decided by this Court that any allegation relating to a breach of the principles of natural justice or a decision which is legally unfounded, in that it is based on a wrongful interpretation of the law or is unreasonable, is deemed to be sufficient to empower the Courts to carry out a judicial review of the contested decision.

This affirmation is also being made on the basis of extensive jurisprudence in this regard, which this Court sustains and holds as its own. Reference is made to a series of judgements to this effect, including that of the 14th February, 2002, by the First Hall of the Civil Court in the case in the names **SM Cables Ltd v. Carmelo Monaco:**

> "*il-Qrati ghandhom gurisdizzjoni generali biex jistharrgu l-imgiba ta' kull tribunal kwazi-gudizzjarju jew mahluq statutorjament (Ara, per ezempju, App. Civ. 13.6.1995 fil-kawza fl-ismijiet Salvino Borg D'Anastasi vs Ian Decesare et noe et). Dan jinghad ghaliex, fi stat ta' dritt, hadd mhu mehlus mir-rabta li jimxi kif tridu il-ligi, u jekk issir xilja li dik il-persuna ma mxietx skond il-ligi, huma l-Qrati li ghandhom is-setgha li jqisu l-ilment u li jaghtu r-rimedju, jekk ikun il-kaz (Ara P.A.*

GCD 20.3.2000 fil-kawza fl-ismijiet Raymond Fenech noe vs Victor Fiorentino);

"*Illi, minbarra kwestjonijiet li jmissu allegazzjonijiet ta' ksur ta' jeddijiet fundamentali mharsin bil-Kostituzzjoni (Ara PA JF 26.5.1987 fil-kawza fl-ismijiet Montalto vs Clews et (Kollez. Vol: LXXI.iii.688), il-gurisdizzjoni li l-Qrati ghandhom hija limitata ghas-setgha li jissindakaw il-hidma u l-ghamil tat-Tribunal Industrijali (a) biex jizguraw li dan ma jkunx mar lil hinn mis-setghat moghtijin lilu bil-ligi li bis-sahha taghha gie mwaqqaf u li tahtha jinsab regolat (jigifieri, l-Att XXX tal-1976); (b) biex jaraw li, tkun xi tkun il-procedura li jkun segwa, jkun hares li jsir haqq skond il-meriti sostantivi tal-kaz migjub quddiemu u dan b'harsien tar-regoli tal-gustizzja naturali; u (c) biex jaraw li s-sentenza jew id-decizjoni li jkun ta ma tkun bl-ebda mod kontra xi ligi miktuba jew kontra xi att li jkollu s-sahha ta' ligi dwar kundizzjonijiet maghrufa tal-impieg (Ara App. 13.2.1997 fil-kawza fl-ismijiet Michael Mallia noe vs Carmel Debono et u l-ghadd ta' sentenzi u awtoritajiet hemm imsemmija);*".

Furthermore, this Court, in its judgement of the 27th June, 2008, in the names **Charles Mattocks v. Dr. Anthony Gruppetta noe et**, held that:

"*Il-principji tal-gustizzja naturali jridu dejjem u skrupolozament jigu osservati minn kull Qorti, Tribunal, Bord jew Kummissjoni mahtura biex tiehu decizjoni fir-rigward ta' individwu, u ebda awtorita` moghnija b'dan il-poter ma tista' twarrab dawn il-principji b'impunita` (ara, per ezempju, il-kazijiet "Zammit vs Falzon", deciza minn din il-Qorti (Sede Inferjuri) fl-10 ta' Marzu, 2003 u "Mangion vs Cilia Pisani noe", deciza mill-Prim Alwa tal-Qorti Civili fl-20 ta' Mejju, 2004)*".

Similarly, in another judgement of the 5th April 2013, in the case in the names **Saed Salem Saed v. Bord tal-Appelli dwar ir-Refugjati et**, it was held by this Court that:

"*Hu principju ta' dritt, pero`, li l-gurisdizzjoni inerenti tal-qrati ta' "judicial review" ma tista' titnehha minn ebda ligi, ghax ma jistax jigi accettat li l-legislatur qatt jista' jippermetti li decizjoni tittiehed bi ksur tal-principji ta' gustizzja naturali jew kontra l-ligi.*

"*…. Il-Qrati Civili jistghu jissindikaw l-operat ta' kwalsijasi tribunal jew bord imwaqqaf bil-ligi, l-ewwelnett biex jassiguraw li l-principji tal-gustizzja naturali jkunu osservati u, fit-tieni lok, biex jassiguraw li ma*

> *jkunx hemm xi enuncjazzjoni hazina jew inkompleta tal-ipotesi tal-ligi fis-sens lat tal-frazi, fis-sens li ghandhom jassiguraw mhux biss li d-decizjoni innifisha ma tkunx wahda "wrong at law", izda li t-Tribunal jew Bord ikollu s-setgha legali jaghti dik id-decizjoni*". (emphasis added by this Court).

It thus follows, that the appellant's second grievance also merits being upheld.

