RREPUBLIC OF SOUTH AFRICA

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

CASE NO: 2024/071038

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
27/3/2025	
DATE	SIGNATURE

In the matter between:

CANCER ALLIANCE	APPLICANT
and	
MEMBER OF EXECUTIVE COUNCIL FOR HEALTH GAUTENG PROVINCE	FIRST RESPONDENT
HEAD OF DEPARTMENT: HEALTH GAUTENG PROVINCE	SECOND RESPONDENT
MEMBER OF EXECUTIVE COUNCIL FOR GAUTENG TREASURY: GAUTENG PROVINCE	THIRD RESPONDENT
VARIAN MEDICAL SYSTEMS AFRICA (PTY) LIMITED	FOURTH RESPONDENT
MINISTER OF HEALTH	FIFTH RESPONDENT
DIRECTOR GENERAL: DEPARTMENT OF HEALTH	SIXTH RESPONDENT

CHIEF EXECUTIVE OFFICER: CHARLOTTE MAXEKE JOHANNESBURG ACADEMIC HOSPITAL SEVENTH RESPONDENT

CHIEF EXECUTIVE OFFICER: STEVE BIKO ACADEMIC HOSPITAL EIGHTH RESPONDENT

MINISTER OF FINANCE NINTH RESPONDENT

NATIONAL TREASURY TENTH RESPONDENT

SIEMENS HEALTHCARE (PTY) LTD ELEVENTH RESPONDENT

JUDGMENT

S. VAN NIEUWENHUIZEN, AJ

Introduction

[1] This matter came before me by way of special motion after the Applicant ("the Alliance") launched it as an urgent application on 27 June 2024, seeking, in Part A of the notice of motion under the rubric of urgency, the following relief:

"**PART A – THE PROVISION OF RADIATION ONCOLOGY SERVICES AT CHARLOTTE MAXEKE FOR BACKLOG LIST PATIENTS**

1. That non-compliance with the form, service and time periods provided for in the Uniform Rules of Court be condoned and directing that the matter be heard as one of urgency in terms of rule 6(12).

2. The First, Second, Sixth, Seventh and Eighth Respondents' failure to devise and implement a plan to provide radiation oncology services at Charlotte Maxeke Johannesburg Academic Hospital and Steve Biko Academic Hospital in Gauteng to cancer patients on the backlog list is declared to be unlawful and unconstitutional.

3. The First, Second, Sixth, Seventh and Eighth Respondents are directed to update the backlog list of cancer patients who are awaiting radiation oncology services in Gauteng within 45 days from the date of this order.

4. The First, Second, Sixth, Seventh and Eighth Respondents are directed to take all steps necessary to provide radiation oncology services to backlog list patients who are awaiting treatment at Charlotte Maxeke Johannesburg Academic Hospital and Steve Biko Academic Hospital in Gauteng at a public and/or private facility.

5. The Respondents are interdicted and restrained from paying, disbursing or otherwise dealing with R250 million, which has been allocated specifically to address the radiation oncology backlog in Gauteng province, pending the outcome and finalisation of Part B of the application.

6. The First, Second, Sixth, Seventh and Eighth Respondents are directed to file an updated report within three months from the date of this order detailing the following:

    6.1 A progress report on the steps taken to provide radiation oncology services to cancer patients who are on the backlog list in Gauteng.

    6.2 A progress report on the First Respondent's long-term plan to provide radiation oncology services to cancer patients at Charlotte Maxeke Johannesburg Academic Hospital and Steve Biko Academic Hospital in Gauteng.

7. In the event that First Respondent fails to comply with the orders in paragraphs 2 to 6 above, the Applicant is entitled to re-enrol the matter on the same papers, duly supplemented to the extent necessary.

8. The Applicant is granted leave to supplement the application in relation to the relief sought in Part B of the application.

9. Costs of the application, only in the event of opposition by the Respondents, including the costs of two counsel.

10. Further and/or alternative relief."

[2] A founding affidavit of Salomé Jeanette Meyer and the annexures thereto were filed in support of Part A of the application.

[3] The Respondents, in terms of Part A of the notice of motion, were given an opportunity until 3 July 2024, at 10h00, to appoint an address referred to in Rule 6(5)(b) at which the Respondents would accept notice and service of all documents in the proceedings and were further given until 16h00 on 12 July 2024 to file their answering affidavits, whereupon the Alliance would file its

replying affidavit, if any, on or before 16 July 2024. The urgent hearing date was set for 23 July 2024.

[4] The Alliance is represented by section 27 a non-governmental organisation, which instructed counsel on its behalf. From the detail provided after the respondents caused a rule 7 notice to be served on it it became clear that it is actually the Cancer Alliance NPC (Reg no:2021/844313/08) who is the applicant although this was not stated in the founding affidavit, The application was issued and served by email on the First, Second and Seventh respondent on 27 June 2024, and served on 28 June 2024 on the 4th to 6th and 8th to 10th respondents respectively, according to a service affidavit deposed to by Ms Laher. This affidavit also states that in the attempt to serve on the 4th respondent it appeared that it no longer exists as a legal entity and had been taken over by the 11th respondent. The 11th respondent has since consented to be joined to the proceedings and was joined in terms of an order made by Twala J on 23 July 2024. It does not oppose the relief sought .

[5] It is necessary to, at least, make reference, in brief, to Part B of the relief sought in order to understand the interplay between Part A and Part B of the notice of motion.

[6] Part B of the notice of motion contemplates that application would be made on behalf of the Alliance for an expedited hearing date to be arranged with the Registrar, for an order in the following terms:

"1. The Second Respondent's decision of 30 April 2024 to allocate R250 million, out of the allocated R784 million, for the outsourcing of radiation oncology services ('**Second Respondent's decision**') is irrational, arbitrary, unlawful and of no force or effect.

2. The First, Second, and Fifth Respondents' decision on 30 April 2024 to award the Radiation Oncology Services tender or, alternatively Part C of the Radiation Oncology Services tender to Varian Medical Systems.

3. The Second Respondent's decision is reviewed and set aside.

4. Costs of the application, only in the event of opposition by the Respondents including the costs of two counsel.

5. Further and/or alternative relief."

[7] The same Founding Affidavit of Salomé Jeanette Meyer and the annexures thereto are utilised in support of Part B.

[8] In addition, the second respondent was called upon to produce the record of proceedings and despatch same within 10 (ten) days of receipt of this application to the Registrar of the Honourable Court and give such reasons as are required by law or they desire to make and inform the applicant that they have done so. Why compliance with the rule has not yet been sought is a mystery to me.

[9] I do not deal with the rest of the notice of motion given that same to a large extent follow the traditional format of Rule 53 of the Uniform Rules of Court and the fact that I am only concerned with the relief in Part "A"

[10] I will refer to the applicant as "the Alliance", and 5th and 6th respondents interchangeably by name or as the "national government respondents". The remaining respondents (excluding the 4th,9th,10th and 11th) will be referred to as the "provincial health respondents" or by their names interchangeably and at times as the "GDoH". The 11th Respondent will also be referred to as cited or simply as "Siemens" interchangeably.

The Alliance's prima facie case

[11] The stated purpose of the present application is to obtain the court's intervention in an alleged ongoing and life-threatening radiation oncology crisis in Gauteng. This centres around a "*significant backlog of cancer patients that have built up largely at the Charlotte Maxeke Johannesburg Academic Hospital ("CMJAH") with the result that approximately 3000 cancer patients have not received radiation oncology treatment in the past three years*". The application is further directed at the GDoH's failure to provide such treatment where funding has specifically been allocated for this purpose.

[12] This brings in to play the right to health care services as guaranteed in section 27 of the Constitution but focuses on cancer patients and the right to receive radiation oncology services. Section 27 of the Constitution reads as follows:

"**27 Health care, food, water and social security**

(1) Everyone has the right to have access to-

(a) health care services, including reproductive health care;

…….

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment."

[13] The backlog list referred to is the list as prepared by the GDoH in May 2023. This fact is important given that this forms part of the relief sought. It was updated from a backlog list generated by the Alliance in March 2022 and at that time reflected a number of 3026 patients and 2400 patients in May 2023. It is also said that many patients have been on this list for several years.

[14] The Alliance emphasises the fact that this case is not about whether the measures taken by the state are reasonable within available resources or about the progressive realisation of the right to health care services. The case rests on the premise that the means to provide services to cancer patients on the backlog list exist and have been allocated for that purpose. Whilst the aforesaid notion goes a long way towards eliminating time delays preceding the delivery of such services it does not mean that such services can be provided overnight and without circumspection. The time delay after such means have become available will of necessity be a factor of the type of procurement process followed thereafter with its own inherent shortcomings and unknown outcomes all of which in itself will play a role in the delivery of such services.

[15] The Alliance makes the serious allegation against the GDoH that as time passes the backlog list continuous to grow and cancer patients on this list face the real possibility that they may not survive without the radiation oncology

treatment. It is said that their pain and suffering goes unnoticed because they are at home trying their best to manage their illness and that this situation cannot continue.

[16] The aforesaid notions are presented in the Alliance's founding affidavit as fact and rests upon the deponent's Ms Meyer's knowledge which she states to be as follows:

> "I have been involved in cancer advocacy for the past 25 years. I am well versed in the importance of timeous cancer treatments and the various cancer treatment modalities. In my capacity as a cancer advocate, I have provided government with guidance on the realities of cancer patients living in South Africa. In this regard I have provided input to the National Department of Health, at their request, in the drafting of the clinical guidelines for breast cancer control and management."

[17] Although her opinion is not backed up by any person purporting to have expertise in all the different kinds of cancer and cancer treatment she seems to have some knowledge in the field. At the same time I cannot just accept that radiation treatment is a panacea and integral treatment indicated for all kinds of cancers following chemotherapy or surgery. Having had regard to a conspectus of all the facts in this application I am prepared to accept that radiation therapy is often deployed as a follow-up treatment and will accept that at least in respect of certain cancers it may well be vital to the success of a specific treatment protocol and to that extent life-saving.

[18] I should mention that although the provincial respondents have defended their position fiercely they have not taken the stance that radiation therapy is totally unnecessary or not life-saving. As will transpire later, included in their extensive defence is the notion that shorter radiation therapy treatments are indicated than used to be the case. I should mention that they also do not avail themselves of any expert on the topic.

[19] Ms Meyer also provides the court with a detailed background to the aforementioned crisis with specific reference to the CMJAH.

19.1 The Alliance has been monitoring the consequences of the ongoing crisis in radiation oncology services for the last 6 years in Gauteng generally and more specifically at the CMJAH;

19.2 The Alliance has in the past 3 years engaged in several meetings with the GDoH and the offices of the Gauteng Treasury and the National Department of Health ("National DOH") for purposes of addressing the crisis;

19.3 The Alliance consists of a group of 30 cancer control non-profit organisations. It is acting in this matter in its own name and interest to ensure that patients diagnosed with cancer receive much needed radiation oncology services;

19.4 It brings the application in the interests of the group of cancer patients in Gauteng who are not receiving critical radiation oncology services;

19.5 It also brings this application in the broader public interest.

[20] The deponent explains that cancer treatment is time-sensitive and that radiation oncology [treatment] is a key component in cancer treatment. She states that cancer patients must receive radiation oncology treatment within a minimum of 3 months from their diagnosis or within a minimum of 3 months or three months after surgery to remove a tumour. She further states that delays in providing radiation oncology treatment to cancer patients often increase the chances of post-surgery cancer recurrence.

[21] She further asserts that there is a national public health care crisis because cancer patients in Gauteng have not been timeously receiving radiation oncology treatment and specifically so at CMJAH. During January 2022 the television programme Carte Blanche aired a programme detailing the challenges faced by patients awaiting treatment at CMJAH. A copy of a link to the programme is in the founding affidavit.

[22] The programme refers to delays at CMJAH as far back as 2010. It also demonstrates that the constant power failures occasioned by Eskom leading to

the equipment having to be re-calibrated once the electricity is restored and also indicates that a typical treatment session last 15 minutes.

[23] In an interview with Dr Duvern Ramiah (“”Dr Ramiah) who is the head of Radiation Oncology at CMJAH he confirms that the backlog list has been increasing since 2018 ultimately leading to the figure of 3026 patients on this backlog list as at March 2022.

[24] Two main issues have driven the increase in the backlog list i.e. a lack of sufficient radiation equipment (Linac and brachytherapy machines) with concomitant barriers at GDoH from procuring the equipment.

[25] The following matters are important with regard to the lack of radiation equipment specifically at CMJAH i.e.:

25.1 A shortage in machinery due to the decommissioning of 2 Cobalt machines and maintenance issues with the remaining machines;

25.2 The tender process to replace the 2 decommissioned machines were commenced in 2019 but abandoned in 2021;

25.3 The tender process was started afresh in January 2022. The bid specification committee compiled specifications for the procurement of these machines, a process that took 9 months. Ms Meyer is unable to inform the court where this bid process was as at the time of filing the founding affidavit but can confirm that no procurement has taken place as yet;

25.4 In the meantime the CMJAH had to manage an influx of approximately 2000 new patients per year as well as the 3000 patients on the backlog with only 4 machines;

25.5 Even if the machinery were to be procured, it would take a further nine months for same to be installed and operating. She states that due to the expensive nature of these machines manufacturers often only commence manufacturing (a delay of another 6 months) once they received the order for the machines which in the case of the state would

only be after the award of a tender. Thereafter the machines must still be installed and inspected by the Atomic Energy Agency to ensure compliance with standards applicable to the use of equipment emitting radiation;

25.6 Where there are no compatible bunkers for the procured machines, bunkers must be built, inspected and licensed. Building bunkers in itself could take months. In this regard the deponent refers to the building of bunkers at the Dr George Mukhari Academic Hospital ("GMAH") and the Chris Hani Baragwanath Academic Hospital ("CHBAH"). Apparently processes there have taken years and have stalled at the approval stage for the building plans. The radiation oncology machines for these hospitals have been in storage for over 3 years;

25.7 In addition there are insufficient healthcare professionals for radiation oncology at CMJAH. These challenges relate to the appointment and remuneration of additional suitably qualified professionals. She states that as at September 2022 the radiation oncology unit was operating with 6 radiotherapists, yet to function at full capacity, it would require approximately 30 radiotherapists;

25.8 In 2022 CMJAH advertised only 3 vacancies none of which was filled. According to Ms Meyer this is due to uncompetitive remuneration and promotion structure. She states that GDoH has lost radiotherapists to public hospitals in other provinces who have sought and obtained an exemption from the Occupation Specific Dispensation which determines the qualifications necessary for promotion and therefore salary;

25.9 She adds that the Alliance and Section 27 the NGO acting as the instructing party for the Alliance are in discussions with the Department of Public Services and Administration ("DPSA");

25.10 Even if the GDoH would be able to procure the equipment, installed, inspected and licensed within a reasonable time there are still insufficient oncology radiotherapists available employed by the GDoH to meet the demand;

25.11 She also asserts that to the extent that the award of the radiation oncology planning category is designed to address the shortage of oncology radiotherapists in the employ of the GDoH at CMJAH this will not provide any reprieve to the patients on the backlog list without the necessary equipment to deliver the treatment which machinery will take months to bring to operation. In the meantime, any person(s) who received the radiation oncology planning services through the contracted services will be forced to return to the public sector where they will again compete for the available machines with those on the backlog list and waiting list.

25.12 Ms Meyer also asserts that as evidenced by the accounts detailed in the attached supporting affidavits (Annexures **SJM20** to **SJM22),** some of the patients on the backlog list have, at some stage or another, undergone radiation oncology contouring and the subsequent radiation oncology planning in preparation for the treatment and notwithstanding that still had to wait months for treatment - while suffering recurrences in the meanwhile - due to a lack of available machinery. I will in due course refer to the affidavits filed by these 3 patients who I will for the sake of their privacy refer to these persons as Ms "V", Ms "W" and Ms "X". There is also evidence from a 4th patient who I will refer to as Ms "Y" who may well not be on the backlog list.

25.13 Ms Meyer concludes that it is clear to her that the backlog is created by a dual issue of a significant shortage of radiation oncology machinery and radiotherapists. Any solution other than integrated radiation oncology services will in her opinion fail to address the crises;

25.14 She further explains that the implementation of Covid-19 measures in 2020 posed great challenges to patients receiving treatment in the public sector. Most public sector hospitals were experiencing problems with providing care for cancer patients in all three treatment modalities, i.e. surgery, chemotherapy and radiation therapy;

25.15 During 2021 a fire broke out at CMJAH further exacerbating the situation leading to the temporary closing down of the hospital and cancer patients having been referred to SBAH for radiation treatment;

25.16 The radiation oncology unit at CMJAH reopened around June 2021. However not all the patients who had been redirected to SBAH were immediately recalled to CMJAH when the unit reopened;

25.17 In the result she concludes that there are more than 3000 patients in desperate need of lifesaving treatment. She concedes that only the GDoH knows the real numbers and calls on them to be forthright and disclose the true numbers to the court;

25.18 She adds that the patients on the backlog list are all diagnosed with one of the four major cancers i.e. prostate cancer, cervical cancer, breast cancer and colorectal cancer. In her view they are undeniably the patients who are most in need of radiation treatment.

[26] Under the rubric "***The background to the allocation of money for the radiation and oncology backlog***" she explains the extensive advocacy work with the GDoH done by the Alliance and Section 27 to try and find a solution and treatment of for cancer patients on the backlog list.

[27] According to Ms Meyer this led to the establishment of the Task Team during February 2022 consisting of the Alliance, The Treatment Action Campaign, Heads of Radiation Oncology Departments at SBAH and CMJAH, clinicians, Gauteng Acting Head of Health Services, Dr Kgongwane, later succeeded by Dr Mankupane as Head of Hospital services at the GDoH, The Alliance was represented by Ms Greeff, Ms Meyer as well as Ms Mamatela. Dr Kgongwane, and later Dr Mankupane chaired the Task Team.

[28] Ms Meyer states that the terms of reference of the Task Ream was never published but based on their letters of appointment it was generally accepted that the Task Team was required to:

28.1 advise the Head of the Department on the treatment of cancer patients in Gauteng;

28.2 establish a sustainable communication and navigation platform for cancer patients across Gauteng;

28.3 assist with mechanisms in which to address the cancer treatment backlog list;

28.4 oversee the occupation specific dispensation ("OSD") concerns of radiation oncology personnel;

28.5 advise on the procurement processes of cancer equipment.

[29] A copy of Ms Meyer's appointment letter is annexed marked "**SJM1**". This letter evidences the aforesaid functions and continues with the notion that the team will have to develop its own terms of reference which must include the listed responsibilities listed above.

[30] The letter states that the *Task Team will form part of the department's governance structures aimed at enhancing the patient's experience of care.*

[31] Ms Meyer's appointment was effective from date of acceptance of the appointment till 31 March 2023.

[32] The appointment letter is signed by Dr S. Zungu in his capacity as Head of Department on 23 March 2022 and accepted by Ms Meyer on 28 March 2022.

[33] Around March 2022 the Alliance commissioned at its own expense and with the permission of CMJAH the services of an independent consultant to compile an updated backlog list. This process entailed perusing the files at CMJAH, contacting the patients and establishing whether they needed to be restaged, had left the province or had died and was completed in a month and concluded that the backlog list at the time consisted of approximately 3000 cancer patients.

[34] It was also through its participation in the Task Team that the Alliance came to learn that outsourcing had been used in other provinces as a short-term life-

saving measure for the provision of various health services. I should point out that Covid-19 treatment is referred to as such an example and the minutes of a meeting of the Task Team dated 10 October 2022 ("**SJM2**") paragraph 4 refers to oncology services being outsourced (with reference to the Northern Cape where Icon is a service provider) but GDoH was of the view that there was no money for such an exercise. I should add that the aforesaid information emanated from the National Department of Health. It is nevertheless instructive as to what could be achieved by a bureaucracy once it sets it mind on delivering services.

[35] The minutes of this meeting was shared with Dr Nolutshungu on 12 October 2022 and in a meeting held on 26 October 2022 he agreed that the GdoH is amenable to outsourcing radiation oncology services as an interim solution, if funds are ring-fenced for this purpose. It was also recorded that the National Department of Health agreed to make a presentation to Gauteng Health about the outsourcing model. It was agreed that Section 27 would invite representatives from Gauteng Treasury to attend the National Department of Health's presentation. A copy of the minutes of the meeting is attached as Annexure **"SJM3"** and a copy of Ms Mapipa's email is attached as Annexure **"SJM4".** The latter reflects the need to involve Gauteng Treasury.

[36] Annexure "**SJM3**" reflects a request by Ms Mapipa acting on behalf of section 27 to make use of Treasury Regulation 16A6.4 to speed up the process.

[37] Ms Meyer's affidavit refers extensively to the Covid-19 model for outsourcing and Mr Manning from the National Department of Health's suggestions that a similar model could be used for the outsourcing of radiation oncology therapy. I do not deal with the minutiae hereof but emphasise that this took place at a meeting attended by Dr Nolutshungu, representatives of the Gauteng Treasury, National Treasury, Dr Ramiah, Section 27 and the Alliance. At this meeting Ms Meyer indicated that the GDoH is not updating the backlog list prepared by the Alliance due to constraints and also communicated the Alliance's concern that the GDoH is not communicating with cancer patients on the backlog list as to their treatment plan going forward.

[38] A copy of the minutes of this meeting is annexed as “**SJM5**” dated 15 November 2022. These minutes reflect that GDoH and Gauteng Treasury would meet before 2 December 2022 to determine and frame the outsourcing model for radiation oncology services in the province and specifically to address the waiting list at CMJAH. Gauteng Treasury undertook to oversee and lead the initial internal meeting. The head of the department would appoint a lead/champion to manage the outsourcing project.

[39] On 7 December 2022 Section 27 and the Alliance met with Dr Nolutshungu, representatives of GDoH and Gauteng Treasury and made submissions to the latter for the ringfencing of funds to address the radiation oncology crises in Gauteng.

[40] On 9 March 2023, in his 2023/2024 Gauteng Provincial Budget to the Gauteng Legislature, the MEC Finance: Gauteng announced that a total budget of R 784 million was being allocated to the GDoH to urgently address the backlog in surgical and radiation oncology services out of a total budget of R5billion allocated to GDoH. A copy of the MEC for Finance: Gauteng's speech on tabling the 2023/2024 Gauteng Provincial Budget to the Gauteng Provincial Legislature on 9 March 2023 is attached as Annexure **"SJM8".**

[41] I could find no reference to outsourcing as a way to alleviate the radiation oncology services, crises in this speech. It is, however, clear that relief on this front was intended to take place urgently.

[42] On 31 March 2023 Ms Meyer’s appointment to the Task Team expired.

[43] From the Alliance point of view all that now had to happen is that the backlog list be addressed as speedily as possible. It alleges that 2 months later by 22 March 2023 the GDoH was planning a tender process for procuring radiation oncology services for cancer patients on the backlog list. The Alliance deemed that to be in contradiction to the numerous preceding meetings to the effect that it would follow the route of an expedited outsourcing process. While same was discussed and actively promoted by National Health I could find nothing in the minutes of these meetings where GDoH committed itself to an outsourcing process by way of any form of deviation under the Treasury Regulation referred

to as opposed to a tender process. In the Alliance's view a tender process was not the optimal way forward given that it is a drawn out process. It would appear that the Alliance's view was fundamentally underpinned by the inherent urgency and hence the notion that a deviation as opposed to a tender process was regarded as more suitable by it. See Ms Mapipa's reference to deviation above.

[44] According to an email from Mr Vilakazi from GDoH a Teams meeting was arranged for 2 June 2023 from 14h00 – 16h00 and Ms Mapipa from section 27 confirmed their availability expressing anticipation regarding the plan developed by GDoH and the timelines for realisation of same including the updating of the radiation oncology waiting list which includes clinical assessments of the patients as well as proposed dates for meetings with private service providers. A copy of Ms Mapipa's email expressing the foregoing hopes appears as annexure "**SJM9**" to the founding affidavit. This email also expresses concern about the GDoH tender and the hope that these concerns would have been addressed.

[45] It is alleged that at the meeting of 2 June 2023 GDoH <u>agreed</u> to:

45.1 A deviation from the normal tender process to expedite the outsourcing of radiation oncology treatment. The power to obtain this is allegedly vested in the Acting Head of Department at Gauteng Health, Mr Malotana. The application would be supported by market research already concluded by a division within Gauteng Treasury for the benefit of Gauteng Health;

45.2 By Friday, 23 June 2023, conduct a briefing session with potential service providers, who will be identified through the market research already conducted by Gauteng Treasury;

45.3 By Friday 7 July 2023, potential service providers would submit proposals;

45.4 By Friday 21 July 2023, Gauteng Health would appoint a service provider to provide the outsourced radiation oncology services;

[46] These timelines were expected to result in cancer patients on the list receiving radiation treatment in early August 2023.

[47] Ms Mapipa confirmed this in an email annexed dated 13 June 2023 annexed as "**SJM10**". A transcript of the discussions at the meeting is annexed marked "**SJM11**".

[48] I should make it clear that although Ms Mapipa who acted as chairperson of this meeting tried her level best according to the transcript "**SJM11** to pin all involved parties down as suggested in paragraph 45 above, I am of the view that upon a proper reading of the transcript, it does not support her conclusions fully.

[49] It is clear that several worrying aspects were outstanding such as specifications, protocols and who the service providers would be. Although section 27 had identified 4 suppliers i.e. Life Hospital Group, Busamed, Icon and Netcare services it would appear that a similar exercise on the part of Gauteng Treasury was not fully in place yet and the permission to deviate from normal procurement processes still had to be obtained. Dr Selby although ostensibly in support of outsourcing at critical times in the meeting kept on falling back on terminology more consistent with tenders such as the need for a bid allocation committee and bid evaluation committee being required to approve the service suppliers. In my view the undertakings supplied in this meeting were at best declarations of intent and to vague to be binding. It is also clear that the business case for outsourcing by deviation was not considered strong enough to implement same immediately. It is clear that outsourcing was nevertheless regarded as an option.

[50] When I pressed the counsel who contextualised the case during the hearing on the fact that the Alliance's case is at least in part constructed on the so-called agreements set out in paragraph 62.1 – 62.5 of the founding affidavit she did not even try to defend the conclusions arrived at in the aforesaid paragraphs and ultimately informed me that the Alliance's case is not constructed or based on the alleged agreement set out in the aforesaid paragraphs of the founding affidavit.

[51] The GDoH missed the first deadline to advise section 27 of the outcome of the deviation process which gave rise to fears that the knock-on effect would

ultimately result in patients not commence receiving treatment as was planned from August 2023. This was also one of the reasons for sending the email referred to, annexure "**SJM10".** The GDoH never responded to this email.

[52] Further correspondence followed. On 20 June 2023 Ms Mapipa sent an email to Dr Mankupane and Dr Selby (Director of Supply Chain Management at GDoH) requesting updates on the deviation and identification of possible private sector service providers, a copy of which is annexed marked "**SJM12**" . When this went unanswered a further email was sent by Ms Mapipa dated 30 June 2023 expressing concern about the lack of response and increasing anxiety experienced by people on the backlog list. This email, annexed and marked "**SJM13**", included a request for another meeting re the aforesaid concerns dated 30 June 2023 which also went unanswered.

