**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

**Not Reportable**

Case No: 20530/2014

In the matter between:

**CHRISTIAAN HERODEMUS BOTHA NO**
**(In his capacity as curator ad litem for**
**CECILIA PETRONELLA POTGIETER)** **APPELLANT**

**and**

**THE GOVERNING BODY FOR THE ELJADA**
**INSTITUTE** **FIRST RESPONDENT**

**BADISA** **SECOND RESPONDENT**

**Neutral citation:** *Botha NO v The Governing Body of the Eljada Institute & another* (20530/14) [2016] ZASCA 36 (24 March 2016)

**Coram:** Cachalia, Majiedt and Willis JJA and Fourie and Baartman AJJA

**Heard:** **7 March 2016**

**Delivered:** **24 March 2016**

**Summary:** Application for the reinstatement of a patient, 30 years old, functioning at the level of a child three years of age, at a community mental health facility – patient a danger to herself, other occupants and staff – institution lacking resources to cope – audi principle had been extensively applied – application dismissed in the high court – application for leave to appeal to SCA – dismissed – no reasonable prospects of success.

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**ORDER**

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**Application for leave to appeal from:** Western Cape Division of the High Court, Eastern Circuit Local Division, George (Griesel J sitting as the court of first instance):

The application for leave to appeal is dismissed.

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**JUDGMENT**

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**Willis JA (Cachalia and Majiedt JJA and Fourie and Baartman AJJA concurring):**

[1] The appellant, Mr Christiaan Herodemus Botha, who was the applicant in the court a quo, applied in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) for a review and the setting aside of the decisions (a) by the first respondent, known as the Governing Body for the Eljada Institute (the Institute) on 19 April 2012 to terminate the care services provided by it to Ms Cecilia Petronella Potgieter (Ms

Potgieter) and (b) by the second respondent, known as BADISA (Badisa),[1] on 7 May 2013 that she must vacate her residency at the Institute. The appellant had previously been appointed as Ms Potgieter's curator *ad litem* by the high court. The Institute is a care home, operated under the aegis of Badisa, for mentally disabled persons. It is registered with the provincial government as a 'community mental health facility' in terms of s 43 of the Mental Health Care Act 17 of 2002. It receives a subvention, but not a full subsidy from the provincial government. Further financial details concerning the Institute were not put before the court.

[2] The appellant also sought a further order that Ms Potgieter be allowed to return to the Institute pending the finalisation and determination of any process, including disciplinary steps, which may be taken against her in terms of Badisa's eviction and service termination policy of 8 May 2009. The Western Cape Division of the High Court, Eastern Circuit Local Division, George (Griesel J) dismissed the application in its entirety. It also dismissed the application for leave to appeal. Consequent to an application for leave to appeal to this court, it was directed that the application should be argued before this court in terms of s 17(2)*(d)* of the Superior Courts Act 10 of 2013.

[3] The deponent to the appellant's founding affidavit was Ms Potgieter's father, Mr Hermanus Lambertus Potgieter. Ms Potgieter, who is now 30 years old, was born on 15 February 1986. She contracted meningitis at birth. As a result, her intellectual capacity has been severely diminished. She functions at the level of a child three years of age. Her parents live on the farm known as Buffelskloof, near Calitzdorp, approximately 30 kilometres from Oudtshoorn. They farm ostriches, sheep, cattle and horses. Her parents placed her in the Eljada School in Oudtshoorn where she received care until she reached the age of 18 years. This school was established for

[1] Badisa, is a faith-based social welfare organisation that provides professional social welfare and development services. The organisation started as the welfare services of the Dutch Reformed Church (Western and Southern Cape) and the Uniting Reformed Church in Southern Africa (Cape). It operates as a registered Non-Profit Organisation and a Public Benefit Organisation committed to social development through 153 community-based programmes in the Western, Northern and Eastern Cape. It is a juristic person, ultimately directed and controlled by the Sinodal Commission for Works of Mercy of the Dutch Reformed Church (Western and Southern Cape) and the United Reformed Church (Cape).

children with special needs. This school, unlike the Institute, was operated by the provincial Department of Education.