On the other hand, it is held that the Medical Council is correct in its submissions that the Court carrying out judicial review cannot substitute its discretion to that of the Medical Council. This, however, does not mean that the Courts should abdicate from their responsibility to carry out their duty to review the decision under contestation.

It is held appropriate at this stage to quote another judgement of this Court of the 11th May, 2010, in the case in the names **Reginald Fava pro et noe v. Supretendent tas-Sahha Pubblika noe et** which examined this point and stated:

> "*F'kaz li l-qrati ordinarji jigu mitluba jistharrgu ghemil amministrattiv, il-kompetenza taghhom hi limitata biex tordna li tittiehed decizjoni jew biex thassar dik l-istess decizjoni, pero` ma jaslu qatt biex huma stess jiehdu d-decizjoni flok l-awtorita` kompetenti. Jekk ligi tvesti diskrezzjoni f'xi awtorita`, hija dik l-awtorita` li trid tuza dik id-diskrezzjoni u tiehu d-decizjoni; jekk id-decizjoni li tittiehed tigi mhassra, il-kwistjoni tigi rimessa mill-gdid lill-awtorita` biex dik tiehu d-decizjoni taghha kif suppost u fit-terminu tal-kunsiderazzjonijiet kollha rilevanti. Jekk l-awtorita` ma tiehux decizjoni tista' tigi mgieghla taghmel dan, u jista' jigi indikat lilha li r-ragunijiet ghaliex kienet qed tittituba milli tiehu decizjoni ma kienux relevanti; pero` finalment hija dik l-awtorita` li trid tiehu d-decizjoni mhux il-Qorti. Hekk fil-kawza 'Grech v. Ministru tax-Xoghlijiet et' deciza minn din il-Qorti (diversament komposta) fid-29 ta' Jannar 1996 intqal illi:*

> "... *il-Qrati fil-funzjoni taghhom ta' judicial review tal-operat tal-Ezekuttiv ghandhom iva d-dritt li jiddeciedu li att partikolari tal-Ezekuttiv ikun null u bla effett izda m'ghandhom qatt id-dritt li jissostitwixxu d-diskrezzjoni rizervata lill-Ezekuttiv b'dik taghhom."*

"*Hekk ukoll fil-kaz aktar ricenti 'Borda v. Ellul Micallef' deciza minn din il-Qorti fid-29 ta' Mejju 2009 gie osservat li, filwaqt li dawn il-qrati jistghu jissindikaw l-operat ta' kwalsiasi tribunal amministrattiv jew organu iehor b'poteri gudizzjarji jew kwazi-gudizzjarji, u li l-awtorita` li hija moghnija b'diskrezzjoni tista' tigi ordnata tezercita dik id-diskrezzjoni f'kaz li tkun naqset li taghmel dan, l-istess awtorita` ma tistax tigi dettata x'ghandha tiddeciedi jew li twettaqha b'xi mod partikolari. (ara wkoll Borg noe v. Gvernatur tal-Bank Centrali ta' Malta, deciza minn din il-Qorti fid-9 ta' Marzu 2007)*".

This Court reiterates the above position, and when applying it to the case in question, holds that the ordinary courts' duty in such cases should only entail a review of the decision, in the sense that an appraisal should be made of the procedures held before the Council, to confirm that it acted within the powers conferred to it by law, and an assessment be made whether the Council acted in accordance with the principles of natural justice, and whether the decision is a reasonable one and gives a correct interpretation of the applicable law. The review by the First Court should ultimately lead to a decision as to whether there are sufficient grounds to quash the contested decision by the Medical Council, in which case the proceedings would then be remitted to the Council, for it to reassess the complaint in the light of the Court's decision.

However, it would then ultimately be up to the Medical Council to take the disciplinary decision as to the complaint regarding the appellant, in

terms of the law. The Court definitely cannot substitute its discretion to that of the Medical Council, which is the organ at law empowered to investigate and take the disciplinary measures as deemed appropriate, according to law. It thus follows that the Court cannot entertain the appellant's first request to decide itself and reduce the disciplinary action decided upon by the Medical Council by quashing it or reducing it. This Court can only accede to appellant's request to have the issues under judicial review referred back to the First Hall of the Civil Court, to decide the appellant's case, in the light of the considerations made in this judgement.

This order is also being made in adherence to the principle that parties should benefit from the so-called *doppio esame* rule.

Therefore, for the reasons explained above, the Court disposes of the appeal filed by the plaintiff, in that it grants the appellant's request, and revokes the appealed judgement of the First Hall Civil Court of the 29th May, 2012, in the above mentioned names, in the sense that it rejects the defendant Council's preliminary plea as to the court's lack of jurisdiction, and orders that the acts of the case be remitted to the First Hall of the Civil Court, so that the plaintiff's claims be decided in the light of the above considerations and in terms of the law.

As for the costs, it is held that the parties should bear half the costs each, of both proceedings held so far, between them.

Silvio Camilleri	Tonio Mallia	Joseph Azzopardi
Chief Justice	Judge	Judge

Deputy Registrar
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