[53] In the meantime and on 9 June 2023 Ms Mapipa published on an online platform an opinion piece styled *"Worrying lack of urgency as Gauteng Health sits on money earmarked to outsource urgent cancer treatment"'*. Same is annexed to the founding affidavit as annexure "**SJM14**". I do not need to refer thereto except for the fact that it i.a. dealt with a patient whose cancer had returned for the third time without receiving radiation oncology treatment post-surgery and was now no longer responding to chemotherapy and expressing the hope that GDoH would fulfil its undertakings. On 22 June 2023 Dr Mankupane published a right of reply to the aforesaid opinion piece in which he accepted that there is a need to act with urgency to address the backlog of surgical and oncological services. In this article he also conveyed Gauteng Health's plan to expand oncology services to Chris Hani Baragwanath Academic Hospital and George Mukhari Academic Hospital. According to Gauteng Health's records, approximately 2000 patients were benefiting from oncology services at CMJAH and SBAH.

[54] Dr Mankupane noted that the proposed outsourcing must be done within the parameters of the Public Finance Management Act and applicable supply chain management processes. He confirmed that the tender process was already underway and that Gauteng Health decided to follow an open tender process with a shorter advertisement period of 14 days. I should point out that such

compliance in an urgent situation and relief by deviation as a *specie* of procurement is exactly what Dr Manning's presentation was about pertaining to the Covid -19 crises.

[55] He assured the public that Gauteng Health recognises the urgency to provide radiation oncology services and gave the assurance that the outsourcing of radiation oncology services was nearing implementation.

[56] By 20 October 2023 GDoH advertised a tender for the outsourcing of radiation oncology services with a closing date for bids set for 3 November 2023. It was described as *"APPOINTMENT OF SERVICE PROVIDERS FOR THE OUTSOURCING OF RADIATION ONCOLOGY SERVICES FOR THE GAUTENG DEPARTMENT OF HEALTH AND WELLNES[S] FOR A PERIOD OF (ONE) 1 YEAR "*

[57] The 90 day validity period concluded on 1 February 2024.

57.1 The tender had 3 categories:

57.1.1 Category 1 - A tender for professional oncologist services. This part of tender sought to procure services from radiation oncologists who can provide radiotherapy simulation and planning as per the SBAH and CMJAH breast and prostate treatment guidelines. The tender also required the service provider to monitor the patients while receiving radiotherapy and discharge the patient to the State upon completion of the radiotherapy.

57.1.2 Category 2 - A tender for the provision of technical services. In this part of the tender, it sought service providers who could provide radiotherapy facilities capable of delivering equivalent radiotherapy treatments to patients who met the admission criteria in the tender.

57.1.3 Category 3 - A tender for the provision of radiation planning services. In this part of the tender, it sought a service provider that would provide remote treatment planning services for radiation oncology. The treatment planning system would be used to facilitate the execution of the scope of work, but no hardware or software would be transferred or sold . A treatment plan includes:

57.1.3.1 all reasonable discussions and consultations required for the Radiation Oncologist, Medical Physicist, and therapy staff to create an acceptable plan with which to treat the patient.

57.1.3.2 reports as per appropriate International Commission on Radiation Units and Measurements (ICRU) guidelines for 2D, 3DCRT and IMRT where applicable. Parameters including planning target volume {PTV) dose reporting, organ at risk (OAR) doses must be adhered to. These must be within acceptable limits as set by guidelines and the referring state facility.

57.1.3.3 all processing from CT to treatment, which includes CT Import, fusion, normal tissue contouring, plan review with Radiation Oncologist in charge of the patient, and plan documentation in the electronic medical records (EMR).

[58] A standard treatment plan will be delivered to the service provider by the end of Standard Hours on the 3rd Business Day following the date of the treatment plan request.

[59] The relevant portions of the Tender are annexed as Annexure "**SJM16**" whilst the complete tender could be made available to the court on request. I regarded same as unnecessary.

[60] The tender clearly shows that the category three planning service was an ancillary service to "facilitate the execution" of the radiation and oncology treatment and services contemplated in categories 1 and 2 of the tender. The tender closed on 3 November 2023. Gauteng Health commenced with the evaluation of the tender on 21 November 2023 and concluded the process on 16 January 2024.

[61] On 1 February 2024, Gauteng Health issued a press statement in which it sought to *"dismiss misleading claims on delays in awarding of cancer treatment tender"* and assured the public and the media that the department was in the final stages of making an award. A copy of the GDoH's media statement is attached Annexure **"SJM17".**

[62] In a television interview hosted by Morning Live presenter, Leanne Manas, on 29 April 2024, GDoH, represented by Dr Ntsakisi Maluleke, confirmed that only the portion of the tender that relates to radiation planning services has been awarded. The R250 million allotted for radiation oncology services is, therefore, to be used for radiation planning services, meaning no actual radiation oncology services will be received by the patients on the backlog list. It is not clear to me whether the latter was part of the utterances of Dr Maluleke or is a conclusion drawn by Ms Meyer. This use of the full R250million for the planning service is denied by the GDoH as will transpire later.

[63] On 30 April 2024, Gauteng Health published a media statement seeking to provide an update on the radiation oncology services tender. In the media statement, Gauteng Health announced that:

"The Department is pleased to announce that a service provider has been appointed to provide radiation oncology services as outlined by the Department's standards for comprehensive quality oncology care as per the applicable treatment guidelines.

Currently, radiation oncology services are offered at Charlotte Maxeke Johannesburg Academic Hospital and Steve Biko Academic Hospital. The finalisation of the radiation oncology services tender will assist to expand the provision of radiation oncology healthcare service in the province. **Contrary to allegations that the Department has not utilised the R784 million allocated to address the backlog in surgical and radiation oncology services, a total of R534 millions had already been invested on oncology, medical and allied equipment such as cutting-edge linear accelerator machines and the building of bunkers for some of the machines.** (my emphasis)

Furthermore, R250 million has been allocated for the outsourcing of the radiation oncology tender which has been finalised for a period of one year. The Department has already commenced with another tender process to ensure that when the ensure that when the 12 months contract lapses the services continue seamlessly as the Department increases radiation oncology services."

[64] The Alliance is of the view that the GDoH's public statement lacks specific detail about the nature of the services to be outsourced, who the service provider is and how the outsourcing will take place. The statement is annexed to the founding affidavit as "**SJM16**". This media statement is at least in respect of the expenditure of the R250 million less than frank and arguably on the balance as well.

[65] Ms Meyer states that she became aware of the fact that Varian (the 4th respondent) was the successful bidder for the category 3 part of the service. This means that the tender for the planning services was actually awarded to the 11th Respondent, Siemens Healthcare (Pty) Ltd.

[66] The Alliance's criticism on the GDoH media release is as follows:

66.1 Of the three categories of services provided for in the tender, only category three, the planning services, was awarded . Thus, Gauteng Health has awarded a tender for the planning of various treatments without appointing any service provider to actually provide the medical treatment. This means that cancer patients on the backlog list are still not receiving the urgent lifesaving radiation and oncology services that the ring-fenced allocations were provided for - and will not receive these services in the immediate future.

66.2 Gauteng Health continues to reiterate that it is providing radiation oncology at Charlotte Maxeke and Steve Biko. Though Gauteng Health may be providing radiation oncology services to other cancer patients, it is not providing such services to cancer patients on the backlog list. This continues to be the case even though Gauteng Health was given a special allocation ring-fenced for the purpose of clearing the backlog list and providing radiation and oncology services to these patients. Gauteng Health cannot refuse or fail to provide life-saving care to patients on the backlog list when a ring-fenced allocation was given to Gauteng Health for this purpose."

[67] The main complaint of the Alliance is that the award for “planning services” in itself brings no relief to patients on the backlog list. The criticism is that no service provider is appointed to provide the actual radiation oncology services in circumstances where the delivery of such services through such appointment is urgently required and could be life-saving. This is said to be more so because the amount was ring-fenced for the backlog patients and GDoH could therefore not refuse or fail to provide services to persons in the circumstances. It acknowledges that GDoH may well be supplying radiation oncology services to other patients. It also alleges that by only focussing on the planning services GDoH demonstrated that it has no intention to fully outsource radiation oncology services to assist the patients on the backlog list by providing treatment as soon as possible. The Alliance views this as a breach by GDoH of sections 7(2), 27, 33 and 195 of the Constitution.

[68] It also poses the question: If R784 million was to be used for addressing the surgical and radiation oncology backlog questions arise about why the GDOH decided to use only R250 million for the radiation oncology backlog and why or how was it decided that the R250 million would be used for planning purposes. It appears that the decision to use R250 million for planning purposes was taken because irrelevant considerations were taken into account or relevant considerations for example the cost of providing radiation oncology services to patients on the backlog list was not considered. It states that only allocating R250 million to radiation oncology services is irrational and arbitrary, when the total allocated budget was R784 million to be spent between surgical and radiation oncology services. The decision to only focus on planning services, to the exclusion of other services, in the endeavour to address the radiation oncology backlog also appears to be arbitrary and irrational.

[69] On 5 June 2024 Section 27 addressed a further letter to the GDoH and demanded that it desists from paying, disbursing or otherwise dealing with the R250 million. It also called upon GDoH, yet again to take steps to urgently provide radiation oncology services to patients who are on the backlog list. In this email it urged the GDOH to:

69.1 update the radiation oncology backlog list;

69.2 clinically assess all patients on the backlog list;

69.2 provide patients with radiation oncology planning services; and

69.3 provide patients with radiation oncology treatment.

69.4 provide it with updates on the progress it made on these steps.

[70] A copy of the letter is attached as annexure **"SJM19.** This letter remains unanswered and the applicant was at the time the application was launched still uncertain as to whether the GDoH has updated the backlog list after March 2023.

[71] Under the rubric "***The compelling need for radiation oncology treatment***" the Alliance repeats that radiation oncology services are a critical component in the treatment of cancer and that International standards and the Department of Health's guidelines require that cancer patients ought to receive radiation treatment within three months of their diagnosis or after surgical removal of a tumour. If patients do not receive radiation treatment within the recommended timeframe of three months, they must undergo further assessment, cancer staging and where required, further surgery and chemotherapy before they qualify for radiation treatment again.

[72] The Alliance refers to the Clinical Guidelines for Breast Cancer Control and Management ("Breast Cancer Clinical Guidelines"), published by the Department of Health in April 2018 which requires radiotherapy resources to be allocated within 60 days of surgery and no more than 90 days after surgery. The Breast Cancer Clinical Guidelines record at page 85, that:

> "over 3 000 South African women die from breast cancer each year, but many survive and become role models for other women and other cancer patients."

[73] If the patient does not receive radiation treatment timeously, there is an increased likelihood that there will be a local recurrence in that the cancer may grow back in the affected area. Once the cancer grows back, the patient is left with no choice but to start the treatment cycle all over again: there may be

chemotherapy and possible surgery. Post-surgery, the patient will have to take their place on the waiting list to receive radiation treatment.

[74] Ms Meyer emphasises two factors. The first is that in the public health care system, patients are often diagnosed quite late after the onset of cancer. Most patients are typically diagnosed at what is referred to as stage 3 or stage 4 of the cancer. Once these patients undergo surgery to remove the cancer, the need for radiation treatment becomes imperative. If a patient receives radiation treatment, within the 3-month window period, it is likely that whatever cancer cells remain after surgery can be eradicated and the patient is better placed to make a steady and good recovery. If the patient does not receive the radiation treatment at all, there is increased likelihood that the cancer could grow back and metastasize to other organs. This renders the need for timeous radiation oncology treatment even more compelling. I interpose the following rhetorical question here – should a new stage 4 patient now be neglected in favour of a backlog list patient? I have no doubt that a suitably qualified medical doctor may well conclude that depending on the competing backlog patient’s condition the hypothetical stage 4 patient requires treatment more urgently. The point I try to demonstrate is simply this: the decision is not as simple as the Alliance would have it and is probably best left to those qualified to make such decisions.

[75] The second factor raised is that there appears to be no way to properly track a cancer patient's health while they await radiation therapy. In some instances, it is possible that a cancer patient who is on the backlog list dies or becomes a palliative patient, while awaiting radiation treatment. There is no accurate record-keeping in this regard. The Alliance is unable to tell the Court, how many patients who were on the backlog list have since succumbed to their illness or have lost the option to obtain curative care as they can no longer benefit from radiation oncology treatment as a means of facilitating remission.

[76] The Alliance states that this factor is demonstrative of the compelling need for urgent and immediate radiation oncology treatment for those on the backlog list, a need that cannot wait for Gauteng Health to conclude a tender process for the procurement of the necessary machines, the building of bunkers for those machines and the recruitment of sufficient staff to provide the service.

[77] Despite being granted significant financial resources, Gauteng Health is not demonstrating any sense of urgency to devise and implement a plan to address the radiation oncology backlog and to spend the allocated funding towards reducing the backlog in Gauteng. It states that in the mean time, the lives of cancer patients are perilously at risk.

[78] It is in the above context that the histories of patients Mses "V", "W" and "X" and "Y" are relevant.

[79] Ms "V" was diagnosed with stage 2 inflammatory breast cancer in September 2020. She underwent her first sessions of chemotherapy between October 2020 and April 2021. Thereafter, she underwent a lumpectomy, a surgical procedure to remove the tumour in the breast and a small amount of the surrounding tissue. In June 2021 she became eligible for radiation treatment and was referred accordingly. She has been awaiting radiation services since June 2021. In the meantime she has suffered three recurrences of her cancer which has now metastasized to her lungs. She is a single mother to a teenage daughter who she would love the opportunity to raise.

[80] Ms "W" was diagnosed with Estrogen Positive Stage 3 breast cancer in February 2022. She underwent her first sessions of chemotherapy between March 2022 and September 2022. In November 2022 she underwent a surgical procedure to remove cancerous tumours in the breast and axiliary lymph nodes. She was eligible for radiation treatment in November 2022. After approaching the radiation oncology department at CMJAH, she was advised that the radiation oncology department at CMJAH was backlogged and placed on the backlog list. She has suffered one further recurrence of the cancer since November 2022, which has necessitated that further chemotherapy treatment and a further surgery. She only received her first radiation treatment on 18 June 2024 . She has two teenage daughters and she is concerned whether she will have the opportunity to raise them. She is in fact a demonstration that a person on the backlog list did receive radiation therapy at CMJAH.

[81] The Alliance makes the valid point that the repeated chemotherapy and surgeries comes at an expense to the public purse. In addition both Mses "V"

and “W” have described side effects which include a low white blood cell and platelet count which results in excessive bleeding and extreme susceptibility to other illness, hair loss, tremors which make it difficult to perform simple tasks such as writing, difficulty walking, skin peeling to the point of forming blisters, nail peeling and skin discolouration. As a non-expert I have often encountered similar narratives and I have no expert evidence before me that the specific symptoms would not have occurred anyway or would have been prevented if radiation therapy was applied the moment they became eligible for same. I will however based on Ms Meyer’s background accept that neither Mses “V” or “W” received optimal treatment.

[82] Affidavits of these witnesses including Mses “X” and “Y” are also annexed to the founding affidavit as “**SJM22**” and “**SJM23**” respectively. Both were radiation oncology patients at CMJAH. Ms “X” was diagnosed with stage 3 breast cancer in July 2018. She only received radiation treatment at CMJAH two years and seven months after she was deemed eligible for the treatment, in October 2021. While she waited for her radiation oncology treatment, she suffered a recurrence of the cancer which necessitated further chemotherapy and surgery.

[83] Ms “Y” was diagnosed with stage 2 breast cancer in April 2021. She waited two years for radiation treatment between June 2021 when she became eligible for the treatment and June 2023. Nervous that she may die awaiting radiation treatment, Ms “Y” and her spouse secured a bank loan in order to obtain radiation treatment in the private sector. She is now indebted to the bank for an amount of R153 000 which is what the treatment in the private sector cost her. Mses “X” and “Y” are mothers with children they are terrified to leave behind. Once again I have not been favoured with expert evidence as to their prognosis with and without radiation treatment.

[84] The Alliance has repeatedly engaged officials of GDoH to try to find a suitable solution so that patients receive much needed radiation treatment urgently. Since June 2023, Gauteng Health has stopped responding to the Alliance and its attorneys of record. In the meantime, the Alliance asserts that patients on the backlog list remain without life-saving treatment and their health is likely

deteriorating. This is despite the fact that funds have been allocated and ringfenced to provide the very services and treatments that are required and which could save their lives.

[85] Hence the Alliance has decided to institute the review and set aside the decision of GDoH of 30 April 2024 and to seek the interim relief set out above.

[86] The Alliance submits that it has met the test for interim relief in that it has demonstrated a protectable *prima facie* right, although open to some doubt; and has a well-grounded apprehension of harm if the interdict is not granted; the balance of convenience favours the grant of the interim interdict and the Alliance has no other satisfactory relief.

[87] The Alliance specifically addresses the effect of the relief on the separation of powers doctrine given the fact that the provincial health respondents are state entities. With regard to the *prima facie* right Ms Meyer states that she is advised that the State is obliged in terms of section 7(2) of the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights. This includes the section 27 right to healthcare. This obligation incorporates both negative and positive duties: the State bears positive obligations to take active steps to promote and ensure the right is protected and fulfilled; and negative obligations in that it may not take steps to undermine the right.

[88] Ms Meyer is further advised that as a matter of law, all decision-making by the State that constitutes the exercise of public power or performance of a public function (as is the case here) must, at a minimum, comply with the prescripts of the rule of law, and more particularly the constitutional principle of legality. Section 33 of the Constitution, read with PAJA, further requires the State's decision-making to be lawful, reasonable and procedurally fair.

[89] She further alleges that in addition, public administration is required, under section 195 of the Constitution, to ensure that resources are managed effectively, efficiently and economically. There is also a mandatory obligation for public administration to provide services equitably and fairly.

[90] Despite having funding allocated to address the radiation oncology backlog since March 2023, the GDoH has not taken any meaningful steps towards the actual provision of radiation oncology treatment to cancer patients who are on the backlog list.

[91] She is advised and submits that the GDOH's failure to use the allocated funding of R784 million for the specific purpose of urgently addressing the backlog in "surgical and radiation oncology services" and/or its decision-making in relation to the manner in which it intends to use the funds to provide radiation oncology treatment to back-log list cancer patients:

91.1 Violates the rights of access to healthcare services of cancer patients who are on the backlog list and who are yet to receive life-saving radiation oncology treatment and services at CMJAH;

91.2 Violates the Alliance’s right to just administrative action (as well as the right of the cancer patients themselves);

91.3 Breaches the State's obligation to take positive measures to protect and promote the right of access to healthcare in circumstances where the funds have been made available but simply not used by GDoH for the purposes for which they were allocated;

91.4 Breaches the State’s obligations not to take negative measures that would undermine the right of access to healthcare services;

91.5 Violates the State's obligations under section 195 to uphold the democratic principles and values enshrined in the Constitution, particularly to promote the efficient, economic and effective use of resources (resources which have already been allocated for this specific use), the provision of services fairly and equitably, being responsive to people's needs, and accountability and transparency by providing the public with information timeously and accurately.

[92] The Alliance alleges that the interim interdict is necessary to ensure that the provincial health respondents are held accountable for the use of the allocated funding to address the radiation oncology backlog in Gauteng.

[93] It also alleges that the circumstances of this case demonstrate devastatingly and explicitly the Alliance's reasonable apprehension of imminent and irreparable harm: the cancer patients who are on the backlog list are facing life-threatening illness. If they do not receive radiation oncology treatment, they may not survive. In the meantime, and as detailed above, in the absence of the much-needed radiation oncology treatment, the health of the cancer patients continues to significantly deteriorate . Back-log cancer patients have passed away, waiting for such treatment that has not been forthcoming.

[94] It further alleges that in the face of the imminent and already occurring harm the balance of convenience must favour the grant of the interim relief.

[95] The interim interdict is intended to ensure that the R250 million allocated for addressing the backlog in radiation oncology treatment is indeed used for this purpose and not otherwise spent or dissipated. The GDoH has done nothing meaningful since the money was allocated in March 2023 to actually provide radiation oncology treatment to the cancer patients. On the other hand, the health and general well-being of the cancer patients has significantly deteriorated.

[96] If the interim interdict is not granted there is the real risk that the GDoH will spend the R250 million without the cancer patients on the backlog list receiving radiation oncology treatment. There is no indication from the GDoH about how and when the radiation oncology treatment will be provided once it has been planned. The information Ms Meyer obtained through the Alliance's network and through utterances made by Dr Maluleke in the Morning Live interview mentioned above, suggests that the GDoH is intending to use the R250 million only for "planning services". There is no information from the GDoH about what planning services means when it will be provided and how the cancer patients will access the treatment. Once the money is spent it cannot be recovered and the patients' health will continue to deteriorate. Given the facts disclosed below

re the effect of such relief on Varian/Siemens Lifecare (Pty) Ltd I need not deal with their involvement further.

[97] It is further alleged that the Alliance truly has no other remedy available.

[98] Ms Meyer states that she is advised that the grant of the interim interdict will not impermissibly violate the separation of powers. If the interim interdict is granted, the respondents, as a state entity, are not being restrained from exercising their executive authority. The interim relief would evidently promote the spirit, purport and object of the Constitution, as required by the *Constitutional Court in National Treasury and Others v Opposition to Urban Tolling Alliance and Others*[1]

[99] She submits that the cancer patients' section 27 right to access health care services features front and centre in this application. The grant of the interim interdict will mean that the respondents cannot spend the R250 million until the finalisation and outcome of the review application under part B. The Alliance intends to prosecute the review expeditiously and this undertaking is already recorded in the notice of motion.

[100] The Alliance thus submits that in all the circumstances, the Alliance has met the requirements for an interim interdict.

[101] It maintains that the matter is urgent given the position of the patients on the backlog list. It also fears that if the R250 million is spent on planning radiation oncology services only this will not result in the cancer patients receiving treatment.

The position of the 5th and 6th Respondents

[102] The 5th and 6th respondents, in terms of Part A, filed an answering affidavit on 16 July 2024. Their answering affidavit is brief and apart from pointing out that it has no competency to exercise powers in the Gauteng Province on the facts pleaded read with the Constitution, brings to bear the objection that to the extent that the Notice of Morion seeks relief against the 6th respondent same is simply

[1] See para 45

incompetent. It is also alleged that the joinder of the national government respondents constitute a misjoinder.

[103] The Alliance replied hereto on 18 July 2024 effectively conceding that the relief sought against the 6th respondent is incompetent, stating that they would only persist in the reformulated relief set out in the form of a draft order annexed as annexure "A" to its replying affidavit. In this draft order there is no relief sought against the 5th and 6th respondents at all. The Alliance denies that the joinder of the national government respondents amounts to a misjoinder maintaining that they were joined due to their interest in the matter in as much as the 5th and 6th respondents were involved in discussions attended by the Alliance and the provincial health respondents about the manner in which radiation oncology treatment could expeditiously be provided to cancer patients in the public sector.

The Provincial Health Respondent's Defence

[104] The provincial health respondents only filed their answering affidavit on 19 July 2024. On 22 July, the Alliance complied with rule 41A (no doubt due to the provincial health respondents referring to the Alliance's failure to do so). In my view given the nature of the litigation Rule 16A(1) should also have been complied with from the outset and the provincial health respondents complained about this by filing a Rule 30A notice on 19 July 2024. On the same date it filed a Rule 7 notice disputing Ms Meyer, the deponent to the founding affidavit's, authority to act on behalf of the Alliance. On 2 August 2024 the Alliance complied with Rule 16A(1). A response was filed to the Rule 7 notice on 22 July 2024 together with a resolution passed by the Executive Board of Directors of Cancer Alliance NPC (Reg no:2021/844313/08) signed by Louise Elizabeth Turner as Executive Director and Treasurer. The resolution takes cognisance of various aspects covered in in Ms Meyer's founding affidavit but does not disclose that she has the authority to speak on behalf of the Alliance. The MOI of an entity styled Cancer Alliance is also annexed. The description of the applicant in the founding affidavit does not correspond with the entity mentioned in the MOI. Given that the provincial health respondents did not take the matter further I make no further mention of the aforesaid state of affairs.

[105] By the time the matter came up for hearing in the Urgent Court before Twala J on 23 July 2024 the Alliance had not yet filed its replying affidavit. On that day Siemens Healthcare (Pty) Ltd was formally joined as the 11th respondent with no order as to costs. The hearing of Part ”A” of the matter was postponed *sine die* and the costs were reserved for determination at the hearing of Part A of the notice of notion. The DJP was approached for further directions as to how the matter should be conducted. The DJP allocated a special motion date for this matter i.e. 21 November 2024 presumably on the basis that the matter remained urgent and, ultimately, the Alliance filed their replying affidavit on 13 August 2024.

[106] The provincial health respondents filed their answering affidavit on 19 July 2024 with the 2nd respondent, the head of the department of Health, Mr Malotana as the spokesperson. He met the Alliance’s case with a series of defences. Firstly he objects to the relief in Part “A ” of the Notice of Motion with the fundamental defence that it amounts to an interference with the operations of the GDoH. He points out that the issues challenged are the subject of procurement processes in the department and that the Alliance fails to demonstrate a breach of internal procurement policies, treasury regulations or section 217 of the Constitution.

[107] He points out that there is no R250 million that is going to be paid to a service provider. The R250 million which was allocated in the 2023/24 financial year was ring-fenced for radiation oncology outsourcing. Radiation oncology outsourcing includes 3 categories which is Category 1, Category 2 and Category 3. It is only Category 3 that a tender has been awarded to, and the budget in terms of Category 3 where a service provider has been appointed would be demonstrated below and it is not even a quarter of the R250 million the applicant is referring to. Later it transpires that the 11th Respondent who was awarded the category 3 planning tender will see no payment given that it has not performed sufficiently to qualify for payment. It is submitted that the interdict is based on speculation and that there are insufficient grounds to substantiate same and that it is legally untenable and misguided.

[108] He is also of the view that the Alliance’s propositions are presented without facts and in the correct context leading to same being hypothetical.

[109] He emphasises that the facts pertaining to cancer patients are that the infrastructure to treat adults with cancer is variable throughout South Africa. Gauteng province has the additional responsibility of rendering oncology services to the neighbouring provinces of Limpopo, North West and Mpumalanga.

[110] He states that all Primary Healthcare Facilities in the Gauteng Province screen and diagnose patients for cancer They refer diagnosed patients for specialised oncology treatment at either CMJAH and SBAH (medical and radiation oncology services), or for medical oncology services at Chris Hani Baragwanath Academic Hospital (CHBAH) and Dr George Mukhari Academic Hospital (DGMAH).

[111] According to him the 2020 National Cancer Registrar South Africa estimates that the number of new patients each and every year are 23 634 people that are treated in Gauteng Province. This obviously places a heavy burden on two centres. Based on what follows he appears to be referring to CMJAH and SBAH.

[112] During the 2023/2024 fiscal year 3 500 patients received radiation oncology treatment (it would appear at the CMJAH) and 2 527 patients received radiation oncology treatments at SBAH. He also includes a table of figures in his affidavit (broken down by quarter) that shows that 16 957 patients are dealt with in the National Health System as outpatient first attendances with 193 403 outpatients follow up attendances. In another column he demonstrates that CMJAH mainly deals with cervix, breast, prostate and rectal cancers and SBAH breast, cervix, prostate and colon cancers.

