QORTI CIVILI
PRIM AWLA

ONOR IMĦALLEF
DR FRANCESCO DEPASQUALE
LL.D. LL.M. (IMLI)

Sitting held on the
Fourteenth (14) day of November 2019

Application Number 948/09 FDP

Johanna Van't Verlaat MD, Ph.D., (ID 21817A)

Vs

Kunsill Mediku Malti

The Court:-

1. 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 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 judgement." (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.1 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's Hospital. Further, as set out below, applicant had formed the view preoperatively that her intervention was not strictly necessary. She therefore concluded after careful consideration that the balance of her responsibilities weighed in favour 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 affected 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".

2. 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".

3. Having seen that 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, accepting the first preliminary plea brought forward by the defendant Medical Council and consequently rejecting 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.

4. Having seen that the plaintiff Johanna Van't Verlaat, appealed from this decision.

5. Having seen that on the 28th of April 2017, The Court of Appeal delivered its judgment, revoking the appealed judgment of the First Hall Civil Court of the 29th May 2012 "*in the sense that it rejects the defendant Council's preliminary plea as to the Court's lack of jurisdiction and orders 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*"

6. Having seen that the Court of Appeal, when deciding to revoke the above-mentioned judgement, had this to say as to the remit of the First Hall following their judgement:

> *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.*

7. Notes that on the 16th May 2018, the Registrar of the Maltese Medical Council, **Inez Cassar**, aappeared in Court and exhibited the original file pertaining to the proceedings initiated against plaintiff by the defendant Council.

8. Notes that on the 16th May 2018 both parties declared that they had no further evidence and the case could be adjourned to final submissions.

9. Notes that on the 4th October 2018 the case was adjourned for judgement with no submissions filed by either party.

10. Notes that when the case was called up again by the Court, as now composed, having taken cognisance of the acts on the 26th June 2019, the defendant informed the Court that both parties were confirming the submissions they had filed in 2012 and the Court could proceed to decide based on the submissions then made.

11. Notes that on the 26th June, the case was thus adjourned for judgement.

Considerations

12. Notes that, in terms of the judgement delivered by the Court of Appeal, as mentioned above, the sole issue the Court should be considering, at this stage, is:

> *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.*

13. Notes that the parameters to be adopted by the Court were very clearly spelt out in the case '**Attard Montalto vs Awtorita' tal-Artijiet**' decided by the First Hall, Civil Court per Mr Justice Joseph R Micallef on the 10th October 2019, when it had the following to say:

> *Illi huwa stabbilit li f'azzjoni ta' stħarriġ ġudizzjarju l-Qorti twettaq funzjonijiet limitati maħsuba biex tara li l-għemil amministrattiv ikun twettaq skond il-liġi, b'użu xieraq tas-setgħat mogħtijin lill-awtorità li tkun mill-istess liġi, u b'mod li **ma jkunx hemm** u la ksur tal-jeddijiet imħarsin mill-ġustizzja naturali u lanqas twettiq abbużiv tal-istess setgħat. Bħala tali, f'azzjoni ta' stħarriġ ġudizzjarju – kemm jekk hija waħda mibdija taħt l-artikolu 469A tal-Kodiċi tal-Organizzazzjoni u Proċedura Ċivili u kif ukoll waħda taħt il-liġi ġenerali – xogħol il-Qorti huwa dak ta' "kassazzjoni" tal-għemil li minnu jitressaq l-ilment quddiemha: il-Qorti ma tiħux fuqha b'rimedju t-teħid jew ittwettiq tal-għemil amministrattiv, liema għemil huwa setgħa li l-liġi tagħti biss lill-awtorità pubblika li tkun;*