[4] As a result of her mental disability, Ms Potgieter self-evidently lacks legal capacity and was unable to participate, in any legally recognised manner, in any of the issues that have given rise to this case.

[5] Once Ms Potgieter reached 18 years of age, her parents applied for her admission to the Institute. She was admitted to the Institute on 19 January 2005. It is one of four privately operated facilities (also referred to as 'programmes') by Badisa. In addition to the Institute, Badisa operates some 160 further programmes catering for the needs of children, the elderly and other persons requiring special care. The Institute itself provides a residential facility at which approximately 100 adult persons having intellectual abilities are taken care of. Of these residents, 23 were housed in the medical care unit and some 75 other persons, including Ms Potgieter, in the main building. There are five housemothers ('huismoeders') on duty at the main building during the day and two in the evenings. The quality of care is high.

[6] Although Ms Potgieter was admitted to the Institute in 2005, the relationship between her parents, acting on her behalf, and the Institute was formalised in terms of a so-called Service Level Agreement entered into between them only on 1 July 2011. The Institute has no independent legal personality. At all material times, it has been Badisa that has acted in relation to Ms Potgieter's father, his wife and their daughter, Ms Potgieter. Very often, Badisa has done so under the rubric or term of convenience, 'the Eljada Institute'. In these proceedings, reference was more frequently made thereto simply as either 'the Institute' or 'the first respondent', these terms being used interchangeably with one another. These technicalities of nomenclature have no bearing, ultimately, on the issues to be decided in this case.

[7] Initially, according to both Ms Potgieter's parents, she adapted well at the Institute's care centre and no problems were experienced with either her functioning or her behaviour during her stay there. Later the situation changed, the records of the Institute showing a long history of disorderly and disruptive behaviour. A melancholy record follows.

[8] On 11 June 2009 a meeting of the professional committee of the Institute minuted that 25 untoward incidents had been recorded as having occurred during that calendar year and that Ms Potgieter had been aggressive, had injured fellow occupiers by throwing heavy metal objects at them and stabbing them with knitting needles, had assaulted a member of staff, Ms Erna Van Rensburg and had damaged property. Despite having altered her medication, her condition had deteriorated. It was recommended , in order to protect the inhabitants of the Institute, as well as staff, that she should be discharged.

[9] On 18 June 2009 the executive committee of the Institute confirmed that the development programme of the Institute could not, at that time, provide for Ms Potgieter's special needs by reason of her levels of aggression, that she did not participate in the daily activities scheduled for her and that she ran away. The executive committee decided that although the professional committee had recommended that Ms Potgieter be discharged, her parents should rather have her evaluated by a psychiatrist and her medication be changed in the light thereof.

[10] On 1 December 2010 the professional committee noted that the entries in the incident register indicated that Ms Potgieter regularly ran out of the gate when it was opened for motor vehicles and that, when she walked in the street, she cried, screamed and swore. She broke windows and framed glass doors, pulled down curtains and curtain-rails and assaulted staff and patients, causing them damage and injury. She also walked on the roof, posing a risk not only to herself and but also to others. The committee concluded that Ms Potgieter was a threat to other patients, the staff and herself. Other parents had complained that their wards were afraid of her behaviour and had become anxious. The housemothers had become incapable of looking after her, as well as another 95 patients, over weekends.

[11] The committee noted that there were precedents for other patients having been discharged from the Institute on account of their disruptive behaviour, the reason being that the Institute was not equipped to look after them. Holding the view that this policy should be consistently applied, the professional committee recommended that Ms Potgieter's parents be informed that the Institute could no

longer cater for her needs. This recommendation was confirmed by the executive committee on 7 December 2010. It decided that the Institute's services to Ms Potgieter would be discontinued with effect from 14 January 2014. A letter to this effect was sent to her parents. It concluded with an expression of confidence that alternative arrangements for her care could be found.