[113] He also indicates that CJMAH has 3 functional Linac machines and SBAH has 3 such machines. CMJAH has 7 bunkers of which 2 are empty and SBAH has 5 bunkers all of which are equipped with Linac machines. He also states that a proposed solution which is currently in implementation by the Department in order to assist cancer patients effectively is as follows:

"1 . Increasing internal radiation oncology capacity through Chris Hani Baragwanath Hospital and Dr George Mukhari Academic Hospital bunkers for the operationalization of 4 LINAC machines; and

2. Procurement of radiation oncology machinery to increase service offering at CMJAH and SBAH;

3. Outsource radiation oncology services to the private sector."

[114] The intention of the Department is to find a lasting solution, and contrary to the suggestion made by the Alliance that the solution is to outsource radiation oncology services to the private sector urgently without following the normal tender process, such suggestion is expensive and it is not a long lasting solution for the State, and more than anything, the Department views this an interference with its administrative powers.

[115] With regard to the updating of the list of patients waiting for radiation oncology services, the radiation oncology backlog lists are updated daily on site at CMJAH and SBAH. The lists include the patient's treatment outcomes (Planning, Radiation Oncology treatment in progress, Discharged) and are verified by Hospital Services monthly. The lists with patients' details cannot be shared in the report due to the regulations outlined in the Protection of Personal Information Act (POPIA). For the month of June [2024], the lists in crude numbers are as follows:

115.1 For SBAH, 455 patients are on the waiting list as of 10 June 2024. The patients include 188 awaiting planning scan, 85 awaiting planning and 82 awaiting treatment start;

115.2 Whilst for CMJAH, 2 562 patients were on the wating list on t10 June 2024, of these, 2000 prostate patients are on hormonal therapy to supress their testosterone while awaiting radiotherapy.

[116] In addition to the above, in order to reduce the backlog, the Department has embarked on a tender process to appoint radiation oncology service providers. The tender was then advertised on 20 October 2023. A briefing session was held on 27 October 2023 and the closing was on 3 November 2023. The tender

number GT/GOH/089/2023 was for the appointment of service providers for the outsourcing of the radiation oncology services for the Department and wellness for a period of one (1) year. Category 3 was awarded to Siemens Healthcare (Pty) Ltd (Siemens), the Eleventh Respondent. The specification for Category 2 had to be cancelled and reviewed for re-advertisement. He states that he was informed that by the time the matter is argued, the advert will be out as it is in the final stage. In terms of Category 1, negotiations on pricing were unsuccessful and will be re-advertised together with Category 2 and as stated above.

[117] In respect of Category 3 (relating to planning) the tender has been awarded to Siemens, and a purchase order was issued on 1 July 2024. A copy of the purchase order is attached to the answering affidavit marked annexure **"LAM1".**

[118] He states that on the issue of additional infrastructure, the Infrastructure building the bunkers at DGMAH and CHBAH, has informed the GDoH that the construction of the infrastructure is at its final stage. However, Treasury requires independent stage date reviews for these types of complex projects. On 12 June 2024, the infrastructure received Unicore's last input into the NEC3 contract and are currently reviewing the scope of work. Once done, infrastructure will discuss the scope with the two hospitals, and then, if all is in order, the contracts can be signed. Infrastructure has also completed a session with internal engineers to discuss the scope of work in the construction contract. They are discussing concerns with the DBSA Engineering team to see how to respond to the issues raised. The concerns are mainly around construction standards that need compliance.

[119] He further explains that the R784 million refers to the cumulative equitable share allocation over the 2023 MTEF from the Provincial Treasury and was not a once-off allocation. The detailed breakdown of the allocated budget (equitable share), is as follows:

2023/24	R250 000 000
2024/25	R261 125 000

2025/26 R273 800 000

Total R783 948 000

[120] I assume the deponent uses the term MTEF in its legal context as same is to be found in the Money Bill and Related Matters Act 9 of 2009 (since its introduction with effect 17 January 2019) meaning Medium-Term Expenditure Framework which is defined as follows:

> "… the Medium Term Expenditure Framework that-
>
> (a) translates government policies and plans into a multi-year spending plan; and
>
> (b) promotes transparency, accountability and effective public financial management for expenditure of the current and subsequent two financial years;".

[121] He confirms that R250 million is ringfenced for radiation oncology outsourcing. The amount is special funds given by Provincial Treasury. The R534 million is from (National Tertiary Services Grant (NTSG) and includes the bunkers (R217million), the remainder is committed to radiation oncology equipment, including brachytherapy units and small Linac units.

[122] On the issue of increasing of human capacity, according to the human resources (HR), specifically therapists are being recruited at CMJAH (21 therapists), SBAH (1 therapist). Additional HR interventions at CMJAH include:

122.1 Provided overtime from 16h00 up to 19h00 Monday to Friday;

122.2 Provided Saturday overtime to attend to mainly emergencies;

122.3 Plans in place to ensure the advertisement closing in 2 weeks' time, should be completed before 15 July 2024 to allow those who can start in August and September 2024;

122.4 Focus is on recruiting at least 5 with planning skills and the rest will be allocated to treatment areas;

122.5 The currently unused Linac machines will be immediately activated with the recruited staff;

122.6 Overtime will be extended to new recruits to increase reduction of the line list backlog that will be confirmed as at end June 2024; and

122.7 Acquisition of the brachytherapy will commence as the contract has been awarded.

[123] He thus states that the relief is sought on speculative grounds and innuendos without verifying the facts, on applicant's own version. He submits that this is legally untenable. He also draws the Court's attention to the fact that the applicant only sought the record in Part B being the review and not Part A being the urgent application. Presumably this was done on the basis that Part "A" is not couched in the form of an interim review. This is of course no reason to ignore the prescribed time periods.

[124] With regard to the R250 million he states that the R250 million is ringfenced for radiology oncology outsourcing, and the outsourcing has been put on tender.

[125] The Alliance knew about the advert in respect of the R250 million as far back as on 20 October 2023. He states that the Category 3 component that was awarded to Siemens is not even a quarter of the R250 million. Therefore, the remaining amount of the R250 million will be utilised in Category 1 and Category 2.

[126] He alleges that the Alliance has failed to substantiate its grounds for an interdict. It is not apparent from the papers whether its case is based on the process of tendering or on the award itself. He makes it clear that the Department has followed its tender processes in awarding the Category 3 tender, and it will follow its own policies in readvertising the tender categories. The GDoH commitment to avoid any *specie* of deviation is obvious.

[127] He points out that on the Alliance's own version it states in paragraph 76 of the founding affidavit that on 30 April 2024, the Department issued a press release which confirms that R250 million has been allocated for the outsourcing of radiation oncology tender which has been finalised for a period of 1 year. This particular tender was advertised on 20 October 2023. He repeats that this means that the Alliance has been aware about the tender for R250 million at

least since the 20 October 2023. In the circumstances, he finds it surprising that the Alliance would only bring an application more than 10 months late and pretend as if nothing has happened. To the extent that this assertion goes to undermine urgency it is of no assistance. The Alliance could not have known then that only a part of the tender would ultimately be awarded. At best this demonstrates that the Alliance knew that the apartment was using a tender process as opposed to a deviation process. I have already referred to the fact that the Alliance does not rely on an agreement by the provincial health respondents. Further to that, as far back as 1 February 2024, the Alliance knew that it is only Category C of the tender that will be awarded, and this was confirmed by Dr Maluleke in an interview with SABC on 29 April 2024.

[128] Despite the fact that the application is not urgent the Alliance instituted this application as an urgent application and this matter has been set down for the 23 July 2024.

[129] He thus submits that the Alliance's application is not urgent as the Department has implemented the plans to provide radiation oncology services in the province, the backlog list has been updated and all necessary steps have been taken in making sure that the Department provides radiation oncology services in the province. In addition to the above, the tender for planning oncology services which is a subject of R250 million has been awarded to the successful bidder and the purchase order has been issued which renders the interdict moot.

[130] He states that it would be argued at the hearing that if the Court is not minded to determine the merits of this application, which in any event have become moot, the Court would be asked to strike this application from the roll. However, should the Court be minded to entertain the application's merits, it should simply dismiss it with costs as an ill-conceived application.

[131] The deponent continues to state that he has been advised that interdicts are about future events and not past events. He states that the Alliance is aware that a tender was advertised and awarded to the successful bidder who as a result, has started to perform its duties. The successful bidder will be paid what

is due in terms of the purchase order. As will be seen later the GDoH eventually followed another approach.

The Provincial Health Respondents Grounds of Opposition

[132] The provincial health respondents then raises eight grounds of opposition to the application.

[133] The first ground already touched upon is urgency. The others are a failure to establish a factual complaint, the incompetence of the relief, no *prima facie* right, the balance of convenience is against the Alliance, there is no irreparable harm, the fact that there are alternative remedies and the non-joinder of material parties.

[134] On urgency the fundamental criticism is that the application is only brought 2 years after the last meeting of the Task Team whilst the essence of the complaint is the exact issues the Task Team was tasked with and the Alliance is not candid with the court as to whether the Task Ream finalised its work or was dissolved. It appears to me that the Task Team only had a lifespan of one year and that once a budget was procured it was up to the provincial health respondents to utilise it in a suitable way.

[135] A further point of criticism is that the Alliance knew about the tender for about 10 months and then only sprung into action after the 30 April 2024 press release. Whilst the argument about urgency speaks to the Alliance's failure to institute its application based on the breach of the agreement listed in paragraph 62 of the founding affidavit (which the Alliance made clear it no longer relies on) some measure of urgency seems to remain. I say so given that the media release of 30 April 2024 provides cold comfort with regard to the outsourcing of radiation oncology services. The provincial health respondents do not deny that funds were provided for outsourcing. If anything it made it clear that another tender is in process to ensure seamless provision of outsourced services once the 12 months in respect of an earlier tender lapses. This can only be a reference to the Category 3 tender lapsing which we know deals only with planning services. Nothing in this media release suggests other radiation services are being outsourced.

[136] Seen from the Alliance's perspective a whole year has elapsed since the budget was acquired and no comprehensive *de facto* outsourced radiation oncology service is in place. Although the Alliance could have acted earlier I am loathe to blame them for holding back till the position became clear. In addition the media release failed to deal with the backlog list. At the same time the Alliance found it puzzling that only R250 million of the R784 million was being utilised for outsourcing. The decision to only outsource the planning services also appeared irrational and arbitrary. At worst the Alliance was being cautious and conservative and did not understand the legal concept of the MTEF. The issues pertaining to specifications and protocols were not completely lost on them. The failure of the provincial health respondents to answer correspondence and ultimately the failure to respond to the letter of 5 June 2024 left them little choice but to litigate.

[137] As to the defence that there is a failure to establish a factual complaint which could give rise to a declaration that the conduct of the provincial health respondents are unlawful and unconstitutional in the sense that there is no breach of policy or breach of legislation the following: Given the background set out in detail by the Alliance the emphasis must be on these respondents' failure to act sooner to focus on the backlog list and more specifically to address the obvious demand for radiation oncology services at CMJAH. As will transpire below it admits that it needs help at CMJAH and SBAH.

[138] The provincial health respondents defend themselves against the aforesaid as follows:

139.1 The GDoH have acted in terms of the Constitution and the guiding policies which obliges the state to provide access to healthcare services including productive healthcare;

139.2 The State is also obliged to take reasonable care and other measures within its reasonable resources to achieve the progressive realisation of the right to access to healthcare;

139.3 The State is not obliged to refuse emergency healthcare to citizens. Both SBAH and CMJAH serve as healthcare facilities in terms of the

Constitution and other legislatives and may not refuse to admit persons referred to it by any other institution. The right to access to healthcare is provided in a context in which the State is obliged to work with personnel trained by the State in a difficult educational context (given the country's history) and within the limited resources;

139.4 In principle, both hospitals [are] open day and night and the hospitals run emergency shifts. The doctors on duty in the night give priority to emergencies. In emergency situations, more critical cases take priority over less critical ones;

139.5 In essence hospitals are a facility where reasonable medical care and treatment and advice are rendered. The personnel in the hospitals do their utmost best to provide access as required by the Constitution but these attempts are limited by human and financial resources;

139.6 The respondents fulfil their constitutional obligations to provide access to healthcare and that obligation is fulfilled progressively;

139.7 The hospitals admitted patients referred to it by other institutions and/or who come to hospitals directly. When admitting these patients, they are fulfilling their statutory obligations;

139.8 In the context of this matter, the relationship between cancer patients and the respondents flows directly from section 27(3) of the Constitution. Section 27 of the Constitution requires the respondent to achieve progressive realisation of the rights, but it does not guarantee availability of the best healthcare. The respondents can only act unlawfully if they breach a statute, and in this case, it is submitted that there is no statute that has been breached;

139.9 As a result, there could be no comparison drawn between the services rendered by these public institutions and the private sector, as these public institutions service 80% of the communities which majority are under privileged;

139.10 In the circumstances, and within the available resources the hospitals are always overstretched. However, the medical staff in these hospitals do their outmost best to service cancer patients against the backdrop of limited human and limited financial resources;

139.11 In an attempt to address the challenges that are faced by cancer patients, the Department in February 2022 established a Gauteng Department of Health Cancer Treatment Task Team (Task Team) which I have already dealt with in the Alliance's case. The Department has been doing its best to procure machines and to improve its services as far back as 2019 within its limited budget and resources. As a result, in 2023, the Department was allocated funds to deal with these challenges and a tender was advertised specifically to address the challenges pointed out by the Task Team [of] which only Category C could be awarded to Siemens on 30 April 2024.

[139] The GDoH states that it has evidence-base treatment guidelines developed by the two oncology centres of CMAJH and SBAH. Recent clinical data supports the use of shorter radiotherapy schemes in the management of most cancers including breast, prostate and rectum cancers. This has been included in international peer reviewed guidelines and applied locally. Deviation from treatment guideline may be required on occasion and clinical justification is required in these cases. The Department nevertheless admits that it is currently in need of assistance to reduce the current radiotherapy waiting times at both CMAJH and SBAH for breast and prostate patients.

[140] I will later deal with the Rule 35(12) notice the Alliance delivered to the provincial respondents to produce i.a. the above treatment based guidelines which were referred to in paragraph 66 of the answering affidavit,

[141] Of more importance is the fact that the deponent admitted that the GDoH requires assistance in order to reduce the radiotherapy waiting times at both CMJAH and SBAH for breast and prostate patients.

[142] The position for radiation therapists has been advertised in the DPSA Circular 20 of 2024 with the closing date 24 June 2024 for 20 therapists (19 for CMJAH and 1 for SBAH). Eighteen (18) applications were received and all were short listed. The interviews are scheduled for 23 July 2024 with a target that the successful unemployed candidates will resume duties on 01 August 2024. Otherwise, those who are currently working will be required to serve notice and only resume duties at CMJAH by 01 September 2024. Another advert for radiation therapist sessional workers (Ref RT/01/CMJAH/2024) was also issued and closed on 11 July 2024. Four (4) applications were received and subsequently short listed. Interviews are scheduled for 19 July 2024 and the successful candidates will resume duties on Saturday, 20 July 2024. The department also sourced four (4) radiographers from Johannesburg District Health to work overtime. This team will be dedicated to the scanning process and will assume duties on or around 03 August 2024. The advertisement Annexure "**LAM2**" is signed at the bottom by Ms C.M. Bogoshi and dated 5 July 2025. Given the closing date referred to this appears to be a bona fide error

[143] I should observe that there is no explanation why the above advertisements did not take place earlier and the Court is also not informed whether the available machines can be used productively with the present staff compliment.

[144] In addition the organisational structure was reviewed in line with the International Atomic Energy Agency's (IAEA) recommended standards and submitted for approval in December 2023 as appears from "**LAM3**".

[145] Therefore it is submitted that the Alliance has not made out a factual and legal basis for a declaratory order. It is further submitted that the application is speculative and a fishing expedition and that there is no factual causation to the claim pursued by the Alliance.

[146] The incompetence of the relief sought is also raised as a defence. The GDoH also gives the Court a glimpse of what occurred since the tender was advertised on 20 October 2023. It explains that the tender was split into 3 categories. Category 1 dealt with a technical proposal of the tender for

professional/specialist oncologist services, Category 2 was a technical proposal of the tender for technical services. Both Category 1 and Category 2 for different reasons were withdrawn with an intention to readvertise them.

[147] Category 3 was awarded to Siemens on or about February 2024. Subsequent to the awarding of the tender, the Department entered into a contract with Siemens which contract has been in operation since May 2024 for a period of one (1) year. For continuation, this Category 3 tender has been advertised on 13 July 2024 together with the re-advertisement of Category 1 and 2. According to the GDoH there is a valid contract in place with Siemens.

[148] The purchase order for planning services is for R 17,480,000.00 and not R250 million. The tender was approved om 28 February 2024, a copy of the recommendation was signed on 4 March 2024 and attached as "**LAM4**". The award letter and contract with Siemens was signed on 23 April 2024. A copy of the contract form with it is attached as annexure **"LAM5".**The list which contained the successful bidder was published on the Gauteng e-T enders Portal website, which list appears at annexure **"LAM6".**

[149] The GDoH thus objects to the interdictory relief on the basis that the tender award was not unlawful yet the Alliance wishes to review same in the main relief and prevents payment of the R250million. It also complains that neither the BEC nor BAC involved in the tender was joined. The latter is of course nonsense once the focus turns to the notion of deviation and cognisance is taken of the ongoing "urgent" state of affairs.

[150] The GdoH's 4th objection to the relief being granted is that no *prima facie* right is disclosed. It submits that as a trite principle of law, an interdict against an organ of state is granted only in the clearest of cases. The applicant seeks to interdict the Department from exercising its statutory powers in terms of section 217 of the constitution and The Preferential Procurement Policy Framework Act, and its Supply Chain Management policies. It is of the view that such relief is inappropriate in the circumstances of this case.

[151] From my perspective this is a misconstruction of the Alliance's intent and the relief sought. The Alliance expected urgent action from the GDoH deploying its

most expeditious response method i.e. deviation, albeit that no case has been made out, in my view, that there was an agreement to do so. Ms Mapipa’s correspondence referred to above speaks for itself

[152] Its fifth objection is that the balance of convenience is against the Alliance. It submits that: it is not convenient that the Alliance be granted interim relief for the following reasons:

153.1 The tender was lawfully awarded to Siemens and Siemens has begun its duties;

153.2 The application is in effect a gag[g]ing order to the extent that it seeks to prevent the Department from fulfilling its constitutional mandate;

153.3 In any event, the Alliance has launched a review application which will deal with all the issues that it is alleging on its papers. In the review application all the allegations will be dealt with holistically not in a piecemeal fashion. The application is nothing other than an abuse of the court process, that is deliberately aimed at running and controlling the Department from outside. It ought not to be permitted to succeed simply because it is litigating tactical to dismantle the Department's constitutionally enshrined duty to consider and award tenders in line with the applicable legislation and its internal policies.

[153] It also objects to the relief on the basis that no irreparable harm will be suffered. It submits that any harm will be limited by the following:

154.1 The applicant has launched a review application which will address all the issues that it is complaining about;

154.2 The award of the tender is final. The decision was made on 30 April 2024. A year after funding was procured;

154.3 It cannot suffer harm where it has no right, alternatively, and the "harm" is not a real harm, the issues that it is challenging are still going to be argued in the review application. This is tantamount to saying that the

people who pass away or have recurrences of cancer in this period suffer no harm.

[154] The deponent also states that the founding papers are voluminous and that the GdoH had to wade through the Alliance's 308 pages and that it has been caused undue prejudice in the context of urgent proceedings, and the Alliance has failed to explain why it was necessary to file such lengthy papers. It alleges that the application is for this reason too, an abuse of the court process and still born. I have to agree that the notion that the provincial health respondents could do justice to their case in the period afforded to them is unacceptable. I am not surprised that they filed their papers late.

[155] Its 7th objection is that there are alternative remedies. It will still have an opportunity to raise its complaints in the review. The Alliance should not be allowed to abuse the Court processes where its intention is calculated to control and interfere with the lawful processes of the Department. Effectively, the Alliance's intention is to deny the Department its ability to discharge its constitutional mandate in line with its policies. In my view there is no foundation for the conclusion of such intention. The utterances made by the Alliance whilst Mrs Meyer was part of the Task Team speaks only of a concern for the Alliance's constituency.

[156] Finally its 8th objection concerns the non-joinder of certain parties. The Alliance seeks to obtain an order directing the GDoH to take all steps necessary to provide the radiation oncology services to backlog list patients who are awaiting treatment at CMJAH and SBAH in Gauteng at a public and or private facility under circumstances where no such entities were joined to the proceedings. The GDoH regards this as a material non-joinder, as the Alliance seeks an order against these other public facilities or any private facility, in their absence, that they accept these backlog list patients who are awaiting treatment at CMJAH and SBAH, without providing these other public facilities or any private facility with an opportunity to file answering affidavits stating their respective capacities to admit these backlog list patients or set out the costs which the Department would be saddled with if did admit these backlog list patients. This non-joinder extends, according to the GDoH, to the failure to join the Task Team

and its members who were tasked to find a solution to *"the radiation oncology crisis in the province".* It alleges that It would be necessary for all members of the Task Team to have been joined to afford the Court a thorough and complete understanding of the issues at hand and then make a proper determination. Given the aforesaid non-joinders it submits that the Alliance cannot obtain the relief which it seeks.

[157] The 8th objection seems to me a perverse notion. Outsourcing was sought as a remedy by the Alliance and the GDoH ostensibly went along with it although with reservations as referred to above. It was not necessary for the Alliance to cite all potential suppliers of “radiation oncology services”. It was the provincial health respondents’ task to find them as quick as possible and appoint them. In this regard they had the Covid-19 example explained to them by the National Department of Health as to how one can mobilise the private sector in a crisis and the example of the Northern Cape province. The defence is not that the private sector could be of no assistance or that it would definitely be to costly to provide any relief. I accept implicitly that long term relief through outsourcing is beyond the GDoH’s means. *Non constat* that short-term relief with ring-fenced funds are beyond the GDoH’s means.

[158] Under the rubric “*Material Background*” the provincial health respondents explains that it is doing all within its powers to render the necessary services. Interestingly in this context it does not explain why it preferred a tender process to a deviation process. Yet as we learn from subsequent events it motivated an expedited process with success when it stood to lose R261miilion allocated for the following fiscal year. The latter was not even ring-fenced funds whilst it did not see its way open to use a *specie* of deviation for such precious funds. We will ultimately see what the facts were that GDoH used to motivate the use of Treasury Regulation 16A6.4 which were also at its disposal after the ring-fenced funds were obtained, more particularly so given Mr Manning’s presentations as to how a deviation may be obtained in a crisis situation. The GDoH was *de facto* in April 2023 facing a crisis fraught with the risk of loss of life of the patients on the backlog list it updated by itself after the Alliance caused a backlog list to be prepared in 2022.

[159] It continued outsourcing the services by advertising a tender. The purpose was to appoint service provider(s) based and operating in Gauteng to provide a short-term contract for the provisioning of radiation oncology services for 1 year to alleviate the breast and prostate cancer backlog lists. I am far from persuaded that a tender process would ever achieve this given the fact that all the indications were that same is cumbersome and Mr Manning's proposed *specie* of deviation was available to them. All they needed was for Gauteng Treasury to do what it undertook to do and for Mr Malotana to approve same.

[160] When one scrutinises the tender information the following becomes obvious:

161.1 The tender comprised the 3 categories already referred to above. There were only 3 bidders. The validity of the tender was for a period of 90 days commencing 4 November 2023 until 1 February 2024. The period was extended for 90 days from 2 February 2024 until 1 May 2024.

161.2 The evaluation of the bids was done in accordance with the requirements of the Preferential Procurement Policy Framework Act, 5of 2000 (PPPFA), Preferential Procurement Regulations, 2022 (Regulations) and the Department's Preferential Procurement Policy 2022 (Policy) in the following stages:

161.2.1 Stage 1A: Mandatory Administrative Compliance Evaluation;

161.2.2 Stage 1 B: Functionality Evaluation;

161.2.3 Stage 1 C: Site Visit Evaluation;

161.3 Stage 2: Price and Preference Point Evaluation.

[161] The bids were evaluated according to the 90/10 preference point system, which is applicable to bids in excess of a rand value of R50 million (all applicable taxes included), where a maximum of 90 points will be allocated for price and maximum of 10 for specific goal in terms of the requirements of the PPPFA, the Regulations and the Policy.

[162] On 21 November 2023, the BEC meeting could not convene as one member declared interest and had to be replaced. On 10 January 2024, a BEC meeting, Mandatory Administrative Compliance evaluation was held at Health Central Office, 45 Commissioner Street, 2nd Floor Boardroom 2. On 16 January 2024, a BEC meeting, functionality evaluation, recommendation and price and preference evaluation was held at the same location.

[163] The tender for the appointment of service providers was awarded to Siemens for the outsourcing of radiation oncology services for the GDoH for 1 year. A letter of award was signed with Siemens and monthly updates of planning commenced. The radiation planning service for 2000 plans has been created for CMJAH. Billing would be done monthly depending on how many plans Siemens does in a month.

[164] In respect of Category 2, one bid was received, however Category 2 was cancelled during the evaluation phase of the tender as the bidder did not attach the South African Oncology Consortium or ICON Certificates as requested from Terms of Reference. Therefore, the BEC resolved that it would recommend to the BAC that Category 2 of the tender be cancelled and re-advertised, due to BSC specifications including non-statutory requirements.

[165] One bid was also received for Category 1, and approved for awarding, pending pricing negotiations. However, the Department and the service provider were unable to agree on pricing, as a result the tender was withdrawn. The omens were there. The need for the use of a *specie* of deviation became pressing. Mr Malotana did not intervene,

[166] Category 1 and 3 would also be re-advertised to capacitate the contract as to award multiple service providers. This was the lame-duck remedy deployed to save the ting-fenced funds.

[167] The overview of how the tender process played out demonstrates that same is cumbersome and unsuitable for any urgent solution. The GDoH of course studiously avoids telling the court why deviation was not preferred. Against this backdrop the deponent states that the Department has taken all the necessary steps to make sure that it provides radiation oncology to each person. That

despite the admission that it required assistance with the backlog list for CMJAH and SBAH.

[168] In the balance of the answering affidavit the deponent addresses the founding affidavit seriatim to the extent that he believed it requires a response.

[169] He maintains that the GDoH has taken all steps possible to deal with the backlog of cancer patients at CMJAH and SBAH. He specifically accuses the Alliance of wanting to interfere and run the department from outside. The motivation for this statement is that the Alliance was aware of the tender and decided to keep quiet. How this is proof of such intent is a mystery to me. The Alliance is accused that it only reacted when the tender was awarded. The categories of the tender were not awarded for the reasons stated and the deponent maintains that the GDoH sought to comply with the Constitution and its policy at all times. Thus it is denied that it did not do anything to deal with the backlog. The deponent seems to forget that the criticism against the provincial health respondents is not only that they did nothing but that they failed to react timeously. Where one's actions are timed to produce a result a year after funding is made available and one then still ends up admitting that help is required at CMJAH and SBAH the statement by the Alliance that nothing was done is not all that outrageous.

[170] With regard to the Alliance's assertions in paragraphs 23 and 23.1 of its founding affidavit the deponent denies same. It maintains that R534million had already been invested on oncology, medical and allied equipment such as cutting-edge linear accelerator machines and the building of bunkers (allocated R217 million). All the machines (R534 million) were funded through a National Tertiary Services Grant. The facts that come to the fore below when GDoH motivated a deviation to avert losing the R261 million (as they did lose the R250 million ring-fenced funds due to the obligation to return unspent funds to Treasury at the end of a financial year) suggests that the R 261 million was not fully committed to the machines. We ultimately learn that a substantial amount of the R261 million is spent on outsourcing to the private sector even if only on a short term basis.