Illi dan ir-rwol tal-Qorti ilu żmien mifhum u aċċettat u dan joħroġ min-natura nnifisha tal-azzjoni ta' stħarriġ tal-għemil amministrattiv. Għaldaqstant, meta l-Qorti tintalab tistħarreġ għemil amministrattiv għandha tqis is-siwi ta' għemil bħal dak skond il-kejl tal-liġi u tal-prinċipji li jgħoddu għall-każ (u, jekk jirriżultaw iċ-ċirkostanzi xierqa, li tħassar dak l-għemil jew issibu ma jiswiex) mingħajr ma hija stess tieħu d-deċiżjoni minflok l-awtorità kompetenti li lilha l-liġi tkun tat dik is-setgħa. Hu mħolli għal dik l-awtorità li twettaq, bid-diskrezzjoni xierqa, l-għemil u li tieħu d-deċiżjonijiet li jitnisslu minn eżerċizzju bħal dak. It-tħassir ta' deċiżjoni min-naħa tal-Qorti jġib biss li l-istess Qorti terġa' tgħaddi l-każ għas-smigħ lil dik l-awtorità għall-kunsiderazzjoni mill-ġdid tal-każ;

Illi dawn il-parametri huma mfissra b'mod ċar u tajjeb f'dan il-kliem meta jingħad li l-istħarriġ ġudiżżjarju

> *"does not allow the court of review to examine the evidence with a view to forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from the procedures which either by statute or at common law as matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or of sufficient evidence to support it, or through account being taken of irrelevant matter, or through a failure for any reason to take account of a relevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. But while the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies it is perfectly clear that in a case of review, as distinct from ordinary appeal, the court may not set about forming its own preferred view of the evidence" (Re Reid vs Secretary of State for Scotland (1999);*

Illi għalhekk, f'azzjoni skont l-Artikolu 469A tal-Kap 12 għall-istħarriġ ġudizzjarju ta' għemil amministrattiv, il-Qorti tista' tintalab li ssib li l-att amministrattiv ma jkunx jiswa u li tħassar att amministrattiv bħal dak għax ma jkunx sar skond il-liġi; iżda ma tistax tintalab tissostitwixxi hi l-att hekk imħassar permezz ta' att ieħor;

14. Notes that the decision of the Medical Council delivered on the 9th September 2009 which plaintiff is asking Court to review stated the following:

1. *On the 19th June 2008, the Medical Council received three copies of correspondence from the Director General (Health Care Services) with regards to an alleged case of unethical behaviour on the part of neurosurgeon Dr Johanna Vant' Verlaat. The correspondence consisted of a letter of Mr Frederick Zammit Maempel, Chairman Department of Orthopaedics, Mater Dei Hospital to Professor Godfrey Laferla, Chairman Department of Surgery at Mater Dei Hospital, a letter of Professor Laferla to the Department of Health, and a reply of Dr Van't Verlaat to Professor Laferla with regards to the alleged case*

2. *From the correspondence it emerged that in February 2006, Dr Johanna Van't Verlaat had referred one of her patients as a candidate for combined surgery to Mr Frederick Zammit Maempel. Due to the long waiting list, the patient was scheduled to be operated upon on the 24th March 2008. The appointment for the combined surgery was arranged between Mr Zammit Maempel, orthopaedic surgeon to perform the first part of the operation and Or Johanna Van't Verlaat, neurosurgeon, to perform the second part. On the day of the operation, the orthopaedic part took longer than planned, allegedly due to the patient's obesity and when Dr Van't Verlaat was informed that the first part of the operation was about to conclude later than the time agreed upon, she refused to wait and noted in the patient's file the reasons for her decision, namely, that it was late in the day, that she had a clinic elsewhere and that the patient did not require a neurosurgical intervention. The second part of the operation was therefore not performed and the patient was closed up by the orthopaedic surgeons.*

3. *After the incident, Mr Frederick Zammit Maempel wrote a letter of complaint to Professor Godfrey Laferla, Chairman Department of Surgery, stating that Dr Van't Verlaat's behaviour on the day was "unethical", that "it sent the wrong message to all the junior doctors who were present" and that "It should not be repeated". On receipt of the relevant correspondence from Director General, Health Care Services, the Medical Council took note of the circumstances and on the 5th August 2008, sent a letter to Dr Van't Verlaat requesting her to clarify her position. A reply reached the Council on the 16th August 2008 wherein Dr Van't Verlaat explained that on the day in question things did not go as planned because without her knowledge, another operation was scheduled before the joint one and therefore her appointment was put forward by over an hour.*