[12] In response to this letter, Mr Barry, the attorney for her parents, who was based in Calitzdorp, wrote to the Institute on their behalf on 10 December 2010, expressing his clients' understanding of the Institute's problems with Ms Potgieter but pleaded for recognition that it would be very difficult to find an expeditious resolution of the problem. Mr Barry also mentioned that his clients had arranged an appointment for Ms Potgieter with a psychiatrist with a view to finding a long-term solution to the problem.

[13] In this correspondence, Mr Barry did, however, draw the Institute's attention to his client's claim that Ms Potgieter's remaining there was protected in terms of s 26(3) of the Constitution, 1996 and that the executive committee had no authority to make the decision which it had. He claimed, inter alia, that his clients had been denied the right of *audi alteram partem*. He nevertheless concluded his letter with an assurance that his clients did not wish to complicate matters or drag out a dispute but requested that his clients be afforded a reasonable opportunity to find a solution to the problem.

[14] The management of the Institute convened a special meeting on 12 January 2011 in order to consider the matter. They noted that in November 2010, Ms Potgieter's mother had been orally informed that it seemed that the Institute would not be able to continue with the care of her ward and had requested her to attend the meeting of the professional committee of 1 December 2010. She had not been able to attend that meeting. Against this background of events, the management of the Institute decided to hold a meeting with Ms Potgieter's parents and their attorney, Mr Barry, on 13 January 2011 – the very next day.

[15] At this meeting on 13 January 2011, Mr Barry requested for an opportunity for his clients to explore alternatives, especially as it was the holiday season at that

time. He reiterated that the *audi* principle applied – that his clients had a right to be heard before any decision adverse to either their or their ward's interests be taken by the Institute. He requested a three-month postponement of any final decision concerning Ms Potgieter's fate with the Institute.

[16] At the heart of this case is the tragic problem that there are few alternative institutions into which Ms Potgieter can be placed. This opinion was expressed inter alia, by Dr Johan Fourie, the psychiatrist, who had treated Ms Potgieter in both 2012 and 2014. Nevertheless, the Institute has said that there is indeed a similar institution in the Oudtshoorn area, known as Bellinghanhof, which has the advantage of a psychiatric section.

[17] A positive outcome, albeit temporary, derived from this meeting. Ms Potgieter returned to the Institute on 14 January 2011. The executive committee noted that Ms Potgieter's medication had been changed and that she now seemed much calmer. In these circumstances, the staff unanimously agreed that her parents should be afforded a reasonable opportunity to find alternative care for her. Accordingly, it was decided that Ms Potgieter could stay at the Institute until 14 April 2011 – for a further three months – and that a further meeting would be held with her parents on 13 April 2011 to discuss 'the road ahead'. Furthermore, it was decided that, in the meantime, a plan for her care would be drawn up and that her behaviour, as well as her response to the altered regime of medication, would be monitored: everything that was relevant should be carefully recorded and evaluated in co-operation with her parents. All of this was done and included a meeting with Ms Potgieter's mother on 10 February 2011.

[18] A further meeting was held on 29 June 2011 at which, among others, the Reverend Willem Smit attended as an ombudsman and Ms Louw acted as chairperson. On this occasion, it was confirmed that Ms Potgieter's disruptive behaviour remained a huge problem. Complaints about her behavior had been received not only from members of staff but also other patients at the Institute. She had, for example, broken a bathroom mirror with her forehead as well as the reinforced glass in a double-door. Ms Potgieter's mother reported that she had looked around extensively for another place, suitable for her daughter's care but had

been unsuccessful. The Reverend Smit emphasised, however, that Ms Potgieter could not remain at the Institute if her behaviour continued to be disruptive. It was recorded that the meeting had taken place 'in a good spirit' and that her parents were deeply mindful of the dilemma faced by the Institute and that the Institute was aware of their concerns about the welfare of Ms Potgieter over the longer term.