[171] This points to another funding mechanism and because it is all under the MTEF the items and services so funded will only become available over the defined period of the MTEF. That in itself suggests that even though the other items and services to be funded in this way may be important they will not materialise urgently. The deponent repeats that R250 million was ring fenced for radiation oncology outsourcing funded through the equitable share from Provincial Treasury in the 2023/24 financial year. The intention was that it be deployed in the financial year and if the background and extent of the crises is borne in mind the only rational way to obtain quick results seems to me the use of deviation as a way of procurement as suggested by the Alliance.

[172] The GDoH is of the view that it has not done nothing to deal with the backlog as portrayed by the Alliance in the paragraphs it responds to. The deponent also makes it clear that the backlog list is updated daily on site at CMJAH and SBAH. I will return to the latter later given the reliance on rights of privacy and POPIA as defences in the GDoH's refusal to make same available to the Alliance. They have updated it in 2023 in the way the Alliance did it in 2022 when given access to such data at CJMAH so why not do so again in the way done before. The GDoH of course studiously avoids setting out the updating procedures followed. I am not persuaded that same is updated using a methodology that permits some form of prioritisation in favour of the patients on the backlog list as it existed after the GDOH's updating of the Alliance's 2022 list. The aforesaid should include a procedure permitting the backlog list patient to be contacted and told he/she can now be prioritised. With this I do not suggest that a properly qualified person will always be bound to prioritise. Such person must be able to do so when circumstances permit.

[173] The deponent states that the to date four (4) Linac machines have been procured. Two for CHBAH and two for DGMAH. The four Linac machines will be commissioned and will be operational, once the four (4) bunkers have been constructed. The Turnkey project to construct the bunkers at CHBAH and DGMAH are envisioned to be completed at the end of 2024. Whether the "rescued" R261 million for the outsourcing will still be the source of payment

after the outsourcing is implemented or how same will be paid for remains unclear.

[174] The deponent also emphasises that a tender for 1 Brachytherapy machine for SBAH is advertised with a closing date of 26 May 2023 and the evaluation process has commenced. The Department has further completed specifications for one 1 Linac machine for CMJAH. Truly a pitiful response given the prevailing and admitted problems at the two hospitals under discussion.

[175] It seems to miss the point that the Alliance seeks to make i.e. that it expected that the GDoH would act with a degree of urgency to outsource the provision of radiation oncology services so as to provide such an outsourced service by August 2023. To the extent that the Alliance alleges that nothing was done its affidavit may well overstate its case. As far as the expectation was that outsourcing would take effect by August 2023 I have already pointed out that in my view there was no agreement in place given the obvious indications in the minutes of the Task Team on the part of the various participants in the employ of the GDoH that a deviation would have to be motivated properly and the fact that the terminology utilised pointed to a tender process being preferred.

[176] The GdoH does not address the failure to obtain a deviation as a *specie* of procurement and why it was not adopted. All it states is that it did not have a deadline and was duty bound to follow the processes it set out in its affidavit. It finds the assertion that the Alliance makes in paragraph 60 of the founding affidavit to the effect that a tender process is not suitable given the urgent need of the patients on the backlog list, strange and states as follows:

> "Who get to decide whether the tender process is not suitable. This is a typical example of trying to control the government from outside."

One can but wonder what underpins the theme of interference – is it perhaps the bureaucrat's desire to be the master of the decision making process ?. Am I to infer from this that the victim saddled with a life threatening disease is from a Constitutional point of view not entitled to some say or even endowed with a right to seek accountability?

[177] It also reiterates that it is bound to adhere to and comply with its internal procurement policies, treasury regulations and section 217 of the Constitution. Its failure to comply with sections 7(2), 27, 33 or 195 of the Constitution does not even enjoy a mention.

[178] I specifically have in mind the following failures with regard to section 195

"**195 Basic values and principles governing public administration**

(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

…

(b) Efficient, economic and effective use of resources must be promoted.

…..

(e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.

….

(g) Transparency must be fostered by providing the public with timely, accessible and accurate information."

[179] The inclusion of various parties in the exercise of the functions of the Task Team which seems to have terminated in 2023 is a demonstration of compliance with the above Constitutional principles. The attitude displayed after Ms Meyer's term expired and the refusal to answer correspondence and the notion expressed in paragraph 177 above is indicative of a diametrically opposed approach to what the quoted part of section 195 requires.

[180] It merely notes the Alliances assertions in paragraphs 61 and 62 of the founding affidavit. Strictly interpreted this not a denial of the undertakings the Alliance contend for – even though I do not believe that the underlying minutes of the meeting of the Task Ream supports the Alliance's conclusion concerning an agreement to utilise deviation.

[181] The closest to a denial is the statement that the GDoH had no deadline. It seeks to explain its failure to meet the supposed deadline by simply stating that it did not obtain a deviation. The response to these paragraphs speaks of an absolute disregard of the parts of Section 195 I referred to. The GDoH certainly does not come across as a model of Constitutional compliance but rather as an obstinate bureaucracy clinging to its established ways. This is even more so in view of what later transpires whilst it could easily have explained its failure to obtain a deviation.

[182] The deponent's response to paragraphs 87 – 92 of the Alliance's founding Affidavit is a denial as a whole and the defence that it is proceeding with a tender that will elevate the issue to diagnosing and treating patients is to say the least, pathetic. Given the state of the long-standing prevailing crisis one would have expected a rational explanation for not adopting the deviation process as a method of procurement.

[183] The deponent now deals with the medical history of Mses "V" and "W". All the patients' including Ms "X" medical histories as recorded by GDoH was utilised by the deponent to the provincial health respondent's answering affidavits. The Alliance argued that same should be struck out. I have come to a different conclusion and will state my reasons for this lower down in the judgment.

[184] It denies the whole of paragraph 94 which sets out the medical situation of Ms "V" as referred to above. The factual disputes as to when her condition arose are immaterial. The deponent relies on Ms "V"'s medical records as taken from the GDoH's records (possibly excluding the treatment she received at Helen Josephs Hospital) which reflect the following:

[185] She "was initially diagnosed: on 03/09/2021 (cT4dN0M0). Post neoadjuvant chemotherapy: completed September 2020. Post WLE and ALND (May 2021): size of tumour 4cm, grade 2 IDC NST, margins negative, 1/2 nodes positive, ER+ PR+ (ypT2N1 Mo). Initial consultation in radiation oncology (Area 348): 01/09/2021 . Put on waiting list for radiotherapy. Developed recurrence in September 2021, post chemotherapy and then surgery (May 2022). For expedited radiotherapy. Planning CT (Computed Tomography) (my insertion) : 23/08/2022 Volumes contoured: 30/08/2022 Whilst awaiting radiotherapy planning patient developed local recurrence

along scar and contralateral left breast lesion confirming malignancy. Restaging CT confirmed lung metastases. The patient was referred to medical oncology for palliative chemotherapy "

[186] Leaving aside the medical jargon, which the GDoH could easily have explained if it wanted to be helpful, the following is clear with minimal help of a dictionary: She was put on chemotherapy pre-operatively which was completed in September 2020. After a wide local excision (WLE) and axillary lymph node dissection (ALND) in May 2021 she was placed on a waiting list for radiotherapy. No administration of radiotherapy is recorded prior to her developing a recurrence of the tumour. She developed a recurrence in September 2021 and post chemotherapy and surgery in May 2022 she was referred for expedited radiotherapy. Whilst awaiting radiotherapy planning she developed a local recurrence along the scar and contralateral left breast lesion confirming malignancy. A restaged CT confirmed lung metastases. She was then referred to medical oncology for palliative chemotherapy. The record of this patient as supplied of course makes no sense – although supposedly initially diagnosed on 3 September 2021 she already completed a course of chemotherapy in September 2020.

[187] Be that as it may the easily comprehended takeaway is that she never received the recommended radiotherapy. To the extent that the above contradicts the version of Ms "V" I accept the above. (See also Ms "V"'s own affidavit "**SJM20**"). It is important to note that the additional information given over and above what she and the Alliance has already disclosed, is minimal.

[188] The description of Ms "W" disease and treatment in the founding affidavit was also denied.

[189] The GDoH official medical record reflects the following about Ms "W".

[190] She "was initially diagnosed: 04/02/2022 (T3N2Mo). Post neoadjuvant chemotherapy: completed September 2022. Post TM and ALND (November 2022): size of tumour 24mm, grade 2 NST, margins negative, 3/4 nodes positive with ENE, ER+ PR+ Her2 - (ypT2N1Mo). Initial consultation in radiation oncology (Area 348): 22/2/2023. Put on waiting list for radiotherapy. Developed axillary recurrence in May 2023, post chemotherapy and then surgery (September 2023): 4/9 nodes positive with ENE. For expedited radiotherapy. Planning CT: 30/1. Volumes contoured: 10/01/2024 Planning complete: not documented. Plan approved by oncologist: 31/05/2024 Physics approval: 09/05/2024. Radiotherapy: 18/06/2024 - 08/07/2024: tolerated well. Patient put on surveillance to be seen in 6/52." (the date is an obvious error) (See also Ms "W"'s own affidavit "**SJM21**")

[191] Once again with a little assistance from a dictionary (in the absence of a proper explanation from GDoH) the following is clear: Ms “W” was initially diagnosed on 4 February 2022. Pre-operative chemotherapy was completed in September 2022. The tumor has metastasized. She had her left breast removed and lymph nodes were removed from her armpit. (Cf her own affidavit) She had an initial consultation in radiation oncology on 22 February 2023 and was put on the waiting list for radiotherapy. No radiotherapy is recorded and she developed a recurrence under her armpit. Thereafter she was referred for expedited radiotherapy / Planning CT and contouring was done and planning completed but not documented. The plan was approved by an oncologist on 31 May 2024 and a physics approval was obtained on 8 May 2024. She received radiotherapy in the period 18 June 2024 to 8 July 2024 which was well tolerated. She was put om surveillance to be seen in June 2025.

[192] I accept the correctness of her record as presented by GDoH. This does not mean thar Ms “W”s affidavit is necessarily wrong. In layman’s terminology her story broadly confirms the position. Of interest is that she did receive radiotherapy whilst on the backlog list but at a late stage. Again minimal new information is disclosed.

[193] The version put up by Ms “X” is also denied by the GDoH. According to the deponent of the provincial health respondents answering affidavit the GDoH record reflects the following.

[194] She was “initially diagnosed: 20/6/2018. Post neoadjuvant chemotherapy (AC/T): completed January 2019. Post WLE and ALND (March 2019): size of tumour 4cm, grade 2 IDC, margins negative, 6/8 nodes positive, ER+ PR+ Her2 3+ (ypT2N2Mo). Initial consultation in radiation oncology 27/8/2019. Put on waiting list for radiotherapy. Developed recurrence November 2020, post total mastectomy 11/12/2020. For expedited radiotherapy due to recurrence. Planning CT: 25/02/2021 Volumes contoured: 08/03/2021. Planning complete: not documented. Plan approved by oncologist: 13/07/2021. Physics approval: 23/07/2021. Delay in starting radiotherapy as patient was on chemotherapy due to recurrence. Radiotherapy: 29/09/2021 - 19/10/2021: tolerated well. Patient put on surveillance seen 3-6 monthly, noted to be well, surveillance mammograms normal. Last seen December 2023,”

[195] In the aforesaid case the delay in radiotherapy is obvious and requires no discussion. There is no major discrepancy between the above and Ms “X”s version. See “**SJM22**”. Again very little new information is supplied.

[196] The GDoH also denies the version put up by Ms "Y". That despite the fact that it has no records of this patient. She first visited CMJAH in July 2022 requesting radiation oncology treatment. She was then told that they were still treating patients from 2018. Although she went to great expense to obtain treatment in the private sector she became a patient receiving chemotherapy at CMJAH in January 2024 Nevertheless they have no record of her. She will have to obtain radiation oncology treatment again and fears that she may not receive same in a timely manner. There is no reason to doubt her story as set out in Annexure "**SJM23**" Her evidence suggests that the updating of the backlog list as referred to by the GDoH is not ongoing or is as a minimum unreliable.

[197] The denial by the GDoH of the content of paragraph 100 of the founding affidavit coupled with the notion that an answer has been found to the problems surrounding the backlog list and that by implication same explains the Alliance's experience of no further engagement by the GDoH is far from satisfactory given its failure to comply with the components of section 195 of the Constitution already referred to.

[198] Whilst I cannot fault the GDoH for the use of the R534million (given the source of the grant and that it plays our during the MTEF period) the failure to produce a significant impact with the R250 million and the absence of an explanation to make use of a deviation and the allegation that the Alliance seeks to control the department from the outside suggests that something is amiss.

[199] I will address the requirements for the relief sought lower down.

The Rule 35(12) Notice

[200] The Alliance delivered a Rule 35(12) notice to the provincial health respondents to produce certain documentation under this Rule on 2 August 2024. The documents sought comprise the following:

> "1 The radiation oncology backlog lists as referred to in paragraph 21 of the answering affidavit. These lists may be redacted to preserve any personal information.
>
> 2. The re-advertised tender for Category 2 for the provision of radiation oncology services, which is referred to in para 23 of the answering affidavit.

3. The re-advertised tender for Category 3 for the provision of radiation oncology services, which is referred to in para 23 of the answering affidavit.

4. The "plans" referred to in paragraph 28.3 to ensure that the advertisement should be completed before 15 July 2024.

5. The written contract was concluded with the Eleventh Respondent, Siemens Healthcare pursuant to tender number GT/GDH/089/2023.

6. Copy/copies of the internal or external advertisements that have been issued for the recruitment of therapists at CMJAH and SBAH, as referred to in para 28 of the answering affidavit.

7. Copies of documents that specify which radiation oncology services have been outsourced and details of all the outsourcing that has been put on tender as alleged in paras 27.1 and 32 of the answering affidavit.

8. Copy/copies of the evidence-based treatment guidelines developed by CMJAH and SBAH oncology centres, as referred to in para 66 of the answering affidavit.

9. Copy of the employment contracts and/or appointment letters relating to:

9.1. the employment of radiation therapists, as advertised on DPSA Circular 20 of 2024.

9.2. the employment of the radiation therapist sessional workers (Ref: RT/01/CMJAH/2024), as referred to in para 67 of the answering affidavit.

9.3. The allegations relating to the employment of the radiation therapists, as described in paragraphs 8.1 and 8.2 above, is dealt with in para 67 of the answering affidavit.

10. Copy/copies of the resolution/ passed, minutes of relevant meetings and/or any related documents that record the provincial health respondents' decision to award the "remaining amount" of the R 250 million for utilisation in Category 1 and Category 2 as alleged in para 32 of the answering affidavit.

11.The decision referred to in para 100 of the BEC to recommend to the Chairperson of the BAC to award Category 3 of the tender to Siemens which was approved on 28 February 2024.

12. Minutes of the BEC meeting held on 10 January 2024, as referred to in para 112 of the answering affidavit.

13. Minutes of the BEC meeting held on 16 January 2024, as referred to in para 111 of the answering affidavit.

14. The resolution passed by the for the appointment of Siemens Healthcare to provide the "outsourcing of a radiation oncology service", as referred to in para 113 of the answering affidavit"

[201] The Alliance filed a supplementary affidavit dealing with same on 6 September 2024 which I regard as admissible given that I am entitled to be updated as to the response. Due to the nature of the GDoH's response I will first deal with item 8 i.e. the copy/copies of the evidence-based treatment guidelines developed by CMJAH and SBAH oncology centres, as referred to in para 66 of the answering affidavit.

[202] What was ultimately produced under item 8 were overseas materials relied on as Annexure "B". I was provided with a hard copy of all the papers in the application in lever arch files and the aforesaid appeared in bundle 3 commencing at Caselines numbering 05-100 and ending in bundle 4 at Caselines numbering 05-645. I perused these documents which reflected the results of various people's and institutions' research efforts and guidelines in respect of radiotherapy treatment with regard to prostate cancer and breast cancer (of different kinds including Phyllodes Tumors). In the absence of any party proffering any expert evidence in support of same the general conclusion to be drawn from these materials appears to me to support the views expressed by the GDoH in the answering affidavit. When I engaged the Alliance's counsel on these documents the particular counsel was unable to make any sensible submission in this regard confessing that she read only a few pages of these documents. Suffice it to state that as a consequence the Alliance case was not improved by the failure to engage the provincial health respondents on the aforesaid. The replying affidavit styled paragraph 66 of the answering affidavit as hearsay evidence and possibly subject to strike out. The fact that the documentation was produced and supports the allegation made puts an end to this notion. It is admissible with full disclosure of the sources due to the Rule 35(12) notice. Although of an expert nature I am not prepared to ignore same.

[203] The information produced was not developed by the CMJAH or SBAH as far as I could establish but seemed to support the notion of shorter radiotherapy cycles.

[204] The re-advertised tender for Category 2 and 3 for the provision of radiation oncology services, which is referred to in para 23 of the answering affidavit was produced. Due to its volume it was not annexed but tendered if needed. I did not deem it necessary to call for it.

[205] The GDoH failed to provide the balance of documents sought and in particular:

failed to produce the following:

206.1 the radiation oncology backlog lists as referred to in para 21 of their answer. They nevertheless persist with the allegation that the backlog

lists are being *"updated daily on site at CMJAH and SBAH."* They maintain that they do not seek to violate the National Health Act and POPIA by producing copies of the backlog lists yet they fail to explain why they cannot provide an appropriately redacted version which preserves the confidential nature of the underlying information as had been requested;

206.2 a copy of its decision to award the tender to Siemens Healthcare for the provision of the tender for category 3;

206.3 copies of employment contracts and/or appointment letters relating to the appointment of radiation therapists and/or radiation sessional workers;

206.4 copies of documents that specify which radiation oncology services have been outsourced;

206.5 copies of minutes and/or resolutions passed and/or relevant documents record[ing] the provincial health respondents' decision to award the "remaining amount of the R 250 million for utilisation in Category 1 and Category 2 as alleged in para 32 of the answering affidavit;

206.6 a copy of documents and/or resolutions passed by the BEC to recommend that the category 3 tender be awarded to Siemens Healthcare;

206.7 copies of minutes and/or resolutions passed by the relevant BAC and BEC meetings.

[206] The Alliance did not seek enforcement of those parts of the Rule 35(12) notice that was not complied with but requested that I draw certain conclusions from the said failures. They later on requested me to exact enforcement,

[207] The Alliance submitted that the conclusions to be drawn are as follows:·

`208.1 that the backlog lists have not been updated as alleged by the health respondents and/or there is no "updated" backlog list as alleged by the provincial health respondents – I am of the view that it is improbable that no list exists. I say this due to the facts that transpired regarding Mses ”V,” ”W”, and “X”. The facts pertaining to Ms “Y” suggested that an unreliable or incomplete list exists. Significantly, they refuse to even produce a confidential redacted version of the backlog lists. Whether any issue arises under the National Health Act and/or the POPIA legislation will be dealt with below;

208.2 the remaining documents and/or resolutions as requested by the Alliance do not exist and/or are being deliberately withheld by the provincial health respondents to obfuscate. The provincial health respondents cannot be permitted to rely on the bald and unsubstantiated allegation in the answering affidavit which have been deposed to by a deponent with no personal knowledge;

208.3 In the circumstances, at the hearing of Part A of this application, the applicant will argue that this Court will be justified in drawing an adverse inference against the provincial health respondents. It will be argued in particular, that the provincial health respondents' failure to fully comply with the Rule 35(12) notice means that there is no documentary evidence to support the provincial health respondents version as stated in the relevant paragraphs that rely on the requested documents;

208.4 that in line with applicable legal principles, the affected issues to which the requested documents relate, fall to be determined by the Court, based on the applicant's version.

The Applicant’s Replying Affidavit

[208] Ms Meyers deposed to the Alliance’s replying affidavit and took issue with a wide range of topics raised by the provincial health departments answering affidavit deposed to by Mr Malotana

[209] She states that she has been advised that much of the answering affidavit is irrelevant, vexatious and/or irrelevant material. In the circumstances she deals with same to the extent that it maybe necessary but subject to the Alliance's right to persist with an application to strike out the objectionable material.

[210] Such a strike out application was filed and sought to strike out the following paragraphs as being irrelevant or hearsay: Paragraphs 21, 28, 60,66 and 67. A second component of this application pertains to the use by the GDoH of the confidential information of Mses "V", "W" and "X" and specifically paragraphs 153 (153.1-153.7), 154(154.1 – 154.11) and 156 (156.1-156.12).

[211] The Alliance also seeks to strike out the allegation paragraph 8 that "the applicant seeks to run the administration of the Department though the Court".

[212] Similarly it seeks to strike out the allegation that in paragraph 13 that the relief sought "amount to interference with the operations of the Department".

[213] The criticism in respect of paragraph 21 is that the deponent fails to set out that he has personal knowledge of the method of preparation and updating of the backlog lists at CMJAH and SBAH. No reasons are provided as to why confirmatory affidavits could not be obtained. The Chief Executive Officers of both hospitals are respondents in this application. These allegations are hearsay and fall to be struck out. In my view this is the type of information that would typically be reported to the deponent as head of the department and although he cannot account for its veracity he would have had sight thereof (although he does not say so). It is contended that he should have obtained supporting affidavits from people who could speak from personal knowledge about this. Given the Alliance's voluminous application and the short period within which same had to be dealt with his failure to get such witnesses to support him is understandable. I was thus not prepared to strike same out. The issue of the POPIA defence as stated before will be dealt with later.

[214] The notion that the recruitment drive by the GDoH for more staff as set out in paragraph 28 would be hearsay evidence in the mouth of the deponent seems also artificial to me. Given his position he would *par excellence* be knowledgeable about this. He also annexed the applicable advertisements.

[215] The notion that the description of routine events as set out in paragraph 60 in the answering affidavit of the GDoH which states that :

> "The hospitals admitted patients referred to it by other institutions and/or who come to hospitals directly. When admitting these patients they are fulfilling their statutory duties"

is hearsay in the mouth of the deponent, is strange. Whilst he might not have the knowledge of the when and where and who he possesses the general knowledge to make such a statement.

[216] The issue in paragraph 66 of the answering affidavit is also part of the Rule 35(12) notice i.e.

> "the Department has evidence-based treatment guidelines developed by the two oncology centres of CMJAH and SBAH. Recent clinical data supports the use of shorter radiotherapy schemes in the management of most cancers including breast, prostate and rectum cancers. This has been included in international peer -reviewed guidelines and applied locally. Deviation from treatment guideline may be required on occasion and clinical justification is required in these cases. The department is currently in need of assistance to reduce the current radiotherapy waiting times at both CJMAH and SBAH for breast and prostate patients".

[217] I accept that the deponent is not a doctor or oncologist or any kind of expert who can validate the information as the truth but he could hardly be unaware of this position and would inevitably have had to come across this notion in the discharge of his duties. The last sentence he would undoubtedly have had personal knowledge of in his cited capacity. I do not accept that this type of evidence falls in the category of evidence he cannot speak of.

[218] The contents of paragraph 67 again deals with recruitment and advertisements for radiation therapist sessional workers which are typically the type of information I would expect the deponent as cited to know about. The same is applicable as to how they will be deployed. I also accept that in the course of his duties he will by now have learnt about the information and content appearing from "**LAM3**". I therefore am not prepared to strike paragraphs 66 and 67 out.

[219] The striking out of the material in the possession of the GDoH regarding Mses "V", "W" and "X" as irrelevant and as utilised by the GDoH without their consent as inadmissible given that same was unlawfully obtained requires some debate. I analysed the information in great detail above to compare same for

discrepancies and additional information. I concluded that the additional information disclosed by the GDoH is minimal. The question is, however. whether the following provisions of the National Health Act or POPIA were infringed.

The National Health Act 61 of 2003

[220] The relevant provisions of the National Health Act reads as follows:

14 Confidentiality

(1) All information concerning a user, including information relating to his or her health status, treatment or stay in a health establishment, is confidential.

(2) Subject to section 15, no person may disclose any information contemplated in subsection (1) unless-

(a) the user consents to that disclosure in writing;

(b) a court order or any law requires that disclosure; or

(c) non-disclosure of the information represents a serious threat to public health.

15 Access to health records

(1) A health worker or any health care provider that has access to the health records of a user may disclose such personal information to any other person, health care provider or health establishment as is necessary for any legitimate purpose within the ordinary course and scope of his or her duties where such access or disclosure is in the interests of the user.

(2) For the purpose of this section, **'personal information'** means personal information as defined in section 1 of the Promotion of Access to Information Act, 2000 (Act 2 of 2000)."

[221] Section 17 of the National Health Act states as follows:

"**17 Protection of health records**

(1) The person in charge of a health establishment in possession of a user's health records must set up control measures to prevent unauthorised access to those records and to the storage facility in which, or system by which, records are kept.

(2) Any person who-

(a) fails to perform a duty imposed on them in terms of subsection (1);

(b) falsifies any record by adding to or deleting or changing any information contained in that record;

(c) creates, changes or destroys a record without authority to do so;

(d) fails to create or change a record when properly required to do so;

(e) provides false information with the intent that it be included in a record;

(f) without authority, copies any part of a record;

(g) without authority, connects the personal identification elements of a user's record with any element of that record that concerns the user's condition, treatment or history;

(h) gains unauthorised access to a record or record-keeping system, including intercepting information being transmitted from one person, or one part of a record-keeping system, to another;

(i) without authority, connects any part of a computer or other electronic system on which records are kept to-

(i) any other computer or other electronic system; or

(ii) any terminal or other installation connected to or forming part of any other computer or other electronic system; or

(j) without authority, modifies or impairs the operation of-

(i) any part of the operating system of a computer or other electronic system on which a user's records are kept; or

(ii) any part of the programme used to record, store, retrieve or display information on a computer or other electronic system on which a user's records are kept,

commits an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding one year or to both a fine and such imprisonment."

[222] In considering whether the GDoH infringed section 14 or 15 above one must bear in mind that one of the objects of the National Health Act is:

" protecting, respecting, promoting and fulfilling the rights of-

(i) the people of South Africa to the progressive realisation of the constitutional right of access to health care services, including reproductive health care;

(ii) the people of South Africa to an environment that is not harmful to their health or well-being;

(iii) children to basic nutrition and basic health care services contemplated in section 28 (1) *(c)* of the Constitution; and

(iv) vulnerable groups such as women, children, older persons and persons with disabilities"

[223] The meaning of "personal information" in the Promotion of Access to Information Act ("PAIA") Act 2 of 2002 includes:

"information relating to an identifiable natural person, including, but not limited to-

(a) information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the person;"

[224] I do not refer to the other meanings which *prima facie* do not apply.

[225] Based on the above the deponent on behalf of the provincial respondents should *prima facie* have obtained the written consent of Mses “V”, “W” and “X”. The provincial health respondents argue that the information was released in exercise and defence of their right as the Alliance consulted with the individual concerned and made allegations that were incorrect. They were thus defending themselves and answering to averments made by the above individuals.

[226] It is also contended that when the above women released their personal information and made it part of the litigation they waived their rights.