4. *After examining all the correspondence at hand, the Council decided to conduct an Inquiry against Dr Johanna Van't Verlaat who was informed of the Council's decision by a letter of the 29th October 2003. The Notice of Inquiry advised that the reason of the Inquiry was to investigate whether her behaviour was in breach of Article 6 (iv) of the General*

Notice for the Guidance of Practitioners: "gross or prolonged neglect of duties and disregard of personal responsibilities to the patients, to clients and to the public" and in breach of Article 5 of the Ethics of the Medical Profession: "a doctor must by his conduct in all matters set a high standard."

5. *The first hearing was held on the 12th January 2009. Dr Johanna Van't Verlaat pleaded not guilty of the accusations brought against her. Mr Frederick Zammit Maempel was summoned as the main witness. During his testimony, he sustained what he had referred in his letter of complaint to the Head of the Surgery Department. He reiterated that although the patient's back problems improved since the operation and that he did not suffer any repercussions from the absence of Dr Van't Verlaat's Intervention, yet "the patient remained open for a longer time", "he was meant to be for two operations" and that "the part of Van't Verlaat was never done", that is the decompression of the nerve root, since "It could not be done by somebody else". Mr Zammit Maempel explained that the patient was a muscular and obese fellow and therefore anaesthesia and incubation took long and the operation started later than scheduled. In fact the operation lasted from 10.10 a.m. to 13.30 p.m. He explained that when he had spoken to Dr Van't Verlaat at 12.20 p.m. on the speaker phone, she explained to him that she was not going to do her part because she would be late for her clinic, and he therefore asked her to enter a note in the patient's file, which was taken to her by her Senior House Officer, in fact. Dr Van't Verlaat never entered the theatre. The theatre nurses for neurosurgery were in the theatre waiting to assist in the neurosurgical part of the operation scheduled to be performed by Dr Van't Verlaat.*

6. *During the sitting. Dr Van't Verlaat asked the Council whether she could explain her position and on her request being granted, she claimed that the case was being "blown up" since the patient's condition had already improved before the operation and an MRI performed one week before the operation revealed that there were "no significant spine or canal spinoses" though she had decided to have a look once the patient's back was opened. She explained that on the day she refused to perform her part because it was late and because she felt that tailings had not gone as decided and another operation had been performed before, which moved things forward. At that point, she did not think that the patient needed her intervention.*

7. *In the second sitting held on the 23rd February 2009, doctors and nurses who were present during the operation were summoned. Of relevance is the testimony of the Senior House Officer of Mr Zammit Maempel, Dr Michelle Spiteri, who confirmed that anaesthesia on the patient took longer than expected because of the obesity and that the operation itself*

took longer for the same reason. She claimed that she had overheard Dr Van't Verlaat on the speaker phone telling Mr Zammit Maempel that the patient did not need nerve decompression since she had revised the scan and it seemed fine. The witness confirmed that there was a small operation before that according to the normal procedure but since they started the major operation at 10.00 a.m., it should have been over by noon, though this did not happen since, as the witness explained, each case varies from the other. This was confirmed by another witness who said it is the norm for reason of logistics and economising on time to prepare a patient for a major operation while a minor operation is being performed. An orthopaedic surgeon, Dr Balent, testified that after the orthopaedic part of the operation was performed, it was Dr Van't Verlaat's turn to perform her part - this part however was never done and the orthopaedic surgeons had to close up the patient themselves. He explained that the operation took longer than planned but stressed that time was not relevant in an operation since things do not always go as planned once the patient is being operated upon.