[19] In the meantime, the Service Level Agreement was signed on 1 July 2011. In that agreement, Ms Potgieter's father was defined as 'the client', Ms Potgieter as 'the occupant' and Ms Potgieter's mother as 'the authorised person'. This agreement recorded that a three month probation period, from the date of signature thereto, would be applicable and that if it appeared that the Institute was not suitable for Ms Potgieter, the client would be responsible for alternative care for her. The agreement does not stipulate, in clear and direct terms, to whom it must appear that the Institute was not suitable. I shall assume, in favour of Ms Potgieter's father, that the criterion was intended to be an objective one.

[20] The Service Level Agreement also records that the client understood that basic services, including basic nursing care only, would be provided for Ms Potgieter. The agreement stipulates that Ms Potgieter could be discharged from the Institute in terms of the second respondent's Policy on the Termination of Services, dated 8 May 2009. A copy of this policy was annexed to the agreement. This policy pertinently refers to disruptive behaviour on the part of the occupant as a ground, which among others, could justify her discharge from the Institute.

[21] Clause 11.2 of this Service Level Agreement deals with the grounds for termination of the service level agreement and the ending of services. There are only two subclauses to clause 11.2 that are relevant and which have absorbed the attention both of this court and the high court. These are subclauses 11(2)*(d)* and 11(2)*(e)*. Sub-clause 11(2)*(d)* provides that termination of services may result where the occupant's needs have changed and the person's profile no longer meets the original criteria for admission. Subclause 11(2)*(e)* provides that an occupant may be discharged as a result of misconduct and contravention of the house rules. It records that the provisions of BADISA's expulsion and Termination of Services policy of 8 May 2009 apply and refers to an attached annexure. This policy is comprehensive. It

provides a detailed process for expulsion, including the holding of a hearing, the exploration of alternatives and stipulates that the rules of natural justice, human rights and relevant legislation ('relevante Wetgewing') must apply to any decision-making process that may end in expulsion.

[22] The executive committee convened a meeting on 21 July 2011 to consider the matter. It took note of the discussions that had taken place on 29 June 2011, as well as a summary of incidents in which Ms Potgieter had been involved between 14 January and 20 June 2011, including entries in the records relating to these incidents, over the period from 4 to 19 July 2011. This meeting noted 'with concern' that two members of staff had been injured during this time and that one of them had, as a result thereof, taken sick leave from 22 to 27 July 2011. It decided that Ms Potgieter's parents should be informed of all these facts and that, as a result thereof, it would recommend to the management of the Institute that their services for Ms Potgieter should come to an end. As will appear more fully later in this judgment, the appellant's central contention during the appeal was that the process by which this decision was made was fatally defective inasmuch as Ms Potgieter had not been represented at this meeting and a subsequent one on 14 February 2012

[23] Management decided, however, on 16 August 2011 that the staff should have a 'think-tank' on how Ms Potgieter could be treated differently so that the Institute would, indeed, have the capacity to take care of her. It was also decided that Ms Potgieter should be evaluated by Ms Daniella De Kock, an occupational therapist. This think-tank took place on 30 August 2011 when it was resolved that the Institute could not deal with Ms Potgieter in any other manner that would produce better results and that the staff responsible for her care should submit a written request to management as to how best to make progress in the matter.

[24] On 8 November 2011 the council for the management of the Institute considered the report and recommendations arising from the convening of the think-tank and decided that Ms Potgieter should, in the meantime, remain at the Institute pending the outcome of the report from Ms De Kock, the occupational therapist.