[227] The question arises of course whether the National Health Act read with PAIA permits a waiver which is not in writing. The obvious answer is that the initial giving of the information to the Alliance in the detail it was supplied under their own signature constitutes the written consent and/or waiver. In addition the use of these persons’ records by the GDoH upon analysis demonstrated so little additional information that it can hardly be said that any new information was disclosed. On this reasoning the documents would become virtually irrelevant given that hardly any new information was disclosed. I have, however, accepted these records because they purport to be the GDoH’s understanding of these patients medical position and it supported the Alliance’s general approach to the case i.e. that the failures of the GDoH lead to an extra burden on the public purse through the cost of extra surgery which could have been prevented by applying timeous radiation therapy.

[228] The illegality pleaded also referred to the legislation discussed below.

[229] In dealing with the above I have taken into account that an infringement of a persons rights of privacy or use of his confidential information may also constitute an infringement of such person’s dignity.

Personal Protection of Information Act 14 of 2013 (“POPIA”)

[230] The POPIA defence pertains to the use of “personal information” as defined therein.

230.1 The purpose of POPIA according to section 2 thereof is i.a. to:

"(a) give effect to the constitutional right to privacy by safeguarding personal information when processed by a responsible party, subject to justifiable limitations that are aimed at-

(i) balancing the right to privacy against other rights, particularly the right of access to information; and

(ii) protecting important interests, including the free flow of information within the Republic and across international borders;

(b) regulate the manner in which personal information may be processed, by establishing conditions, in harmony with international standards, that prescribe the minimum threshold requirements for the lawful processing of personal information;

(c) provide persons with rights and remedies to protect their personal information from processing that is not in accordance with this Act;

..."

230.2 It prescribes in section 4 conditions for the lawful processing of personal information. Suffice it to state that the information disclosed by the GDoH (a public body as defined) is within the definition of personal information and special personal information and Mses "V", "W", "X" are data subjects as defined in POPIA. The Alliance on the other hand would be a "private body " as defined. The same section refers to the prohibition of processing of special personal information under Section 26 unless the provisions of section 27 to section 33 are applicable. Only section 27 and section 32 are applicable to the information under discussion. Section 26 imposes a prohibition on the processing of this kind of information subject to section 27. "Processing" means i.a:

"… any operation or activity or any set of operations, whether or not by automatic means, concerning personal information including-

(a) the collection, receipt, recording, organisation, collation, storage, updating or modification, retrieval, alteration, consultation or use;

(b) dissemination by means of transmission, distribution or making available in any other form"

230.3 Section 27 reads i.a. as follows:

27 General authorisation concerning special personal information

(1) The prohibition on processing personal information, as referred to in section 26, does not apply if the-

(a) processing is carried out with the consent of a data subject referred to in section 26;

(b) processing is necessary for the establishment, exercise or defence of a right or obligation in law;

.....

(d) processing is for historical, statistical or research purposes to the extent that-

(i) the purpose serves a public interest and the processing is necessary for the purpose concerned; or

(ii) it appears to be impossible or would involve a disproportionate effort to ask for consent,

and sufficient guarantees are provided for to ensure that the processing does not adversely affect the individual privacy of the data subject to a disproportionate extent;

(e) information has deliberately been made public by the data subject; or...."

230.4 Section 32 states i.a. that:

"32 Authorisation concerning data subject's health or sex life

(1) The prohibition on processing personal information concerning a data subject's health or sex life, as referred to in section 26, does not apply to the processing by-

(a) medical professionals, healthcare institutions or facilities or social services, if such processing is necessary for the proper treatment and care of the data subject, or for the administration of the institution or professional practice concerned;

....

(2) In the cases referred to under subsection (1), the information may only be processed by responsible parties subject to an obligation of confidentiality by virtue of office, employment, profession or legal provision, or established by a written agreement between the responsible party and the data subject.

(3) A responsible party that is permitted to process information concerning a data subject's health or sex life in terms of this section and is not subject to an obligation of confidentiality by virtue of office, profession or legal provision, must treat the information as confidential, unless the responsible party is required by law or in connection with their duties to communicate the information to other parties who are authorised to process such information in accordance with subsection (1).

(4) The prohibition on processing any of the categories of personal information referred to in section 26, does not apply if it is necessary to supplement the processing of personal information concerning a data subject's health, as referred to under subsection (1) *(a)*, with a view to the proper treatment or care of the data subject."

230.5 It is of some importance to note that a "responsible party" is defined as:

> "....a public or private body or any other person which, alone or in conjunction with others, determines the purpose of and means for processing personal information"

[231] On a careful reading of the above provisions I am satisfied that the GDoH has a defence on at least one basis under POPIA to the Alliance's assertion that its use of the above-mentioned people's information was a breach of POPIA. Section 27(1)(b) would constitute a defence. I know they rely on waiver as well and accept same as correct.

[232] It further seeks the strike out of the allegation in paragraph 14 that the relief sought by the applicant "will tamper with the operations of the Department".

[233] It also seeks a strike out of the allegations made in paragraphs 86 – and 87.2 that "it is clear that the applicant seeks to interfere with the lawful processes of the Department and control it from outside" and "The application is a gaging order"'

[234] It in addition it seeks the strike out of the contents of paragraphs 88, 161.5, 164.2, 165.2 and 165.4.

[235] The themes objected to in these paragraphs are time and again that the Alliance is attempting to run the Department and control its processes from outside and that the application by the Alliance is an abuse of the court process that may result in the Department being denied the ability to discharge its constitutional mandate to the benefit of the people of the Province.

[236] The provincial health respondents has by making such assertions demonstrated a certain stance which is informative as to its comprehension of section 195 of the Constitution and its general stance on accountability to a vulnerable component of society.

[237] According to the provincial health respondents the acid test for strike out is as follows:

> "……Two requirements must be met before a striking-out application can succeed: (i) the matter sought to be struck out must be scandalous, vexatious or irrelevant; and (ii) the court

must be satisfied that if such a matter is not struck out the party seeking such relief would be prejudiced."[2]

[238] The Alliance at no stage alleges "prejudice". I also cannot see how it is prejudiced given the nature of the matter it sought to strike out. On the contrary the GDoH's approach to the Alliance and its constituency is helpful to its case.

[239] The strike out application thus falls to be dismissed.

[240] I now revert to the balance of the Replying Affidavit.

[241] It is alleged that the provincial health respondents did not take the court into its confidence in respect of the progress made as to the reduction in the backlog list. The GDoH did deal with this but in such a way that the Court is unable to establish whether the ostensible reduced numbers are real. The information given with regard to CMJAH suggests large numbers of patients are kept waiting whilst receiving hormonal treatment to suppress testosterone to postpone the need for radiotherapy treatment. No information is forthcoming regarding the other forms of cancer such as colorectal cancer

[242] No updated backlog list is provided. The fact that it is stated to be updated daily at the hospitals raises concerns as to why a redacted version is not proffered. A valid concern is raised i.e. that there could be a conflation of the backlog list with those persons currently receiving treatment.

[243] Another concern raised is the omission of the value of the Category 3 tender awarded to Siemens. The Alliance is not satisfied with the notion that the amount involved is less than a quarter of the R250 million or that 200 plans were ordered at a total cost of R17 480 000. The Alliance is concerned that there is no "cap" disclosed on this. Subsequent developments cast more light on this.

[244] It is of the view that the high-water mark of the provincial health respondent's opposition appears to be their allegation that the department

[2] See Helen Suzman Foundation v President of the Republic of South Africa and Others - 2015 (2) SA 1 (CC) para 27

"has taken all possible steps to deal with backlog of cancer patients both at CMJAH and SBAH"

[245] The Alliance is also concerned that the provincial health respondents embarked on a tender to "alleviate the breast cancer and prostate cancer backlog" It makes the valid point that there are also patients with cervical cancer and colorectal cancer and states that it raises this not to

"control the department from the outside"

as alleged, but to ensure that the Court holds the provincial health respondents to account for their dilatory and nonchalant attitude towards providing radiation oncology treatment to cancer patients on the backlog list.

[246] It objects to the use of hearsay evidence without explanation or compliance with section 3(1)(c) of the Law of Evidence Amendment Act, 45 of 1988 ("the Act"). It states that no case is made out that this Court should exercise its discretion and admit the hearsay evidence. It seems to forget that the provincial health respondents had to answer a 309 page application on short notice and could only file late given the unrealistic time periods the Alliance set for the filing of the answering affidavit and hearing date of the matter. So much so that it ultimately had to be heard as a special motion after intervention sought from the DJP. It is an urgent application and I may allow in my discretion such evidence where the source is disclosed. In any event most of the hearsay complaints were dealt with under the rubric of the Strike Out Application.

[247] The Alliance denies the baseless allegations made as to the non-joinder of the various parties already referred to and in particular find the notion that the parties in the private sector to whom outsourcing should take place "bizarre". I have already expressed my views in this regard.

[248] Unsurprisingly Ms Meyer reiterates parts of the founding affidavit such as paragraph 53 read with Annexure "**SJM7**". She states that it was against the background of this outsourcing model that the applicant made submissions to the provincial treasury to ring fence any future allocation of funding to address the radiation oncology backlog.

[249] She accuses the provincial health respondents of failing to keep to their undertaking and develop the outsourced model. Instead, it chose to issue a tender for three categories of services. She points out that there is no evidence provided by the provincial health respondents that the award of the tender will result in cancer patients who are on the backlog list receiving radiation oncology services urgently.

[250] She also states that to suggest, as the provincial health respondents do, that it now falls to the applicant to identify and join the public and/or private health facilities to the application is untenable.

[251] She similarly criticises the notion that the Task Team should have been joined and submits it has no separate legal identity. She therefore contends that the provincial health respondents are properly cited.

[252] She also states that awarding the tender for planning services was irrational leaving the backlog cancer patients without the urgent radiation and oncology services within the necessary timeframes. Time has proved her right.

[253] She reiterates that the backlog list continues to grow and seeks this Court's intervention to ensure that there is some level of urgency from the provincial health respondents to provide treatment to those patients who are on the backlog list. She suggests that the Court can address the pace at which the provincial health respondents are to act given the availability of funding.

[254] She regards it as noteworthy that it is nowhere stated that the tender award to Siemens is for services to cancer patients on the backlog list. She also makes the obvious point that given the terms and scope of the tender awarded to Siemens it could only function if the other categories of the tender was awarded and although the point was made in the founding affidavit the provincial health respondents have only responded with a bare denial. In the circumstances she regards this tender award as irrational.

[255] She also says that the provincial health respondents continue to be opaque about what the planning service entails. Though the tender clearly stipulates that the service is intended to be offsite/fully remote and would involve no

transfer of hardware or software, it is said in the answering affidavit that Siemens has invested in IT infrastructure on-site, which is completely contrary to the tender specifications. Therefore the interdict preventing the dissipation of the R250 million is even more urgent. Later developments discussed below suggest that it is already to late.

[256] She demonstrates that the time delays with the tender process is such that even if the best efforts are used , it is improbable in the extreme that the tender will be completed and a service provider will start providing treatment by the end of the year.

[257] Therefore she is of the view that there is no other remedy available to the Alliance and persists in the assertion that the matter was and still is urgent.

[258] The historical background demonstrates the radiation oncology crisis in the province. Cancer patients who are on the backlog list are very sick, and without the radiation oncology treatment, their health continues to deteriorate.

[259] She also deals with the answering affidavit on an ad seriatim basis and largely denies the content of such paragraphs where it is in conflict with the Alliance's version. She states that the court has the power to grant the orders sought and is obligated to declare conduct unconstitutional and unlawful where it is found to be so. She maintains that the courts are required to hold the executive accountable when they fail to comply with a constitutional obligation or act unlawfully and is of the view that this is such a case.

[260] I do not deal with all the responses in the ad seriatim section given what has been said and what is to come.

[261] Ms Meyer persists that there remains a compelling need for the original backlog list to be updated in order so that the Court can determine how many cancer patients are on the backlog list and for how long they remain on the backlog list, awaiting radiation oncology treatment. Significantly, the correct number of patients that require treatment has to be determined by the provincial health respondents. In the absence of an updated backlog list, the provincial health

respondents cannot say that they are treating cancer patients who are on the backlog list.

[262] The advertisement of the tender was not shared with the Alliance and it became aware when approached by the media for comment. This was somewhere around October 2023 but the Alliance was unaware of the fact that the tender was to be broken down in 3 categories.

[263] The provincial health respondents have not seen fit to put up the terms of the agreement with Siemens or provide any detail in that regard, and therefore the Alliance simply does not know whether the purchase order is a once-off purchase order, or whether there may be subsequent purchase orders.

[264] The Alliance denies that the application is 10 months late. On the provincial health respondents' own version, the tender for category 2 was withdrawn sometime after 20 October 2023 (although the date is not disclosed) and the award of category 1 was unsuccessful in price negotiations - which must have been some time after January 2024 when the tenders were allegedly adjudicated (again the date is not disclosed). Thus the date on which the tender was first advertised is entirely irrelevant to the question of urgency.

[265] What is missing from the provincial health respondents' answer is when outsourced radiation oncology services will, in fact, be provided to cancer patients who are on the backlog list.

[266] The Alliance is also of the view that the application should not be struck for lack of urgency. Ms Meyer also makes it clear that the relief sought is not hypothetical. The cancer patients who are on the backlog list are people who are sick and who are at risk of losing their lives. Their lived reality is not a figment of the Alliance’s imagination. These cancer patients and their lived realities are being reduced to insignificance. The provincial health respondents cannot, by sleight of hand, downplay the fact that their failure to provide radiation oncology treatment attracts serious consequences. Thus the Alliance urges the Court to take the provincial health respondents' conduct into account when it considers the issues of urgency and costs.

[267] Ms Meyer is of the view that the provincial health respondents' appear insensitive and dismissive of the actual harm that has been - and is being - suffered by the cancer patients on the backlog list, to whom they owe (undisputed) constitutional obligations.

[268] She states (correctly) that the Court is no closer to knowing what services are to be rendered by the service providers who are to be appointed under categories 1 and 2 of the tender. The provincial health respondents are vague in their explanation. The Alliance submits that the provincial health respondents' stance is both deliberate and by design. The services to be rendered do eventually become clearer as will become apparent below.

[269] Ms Meyer also points out that when the backlog of cancer patients at CJMAH was compiled the consultant paid for by the Alliance reported to both Dr Ramiah, the CMJAH Head of department and to the Alliance. As the compilation of the backlog list was a clinical matter the consultant worked under the supervision of Dr Ramiah to determine the scope of the project and how the backlog lists will be compiled and categorized . For each of the specific cancer backlog lists the consultants associated with breast, prostate, gynae and colon cancers were involved in the compilation of these lists to ensure accuracy. These lists were submitted to the Head of Department for verification before it was signed off as being the complete backlog list CMJAH. It would appear that no objections were raised then as to privacy and confidentiality or based on POPIA.

[270] Ms Meyer also seeks condonation for the late filing of the replying affidavit. She explains the difficulties experienced in the process to persuade the provincial health respondents' to co-operate in obtaining an expedited hearing date and that contact had to be made afresh with Mses "V", "W" and "X" to establish whether the use of their medical information was after written consent was obtained. She contends that the provincial health respondent's suffered no prejudice due to same being late and that the Alliance also granted the provincial health respondents an indulgence. She submits that good cause exists and that the Court ought to condone the late filing of this replying

affidavit. The application concerns a matter of significant constitutional importance, and the applicant has good prospects of success.

[271] On a consideration of all the facts I condone the late filing of the replying affidavit.

[272] I have already referred to the filing of 2 supplementary affidavits which I also condoned. More, however, was to come.

The Additional supplementary affidavits filed from October 2024 onwards

[273] On 18 October 2024, the Alliance filed a further supplementary affidavit, the purpose and background of which was the following. On 19 September 2024, a media enquiry was sent to the communications department of the second respondent by a journalist from *The Sunday Times*, Ms Gill Gifford. In this enquiry, Ms Gifford enquires about the status of the tender advertised on 13 July 2024. Importantly, Ms Gifford enquired whether the tender has been withdrawn and, if it has, requests reasons for this decision. The media enquiry was forwarded to the Alliance, who then enquired with the Provincial Health Respondents on the status of the tender. This media enquiry is attached as annexure “KM1”.

[274] On 6 October 2024, the Office of the Premier in Gauteng and the Gauteng Department of Treasury took a decision to freeze all vacant posts and reduce the overtime offered within the Gauteng Department of Health. A copy of the Public Servants Association Union’s statement, dated 6 October 2024, is attached as annexure “KM2”.

[275] The supplementary affidavit was filed on behalf of the Alliance to place on record the enquiry on the cancellation of the tender advertised by the Provincial Health Respondents on 13 July 2024 and the provincial health respondents’ response thereto, as well as the possible impact on the freezing of posts and the provincial health respondents’ ability to fulfil their plans to address the radiation oncology backlog as set out in their answering affidavit.

[276] This affidavit proceeds to state as follows: On 8 October 2024, the Alliance addressed a letter to the provincial health respondents in which it states that it has received 'media reports and requests' for comment concerning the alleged cancellation of the tender advertised by the second respondent on 13 July 2024. The Alliance explains that it finds such reports concerning given that the provincial health respondents have placed significant reliance on the tender in their defence to the Alliance's claims that the provincial health respondents have no plan to address the backlog of patients awaiting radiation oncology services. Further the Alliance states that without the tender it is less apparent how the provincial health respondents plan to address the backlog for radiation oncology services in the province. To this effect a copy of a letter annexure "KM3" was annexed.

[277] On 9 October 2024, the provincial health respondents' legal representatives acknowledged receipt of the Alliance's letter requesting that the Alliance provide them with the media reports to enable their clients to furnish them with proper and meaningful instructions. A copy of this email is annexed as annexure "KM5".

[278] The provincial health respondents' replied to the Alliance's email and stated that they had requested the Alliance to provide them with the media reports referred to in the said letter of 8 October 2024, but that the Alliance had instead provided the request for comment. The provincial health respondents again requested a copy of the media reports by email, annexed as annexure "KM6".

[279] To this the Alliance replied to the provincial health respondents, stating that they had failed to respond to the query regarding the status of the tender. The Alliance further asserts that their evasive responses suggest an attempt to withhold the true facts from the Court and the public. Same is annexed as annexure "KM7".

[280] On 16 October 2024, the provincial health respondents sent an email in which they stated again that the Alliance had provided them with a media request for a comment, rather than the media reports referred to in the letter dated 8 October 2024, and that the media reports were required in order to respond

to the question of whether the tender had been cancelled. Additionally, they allege that the Alliance's conduct constitutes a blatant attempt to tarnish their reputation. This email is annexed as annexure "KM8".

[281] The Alliance replied to the provincial health respondents, stating that it had provided them with the media enquiries at hand and that, despite the time that had passed, they failed to provide the information that was entirely within their knowledge. A copy of this letter is attached as "KM9".

[282] On 18 October 2024, the provincial health respondents again refused to say whether the tender has been cancelled. A copy of this email is attached as annexure "KM10".

[283] The provincial health respondents remained persistent in their refusal to say whether the tender has been cancelled.

[284] Under the rubric "freezing of vacant posts and reduced overtime" at the Gauteng Department of Health, it is stated that the Alliance has also become aware of the allegations circulating in the media that the Office of the Premier Gauteng and the Gauteng Provincial Treasury had taken a decision to impose an immediate freeze on all vacant posts and reduce overtime within the Gauteng Department of Health. To this end, a copy of a *City Press* article detailing these allegations is attached as "KM11".

[285] The provincial health respondents, in its answering affidavit, stated that one of the ways in which they plan to deal with the human constraints (which constitute one of the impediments to its providing radiation oncology services at CMJAH and SBAH) is to recruit 21 therapists at CMJAH and one therapist at SBAH. Additionally, they plan to offer overtime at CMJAH from 16h00 to 19h00, Monday to Friday.

[286] The Alliance expressed its concern that the immediate freezing of the vacant posts may affect the second respondent's plans to recruit staff and other overtime to deal with the backlog of radiation oncology patients. In the circumstances, the said attorney concludes that the provincial health respondents' refusal to confirm whether the tender has been cancelled should

cause the Court to draw a negative inference and to assume that the tender has in fact been cancelled. In this regard, the provincial health respondents are invited to place any contradictory evidence before the Court, should such evidence exist. No such affidavit was filed.

[287] The Alliance also avers that the alleged freezing of the vacant posts and reduction of overtime within the Gauteng Department of Health will make it even more difficult for the provincial health respondents to respond to the radiation oncology backlog. They were accordingly invited to take the Court into their confidence and to explain how, in the face of the constraints imposed by the office of the Premier and Provincial Treasury, they plan to provide radiation oncology services at CMJAH and SBAH to address the backlog. This invitation was not accepted. There is no explicit application for condonation in this supplementary affidavit but in the circumstances of the case I also condone the filing thereof. The recalcitrance of the GDoH to assist the Alliance is astonishing.

[288] The evening before the hearing of the matter, the Alliance, filed a further supplementary affidavit deposed to by Ms Turner. The purpose of this affidavit was to bring further relevant facts to the Court's attention that had come to the Alliance's attention between the close of the court file on 18 October 2024 and the hearing date (the date the Court file closed is in dispute but of no consequence given the unique facts of the case). It was submitted that the facts are of particular importance in that they demonstrate, at least, that the provincial health respondents had not fully taken the Court into their confidence despite the facts and documents set out below being in their knowledge and under their control.

[289] It is alleged that these facts show that:

289.1 As of 15 October 2024, the GDoH has failed to spend any of the R511 million allocated to provide urgent services to cancer patients on the backlog list and none of the allocated funds have been used. The GDoH has failed to disclose this to the Court.

289.2 The GDoH, in its answering affidavit stated that it is “following the normal tender process” in accordance with the constitutional statutory procurement obligations and in line with its procurement policy. However, in the last three weeks, the GDoH appeared to have abandoned the tender process for Categories 1 and 2 radiation and oncology professional services (although it refuses to confirm whether or not this is the case) and, instead, in response to the litigation and public pressure, GDoH appears to have opted to outsource radiation oncology services at SBAH. Notably, no such arrangement has been concluded at CMJAH, even though two-thirds of the cancer patients on the backlog list are at CMJAH. It is asserted that the change of process is significant because it shows that GDoH has wasted almost a year and a half by persisting with the tender process which has been mired in delays (amongst other issues) and has ultimately not resulted in the backlog cancer patients receiving lifesaving radiation oncology treatment, despite the fact that the funds were allocated specifically for that purpose.

289.3 It is submitted that it should be recalled that the Alliance proposed that outsourcing be pursued as a viable treatment option from as far back as February 2022 and that the ring-fenced R250 million allocation from Provincial Treasury was specifically provided for the outsourcing of treatment for patients on the backlog list. The Alliance has detailed this in the founding affidavit and it is, hence, not repeated.

289.4 It is further said to be concerning that GDoH provides one version to the Court and an entirely different version in its public communications and a different stance when it reported to the provincial legislature oversight committees.

[290] It is alleged that these facts are important to the Court determining the application and are set out in detail below.

[291] Under the rubric the GDoH’s responses to questions raised in Gauteng Legislature, the following is alleged, i e that on 15 October 2024 the provincial health respondents submitted written responses to questions raised in the

Gauteng Legislature in relation to radiation oncology services in the Province. A copy of the GDoH's response to these questions is annexed to this affidavit as "LT1" (not so marked). I refer to Caselines 02-816-817.

[292] This document the answers the question posed as to the breakdown of the patients, according to their different types of cancer, at the CMJAH, including breast, prostate, lung, colorectal and other cancers. The CMJAH position is stated to be as follows:

> "gynae: 100 patients, GIT: 80 patients, breast: 497 patients, prostate: 1440 patients (on hormonal therapy but awaiting radiotherapy), lung: 0, other: 171.

[293] The similar breakdown with respect to the SBAH reads as follows:

> " gynae: 182, prostate: 41, breast: 56, GIT: 24, head and neck: 39, other: 16, paediatric: 04."

[294] This annexure also accounts for the long waiting lists. The reasons provided are as follows:

> "historical delays due to Covid-19 and the fire at the CMJAH that contributed to the patient waiting list for all categories of patients; the first era of loadshedding affected the functioning of the high-tech radiotherapy equipment; overcrowding of patients from all over the country and across borders; historical inability to attract radiotherapists to public sector; Gauteng oncology infrastructure needed expansion, hence Christ Hani Baragwaneth Hospital and Dr George Mukhari Academic Hospital"

[295] Under the question what the effect of the delayed radiation treatment on the survival chances of cancer patients are, the ultimate response is given in this annexure under the conclusion which rather grimly states that:

> "Based on these individually linked data and for the cancers we looked at we did not find that Cancer Waiting Time targets being met translate into improved one-year survival. Patients may benefit psychologically from limited waits, which encourage timely treatment, but one-year survival is not a useful measure for evaluating trust performance with regards to cancer waiting time targets, which are not currently stratified by stage or treatment type. As such, the current composition of the data means target compliance needs further evaluation before being used for the assessment of clinical outcomes."

[296] This document also answers an important question i.e. "How many cancer patients who were diagnosed as requiring radiotherapy have been removed from the list since January 2021 as they have died or their disease has progressed too far to be treated by radiation? This question was answered as follows:

- The patients' complete treatment and are removed from those awaiting treatment list and new patients are seen and prescribed Radiation Therapy daily. This is a dynamic process where old patients are treated, and new ones enrolled.
- There are also different waiting times for different diagnosis of cancer.
- Between 3000 and 3 700 patients have received Radiotherapy annually between 2021 and 2024 at CMJAH.
- Please note that patients may have died from advanced disease and poor prognosis and not from delay. The majority of patients present with advanced disease where the treatment intent is palliative. Hence we implemented a see and treat approach for palliative cases.

[297] Another question which was posed is: What amount in rands and cents was spent of the R250 million set aside last year specifically to treat cancer patients?

- Charlotte Maxeke Academic Hospital or the Steve Biko Academic Hospital has not spent any allocated funds.

[298] The failure to spend the full R250 million last year (2023), was explained as follows:

- The outsourcing to private facilities needed to be re-advertised

[299] With regard to the question as to how much of the R250 million is available to spend in this fiscal year the answer given is:

The money is not being used as yet because the tender is still being finalised.

[300] Under the question of how many cancer patients have received treatment so far from the R250 million set aside last year and the R261 million set aside this year, this was answered as follows:

- Patients have been treated internally and the above allocation has not been used.

[301] The question what was being done to spend the full budget available to cut the waiting list of cancer patients speedily and significantly, was answered as follows, under the heading CMJAH:

- A tender has been completed to purchase two desperately needed two compact linear accelerators to replace the two obsolete cobalt teletherapy units at CMJAH to increase treatment capacity.
- The two LINAC machines will be included in NTSG demand plan for 2025/2026 financial year.
- PO for brachytherapy was issued, and we are in the process of commissioning.

- Interviews were held for radiotherapists and approximately 10 new radiotherapists are going to be appointed to join the radiotherapist team so the current equipment can be used more efficiently.

- A prostate cancer Lose Dose radiation brachytherapy programme has been started at Chris Hani Baragwaneth Hospital and treats about four patients a month with prostate brachytherapy.

[302] In answer to the same question for SBAH the response was:

- The tender process is currently being finalised.

- The breast and prostate patients will be referred to successful bidder facilities and oncologists.

[303] These responses were signed by Dr S Mankupane, Acting CD: Hospital Services on 13 October 2024 and supported by Mr L A Malotana, HOD: Gauteng Health, dated 2024/10/14, and approved by Ms N Nkomo-Ralehoko, MEC: Gauteng Health, dated 15 October 2024.