8. *During this session, Dr Van't Verlaat sustained that since that day was not her operating day, she could make her conditions which in fact she did - that is, that the operation had to be the first case. She sustained that she had a plan for the day and since the condition was not respected, she refused to go out of her schedule which would have been disrupted had she gone in the theatre to operate.*

CONSIDERATIONS

9. *It appeared from Dr Van't Verlaat's behaviour during the inquiry that there is no sign of acceptance of inappropriate behaviour on her part. Her words reflect a sense of pique and anger towards a colleague who, in her opinion, did not respect her condition that the operation had to be the first one on the list. Her insistence that she had imposed the condition that the operation had to be performed first is recurring during her testimony and her consequent anger when she discovered that there was a delay because her condition had not been respected, provoked her decision not to perform her part of the operation, it appears that Dr Van't Verlaat allowed her anger and personal agenda to override the interest of the patient being operated upon at that moment. This behaviour is considered as unjustifiable and unacceptable and against the interest of the patient, a priority to the medical profession. Behaviour against this maxim would result - in "gross neglect of duties and disregard of personal responsibilities towards the patient" according to Article 6(iv) of the General Notice of Guidance for Practitioners. The patient was scheduled for combined surgery and he submitted himself to the operation for combined surgery. Although*

Dr Van't Verlaat is now insisting that the last MRI of the patient's back taken one week before the operation, revealed that the decompression was not really necessary, and that "at the end of the day, I don't think that the patient suffered ... nothing happened to the man". "I think that the patient could have done even without me. The neurological part of the operation wasn't very important for him" ... yet it is evident that this attitude was adopted at the moment when she decided to quit, as a means of self-justification. Her presence in the hospital that morning and her expectation to be called at noon to do her part, ostensibly reveals that up to that moment, she was still of the opinion that "once the back is open it was not a bad idea to have a look" which phrase she repeated on several occasions during her testimony. She even claimed that "having a look wouldn't be a bad thing once it's open even to see if the screws are placed properly, because it hasn't always been the case".

10. *It is important to note that the patient in question was a patient of Dr Van't Verlaat and it was she who had recommended him for joint surgery two years before. Therefore, the bond of trust between the patient and his doctor has been broken in this case. The doctor's sense of duty and concern has been replaced by anger because things did not go according to plan. Dr Van't Verlaat gives her reasons: "I had my clinic at 2.00 p.m. and before I had to go and see my husband who was seriously ill. That was my planning for the day... I was very upset that they went their own way". Although the Council respects Dr Van't Verlaat's sense of duty towards her spouse, yet it does not accept her obstinate decision to stick to her plan and condition which is evident from her reply: "I make my conditions"; "the operation started much too late... usually I do my part at 12.00 noon. I was not willing to wait".*

11. *To a question put to her by the Council whether the fact that she didn't go to the theatre to actually examine the patient's back was in her opinion a good judgement, she replied and admitted : "well I don't think", though she immediately reiterated that the patient did not suffer any consequences. This however is not the issue - the issue under examination is that the operation was agreed as a combined surgery; that the patient had been assured that he would be seen by his doctor Dr Van't Verlaat and that she was originally and up to that morning of the operation, of the opinion that once he was being operated upon, she would have a look and do her part. What made her change her mind is evident in her reply that in her opinion, Mr Zammit Maempel "misbehaved since he planned another operation before... I didn't go to the theatre because I had asked that I wanted it to be done as a first case and I found out it was not done as a first case". Yet, the matter of timing, according to the testimony of the surgeon and the SHO who testified, is not an issue in this case, since in spite of the fact that there was actually a minor operation performed before, in the meantime, the patient*

planned for the combined surgery was being prepared for his operation. There is no evidence that the operation in question initiated at 10.00 a.m. and not before, because of the previous one.