[25] In essence Ms De Kock's reports, two of which were filed in 2011 and one in 2012, while recognizing the difficulties which the Institute faced with regard to Ms Potgieter, pleaded with the Institute to allow for more time for matters to improve. Ironically, Ms De Kock considered Ms Potgieter's regular trips home to her parents' farm, Buffelskloof, were disruptive and unsettling for her and recommended that they should be reduced. A report by Ms Charlotte Marais, an occupational therapist, describes Ms Potgieter's life at the farm in almost idyllic terms: she rides horses, plays with plastic building blocks, colours in pictures, bakes (under supervision), sets the table, prepares vegetables for cooking and makes tea.

[26] Having received this report, a meeting of the Institute's management council decided on 14 February 2012 that the Institute did not have either the infrastructure or capacity to accommodate Ms Potgieter, especially on account of the risk which she posed to the other occupants and the staff. It considered that it would not be fair either to Ms Potgieter or her parents to keep her at the Institute in view of its inability properly to take care of her. It decided that the Institute's services for Ms Potgieter had to be terminated and that it should recommend to her parents that she be taken care of in a more strictly controlled environment.

[27] On 19 April 2012 the Institute addressed a letter to this effect to the parents and informed them that, as from 19 May 2012, its services for Ms Potgieter would terminate. Reacting to a letter from Mr Barry, the attorney, the Institute confirmed this decision once again on 15 May 2012 and relayed to him in a letter dated 18 May 2012. In that letter, the Institute threatened to bring an application for a court interdict, in the event that her parents did not remove Ms Potgieter from the premises on or before 19 May 2012.

[28] In response to further pleas by Mr Barry, on behalf of his clients, a further round-table conference was held on 25 May 2012 at which representatives of the Institute as well as Ms Potgieter's parents were present. Mr Barry, as well as the Institute's lawyers, also attended. At that meeting Ms Potgieter's father and his wife agreed to remove Ms Potgieter from the Institute. They claim, however, to have reserved the right for her to be placed back at the Institute 'at any time'. The Institute denies not only that they said so but also that they have any such right. Ms Potgieter

did indeed leave the Institute during May 2012, being taken in the care of her parents. A resolution of the council taken on 6 May 2013 makes clear its decision that it would no longer supply its services to Ms Potgieter. On 14 August 2012 the Institute decided to reconfirm its stance. This decision of the Institute was conveyed in a letter to Mr Barry dated 10 September 2012.

[29] In consequence of the refusal by the Institute to readmit Ms Potgieter, her father brought an application against it in the magistrate's court in Oudtshoorn. The magistrate held that Ms Potgieter should be a party to the application, acting, if needs be, though a duly appointed curator *ad litem*. The magistrate also found that the Institute had no legal personality and Badisa should have been joined in the proceedings. The magistrate then dismissed the application without dealing with the substantive merits of the application.

[30] Ms Potgieter is currently at the home of her parents' farm, Buffelskloof. She had been taken there regularly by her parents for weekends and holidays ever since her first admission at the Institute in 2005. He father contends that it is dangerous for her to be at the farm and mentions, by way of example, that she escaped into an ostrich pen and was attacked by one of them in that enclosure. Ms Potgieter's father is 76 years of age. Her mother is ten years younger than her father. Concerns have been expressed in the papers about the advanced age of both Ms Potgieter's parents.

[31] Suggestions by the Institute that Ms Potgieter's parents could provide for her round-the-clock care and supervision at the farm were met with no direct response from them. Her parents nowhere complain of a lack of financial resources with which to take care of her.

[32] After the answering and replying affidavits in the petition to this court for leave to appeal had been filed, the parties were required to file further affidavits setting out the current medical condition of Ms Potgieter and proposals concerning the steps that could reasonably be taken to ensure the safety of others. In response thereto, Daniella De Kock, the occupational therapist, filed a further affidavit on 21 January 2015 in which she referred to her three previous reports delivered in 2011

and 2012. She also referred to the so-called APOM Baseline Assessment form completed by her and an Occupational Therapy Report completed by her on 8 December 2014, after her assessment of Ms Potgieter. Ms De Kock said in that affidavit that, in her professional opinion, Ms Potgieter was not a danger to the personnel or other inhabitants of the Institute and that she 'can and should return there as soon as possible'. Ms De Kock expressed the view that the staff of the Institute were trained to 'read' the inhabitants and 'to notice when they are about to have a temper tantrum and then to take steps to prevent or curtail it, for instance to administer appropriate medication timeously.'