[304] As can be seen the above demonstrates that little progress has been made.

[305] No answer was provided when asked how many patients on the backlog list have been removed from the backlog list as a result of death or because their disease had advanced too far to be treated by radiotherapy. It would seem, from this response, that the provincial health respondents have not maintained or updated the backlog list.

[306] It is surprising that the provincial health respondents did not refer to the award of the tender for Category 3 to Siemens, the agreement concluded on 30 April 2024 and the purchase order issued in July 2024. Throughout the answering affidavit in these proceedings, the provincial health respondents referred to the award of this portion of the tender as evidencing the steps that it has taken and that it is implementing the plan.

[307] They also maintain, in the answer, that Siemens has begun performing its duties and that they will make payments to Siemens as and when required. At the very least, therefore, one would have expected the provincial health respondents to respond to this question by saying that approximately RX has been paid to Siemens or will be paid to Siemens in accordance with the contract and the purchase order for the planning services Siemens is already allegedly

providing to GDoH. The provincial health respondents failed to mention this at all in responding to questions in the provincial legislature.

[308] No explanation is provided as to how GDoH is managing to treat any of the backlog list patients as well as new patients "*internally*", given the dire shortage of staff and equipment which, on the own version, gave rise to the backlog in the first place.

[309] However, and notably, there is no mention of an outsourcing arrangement with private facilities, for which the initial R250 million was specifically allocated and ring-fenced. In contrast, their response to the same question in respect of SBAH is that the tender is being finalised and that the referral of patients to private facilities is imminent.

[310] From these answers, it is said that it would appear that, as at 15 October 2024, the tender for outsourcing services was still underway. Of R500 million that has been allocated for the treatment of backlog list patients, none had been allocated or spent for providing such treatment to patients. There have been no public announcements as to the status of the tender and, as detailed in the Alliance's further supplementary affidavit, the provincial health respondents refused to engage with it and provide further information as to the status of the tender.

[311] In the initial answering affidavit, the GDoH maintained that the Alliance's allegation that it has failed to utilise the funds so allocated: "*are not based on facts and are not supported by evidence*" (par 81).

[312] Given that the deponent to the answering affidavit, Mr Malotana, in his capacity as the Head of Department: Gauteng Health, supported the response (as is evident from the signature page at the end), it is alleged that it beggars belief that the provincial health respondents can allege that there is no evidence to support the allegation that they failed to utilise the funds.

[313] Under the rubric "*Media coverage about outsourcing radiation oncology treatment*", further new allegations surfaced. In response to the embarrassing disclosures made in the provincial legislature, a number of newspaper reports

have emerged regarding GDoH allegedly “pumping millions” into cancer treatment in Gauteng.

[314] On 18 October 2024, the deponent came across an article in the Pretoria “REKORD”, titled “*Department pumps millions into radiotherapy*” (“the article”). The article highlights the efforts made by GDoH in outsourcing radiation oncology services to the private sector “*to help with the backlog*”. A copy of this article is annexed to the supplementary affidavit, supposedly annexure “LT2”, (again unmarked).

[315] .It reports that:

> “Oncology patients will now have access to private resources as part of the investment to help with the backlog.” It continues to state that the GDoH says that “prostate and breast cancer patients will be assessed at Steve Biko Academic Hospital before being referred to private facilities as part of its R260 million plus investment into oncology services. This investment is aimed specifically towards patients who require radiotherapy. In a statement the Department said it has outsourced radiotherapy services to private healthcare providers for two years.
>
> According to the GDoH, the main aim is to assist the most urgent cases, such as prostate cancer patients, who can wait up to 300 days for radiotherapy, and breast cancer patients, who can wait up to 120 days.”

[316] The same document, reports that “the service level agreement has been finalised and treatments are expected to commence soon”.

[317] It also reports that:

> “as part of this intervention, the flow of patients between public and private healthcare facilities has been carefully planned with the system designed to ensure that patients are seamlessly managed”.

[318] It continues the report with:

> “Prostate and breast cancer patients will be assessed at Charlotte Maxeke Johannesburg Hospital and Steve Biko Academic Hospital before being referred to private facilities for radiotherapy.”
>
> The Department said this process will be subject to quality checks.
>
> This will help to reduce waiting times to improve the overall quality checks for oncology patients.
>
> After the completion of the treatment, the patients will be referred back to the public health system.”

The Provincial Health Department is also expanding its radiotherapy infrastructure. Construction of additional radiotherapy centres is currently under way at Chris Hani Baragwaneth and Dr George Mukhari Academic Hospitals.

"New linear accelerator machines have also been acquired, existing equipment contracts extended and radiotherapist recruited."

[319] The same extract reports as follows:

"'The backlog in cancer treatment, especially radiotherapy, has been exacerbated by an influx of patients from outside Gauteng resulting in long waiting times. Currently, over 2600 patients are waiting for radiotherapy, mostly being prostate and breast cancer patients', the Department said."

[320] This article, which seems to have been published in one of the Caxton newspapers, calls on anyone with further information on the story to send an email to bennett@record.co.za or phone same at 083 625 4114.

[321] The deponent states that she has since become aware that the two SLA's have been signed with the private healthcare facilities. This appears to contradict the provincial health respondents' case in answer to the application, where they maintain that a tender process is required for outsourcing and is being run. It also appeared to contradict the answers given by GDoH, which again reiterated the tender process.

[322] As set out in the Alliance's supplementary affidavit, the provincial health respondents refused to provide the Alliance with any meaningful response as to the status of the tender. It, therefore, came as a surprise to the Alliance that the SLA's have been concluded.

[323] The deponent further points out that these SLA's relate only to SBAH and not to CMJAH. From her enquiries with stakeholders in the sector, no SLA's have been similarly concluded to provide radiation oncology services to backlog list cancer patients at CMJAH. Although the conclusion of the SLA's is a welcome development, Ms Turner states that the fact that the backlog list patients at CMJAH are not catered for is a concern because the bulk of backlog cancer patients are awaiting treatment at CMJAH.

[324] It is further asserted that the provincial health respondents' own version, at paragraph 21 of the answering affidavit, also confirms this. The latter states

that, as of 10 June 2024, SBAH "*only had 455 patients on the waiting list*", while CMJAH "*had 2562 patients on the waiting list*".

[325] On 30 October 2024, a further article on the outsourcing of radiation oncology services, titled "*Gauteng Health Department races to spend R511 million on Outsourced Cancer Treatment*", was published in an online publication called Gauteng News, which appears to be a government sponsored news agency. A copy of same is annexed as annexure "LT3" (again unmarked). In this article, the GDoH's spokesperson, Motalalale Modiba, is quoted as saying: "*The Department has completed the process of outsourcing radiotherapy services to private health providers*".

325.1 This annexure seems to have been extracted from the following internet link:"https://Gauteng.net/news/Gauteng-health-department-cancer-treatment/#-text=in a major push over the next two years", reports under the heading "Gauteng Health Department races to spend R511 million on outsourced cancer treatment", above a photograph of the name board of the Charlotte Maxeke Johannesburg Academic Hospital (and apparently published in the *Sowetan Live)* the following:

"Addressing Backlogs and Improving Access to Cancer Care in Gauteng Through Private Partnerships"

325.2 It reports:

"In a major push to address the extensive cancer treatment backlog, the Gauteng Health Department is moving swiftly to outsource radiotherapy services, directing R260 million to private healthcare providers over the next two years. This allocation comes as part of the Gauteng Department of Health's urgent strategy to spend a total of R511 million aimed at alleviating cancer treatment delays for thousands of patients.

325.3 Then under the heading, "2024 Global Threat Report" , which heading seems to be incomplete,(and a further sub-logo styled "CrowdStrike", with a similar reference as the earlier https address,) the following is reported:

"Tackling backlogs in cancer treatment.

> Gauteng Health spokesperson, Motalalale Modiba, highlighted that the outsourcing initiatives specifically target critical cancer patients. Currently, prostate cancer patients pay a daunting average wait of 300 days, while breast cancer patients wait around 120 days. The delay has been of significant concern with over 2652 patients waiting for essential radiation therapy across the province's hospitals, including Charlotte Maxeke Johannesburg Academic Hospital and Steve Biko Academic Hospital. "The

Department has completed the process of outsourcing radiotherapy services to private healthcare providers". Modiba said, noting that this arrangement is designed to ensure a seamless transfer and management of patients between public and private facilities. The final service level agreement is nearing completion with treatments expected to begin shortly."

325.4 A continuation of the same report under the rubric "Overcoming Barriers to Effective Cancer Care", states that:

> "The outsourcing move was prompted by a legislative inquiry revealing that Gauteng Health failed to utilize R511 million earmarked for urgent cancer cases since April last year. Health and Wellness MEC Nomantu Nkomo-Ralehoko recently conceded this fact during a response to the Democratic Alliance in the Gauteng legislature, underscoring the department's challenges in managing budget allocations for critical care.
>
> To address these issues, the department has not only sought private partnerships but has also upgraded essential medical equipment and bolstered human resources within oncology. The department's oncology centers are actively recruiting radiotherapists, aiming to fill 29 vacancies at Charlotte Maxeke Hospital, with several candidates having already been interviewed."

325.5 Under the rubric "Improving Cancer Treatment Accessibility in Gauteng", the following is said:

> "The Gauteng Department of Health's commitment to reducing cancer treatment waiting times is crucial for improving patient outcomes. Modiba explained that the system for patient flow has been carefully structured to avoid unnecessary delays, ensuring effective management across public and private facilities.
>
> In the past, Gauteng's health system has faced significant challenges, from underspending to issues in patient safety and attacks on ambulance crews. This proactive step toward outsourcing cancer treatment demonstrates a shift towards addressing these long-standing problems with more urgency"

325.6 The take home message from the above is clear: the outsourcing is not taking place yet.

[326] Ms Turner's comment on this is that the GDoH's spokesperson's statement appears to be inconsistent in the responses given by GDoH addressed above. It is further notable that no reference is made to the conclusion of the tender process or whether the process was cancelled or not. It also appears to be misleading since the process is nowhere near completion – no SLA's have been concluded with CMJAH, where the majority of the backlog patients are awaiting treatment.

[327] GDoH further states in the article that it is actively recruiting radiotherapists aiming to fill 29 vacancies at CMJAH *"with several candidates having already*

been interviewed'. This statement is also contrary to information made public by GDoH about the freezing of posts. The Alliance has dealt with same in its supplementary affidavit, filed in Court on 18 October 2024.

[328] Under the rubric "**GDoH presentation to Gauteng Legislature**", in the supplementary affidavit the following assertions are made:

328.1 On 14 November 2024, the provincial health respondents appeared before the Gauteng Legislature for purposes of providing an update on oncology services in the province. Cancer stakeholders were invited to the meeting and the deponent attended on behalf of the Alliance, and a copy of the presentation that was delivered at the meeting was annexed as annexure "LT4" (again unmarked).

328.2 GDoH reported that it signed SLA's with private sector partners and that the duration of the agreement is two years. The budget of this agreement is R260 million. No indication was given as to whether these SLA's were the outcome of the tender process that the provincial health respondents have relied upon so heavily in the answering affidavit. However, it was confirmed during a meeting that the SLA's have been signed only in relation to treating backlog cancer patients at SBAH and not those awaiting radiation oncology treatment at CMJAH. The Chief Executive Officer of CMJAH, Ms Gladys Bogoshi, who was also present at the meeting, stated that she had received the service level agreements from GDoH for her signature but she had yet to sign the agreement. She further stated that, even if she were to sign the agreement soon, it would take approximately a year to work out the logistics to refer patients to the private sector. The deponent was present at the meeting and when these statements were made.

328.3 At slides 6 and 7 of the presentation, GDoH provided the flowchart on the patient flow design. This flowchart was meant to indicate the path walked by a patient in an outsourcing arrangement with the private sector. However, it is notable that the presentation fails to stipulate exactly which patients will be referred to outsource radiation oncology

treatment. In the flowchart for CMJAH, it is indicated that "*CMJAH consults oncologists*" with an added note "*see's patients for the first [time] and assess patient and refer to private doctor*".

328.4 It appears from a reading of the flowcharts that CMJAH intends to outsource services for new patients who are consulting with an oncologist "*for the first [time]*". This means that cancer patients who are on the backlog list will not be referred for outsourced radiation oncology treatment (or so the deponent concludes).

[329] The deponent states that the use of the allocated funds to treat new patients in the private sector would be going against the reasons for the allocations of funding. These funds were allocated by provincial treasury for the *urgent* treatment of cancer patients on the backlog list. Without sufficient machinery, staff and a freeze on filling posts, it is hard to imagine how the provincial health respondents plan to provide radiation oncology treatment to the backlog cancer patients at CMJAH if these patients are excluded from the outsourcing arrangement.

[330] When the Alliance motivated to Gauteng Treasury for the ring-fencing of funds, the Alliance did so specifically for the radiation oncology treatment of patients who have been awaiting treatment for 18 months to 3 years – patients on the backlog list. In response to the Alliance's plea, Gauteng Treasury allocated R785 million for GDoH to *urgently* address the backlog. The bulk of the backlog of cancer patients is said to be at CMJAH. It is crucial that any outsourcing efforts, while welcome at SBAH, are also replicated at CMJAH to treat patients on the backlog list.

[331] In conclusion, it has been stated that the above reports show major inconsistencies and even contradictions in the versions produced by GDoH and those provided to the Court and to the Legislative oversight committees. It is also clear that the provincial health respondents continue to withhold relevant information in their possession from the Court.

[332] The provincial health respondents are, therefore, called upon to furnish relevant information to the Court on affidavit:

332.1 In relation to SBAH: Whether an outsourcing arrangement has been concluded in relation to SBAH?

332.1.1 if so, whether the outsourcing arrangement is for cancer patients on the backlog list;

332.1.2 to furnish relevant supporting documents, including (if necessary an appropriately redacted version of the SLA concluded;

332.2 In relation to CMJAH:

332.2.1 if and when an outsourcing arrangement for CMJAH will be concluded;

332.2.2 if so, whether the outsourcing arrangement is for cancer patients on the backlog list; and

332.2.3 to furnish relevant documents

332.3 In relation to the Category 3 planning services contract awarded to Siemens:

332.3.1 How much of the R250 million has already been spent on the Category 3 planning services?

332.3.2 How much of this was for planning for cancer patients on the backlog list and how much was spent on new cancer patients?

[333] It is submitted that, in order for the Court to make a just and equitable order, the Alliance has placed the above further facts before the Court, even though these facts are peculiarly within the knowledge of the provincial health respondents and one would have expected them to disclose same to the Court in compliance with its section 195 obligations, particularly those in relation to openness, transparency and accountability. The provincial health respondents have failed to do so, in keeping with the tactic discernible throughout the litigation of withholding relevant facts and documents from the Alliance and the Court.

[334] The Alliance, therefore, submits that the relevant information must be furnished by the provincial health respondents and, if necessary, the Court ought to compel them to do so.

[335] I was quite surprised to receive this supplementary affidavit by email through the Caselines system the evening before the matter was to be argued and raised this issue during the hearing the next day. I was of the view that the provincial health respondents would be entitled to answer this affidavit and pursuant hereto an agreement was reached that the day would be spent on the existing papers filed and that supplementary papers would be filed by the provincial health respondents by 28 November 2024 and the Alliance would reply thereto by 6 December 2024. This arrangement was made subject to their right to object and I did not allow the content of this affidavit to be debated at the hearing.

[336] Arrangements were also made for the filing of supplementary heads of argument. The aforesaid was the best practical arrangement that could be entered into.

[337] The overall effect of the Alliance's supplementary affidavit read in isolation is in many ways are such, that it ostensibly undermines the provincial health respondents defences. It certainly calls on them to explain the questions that arise. Some of these questions were already in my mind when I read Mr Malotana's original answering affidavit.

[338] As per arrangement made during the court proceedings on 21 November 2024, a further affidavit, dealing with the new matter placed before the Court, was filed by the First, Second, Seventh and Eighth Respondents. I should mention that having made the aforesaid arrangements, they were all subject to the fundamental objection that no further affidavits should be permitted and I would have to make some ruling thereon after considering all the material placed in front of me.

The Provincial Health Respondent's Answering Affidavit.

[339] The Provincial Health Respondents' further supplementary affidavit dealing with the supplementary affidavit of the Alliance of Ms Turner, was deposed to by Mr Malotana, who deposed to his affidavit in his capacity as the Head of Department in the Gauteng Department of Health, and also by virtue of his position as accounting officer of the Department. Due to these aforesaid positions, he has the knowledge to speak about the matters arising in the litigation, as well as the supplementary affidavit of 20 November 2024, and is also duly authorised to speak thereto. He was of course also the spokesperson in the original answering affidavit and knows the background intimately

[340] The supplementary answering deposed to by Mr Malotana is duly supported by Dr Majake-Mogoba the CEO of the SBAH and Dr Bogoshi the CEO of CMJAH. The latter two affidavits are drawn in such a way that it confirms the original answering affidavit filed by Mr Malotana on behalf of the provincial health respondents as well. In so doing some of the alleged hearsay allegations made by the GDoH are also addressed.

[341] The most important aspect that transpires from this affidavit is that the budget was actually not spent and effectively, if one has regard to the report to the Gauteng Legislature, a lot remains to be done and little progress seems to have been made. The latter was already evident after the original answering affidavit was filed. Although the position seems to have improved at the SBAH, the CMJAH still suffers from a major backlog and this has to be addressed. In addition the R250 million ring-fenced funds have been forfeited to treasury being unspent.

[342] Mr Malotana makes it clear that the affidavit of 20 November 2024 is the third supplementary affidavit that the applicant has filed without leave of the Court and without any application to the Court for such leave. He states that the respondents (presumably those he speaks for) object to the filing of the supplementary affidavits without an application for leave to do so. He requests that the supplementary affidavits should be disallowed. He regards them as highly prejudicial to the respondents who could not respond to them, especially the first two supplementary affidavits, as no leave of the Court was sought and granted. The filing of the latter affidavits have been condoned during the

hearing in court and if any of those affidavits already condoned required some response he could have tendered same and respond in the present answering affidavit. The GDoH could even have filed answers to same on a conditional basis. It should have been clear to Mr Malotana and his legal team that given that the case involves what he regards as a complex tender (given that the risk of loss of ring-fenced funds existed and a readvertisement of Categories 1 and 2 of the original tender was required, that follow-up affidavit(s) would be inevitable to explain the ultimate outcomes. Once it knew that the ring-fenced funds were lost it should have told the Court about it of his own accord and his legal team should have advised accordingly..

[343] In as much as the objection rests on the notion that Ms Turner's affidavit raises new matters not foreshadowed in the founding affidavit, it is simply incorrect. Every issue traversed in the founding affidavit such as the backlog list and including the ring-fenced funds, the tenders and the failure to use an expedited process such as deviation under Treasury Regulation 16A6.4 or to act in an urgent fashion given the crises, are relevant and will remain so till all relevant information about same, is clarified. I accept that the Alliance cannot now commence a new cause of action in these proceedings and I will not permit same. I am however not so sure that that paragraph 28 of Ms Turner's affidavit has that in mind. All the components raised in this paragraph still harps on the original issues. The issue of further documentation is uncertain and will depend on what transpires. The Alliance can, however, not revisit the initial Rule 35 (12) notice in as much as it did not earlier exact full compliance therewith. Its approach was to seek that the Court draw inferences from the alleged deficiencies.

[344] He also alleges that the third supplementary affidavit of 20 November 2024 is prejudicial to the provincial health respondents as they could not respond to it before the matter was argued, as it was filed the night before the hearing of 21 November 2024. This is utter nonsense.. The GDoH was protected by the fact that on the hearing date I did not permit debate about the content of Ms Turner's supplementary affidavit. The only attention it received was of a procedural nature i.e. when and how it would be dealt with. I most certainly did

not admit the affidavit at the time leaving it open for the GDoH to file proper reasons on oath as to why it should not be admitted.

[345] Its objection to its admission are to say the least given that it is a state entity that should maintain the highest standard of compliance with the Constitution, facile and unpersuasive. To complain about the figure referred to in Ms Turner's affidavit as if it is unknown when one works with the MTEF is ridiculous. One does not have to be a genius to work out that the Alliance and Ms Turner added together the ringfenced R250 million and the R261 million to get to R511 million which in their minds are on the table for use. They were not yet told that the ringfenced funds were lost and given the award made to Siemens in the 2023/2024 year in respect of the Category 3 year and not knowing what happened thereafter the mistake made by the Alliance and Ms Turner should have been obvious to Mr Malotana and his legal team. In any event the media reports annexed to Ms Turner's supplementary affidavit planted the notion of such an amount in her mind if the Alliance did not work it out in the way I suspect. A Gauteng Province spokesperson seemed to think there is such an amount.

[346] Mr Malotana submits that the Alliance's interdict, cannot succeed because there is no R250 million which has been ring-fenced for planning services to be performed by Siemens. The R250 million that was ring-fenced was for all three categories for the fiscal year 2023/2024 (see paragraph 27 of the answering affidavit). This money was not spent because, at the time it was made available, there was no commitment in terms of the purchase order, nor was the award made at this stage. When Siemens was appointed, the purchase order was generated but Siemens could only invoice once it had reached certain milestones on planning services agreed to be in batches of 100 pages at a time. Siemens has not reached the first 100 and it has not invoiced.

[347] The entire R250 million was unspent and thus returned to the Provincial Treasury. There is no R250 million that is in the possession of the Department at this stage. The Department is required at the end of every fiscal year to return to Provincial Treasury all unspent funds which the Department did at the end of the 2023/2024 fiscal year. Similarly, the Department will be required to return

any unspent funds, if any, at the end of the fiscal year 2024/2025. Hence, it was stated the interdict sought is moot and Part B has also been rendered academic.

[348] In the event of Ms Turner's affidavit being allowed, the deponent responds to the allegations *ad seriatim*.

[349] Various defences are raised with regard to this belated supplementary affidavit. It is alleged that the allegations made by Ms Turner are, by and large, hearsay and not confirmed by confirmatory affidavits and are of little or no evidential value and certain of the allegations (no specifics are indicated) are based on speculation and rumours. I disagree. The components that might be hearsay stems from disclosed sources and there remains an element of residual urgency in this matter.

[350] To the extent that the deponent disputes that the Alliance was duty bound to bring to the Court's attention what it regards as "further relevant facts" by filing a supplementary affidavit without leave of the Court I have already dealt therewith. It is further asserted that there are no relevant facts. Facts are relevant if they substantially support the relief sought in the notice of motion. This is incorrect. They are also relevant when such facts demonstrates that the relief sought might be moot..

[351] It is stated that the facts in the supplementary affidavit do not support the relief for an interim interdict or declaratory order sought in the notice of motion. Instead, they seek to support a new cause of action based on compelling the Respondents to produce documents to the Court. I have already dealt with this.

[352] The deponent is of the view that he has answered the case they were called to answer in the answering affidavit and they dealt with the facts as they stood in July 2024 in its answering affidavit and there was no duty on the GDoH to bring to the attention of the Court events that occurred after its answering affidavit was filed in July 2024 because those events have nothing to do with the relief sought by the Alliance in its notice of motion. I have already dealt with this misplaced notion as well. For the aforesaid reasons, the provincial health

respondents deny that they have not taken the Court fully into their confidence as alleged by the Alliance.

[353] It is further submitted that the submissions made in paragraph 5.1 of the supplementary affidavit contradict the founding affidavit in respect of the alleged allocated funds for radiation oncology services. In the founding affidavit, the Alliance has alleged that R784 million has been allocated by the Provincial Treasury for radiation oncology treatment to cancer patients on the backlog list. According to the Alliance, of this amount the Department allocated R250 million to planning services, only to be paid to Siemens. I should point out that this is exactly what the provincial health respondents told the Court in their answering affidavits. I have already expressed my views about the Alliance's knowledge of the MTEF budget period.

[354] It is then argued that it is the alleged spending of the R250 million that the Alliance is challenging, in both Parts A and B, and not the remainder of the R534 million. This is, of course, correct and is based on the original notice of motion of the Alliance, which has never been substituted by any other notice of motion.

[355] It is then contended that the Alliance changed its version and is now alleging a new figure of R511 million as the amount allocated to the cancer patients on the "backlog" list without providing any source of that information. I have dealt with this already.

[356] Mr Malorana states that he made it abundantly clear in the answering affidavit that none of the allocated funds have been used because the Department was still busy with the tender process to outsource these services. Whilst finalising the tender process and the award to successful bidders, the Department continues to treat patients on the waiting list internally according to the need as determined by the clinicians on site every day. Such decisions as pertaining to patients' treatment and when same is to be administered and how is entirely the decision of the clinicians who treat patients and nobody else. It is, therefore, not up to the Alliance to determine how such treatment is to be administered, when and by whom. I do not agree that the non-use of the funds was made

abundantly clear. How was the Alliance to know that Siemens might not reach a target that permitted it to invoice?

[357] Accordingly, the allegations in this paragraph specifically deal with clear allegations made by Ms Turner and, more specifically, apart from the quantum involved, with the assertions that GDoH appears to have abandoned the tender processes for Categories 1 and 2 radiation and oncology professional services. It is clear that Ms Turner's views re the tender process having been abandoned at the point in time she deposes to her in affidavit stems from sources of information later referred to in her affidavit. I agree that paragraph 73 of the answering affidavit discloses what Mr Malotana is still saying, but he ignores the time lapse since his affidavit is filed and the fact that the GDoH did abandon the tender process and as now disclosed in his affidavit he had to follow a deviation under Treasury Regulation 16A6.4 as is evident from an analysis of the annexures attached to his answering affidavit.

[358] One has to work through Annexure AAA1 to find on page 30 -32 (of 34) (Caselines 2-890-892) the motivation placed before the BEC for the use of Treasury Regulation 16A6.4 and the actual motivation for the deviation contained therein to see that it contains little new information that was not already available at the time the Alliance thought the GDoH would follow the process as one should in urgent cases. One can but wonder why Mr Manning's suggestions as to the process used in the Covid -19 crisis was not utilised from the outset or any other *specie* of deviation in particular given the fact that the R250 million was ring-fenced.

[359] Mr Malotana's denials in the body of his affidavit seems to include a denial of the assertion that in response to the litigation and public pressure GDoH appears to have opted to outsource radiation oncology services at SBAH and not CMJAH, even though over two-thirds of the cancer patients on the backlog list are at CMJAH. It is also a denial of Ms Turner's assertion that the approach has changed significantly and it shows that GDoH has wasted almost a year and a half by persisting with the tender process that has been mired in delays, amongst other issues, and has ultimately not resulted in backlog cancer patients receiving lifesaving radiation oncology treatment, despite the fact that

the R250 million were allocated for that purpose specifically. He later makes it clear that the present year's R261 million has been retained (thanks to the deviation) and that the services procured includes outsourcing at CMJAH as well.