12. *Dr Van't Verlaat was put before a choice: either to displace her plans and seek the interest of the patient or to stick to her plans and the patient is closed up without having been examined by her. Her pique and anger that she was slighted and that her plans were disrupted, made her go for the second choice. It was in fact her anger towards the other surgeon that took the better of her. This is evident in her comment during the inquiry: "if he had told me I am very sorry; what I did was not good and I should not have done it; please come and do it, then I would have gone". This is corroborated by a comment that she made in a letter to the Council dated 11th January 2009: "the only fact that counts is that Zammit Maempel was so ill-mannered to plan an operation in advance of the joint surgery without talking to me... I think he should not try to employ me as his slave".*

13. *It is the opinion of the Council that Dr Van't Verlaat's behaviour is also in breach of Article 5 of the Ethics for the Medical Profession, that is that: "a doctor must by his conduct in all matters set a high standard". Dr Van't Verlaat's decision on the day to quit the operation because she was running late, justifying herself by changing her opinion about the necessity of seeing the patient, stating at that point that the patient did not need her and breaking the bond of the patient-doctor trust, is unjustifiable and unacceptable and above all, aggravated by the fact that her part of the operation could not be performed by another surgeon and therefore the patient was dosed up without having the second part of the operation done, or at least, without even being seen by a neurological surgeon. The fact that the patient is well and did not suffer any consequences does not justify Dr Van't Verlaat's actions.*

    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 judgement.

15. Notes that, in accordance with Section 31 of the Health Care Professionals Act, the Medical Council, being the Council regulating Medical Practitioners, as plaintiff is, has

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.

16. Notes that, in accordance with Section 32 of the said Health Care Professionals Act (Ch 464), the disciplinary powers of the Court are as follows:

(1) If after due inquiry, the relevant Council has found that a health care professional falling under its authority -

(a) has been convicted by any Court in Malta of any crime punishable by imprisonment for a term exceeding one year or of any of the crimes mentioned in articles 198 to 205 or in articles 206 to 209 of the Criminal Code; or

(b) has been guilty of professional or ethical misconduct in any respect; or

(c) in any other manner has failed to abide by the professional and ethical standards applicable to him,

then the relevant Council may direct any one or more of the following measures, that is:

(i) his name be erased from the appropriate register and, where appropriate, recommend to the President of Malta that the professional's licence be withdrawn; or

(ii) his name be taken off such register for such period of time as the relevant Council may determine and, where appropriate, recommend to the President of Malta that the professional's licence be also so suspended; or

(iii) a penalty, not exceeding such amount as may be prescribed, is inflicted on the health care professional concerned; or

(iv) the health care professional concerned is cautioned; or

(v) order that the health care professional undergoes such period of training or practice of the profession under supervision for such period as the relevant Council may determine

17. Notes that, according to documentation forwarded to the Court, both by the plaintiff as well as the Registrar of the Medical Council, it appears that plaintiff Mrs Van't Verlaat was made aware of the accusations lodged against her by Mr

Zammit Maempel and Professor LaFerla and replied to such allegations on the 16th August 2008. (fol 15)

18. Notes that, by means of an undated letter, plaintiff was communicated with a '**Notice of Inquiry**', which read as follows; (vide file exhibited by the Registrar on the 16th May 2018.)

> *With the present notice kindly be advised that the Medical Council has ordered that an inquiry be held to consider and decide whether you acted in breach of:*
>
> *Article 6(1 v) of the General Notice for the Guidance of Practitioners - gross or prolonged neglect of duties and disregard of personal responsibilities to the patients, to clients and to the public, and*
>
> *Article 5 of the Ethics of the Medical Profession - A doctor must by his conduct in all matters set a high standard.*
>
> *You are thus being charged and requested to answer to these charges which may lead to finding you guilty of professional and ethical misconduct in terms of Article 32 (1) (b) and (c) of Chapter 464 of the Laws of Malta.*
>
> *You are hereby being advised that the first sitting is due to be held at the Medical Council Premises at St Luke's Hospital (Medical School premises) on the (date not included)*
>
> *Should it be required that other sittings be held before a decision is taken, then other sittings will be fixed at a date, time and place to be set by the Council.*
>
> *Kindly be advised that you are entitled to be represented by a lawyer or legal procurator of your choice.*
>
> *A copy of the 1959 regulations relative to the procedure "Erasure from Registers" is hereby attached for your help. You are hereby being advised that should you fail to present yourself on the fixed sitting date without a valid reason to be given beforehand, the Medical Council may decide to proceed with the inquiry in your absence.*