[33] Dr Johan Fourie, the psychiatrist who, as we have previously seen, had dealt with Ms Potgieter as a patient in 2012 and 2014, also filed an affidavit in response to this court's directive. He expressed the opinion that her behaviour could be modified and controlled by the administration of medication which would have a calming effect upon her. He said that he did not consider that Ms Potgieter constituted a danger to the other occupiers at or the staff of the Institute.

[34] Ms Julia Pead is the mother of a 40 year-old sufferer from cerebral palsy, who is also a resident at the Institute. She has worked as a volunteer at the Institute for six years, during which time she cared for Ms Potgieter for a period of six months. She also filed an affidavit. In that document she said that she had resigned from her position at the Institute precisely because of Ms Potgieter's aggression. Ms Pead has nothing but praise for the Institute, which is 'doing their utmost best to cater for every resident's needs.' She expressed the view that the Institute is not suitable for Ms Potgieter and that she constitutes a danger to others. Ms Pead attributes at least part of Ms Potgieter's aggression to the fact that she much preferred being at her parents' farm than at the Institute.

[35] The factual outline given above is merely skeletal. It is clear from the affidavits filed of record, as well as the annexures thereto, that the Institute was meticulous and thorough in keeping records of incidents, attempts to address them, the follow-up thereof and meetings related thereto. The Institute was in regular telephonic contact, throughout this period, with Ms Potgieter's mother about the problems it encountered. Recommendations that Ms Potgieter be closely attended

by specialist caregivers were implemented, from time to time, at the expense of her parents, but to no avail. Those who were appointed gave up within very short periods of time. There is clear and consistent evidence that the Institute did its best to avoid taking a decision which it always saw as one of last resort: terminating its responsibility to care for Ms Potgieter.

[36] The appellant has submitted that, although the respondents (and more particularly, Badisa, by reason of the fact that the Institute has no legal personality) constitute a private organization, whose decisions relating both to Ms Potgieter's discharge and not to re-admit her are reviewable in terms of PAJA because the Institute exercises a 'public power or performs a public function' in terms of s 1(i)*(b)* of PAJA. In this regard, the appellant relies, inter alia, on the facts that the second respondent is publicly funded and acts subject to government regulation.

[37] The appellant claims that the Institute acted unlawfully in disregarding the right which Ms Potgieter had not only at common law but also in terms of its own internal rules and policies, by which it is contractually bound, to a fair disciplinary hearing before she was discharged from the Institute. Put differently, the complaint of the appellant is that the Institute, in coming to the decision to terminate its services to Ms Potgieter, acted in disregard of the principle of *audi alteram partem*.

[38] The Institute's response has been that if regard is had to Ms Potgieter's degree of mental incapacity, she having been represented in a thorough process of consultation over several years not only by her parents but also an attorney, Mr Barry, the principle of *audi alteram partem* had been more than adequately met. The high court found that, even though the decision by the Institute was not reviewable in terms of PAJA, that it was reviewable under common law. It is not necessary to decide whether PAJA applies in this situation. The parties agree that the decision is capable of being reviewed through the application of the principles of natural justice. Accordingly, I shall deal with it on this basis.