[360] Crucially he does not tell us when the SLA's for CMJAH will be finalised. The latter question is most pertinent given the assertion that it will take Ms Bogoshi a year to work out the logistics to refer patients to the private sector. I know he denies that Ms Bogoshi ever said this. But he does not tell the court when the SLA's for CMJAH will be signed nor does he address the details of the logistics. Even worse Ms Bogoshi only makes a confirmatory affidavit but never addresses Ms Turner's supplementary affidavit on a seriatim basis. Where the statement about the logistics is alleged to have been made openly in the Gauteng Legislature one would have expected her to deal with it specifically and to want to clear her name and to give the Court some comfort about the logistics. Even more importantly there is nobody who informs the Court when a backlog list patient will receive treatment other than through the waiting list. This drives one to the conclusion that all the Alliance's efforts were in vain and will remain so until the GDoH updates the backlog list and systematically call the patients in for treatment, each according to his/her clinical condition.

[361] It also amounts to a denial of the fact that the Alliance proposed that outsourcing be pursued as viable treatment options from as far back as February 2022 and that the ring-fenced R250 million allocation from provincial Treasury was specifically provided for the outsourcing of treatment for patients on the backlog list. It also amounts to a denial of the fact that GDoH provided one version to the Court and an entirely different version in its public communications.

[362] The deponent to this affidavit of the GDoH further states that parts of paragraph 5.2 of the supplementary affidavit are based on speculation and rumours and are not factual. He contends that the correct facts are that, as stated in the answering affidavit (at paragraph 73) that Categories 1 and 2 were re-advertised on 13 July 2024. Category 3 which had been awarded to Siemens in February 2024, starting from May 2024, for a period of 12 months was also simultaneously advertised on 13 July 2024 for the appointment of service

providers who will take over the planning services from Siemens in May 2025, whilst the Siemens contract expired in April 2025. It is asserted that this was the factual position when the answering affidavit was filed in July 2024. The request for proposals appears as Annexure “A” (at Caselines pp 05-9 to 05-97) and as can be seen from this, the closing date for submission of bids was 2 August 2024, which was after the answering affidavit was already commissioned and filed.

[363] Mr Malotana states that the answering affidavit could not have dealt with events subsequent to when it was filed and in any event, the events that happened after the answering affidavit was filed had no relevance to the relief sought by the Alliance in Part A and there was no duty on the provincial health respondents to disclose same to the Court by way of further affidavits, which are not permitted by the rules of Court. I have already expressed my views on this topic above. A State Organ will from time to time find itself in this position as is demonstrated by the unique facts of the case.

[364] He also states that, as he has already said in the answering affidavit, this was a complex tender which involved the procurement of delicate services and equipment to be used on human beings and every effort is to be made that the Department is as accurate as possible in everything it does. Indeed, after the closing date of 2 August 2024, the submitted bids were evaluated by the Bid Evaluation Committee (“BEC”) and adjudicated by the Bid Adjudication Committee (“BAC”) and then, for convenience, the BEC report is annexed as “AAA1” and also the probity report as “AAA2”. The BAC resolution is attached as “AAA3”. It stated that, contrary to the assertion by the Alliance, that the tender was abandoned. It was not abandoned. It was cancelled for the reasons stated in the BEC report, which were accepted by the BAC and approved by the deponent. The cancellation of this tender was due to non-compliance by those who submitted bids, which meant that the GDoH should recommence the tender process.

[365] The deponent states that he took into account that the tender had previously been cancelled for various reasons, which resulted in the Department forfeiting the R250 million which was allocated for the specific project, when the funds

were returned to Provincial Treasury. Because it could not risk forfeiting the R261 million allocated for the 2024/2025 fiscal year, the tender was re-advertised. This would mean that, by end of 2024/2025 fiscal year, the tender would still not have been awarded, resulting in the return of R261 million to the Provincial Treasury. Thus, he decided that the same bidders who submitted the bids be scored on functionality and appoint those who met the functionality requirements through a process of deviation in terms of Treasury Regulation 16A6.4.

[366] He also attached letters of appointment and the contract form to the successful bidders for Categories 1 and 2, marked “AAA4(a)” to “AAA4(f)” in this regard. He further states that appointments have been made in respect of all three categories as evidenced by the appointment letters. The appointed service providers are appointed to provide the services to both SBAH and CMJAH for a period of 24 months. Hence, the allegations referred to are denied.

[367] In response to the further submissions made by Ms Turner in paragraph 5.3 of the supplementary affidavit it is stated that the Alliance wanted the Department to outsource these services without following the prescripts of procurement in a public administration. Deviation is permitted under Treasury Regulation 16A6.4. I read this to mean that he alleges that the Alliance’s original intention was that procurement prescripts be abandoned. This is not so. As the tender process did not meet the Alliance’s expectation for urgent results and given Ms Meyer’s exposure to Mr Manning’s suggestions as to how urgent procurement can be done other than by a tender process, the Alliance naturally defaulted to deviation over time. This deponent makes it clear that the GdoH has never, at any stage, refused to outsource services, hence it embarked upon the tender process, which resulted in the appointment of the current service providers.

[368] This deponent makes it clear that GDoH will continue to provide these services internally as it does currently and that the outsourcing will complement the Department’s internal mechanisms of providing these services. Mr Malotana carefully avoids the pitfalls of why Treasury Regulation 16A6.4 was not motivated at the time following the presentations by Mr Manning. He knows he

could have saved the ring-fenced R250 million by permitting a deviation along the lines suggested by Mr Manning.

[369] In response to the allegation that the Department has provided different versions in different platforms, he denies the allegations by the Alliance, which he terms are new facts, irrelevant to the determination of Part A of the application, which he maintains became moot in every respect and legally incompetent. The freeze of the ring-fenced funds may have become moot but it does not necessarily render all the relief sought moot. Or the fact that the provincial health respondents' delays may well have been unconstitutional.

[370] In response to paragraph 8 of Ms Turner's supplementary affidavit he accepts that annexure "LT1" is the written response from the Department, which I have already referred to.

[371] As far as the waiting list is concerned, he states as follows, in response to paragraphs 9.1 to 9.4 of Ms Turner's supplementary affidavit, that the Department maintains a waiting list which is updated daily on site as new patients come onto the waiting list and others falling out of the waiting list for various reasons, such as treatment completed, death or radiation treatment no longer necessary. He does not elaborate as to how the Department would be cognized of such death or any other reason for a patient being removed from the waiting list, in instances where patients do not visit the hospital. This is the obvious gap in his explanation and which requires more attention. In any event if it is so updated the relief sought should not be onerous at all.

[372] The composition of the waiting list when the answering affidavit was signed is fundamentally different to the waiting list as it stands today for the reasons mentioned.

[373] He states that the Department does not share the contents of the waiting list to third parties, let alone the Alliance. This is based, for obvious reasons, on the doctor-patient confidentiality and POPIA. I have already analysed POPIA above and am satisfied that section 26 as read with 27 and 32 will not be a barrier to the relief sought. This is for statistical purposes to satisfy the Alliance and its constituency that progress is being made and if granted will be authorised by

court order. POPIA permits this kind of processing in sections 32 (1)(a) and 32(4). It is in any event in the interest of the data subjects

[374] He confirms that the written responses by the GDoH in “LT1” are accurate and correct and that the Alliance has conveniently failed to reference the responses provided to questions posed in which he says answers the very questions which the Alliance alleges were not answered.

[375] As far as the allegations in paragraph 9.5 are concerned, he maintains that the answer is correct and consistent with what was stated in the answering affidavit. The R250 million was unspent and returned to Provincial Treasury as it was earmarked solely for the 2023/2024 fiscal year. It is thus not in dispute that this budget is no longer available but was not utilised during the relevant year for purposes of outsourcing for patients on the backlog list. Clearly the GDoH is working on its dynamic waiting list but I am not persuaded that the dynamic waiting list and backlog list was at any point in time the same. There is clearly a need to clarify this if one wishes to address the forgotten patients on the Alliance backlog list and establish whether these patients are actually able to obtain oncological radiation services timeously or not and if not what progress if any has been made.

[376] He states that it is unfortunate that the Alliance wanted the GDoH to answer the question posed by the legislature the way the Alliance would have preferred. According to this deponent, this is entirely inappropriate. The Department responded to the question truthfully and in an appropriate manner. There was no need for the Department to mention the tender to Siemens which was already a matter of public record and, in Part B of the application, the Alliance is seeking to review the decision to make the award. He states that, in Part A, it seeks to interdict the payment of R250 million to Siemens. According to this deponent, the Siemens contract started in May 2024 and it is ending in April 2025..

[377] With effect from May 2025, the new service provider, ONCAI Solutions (Pty) Limited will be providing the services in Category 3 for 24 months to the Department in respect of SBAH and CMJAH.

[378] It is convenient to mention here that Rule 53 has its own provisions permitting the Alliance to amend its notice of motion once the GDoH has provided the record of decision.

[379] Ms Turner raised the question, in her supplementary affidavit, which I regard as quite pertinent, i.e. as to how many cancer patients have received treatment so far from the R250 million set aside the previous year and the R260 million set aside in the 2024/2025 fiscal year. To this, the provincial health respondents replied that patients had been treated internally and that the above allocation has not been used. She complains that no explanation is provided as to how GDoH is managing to treat any of the backlog list patients as well as new patients "internally", given the dire shortages of staff and equipment which, on the provincial health respondents' own version, gave rise to the backlog in the first place.

[380] To this, the provincial health respondents maintain that they are consistent in what they have said in their answering affidavit, in that no allocated funds have been spent (in respect of the previous fiscal year). The R261 million was allocated for the 2024/2025 fiscal year and has not yet been spent because the award of all three categories of the tenders was only made in October 2024, as is apparent from annexure "AAA4" to the affidavit.

[381] In response to the criticism, GDoH stated that nothing stated in its answering affidavit is inaccurate and nor does Ms Turner indicate what exactly the GDoH allegedly presented is inaccurate. It maintains that it has been treating the cancer patients on the waiting list internally and continues to do so. It also maintains that the outsourcing of these services is intended to complement what it is doing internally with the treatment of cancer patients on the waiting list.

[382] In respect of paragraph 9.9 of Ms Turner's affidavit, the answer is simply that the tender process that was underway has now been finalised and the service providers have been appointed, as per annexure "AAA4", as stated before. The latter is the response to what has been done to spend the full budget available to cut the waiting list of cancer patients speedily and significantly.

[383] The use by Ms Turner of the words “waiting list”, as opposed to the consistent use earlier in the Alliance’s papers of “backlog list”, is not helpful. As matters stand, it is clear that GDoH is not working from the same backlog list as is the Alliance and it has studiously steered away from the use of the phrase “backlog list”. Ms Turner’s use of the words “waiting list” is not helpful and, given the difference between the two concepts, as understood by the relevant parties, I do not draw a negative inference against GDoH on this part.

[384] To the extent that Ms Turner criticises the failure to mention the outsourcing arrangement to private facilities, she must have known, by the time she deposed to her supplementary affidavit, that the answering affidavit, having indicated the inchoate tender processes, suggests that this was unspent and, if there was any doubt about that, that is made abundantly clear in the supplementary affidavit in answer to Ms Turner’s affidavit, given that the tender process has now only been finalised and the service providers have been appointed, as indicated in annexure “AAA4”. What is equally clear is that it took the Department the period from April 2023 till October 2024 before anybody had been appointed. I disregard the initial appointment of Siemens given its insignificant role. There is no real explanation before me as to how GDoH discharged its mandate to outsource the relevant services on an urgent basis. The tender documents it should have produced under Rule 35(12) included those part pertaining to the failed components it did not produce and its failure to use Treasury Regulation 16A6.4 earlier to protect the ring-fenced funds are nowhere to be found. Whether the GDoH made any impact on the backlog list as it existed in 2022 when it was compiled or 2023 when it was updated remains an open question.

[385] As indicated the backlog list, I refer to is as same was kept by the Alliance, as opposed to the “dynamic waiting list” kept by GDoH. The two concepts are of a different nature and obviously cannot speak to each other without further investigation. This is most unsatisfactory for purposes to coming to a decision in this matter and until such time as the backlog list and all the patients that have been treated or passed away have been reconciled and a list of untreated patients is compiled which has as its basis the 2022 backlog list, these statistics

will merely be products of the GDoH's dynamic list which may satisfy a bureaucrat but never the Alliance or this Court. What is desperately needed is a list which goes to the root and exposes who has gone untreated be it by happenstance or neglect. The extent of the real crises has not been determined.

[386] Although Ms Turner alleges, in paragraph 10 of her supplementary affidavit, that, as at 15 October 2024, the tender for outsourcing services was still under way and, of the R500 million that has been allocated for the treatment on backlog list patients, none has been allocated or spent on providing such treatment to patients, this does not follow. Neither party can categorically make such a statement. I assume the R500 million refer to should be R511 million. What can be said is that R250 million has not been spent. Whether the balance will ever be spent on a backlog list patient only time will tell.

[387] Ms Turner relies on the fact that no public announcement has been made as to the status of the tender and, as detailed in the Alliance's further supplementary affidavit and the provincial health respondents refuse to engage with the Alliance in providing further information as to the status of the tender.

[388] Rather than dealing with this complication and trying to cast light on the matter, other than clarifying that GDoH has never denied that it has not spent the R250 million or the other allocated funds, it maintains that it continues to treat patients on the waiting list (as opposed to the backlog list), internally, in both SBAH and CMJAH and is in the process of extending these services, in the long term, to Dr George Mukhari Academic Hospital and Chris Hani Baragwaneth Hospital in Soweto.

[389] It is then stated that the awarding of the tenders to the service providers, in annexure "AAA4", will complement the work done by the Department internally in these hospitals. This fails to deal with a further fundamental complaint. i.e. that the GDoH is not engaging with the Alliance or providing further information and is also not explaining how it is now able to deal internally with the patients without utilising the budget for outsourcing. It should be remembered, in this

regard, that, on its own version, it is still in the process of appointing further radiotherapists.

[390] Ms Turner, in her supplementary affidavit, criticised GDoH inasmuch as it originally stated in its answering affidavit that it has failed to indicate that there is no evidence to support the allegation that they have failed to utilise the funds. I observe, in this regard, that, whilst there is certainly room for criticism to the answering affidavit, I am not satisfied that GDoH ever denied that they failed to utilise the funds. In fact, to me it is quite clear, from the answering affidavit, that the tender processes all failed and that, by the time the answering affidavit had to be filed, the obvious consequence of having failed to spend the budget either had or would have taken place, i.e. the return of the money as is the practice at the end of the fiscal year. The GDoH of course do not explain when exactly it returned the ring-fenced funds.

[391] I accept that GDoH could have communicated more clearly and should have, as a State Organ subject to the Constitution, acted in a transparent and open fashion.

[392] With regard to Ms Turner's reliance on the media coverage, which is evident from the annexures I have already referred to and which stems from the assertions made in paragraphs 12, 13 and further in her supplementary affidavit, the deponent to the GDoH's supplementary affidavit responds globularly to paragraphs 12 to 21 of Ms Turner's affidavit by stating that same is hearsay and unconfirmed by confirmatory affidavits. The point is taken that same is of no evidentiary value, does not constitute evidence and also contains nothing materially contradictory to what the Department has told the Legislature and what it has told the Court in its answering affidavit.

[393] At the same time, GDoH admits that the Department is pumping millions into cancer treatment in Gauteng, taking into account that Gauteng caters also for three other provinces, Mpumalanga, North West and Limpopo, for these services. To that extent, GDoH admits that the Department is pumping millions into radiotherapy and admits paragraph 13 of Ms Turner's affidavit and, to the

extent that she relies on annexure “LT2”, an article from the Pretoria *Rekord*, the GDoH does not dispute it.

[394] It also does not take issue with the assertion made by Ms Turner based on the fact that the article specifically refers to patients who are on the radiation oncology backlog list and who are awaiting radiotherapy services. In this respect, there is a differentiation between patients, according to the article, at SBAH, following an assessment at the hospital which will be referred to private health facilities. According to the newspaper, was “part of GDoH’s R260million – plus investment into oncology services. The content of this paragraph is accurate, save for the fact that it will not only be patients at SBAH, but also will include patients at CMJAH who will enjoy this benefit. The latter is based on Mr Malotana’s and Ms Bogoshi’s say so. The dispute between Ms Bogoshi and Ms Turner must of course be assessed on the Alliance’s version given that interim relief is sought.

[395] To the extent that Ms Turner understands that the reported outsourcing arrangement as well as the R260 million investment reported on are related to the radiation oncology backlog and the R250 million that is at the centre of the litigation, GDoH is quite emphatic. It is clearly stated that her understanding is incorrect, that the R250 million was unspent and returned to the Provincial Treasury, and that the R261 million, as already stated in paragraph 27 of the answering affidavit, is for the 2024/2025 fiscal year and is still unspent. The GDoH makes it clear that this will be spent now that the tenders have been awarded to the service providers in annexure “AAA4”, as long as it is able to have commitments made in the form of purchasing orders before the end of the 2024/2025 fiscal year.

[396] To the extent that Ms Turner, relying on the various newspaper articles which state that the outsourcing relationship will be for the benefit of prostate cancer and breast cancer patients and that the service level agreements between the private healthcare facilities and two public radiation oncology centres, namely, SBAH and CMJAH, had not been finalised, GDoH states that this is of no moment, given that the appointment of the service providers have already spelt out the nature and extent of the services and the details will be fleshed out in

the service level agreements which are being negotiated and concluded "as we speak". Presumably same were not yet concluded by the time Mr Malotana's affidavit was signed.

[397] The affidavit proceeds to state that two of the service providers (no names provided) have already signed the SLAs and the remainder are still reviewing the SLAs with their attorneys and will sign same in due course. This undermines, to some extent, the GDoH's statement that the services will, in due course, be outsourced. There is no assurance that the SLAs will necessarily be signed.

[398] Ms Turner specifically refers to the fact that two SLAs have been signed with private healthcare facilities and states that this appears to contradict the GDoH's case in answer to this application where it maintains that the tender process is required for outsourcing and is being run and also appears to contradict the answers by GDoH, which reiterated the tender process. She states that, as set out in the earlier supplementary affidavit the GDoH Respondents refused to provide the Alliance with any meaningful response as to the status of the tender and it therefore came as a surprise to the Alliance that the SLAs have been concluded.

[399] To this, Mr Malotana responds that the allegations are speculative and based on the Alliance's own incorrect suppositions. It denies that there is any contradiction with its answering affidavit and criticises the Alliance for unreasonably expecting the Department to have dealt with events that only occurred in the future in its answering affidavit which was filed in July 2024, and, hence, it is alleged to be absurd.

[400] What this fails to discount is that one would have expected the necessary transparency and openness given the nature of this matter and the constitutional rights at play.

[401] The deponent admits that the tender process was required in order to outsource and that it did so and re-advertised same, which resulted in the appointment of the service providers in annexure "AAA4".

[402] The GDoH notes the welcoming of the Alliance of the signing of the SLAs and that same is the end product of the tender that was re-advertised and awarded to these mentioned service providers. The GDoH denies that the SLAs were concluded for SBAH only. The appointment of these service providers is allegedly for both SBAH and CMJAH. The Department also welcomes the successful completion of the tender process. This flies in the face of the fact that two of the SLAs are not yet signed and there is no evidence before me that any SLA has been signed in respect of the CMJAH, which is the hospital with the largest waiting list.

[403] Ms Turner specifically alleges, in her supplementary affidavit, that the SLAs that are signed relate only to SBAH and not to CMJAH. According to her, and as a result of her enquiries with stakeholders in the sectors, she is of the view that no SLA's have been similarly concluded to provide radiation oncology services to backlog cancer patients at CMJAH. Although the conclusion of the SLAs is a welcome development, the fact that the backlog lists at CMJAH are not catered for is a concern because the bulk of the backlog cancer patients are awaiting treatment at CMJAH.

[404] To this, the Department responded as follows:

> "The Alliance refers to the number of patients on the waiting list as at 10 June 2024 and five months' later the waiting list has significantly changed as it is updated daily for the reasons set out before."

[405] Here we have the pointed reference by Ms Turner to the backlog list patients, which are not catered for, as opposed to the waiting list referred to by the GDoH. This I cannot resolve on the papers, as stated before. It nevertheless remains a mystery how the backlog list, or the waiting list, could have been reduced at CMJAH given that none of the tenders have taken effect, unless some internal capacity was acquired, which we have not been referred to, or in some or other way patients have dropped off either of the lists, or simply passed away.

[406] In the GDoH's response to Ms Turner's affidavit as to the quote referred to in the media by Motalalale Modiba, i.e. that on 30 October 2024 the tender process had been concluded and the service providers had been appointed, it

is stated that this is correct and it is also stated that this statement is in no way inconsistent with what it has always been saying.

[407] Ms Turner, on the other hand, according to the article published in *Gauteng News* (which appears to be a government sponsored news agent) and which is annexed as “LT3” (although unmarked in my papers), refers to the spending of R511 million. There is no issue taken with this statement and nor is any issue taken with Modiba’s statement as referred to.

[408] Ms Turner alleged that Modiba’s statement appears to be inconsistent with the responses given by GDoH, referred to by her higher up in her affidavit, as well as in her answering affidavit. It would appear to me that this is unfair criticism, given that there is no allowance made for the lapse of time since the answering affidavit was filed.

[409] Ms Turner also suggests that it appears to be misleading since the process is nowhere near completion inasmuch as no SLAs have been concluded with CMJAH where the majority of the backlog patients are awaiting treatment. Unsurprisingly, GDoH had no choice but to admit this. It states, in paragraph 25.11 of its supplementary answering affidavit in response to Ms Turner, that the contents of this paragraph are correct with regard to the efforts of the GDoH to fill the vacancies at CMJAH with several candidates being interviewed. I specifically point out that there is no reference to any additional candidates having been appointed or already in the employ of GDoH. There is a cross-reference in this affidavit to the answering affidavit and it is specifically stated that the Department has not frozen posts for the appointment of radiotherapists and, to that extent, the statement of Ms Turner is incorrect.

[410] What is not addressed is the fact that there are no SLAs concluded for CMJAH. To the extent that Ms Turner alleges that this is contradictory to the allegation about the freezing of posts, it does not follow and it is specifically denied by GDoH.

[411] Be that as it may, nothing in the GDoH’s supplementary affidavit explains how the position at CMJAH is being addressed, or states that SLAs have already been concluded for this hospital. The effect hereof is that, as at the date this

affidavit was filed, the final pages of which were only put before the Court on 28 November 2024, suggests that nothing was done with regard to the massive backlog or waiting list at CMJAH. When one uses the waiting list as indicator, somehow, according to GDoH, the numbers have dropped. No explanation is offered in this regard.

[412] Finally, the GDoH's representation dealt with by Ms Turner in annexure "LT4" of her supplementary affidavit, which is the flowchart placed before the Gauteng Legislature for providing an update on oncology services in the province and to which the cancer stakeholders were invited, and which Ms Turner attended, are admitted. It is alleged by Ms Turner that GDoH reported that it has signed a service level agreement with private sector partners and that the duration is two years and the budget is R260 million. No indication was given as to whether these SLAs were the outcome of the tender process that it has relied upon so heavily in their answering affidavit. To this GDoH responded by admitting the first three sentences of this paragraph and denying the balance, which was allegedly stated by Gladys Bogoshi and referred to by Ms Turner in paragraph 23 of her supplementary affidavit.

[413] In sum then, the GDoH, to the extent that it is alleged that Ms Bogoshi has stated at the meeting that she had received the SLAs from the GDoH for her signature in respect of CMJAH and had yet to sign them, and that, once she had signed them, it would take approximately a year to work out the logistics to refer patients to the private sector, denies same.

[414] The flowcharts, which were apparently slides 6 and 7 of the presentation, referred to by Ms Turner, which is meant to indicate the path walked by a patient in an outsourcing arrangement with the private sector, are also denied to the extent that they contradict the objective facts from the annexures in the further supplementary affidavit filed by the GDoH. The flowcharts are reproduced, as far as I can see, from what was presented at the hearing at the Legislature and the effect of this denial is actually to deny what Ms Turner says, i.e. that it appears from a reading of the flowcharts that CMJAH intends to outsource services for new patients who are consulting with an oncologist for the "first time". She drew the conclusion that the cancer patients who are on the backlog

list would not be referred to outsourced radiation oncology. This remains in dispute by the Department. Again the different concepts of a dynamic waiting list and the backlog list is at play.

[415] To the extent that Ms Turner alleges that the allocated funds should be used for patients on the backlog list and not for new patients, given the historical background to the funding and that the funds were allocated by the Provincial Treasury for urgent treatment of cancer patients on the backlog list, this is also in dispute. As she puts it:

> "without sufficient machinery, staff and the freeze on filling posts, it is hard to imagine how the provincial health respondents can provide the radiation oncology treatment to the backlog cancer patients at CMJAH if these patients are excluded from the outsourcing arrangement."

[416] It would appear that GDoH denies the contents of these paragraphs as well.

[417] In her paragraph 26, Ms Turner makes the point that the Alliance motivated the Gauteng Treasury for the ring-fencing of funds and that the Alliance did so specifically for the radiation oncology treatment of patients who have been awaiting treatment for eighteen months to three years – patients on the backlog list. She alleges that, in response to the Alliance's plea, Gauteng Treasury allocated R785 million for GDoH to urgently address the backlog. The bulk of the backlog of cancer patients are at CMJAH and it is crucial that any outsourcing efforts, while welcome at SBAH, are also replicated at CMJAH to treat patients on the backlog list.

[418] GDoH just denies Ms Turner's conclusions that the reports of the Legislature show major inconsistencies and contradictions in the versions provided by GDoH and as opposed to what was provided to this Court and the Legislative Oversight Committee. It is also alleged that the provincial health respondents continue to withhold relevant information in their possession from the Court.

[419] Inasmuch as Ms Turner issues a call upon the provincial health respondents to furnish relevant information to the Court on affidavit in relation to SBAH as to whether an outsourcing arrangement has been concluded in relation to SBAH, it would appear that this has been answered in the positive. To the extent that she requests that, if so, whether the outsourcing arrangement is for cancer

patients on the backlog list, this question remains unanswered. This is due to the differential between the concept of the backlog list and the waiting list.

[420] Turner's request for further relevant supporting documents, including, if necessary, an appropriately redacted version of the SLA concluded, is, to some extent, met, although not completely and there is no evidence of any SLA concluded in respect of the CMJAH, nor any indication when same will be concluded.

[421] A final question posed in one of the concluding paragraphs to the supplementary affidavit, i.e. how much of the Category 3 planning services contract awarded to Siemens had already been spent, and how much of this was for planning for cancer patients on the backlog list, and how much was spent on new cancer patients, seems to have been answered inasmuch as the assertion is that the R250 million was returned to Treasury.

[422] I should refer to the concluding paragraphs of Ms Turner's supplementary affidavit. It was submitted, in paragraph 29, that the aforesaid information put forward by the Alliance, and the request for the further information that should be furnished by the provincial health respondents, are all necessary in order for GDoH to be in compliance with their section 195 obligations, particularly those in relation to openness, transparency and accountability. The point was made that they have failed to do so, in keeping with the tactic discernible throughout the litigation of withholding relevant facts and documents from the Alliance and the Court.

[423] To the extent that relief was sought in paragraph 28 of the supplementary affidavit, which I have already referred to, it was contended by GDoH that they are not entitled to such relief, same not having been sought from the outset. I have indicated that, to some extent, such information has been furnished, although by no means all such documentation and, in particular, not as far as the CMJAH is concerned.

[424] The supplementary affidavit filed by Mr Malotana on behalf of the provincial health respondents was supported by way of a confirmatory affidavit from one Dr Lehlohonolo Majake-Mogoba, to the effect that she is an adult female

medical doctor employed as Chief Executor Officer at the SBAH. Not only did she confirm that she read the various affidavits, including the most recent affidavit of Ms Turner, as well as that of Mr Malotana, and confirmed the correctness thereof insofar as it related to her or the CMJAH. Significantly, she does not confirm any of the content pertaining to the SBAH where she is employed.