19. Notes, furthermore, that the inquiry carried out by the Medical Council consisted of a hearing held on the 12th January 2009, in the presence of the plaintiff, wherein Mr Frederick Zammit Maempel and the plaintiff herself, gave their versions of the facts which led to this investigation. (fol 18 – 37)

20. Notes that a further hearing was scheduled and held on the 23rd February 2009, in the presence of the plainiff, where Mr Stephen Ebejer, Dr Patrick Hunn, Dr Michele Spiteri, Mr David Grech, Dr Laura Vassallo, Dr Balent as well as the plaintiff herself, gave evidence. (fol 38 – 72)

21. Notes that, eventually, on the 9th September 2009, the Medical Council delivered its decision, which was duly communicated to the plaintiff and from which plaintiff advised on the 21st September 2009 that she was going to appeal (vide file exhibited by the Registrar on the 16th May 2018.)

22. Notes that, from all the documentation provided to the Court as well as the legisaltion referred to above, it appears that the Medical Council acted within the powers conferred to it in accordance with Section 32 of Chapter 464, where it had the power to "*direct any **one or more** of the .... measures*".

23. Notes that, in accordance with the principles of natural justice, the plaintiff was granted the possibility to put forward her defence in view of the accusations being levelled against her, which she was well aware of before she was actually communicated the 'Notice of Inquiry'.

24. Notes also that the same plaintiff was present when all the witnesses were questioned and, having been given the right to legal representation, questioned the said witnesses herself.

25. Notes that it is within the sole discretion of the Medical Council as to what pecuniary penalty it was to dispense, provided that the said penalty did not exceed the amount provided for in Legal Notice 464.16 entitled '*Medical Council (Penalites) Regulations*', wherein the maximum penalty was set at twenty thousand Euro (€20,000) – vide Section 2 of LN 464.16.

26. Notes that awarding a penalty of ten thousand Euro (€10,000) was reasonable and within the remit granted to the Medical Council.

27. Notes, furthermore, that in accordance to Section 32 of Chapter 464, as above reproduced, the Medical Council was entitled to decide that her " *name be taken off such register for such period of time as the relevant Council may determine*" no time limit being provided for in the law.

28. Reiterates that, as pointed out by the Court of Appeal, above referred to,

> *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.*

29. Concludes that, having had consideration of all the documentation exhibited by the parties and the submissions made by the learned legal counsels, there do not exist sufficient grounds to contest the decision delivered by the Medical Council on the 9th September 2009, since such a decision was given within the parameters of the powers granted to the Medical Council and in accordance with the principles of natural justice, and appears to have been a reasonable one in view of the various punishments available to the said Medical Council, which appears to have correctly evaluated the applicable law.

Conclusion

The Court,

Having seen all the evidence produced before it by the parties,

Having seen the decision of the Court of Appeal on the preliminary plea filed by the defendant, which decision was delivered on the 28th of April 2017,

Having seen parties request the Court to decide the issue, in accordance with the above decision of the Court of Appeal,

Decides the issue between the parties by

Rejecting and dismissing the demands of the plaintiff Johanna Van't Verlaat as filed and contained in her sworn application dated 30th September 2009, as the decision taken by the Medical Council on the 9th September 2009 was taken within the remits of the powers conferred to it and in accordance to the principles of Natural Justice.

As for costs, in line with the decision taken by the Court of Appeal, parties should bear half the costs each.

Francesco Depasquale **LL.D. LL.M. (IMLI)**
Imhallef

Rita Sciberras
Deputat Registratur