[39] As Gauntlett JA said in Lesotho in *Matebesi v Director of Immigration & others*:[2]

'The right to be heard (henceforth "the *audi* principle") is a very important one, rooted in the common law not only of Lesotho but of many other jurisdictions…It has traditionally been described as constituting (together with the rule against bias, or the *nemo iudex in re sua* principle) the principles of natural justice, that "stereotyped expression which is used to describe [the] fundamental principles of fairness (see *Minister of Interior v Bechler: Beier v Minister of the Interior* 1948 (3) SA 409 (A) at 451). More recently this has mutated to an acceptance of a more supple and encompassing duty to act fairly (significantly derived from Lord Reid's speech in *Ridge v Baldwin* [1964] AC 40, particularly in *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A) and more recently, *Du Preez v Truth and Reconciliation Commission supra*[3] and *Doody v Secretary of State for the Home Department* [1993] 3 All ER 92 (HL) at 106d-h).'

This judgment was referred to with approval by Steyn P in *Commander of the Lesotho Defence Force & others v Mokoena & others*[4] and Brand JA, also in Lesotho, in *The President of the Court of Appeal v The Prime Minister & others.*[5]

[40] In that case Brand JA went on to say:

'The principle that procedural fairness is a highly variable concept which must be decided in the context and the circumstances of each case and that the one-size-fits-all approach is inappropriate, has been explicitly recognised by the highest courts in England (see eg *Doody v Secretary of State for the House Department and Other Appeals* [1993] 3 All ER 92 (HL) 106d-h) and in South Africa (see eg *Du Preez & another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) 231-3; *Minister of Health & Another NO v New Clicks SA (Pty) Ltd & others (Treatment Action Campaign & another as Amici Curiae)* 2006 (2) SA 311 (CC) para 152). This means, as I see it, that the strict rules of the *audi* principle are not immutable. Where they are not strictly complied with, as in this case, the question as to whether in all the circumstances of the case the procedure that preceded the impugned decision was unfair, remains.'[6]

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[2] *Matebesi v Director of Immigration & others* [1998] JOL 4099 (Les A) [1998] LSCA 83 at 7-8.
[3] *Du Preez v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) at 231C-D.
[4] *Commander of the Lesotho Defence Force & others v Mokoena & others* [2002] LSCA 11 para 5.
[5] *The President of the Court of Appeal v The Prime Minister & others* [2014] LSCA 1 para 11.
[6] Ibid. para 20.

[41] The high court correctly referred with approval to the observation by Professor Cora Hoexter in her *Administrative Law In South Africa*,[7] that the courts are wary of 'over-judicialising' administrative processes.[8] In *Hamata & another v Chairperson, Peninsula Technikon Internal Disciplinary Committee & others*[9] this court referred to 'the potential tyranny of artful forensic footwork'.[10]

[42] The general requirements for a fair hearing have received much attention in labour law in recent years.[11] As was said in *Thebe Ya Bophelo Healthcare Administrators (Pty) Ltd v National Bargaining Council for the Road Freight Industry & another*,[12] when it comes to judicial review on the grounds of procedural fairness, a court must be careful not to take an 'armchair view'.[13] A mechanical, 'checklist' approach is also to be avoided in situations such as this.[14]

[43] In the papers the appellant's complaint was confined to the allegation that the Institute's decision to terminate its services to Ms Potgieter had been unfairly made because it was disciplinary in nature and Ms Potgieter had not been represented at any disciplinary proceedings. It was only later that it was argued that the principle of '*audi alteram partem*' required that Ms Potgieter should have been represented at the meetings of the council, including the think-tanks, on 30 August 2011, 8 November 2011 and 14 February 2012 respectively.

[44] The high court concluded that Ms Potgieter has not been discharged for misconduct and that the hearings in question had not been disciplinary in nature. The high court came to this conclusion for two reasons. The first is that Ms Potgieter lacked the requisite mental capacity to be guilty of misconduct. This finding is

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[7] 2012, *Administrative Law In South Africa*, 2nd ed, Juta's, p366.
[8] Hoexter relies, inter alia, on *Dabner v South African Railways and Harbours* 1920 AD 583.
[9] *Hamata & another v Chairperson, Peninsula Technikon Internal Disciplinary Committee & others* 2002 (5) SA 449 (SCA)
[10] Para 5.
[11] See for example *Modise & others v Steve's Spar Blackheath* 2001 (2) SA 406 (LAC), especially the references in paras 14 to 35 thereof.
[12] *Thebe Ya Bophelo Healthcare Administrators (Pty) Ltd v National Bargaining Council for the Road Freight Industry & another* 2009 30 (ILJ) 31 (W).
[13] Paragraph 31.
[14] Although the contexts are different, it is instructive to read, in regard to the undesirability of a 'checklist approach': *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union* (1999) 20 ILJ 89 (LAC) para 29; *S v Manamela & another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC) para 32; *Chevron SA (Pty) Ltd v Wilson t/a Wilson's Transport & others* 2015 (10) BCLR 1158 (CC) para 34; *Steenkamp & others v Edcon Ltd* (supra) para 20.

correct. A useful summary of the state of our law as to whether a person, not of normal adult capacity, is *culpae capax* is to be found in *Eskom Holdings Ltd v Hendricks*.[15] As a matter of logic, a person with a mental age of an *infans* is also *culpae incapax* even though her chronological age may be different. The second is that a plain reading of subclause 11.2(e) of the Service Level Agreement made it clear, against the background of events, that it could never have been understood by either the Institute or Ms Potgieter's parents that the issue was one of discipline. On the contrary, the parties would have understood the issue to have related to clause 11.2(d) thereof, which is concerned with a change of the needs of a resident at the Institute from those which had lead to her original admission.

[45] Insofar as the rules of natural justice, procedural fairness and the principle of *audi alteram partem* are concerned, the high court observed that when regard is had to the voluminous record, as a whole, in respect of which a short summary has been given above, the reader is struck by the long process that had been followed and the countless meetings that preceded the final decisions that were made. The court noted that Ms Potgieter's parents played an active role in this process throughout and they were kept fully informed of the precise nature of the problems that the Institute had been experiencing with her. The high court correctly took into account that at no stage had any of the factual allegations concerning the patient been placed in dispute, contested or refuted. The high court found that, against this background, to expect of the Institute that it appoint a curator *ad litem* for her and then to conduct a formal hearing, with oral evidence, restrictions according to the law of evidence against hearsay, legal representation and everything that goes along with this would not only serve no useful purpose; it would border on the absurd. I agree with these reasons too.

[46] Several hearings did, in fact, take place. As for the adequacy of Ms Potgieter's respresentation, it is not without significance that, although the appellant is Ms Potgieter's curator *ad litem*, the deponent to his founding affidavit is her father. Who could be better, in the circumstances, to represent her on the issue of her

[15] *Eskom Holdings Ltd v Hendricks* 2005 (5) SA 503 (SCA) paras 15 to 17.

continuing to receive care at the Institute than her parents? They were actively involved in the process, over a protracted period of time. Moreover, the meetings in respect of which the appellant's counsel has complained by reason of the non-attendance by representatives of Ms Potgieter were not only internal to the Institute but also followed an extensive process of *audi alteram partem.* If one takes an overall conspectus of the facts in this matter, there can be no question that the Institute acted fairly.

[47] The application for leave to appeal must fail as there are no reasonable prospects of success in the event that the appeal were to be heard. The parties agreed that, in view of the particular circumstances of this case, there should be no order as to costs in the event that the application for leave to appeal were to be dismissed.

[48] The following order is made:

The application for leave to appeal is dismissed.

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N P WILLIS

Judge of Appeal

APPEARANCES:

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|---|---|
| For the Appellant: | A De Vos SC |
| | Instructed by: |
| | Barry & Mouton Attorneys, Calitzdorp |
| | Phatsoane Henney, Bloemfontein |
| For the Respondents: | AM Breitenbach SC (with him AF Schmidt) |
| | Instructed by: |
| | Johan Wagener Attorneys, Oudtshoorn |
| | Webbers, Bloemfontein |