[425] A further confirmatory affidavit of Ms Bogoshi, which I have already referred to, was filed, in which she confirmed that she is an adult female, the Chief Executive Officer at CMJAH. I point out that she does not indicate that she is qualified as a doctor. She has also confirmed that she read all the affidavits, particularly including the one deposed to by Mr Malotana, and confirmed the correctness thereof, specifically inasmuch as it related to CMJAH.

[426] The Alliance, after receipt of the supplementary answering affidavit filed an affidavit styled “Replying affidavit to first, second and seventh respondents’ answer, dated 28 November 2024.” This affidavit, again attested to by Ms Turner, deals with the above response by the said Mr Malotana and makes the point that, for the first time, the provincial health respondents informed the Court that the R250 million was not spent and had to be forfeited to Provincial Treasury at the end of the 2023/2024 fiscal year.

[427] She points out that the fiscal year for all departments of the Provincial Government is the end of March. The provincial health respondents carefully avoided giving the date of the fiscal year end throughout their answer to the supplementary affidavit. The provincial Government’s 2023/2024 fiscal year ended on 31 March 2024. She points out that the provincial health respondents had at least five opportunities to inform the Alliance and the Court that the R250 million was returned to Provincial Treasury at the end of March 2024, i.e. when they filed their answering affidavit on 19 July 2024 (it should be borne in mind that this was done under circumstances where same was due in terms of an urgent application): when they filed their heads of argument on 4 October 2024, when they received the first supplementary affidavit on 6 September 2024, when they received service of the second supplementary affidavit on 18 October 2024 and at the full-day hearing held on 21 November 2024. There is

truth in the statement. Especially when nobody goes on oath to say exactly when the funds were returned.

[428] She points out that GDoH did not disclose the fact at any of the above stages in the litigation, until they were given the opportunity to respond to the supplementary affidavit dated 20 November 2024.

[429] She further points out that the answering affidavit, dated July 2024, filed 24 months after the end of the 2023/2024 financial year, told the Court that the R250 million would be used to provide Category 1, 2 and 3 services provided for in the tender, as set out in the answering affidavit at paragraphs 10, 27.1 and 32, which full well knowing that the money had already been forfeited. It is unclear to me whether it was already known then but the GDoH most certainly could have clarified in its final affidavit. There is a lingering suspicion that it knew earlier.

[430] Hence, she draws the conclusion that the forfeiture of the money and the provincial health respondents' lack of candour with the Court strengthens the Alliance's case for the declaratory and mandatory relief sought.

[431] In her replying affidavit, it is denied that the supplementary affidavits were filed without seeking leave of the Court. It is submitted that, at the hearing on 21 October 2024, the Alliance sought leave to file the supplementary affidavits, dated 6 September 2024 and 18 October 2024. I am in agreement herewith and, to the extent that reliance is placed on the Court's overall discretion in terms of Rule 6(5)(e) to permit the filing of further affidavits, I had no problem in admitting these affidavits, bearing in mind that the 6 September 2024 supplementary simply attached the Rule 35(12) and its response and that the provincial health respondents had over 10 weeks to respond thereto. The statement that the provincial health respondents chose not to respond to it; despite having ample time to do so and their claims of prejudice is baseless. I might add to this that the Alliance invoked no remedy to compel such discovery either.

[432] The 18 October 2024 supplementary affidavit attached correspondence related to the refusal of the provincial health respondents to confirm whether the tender

had been abandoned or cancelled. She states that, as it turns out, they had abandoned the tender, but they had no intention of informing the Court of this fact until they were forced to in their answer, dated 28 November 2024. They had in excess of four weeks to respond to the supplementary affidavits but no response was filed. The provincial health respondents had many opportunities to respond to these two supplementary affidavits. They elected not to do so and they cannot claim prejudice when they chose not to answer and their claim of prejudice is, therefore, baseless.

[433] It is then stated that, on the directions of the Court, the provincial health respondents agreed to timelines for filing an answer to the 20 November 2024 supplementary affidavit and for the Alliance to deliver a replying affidavit, as well as an exchange of supplementary heads. The facts in the supplementary affidavit ought to have been brought to the Court's attention by them and they failed to do so. The provincial health respondents filed an answer and, therefore, any claim of prejudice is baseless.

[434] I pause to state here that at no stage did Adv Mokhare SC, acting on behalf of GDoH, agree that further supplementary affidavits may be filed. I distinctly recall him obtaining instructions for the filing of such affidavits, but as indicated in the affidavits, this was subject to the right to still object thereto and, hence, all answers were subject to the Court ultimately admitting these affidavits. To the extent that it is alleged here that the provincial health respondents should have kept the Court updated and informed, there is in my view merit to same.

[435] She also takes issue with the allegations contained in paragraph 6 of the GDoH's supplementary answering affidavit. She points out that paragraph 28 of this affidavit only requests information from the provincial health respondents to provide relevant information to the Court relating to the alleged outsourcing arrangement, whether these arrangements are for cancer patients or the backlog list, and how much has been spent on the Category 3 planning services and if these services were for patients on the backlog list. She states hat the suggestion that the supplementary raises a "new cause of action" is absurd. It is contended that it is unnecessary and a baseless technical point taken by the provincial health respondents.

[436] I should state here that I do not see any new cause of action inasmuch as this affidavit requires the provincial health respondents to provide relevant information. If anything, it is an attempt to hold GDoH to section 195 obligations under the Constitution. In any event, this paragraph is again bedevilled by the terminology "backlog list", as opposed to "the waiting list", which is consistently encountered in the GDoH's affidavits.

[437] It is contended that the information in this paragraph lies within the exclusive knowledge and control of the provincial health respondents and, in the context of the relief sought, the Alliance is entitled to request the Provincial Health Respondents to adhere to the obligations of transparency and openness.

[438] As already stated, this paragraph is bedevilled by the confusion between the backlog list and the waiting list and, inasmuch as the specifics are sought with regard to whether an outsourcing arrangement can be concluded in relation to SBAH and/or in relation to CMJAH and to furnish the relevant documents, I can see no objection thereto.

[439] The questions in regard to how much of the Category 3 planning services was awarded to Siemens and how much thereof has been spent, how much was for planning for cancer patients on the backlog list, and how much was spent on new cancer patients, are not entirely irrelevant questions, given the differential between the concept of the backlog list and the waiting list.

[440] One should bear in mind that paragraph 29 of that supplementary affidavit makes it clear that the information placed before me in the supplementary affidavit was done in order to enable me to make a just and equitable order and, in my view, ultimately led to further and fuller disclosure by the provincial health deponents.

[441] The whole tenor of the application from the original affidavits to the sequence of supplementary affidavits discussed above was always aimed at establishing to what extent ring-fenced funding was utilised for new patients as opposed to the patients already on the backlog list. I am, unable to agree with the provincial health respondents that the supplementary affidavit filed on the eve of 20 November 2024 should be disallowed. There is no attempt to found on a new

basis, but purely an attempt to update the Court as to the information that came into its possession which appears to be relevant.

[442] Siemens was appointed, a purchase order was generated but Siemens could only invoice once it had reached certain milestones of planning services agreed to in batches of 100 patients at a time, and Siemens has not reached the first 100 and it has not invoiced. This latter part does not appear in the answering affidavit. It would have been of some help if this was in the answering affidavit and it would suggested that the provincial health respondents are discharging their duties in terms of section 195 had they made it clear in the answering affidavit that the R250 million was unspent and returned to the Provincial Treasury.

[443] On its own version, in paragraph 9 of the supplementary affidavit, the GDoH states that it is required at the end of every fiscal year to return to Provincial Treasury all unspent funds. This it must have known when it deposed to the answering affidavit. I take into account that it was filed under urgent circumstances and that this may have led to this topic not being fully covered. Of course, as suggested by the provincial health respondents, the interdict sought in Part A has become moot. To insist that for these reasons the supplementary affidavit should be disallowed I believe is unreasonable. I do not suggest in criticising this decision that the Alliance was without blame in not arriving at its own conclusion that the R250 million was bound to be returned at the end of the fiscal year and probably was returned, but it would have been within the knowledge of the provincial health respondents to testify thereto in their answering affidavit and, in accordance with their section 195 duties under the Constitution, to make full disclosure thereof.

[444] Ms Turner, in her replying affidavit to the supplementary affidavit and, in particular, with regard to the notion that the relief sought is moot, states that no new cause of action is introduced and denies that the relief sought in Part A of the notice of motion is untenable and without legal foundation. She does not elaborate on this, although more appears in this regard form the heads of argument. She does state that the first supplementary affidavit became necessary to place new facts before the Court, that these are vital to the

determination of the relief sought and particularly as to whether the provincial health respondents' defence has any merit. The provincial health respondents chose not to place the new facts before the Court and it, therefore, became incumbent on the Alliance to do so.

[445] This raises the question whether there remained a continuous duty on the provincial health respondents after the filing of the answering affidavit in the urgent application to continue updating the Court so that the Court could deal with the latest state of information as it stood on the date the case was argued. Whilst I can see ample room for the provincial health respondents to have been more open and transparent, as is required from them under the Constitution, this duty certainly did not require them to update me in every respect with regard to any new tender and they were only obliged to fully deal with the failed tenders and the outcome thereof. In this regard, I have already pointed out the part that was not dealt with in the answering affidavit, which I do regard as vital.

[446] I am, for the above reasons, not inclined to disallow the supplementary affidavits.

[447] The fact that part of the relief may well have become moot does not mean that the need for a declarator to the effect that the provincial health respondents have acted unlawfully and unconstitutionally by failing to devise and implement a plan to provide radiation oncology services at CMJAH and SBAH to provide radiation oncological services to backlog list patients has also become moot, and mandatory orders directing that the provincial health respondents take all steps necessary to provide the radiation oncology services to backlog patients urgently via outsourcing or otherwise, updating the backlog list in a meaningful way, and that supervisory or structural relief requiring the provincial health respondents to deliver an updated report providing progress reports on the steps taken to provide radiation oncology services to backlog list patients and the long term plan to provide radiation oncology services to all cancer patients at CMJAH and SBAH, have all become moot..

[448] She contends that the matter is moot where the relief sought will have no practical effect, although a Court may still determine an otherwise moot issue if

the interests of justice so required and also refers to legal argument that will be addressed in the Alliance's submissions, which indeed appears in the heads of argument.

[449] She further states that she has been advised and submitted that, even if the interdictory relief has become moot as a result of the return of the R250 million to the Gauteng Treasury, the other three categories are not moot for, at least, the following reasons

449.1 the declaratory relief is premised on the provincial health respondents' breach of the backlog list patients' right of access to healthcare in section 27(1) of the Constitution;

449.2 the breach of the provincial health respondents constitutional obligations, in terms of section 7 read with section 27 of the Constitution, to protect, promote and fulfil the backlog list patients' right of access to healthcare by taking positive steps and also by not taking negatives steps that impinge on those rights;

449.3 the breach by the said respondents of their constitutional obligations in terms of section 195 of the Constitution; and

449.4 the possible infringement by the said respondents of the backlog list patients' right to administrative justice in terms of section 33 of the Constitution, by the failure to outsource and provide radiation oncology services to those patients in circumstances where the funds (R250 million) were made available to the Provincial Health Respondents with the specific purpose of doing so. I am of course not at present seized with this part of the matter but there is an interplay with the relief sought the Alliance under part B of the Norice of Motion.

[450] It is submitted that the Alliance did make out a case in its papers therefore and that the provincial health respondents had acted unlawfully and that the Court should at least grant a declarator. The fact that they were obliged to return the R250 million to Treasury is, according to Ms Turner, a consequence of their own inaction. and if anything, same renders the listed relief even more urgent.

[451] I interpose here to observe that no SLA seems to have been concluded in respect of the CMJAH which adds to the need for the above relief.

[452] Ms Turner further points out that, in order to implement the SLAs, GDoH must have a list of patients who are to be treated under those SLAs and those must be or to my mind include backlog list patients, since the funding to be used was specially allocated and ring-fenced and became lost..

[453] The notion of updating the backlog list or reconcile same with the waiting list is, in itself, problematic and I will deal therewith lower down.

[454] It is further submitted that irreparable harm will occur if the provincial health respondents continue in their failure to act expediently, given that, on their own version, R250 million of the R784 million has already been returned to Gauteng Treasury.

[455] Ms Turner expresses the real fear that, as the end of the current fiscal year rapidly approaches, there is a real danger that the provincial health respondents will be required to return some or all of the unspent funds from the second allocation for the 2024/2025 fiscal year.

[456] Ms Turner points out that there is nothing in the supplementary affidavit that explains where the money required to pay Siemens Healthcare or the service providers in SLAs comes from. In this she is incorrect. Nevertheless the Alliance (correctly) assumes it will come from the second allocation paid in the 2024/2025 fiscal year, but whether or how this affects or alters the decision to split the allocation between outsourcing services, on the one hand, and equipment and personnel, on the other, is impossible to determine from the answer.

[457] Hence, it is concluded that the lawfulness and constitutionality of the decision to split the allocation remains a live controversy and the relief sought in the review will have a practical effect.

[458] Ms Turner thus globularly submits that neither all the interim relief or even the review relief is moot and, even if it were, she states that she is advised and

submits that the Court may determine an otherwise moot issue if the interest of justice so requires. I will deal later with this, given that legal authorities have been advanced and put forward in the heads of argument to this effect.

[459] She also states that she is advised that there are a number of factors the Court will generally consider and submits that these factors favour the determination for at least the following reasons. The Court's order will have some practical effect on the cancer patients on the backlog list and for the broader public – since the provincial health respondents are utilising (or failing to utilise) public funds, and their obligations of openness, accountability, and transparency as cornerstones of our constitutional democracy are in issue.

[460] The importance of the issues at stake in this matter cannot be overstated. The issues are complex, covering, as they do, fundamental constitutional rights and obligations of the State and the proper use of public funds specially allocated to provide potential lifesaving treatment to a vulnerable group of people.

[461] Full argument has been advanced and exchanged in the argument before me on 21 November 2024 and similarly in the supplementary affidavits and the further written submissions and supplementary heads of argument.

[462] She thus makes it clear that the Alliance seeks the relief set out in the notice of motion.

[463] Ms Turner further engages in an a*d seriatim* response to the additional supplementary affidavit as dealt with by the provincial health respondents, She denies that the allegations in paragraphs 1 to 3 of the supplementary affidavit are in any way hearsay and not confirmed by confirmatory affidavits and thus of little evidentiary value. She rejects the notion that the allegations are baseless speculation and rumours. I agree with this. Many of the allegations contained in the supplementary affidavit are based on the provincial health respondents' documents and the inconsistent versions before different *fora* about the obligations to provide potentially lifesaving radiation oncology treatment to cancer patients on the oncology list.

[464] Ms Turner specifically takes on the provincial health respondents on the notion that they answered the case in their July affidavit. She relies on what has transpired from the supplementary answering affidavit and states that they only address material omissions and glaring inconsistencies when confronted with their own documents in the 20 November supplementary affidavit. I am of the prima facie view that there is some truth in this.

[465] She continues by saying that, if the R250 million was returned to Provincial Treasury at that stage, that fact was well within the provincial health respondents' knowledge when finalising its answering affidavit and it was a material fact as of July 2024. She quite rightly states that the forfeiture of the R250 million should have explicitly been pleaded in the affidavit of July 2024 or as soon as it occurred and have taken cognisance that they at no stage tell the Court when exactly they knew and actually did return the funds. I have already indicated that I agree with this notion, but that does not detract from the Alliance's obligation to familiarise itself with the procurement laws and it should have reckoned from the outset that, by the time the urgent application could be heard, the obligation to return the R250 million may already have kicked in. The only exception thereto would have been if the indications were that it was fully spent, which it was not. The form and extent of the application may then well have been casted in a more workable format.

[466] She, therefore, states that the provincial health respondents have demonstrated that they have not fully taken the Court into their confidence.

[467] I should point out that, in the paragraph under discussion, the provincial health respondents emphasise, in their answering affidavit, they had no duty to bring to the Court's attention the events that occurred after the answering affidavit was filed in July 2024, because these events have nothing to do with the relief sought by the Alliance in its notice of motion. Hence, it denies that it had not taken the Court fully into its confidence. This, however, does not address its failure to deal with the use of the R250 million and the fact that the obligation to return same had already become effective. I have also expressed my views as to a State Organ's obligations to put all relevant facts before the Court even when that means having to resort to a supplementary affidavit.

[468] To the extent that they in this section of their supplementary affidavit still invoke the notion that the Alliance seeks to rely on a new cause of action, I disagree as to the correctness thereof.

[469] Ms Turner also takes the provincial health respondents on with regard to her further allegations in paragraph 14 of the supplementary affidavit. In this part of the affidavit, they state that the spending of the R250 million is at the heart of the relief sought by the Alliance, challenged in Part A and Part B, and the remainder of the R534 million is not challenged. To this end, they have already alleged that a new figure of R511 million is allocated to cancer patients from the backlog list without providing any source of information and that it was made abundantly clear in the answering affidavit that none of the allocated funds had been used because the GDoH was still busy with the tender process to outsource these services.

[470] Whilst the answering affidavit is capable of such a reading, it would certainly have helped to indicate that the R250 million had already been returned and same may well have prevented the need for some of the further supplementary affidavits. At the same time, to the extent that in this affidavit the provincial health respondents state that the GDoH continues to treat patients on the waiting list internally according to the need as determined by the clinicians on site, and that such decisions as pertaining to patients treatment and when same is to be administered and how is entirely the decision of the clinicians who treat patients and nobody else, it hardly explains how they manage to deal with the waiting list or, for that matter, the list relied upon by the Alliance. I remind myself of the list of woes expressed by Dr Ramiah in the Carte Blanche programme.

[471] To the extent that the provincial health respondents state that it is not up to the Alliance to determine how such treatment is to be administered, when and by who", I agree. This surely is a matter for determination by experts in these fields and it would have been of significant help if the GDoH did provide evidence as to how they managed to work out the waiting list at SBAH as well as the CMJAH with the help of such experts as opposed to bureaucrats.

[472] With regard to paragraph 14 of the GDoH's supplementary affidavit Ms Turner attacks the provincial health respondents in this regard and suggests that they are disingenuously suggesting that the Alliance is somehow responsible for arriving at the R250 million allocation for planning services. It is abundantly clear from the papers that will be discussed below and the media statement issued by the provincial health respondents on 30 April 2024 (annexure "SJM18", pages 2–319), in which the provincial health respondents on their own version say that the R250 million has been allocated for the outsourcing of radiation oncology services.

[473] I should point out that nowhere mention is made of the backlog list although same could be understood to include a waiting list or the backlog list. Ms Turner denies that the Alliance is changing its version and now alleging an unsubstantiated new figure of R511 million. She states that the provincial health respondents, on their own version, say that, in terms of the "MTEF R250 million was allocated for the year 2023/2024 and R261 125 000 was allocated for the 2024/2025 year". These two amounts combined totalled R511 million, hence the reference to such an amount in Alliance's supplementary affidavit of 20 November 2024. Leave alone the media propaganda. She points out that they say this funding was derived from the equitable share (answering affidavit, paragraph 27, page 02-145) and that, in "LT1" to the November supplementary affidavit, they state that the R250 million allocated in this 2023/2024 fiscal year and the R261 125 000 allocated in the 2024/2025 fiscal year are entirely unspent. This, of course, does not mean that the GDoH now has R511 million to spend. The fact remains that R250 million was returned to Gauteng Treasury.

[474] Ms Turner submits that, despite substantial funding, the failure to provide radiation oncology treatment to cancer patients on the backlog list has caused the compelling need for the grant of the relief sought. The way I understand her affidavit is simply this, that, although the R250 million may no longer be available, the remaining relief in the notice of motion remains relevant and is even more pertinently required, given that it has taken the GDoH so long to arrive at the point where they are now.

[475] I bear in mind here the fact that the SLAs for the CMJAH are not yet signed and that it is alleged that, should they be signed, it would take another year to implement. This is, of course, coupled with the difficulty the GDoH experiences in employing suitable radiotherapists.

[476] Ms Turner takes issue with the notion that the answering affidavit made it abundantly clear that the R250 million was unspent and had to be forfeited. I have already dealt with this.

[477] She also takes issue with the notion that the provincial health respondents again attempt to impute an improper motive to the Alliance for bringing the application. As she rightly says, the GDoH cannot run away from the following indisputable facts i.e. that they are constitutionally obliged to provide radiation oncology treatment to cancer patients, they have received, over a two-year period, R511 million to address the radiation oncology backlog in Gauteng and to date, the backlog has not been cleared despite receiving the funds to do so.

[478] Whilst I appreciate this is not a true reflection of the actual funds still available, the above vividly demonstrates the relative delay in arriving at a solution for the radiology oncology backlog in Gauteng.

[479] In paragraph 15 of the GDoH supplementary affidavit in response to Ms Turner's affidavit of 20 November 2024, the provincial health respondents seek to explain their delays and the difficulties experienced, inasmuch as same is not already set out in the answering affidavit. They pointedly refer to the fact that Categories 1 and 2 were re-advertised on 13 July 2024. As stated in paragraph 73 of the answering affidavit, Category 3, which had been awarded to Siemens in February 2024, starting from May 2024, for a period of 12 months, was also simultaneously advertised on 13 July 2024 for the appointment of service providers who would take over the planning services from Siemens in May 2025, once the Siemens contract expired in April 2025. That was the factual position when the answering affidavit was filed in July 2024.

[480] They make it clear that the request for proposals, which appears at Caselines pp 05-09 to 05-97, as the closing date for the submission of bids at 2 August 2024, a period which was after the answering affidavit was already

commissioned and filed and, hence, this could not have been dealt with, being events subsequent to the answering affidavit being filed. Nothing but a lack of openness and transparency prevented them from updating the Court and the Alliance timeously in this regard.

[481] They also state, in this paragraph, that the events that happened after the answering affidavit was filed had no relevance to the relief sought by the Alliance in Part A and there was no duty on them to disclose it to the Court by way of further affidavits, which are not permitted by the Rules of Court. This is then bolstered by the notion that it was a complex tender involving the procurement of delicate services and equipment and that every effort is to be made that the GDoH be as accurate as possible and then follows the explanation about the BEC and the BAC and the resolution of the BAC, which was annexed as annexure “AAA3”.

[482] All this is indisputable according to Ms Turner. She states that these respondents were obliged to disclose material new facts that arose after the answering affidavit was filed in July 2024, which they failed to do, and that, therefore, the facts set out in the third supplementary affidavit remained relevant to the relief under Part A, which is already dealt with. She also states, in response to paragraph 15.5, which is where the GDoH states that, contrary to the assertion that the tender was abandoned, it was cancelled for the reasons stated in the BEC reports, which were accepted by the BAC and approved by the deponent to the GDoH affidavit, that the Alliance had tried, over several weeks, to get a clear answer from them about whether the tender was cancelled.

[483] They refused to provide a response to this direct enquiry. Instead, they adopted an evasive approach. She repeats the facts set out in the supplementary affidavit of 8 October 2024 (Caselines 02-49, 02-761, paras 7–15). She specifically points out that they have failed to respond to this supplementary affidavit.

[484] To the extent that the GDoH relies on the fact that the tenders could not be awarded because of non-compliant bids, she points out that the crucial question

is whether their conduct over a period of two years after receiving hundreds of millions in funding met the legal test as set out in paragraph 42 of the Constitutional Court's judgment in the *Grootboom*[3] case. This well known matter sets out the following in paragraph 46:

> "**Within available resources**
>
> [46] The third defining aspect of the obligation to take the requisite measures is that the obligation does not require the State to do more than its available resources permit. This means that both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources. Section 26 does not expect more of the State than is achievable within its available resources. As Chaskalson P said in *Soobramoney*:
>
> > 'What is apparent from these provisions is that the obligations imposed on the State by ss 26 and 27 in regard to access to housing, health care, food, water, and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled.'
>
> There is a balance between goal and means. The measures must be calculated to attain the goal expeditiously and effectively but the availability of resources is an important factor in determining what is reasonable.

[485] The Alliance maintains that the provincial health respondents' conduct in the case has fallen far short of the legal and constitutional obligations that they bear in relation to providing radiation oncology services to cancer patients who are on the backlog list.

[486] Now that they are relying on Treasury Regulation 16A6.4 to enter into new SLAs for the provision of outsourced radiation oncology services, which regulation provides as follows:

> "If in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority."

one can but wonder why this was not done from the outset.

[487] Ms Turner takes the stance that the provincial health respondents, and particularly the deponent as the Accounting Officer, have always had the power to rely on this regulation and to do the necessary deviation in order to expedite the procurement process. The deponent now states that he has relied on this

[3] Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC)

power to ensure no further forfeiture of the R261 million allocated in the 2024/2025 fiscal year. The implication here is quite clear and begs the question given the urgency of providing potentially life-saving treatment, i.e. that they did not consider using this power sooner to prevent the forfeiture especially of allocated life-saving funds ring-fenced for radiation oncology treatment for patients on the backlog list. She, indeed, poses this rhetorical question.

[488] To my mind, this may well have been due to the GDoH merely being circumspect given the sensitive nature of the matter and the issue of specifications of equipment that should be acquired. I am not suggesting that this should have prevented outsourcing to the private sector or that their plan for outsourcing could not have been compiled earlier. Their seems to me at least a measure of delay on the part of the GDoH, which is not fully explained and a reluctance to use the deviation model proposed by Mr Manning.

[489] The invocation of the relevant Treasury Regulation quoted was certainly within their reach, at least as far as the outsourcing of the services to the private sector was envisaged.

[490] Tenders will not deliver results as quickly as deviations might do, but it would certainly give the GDoH a proper overview of the market and the market response given their plans to outsource same and ensure competitiveness. But Mr Manning's deviation model will always support a case of urgency. The GDoH seem not to understand the plight of the cancer patients on the backlog list.

[491] Nevertheless, Ms Turner is of the view that the power of deviation would not have resulted in the provincial health respondents violating their section 217 constitutional obligations and it would not have meant that they did not follow a proper procurement process. She maintains that if the deviation could have been invoked earlier and expeditiously at various stages to prevent the first allocated R250 million from being forfeited – immediately following the allocation of funds in March 2023 and later at the point it became clear to them that Category 1 and Category 2 needed to be re-advertised in early 2024 or at any point before the ring-fenced funds would have become subject to return to Treasury.

[492] I can only state, in this regard, that these points are valid and should have informed the decisions of the GDoH.

[493] She further points out that no answers are provided by the provincial health respondents and, given the consequences and the eventual loss of the specially allocated funds, their conduct is clearly in breach of their constitutional obligations to make "efficient economic and effective use of resources" as required in section 195 of the Constitution.

[494] To the extent that the deponent states, in paragraph 16 of the supplementary affidavit, that he never refused to outsource and hence embarked upon the tender process, which resulted in the appointment of the current service providers and that the GDoH made it clear that it would continue to provide the service internally as it continues to do currently and that the outsourcing would complement its internal mechanism of providing these services it is unhelpful especially when he does not explain where the capacity comes from.

[495] Ms Turner makes it clear that the Alliance did not want the Department to outsource their services without following the prescripts of procurement. She states that the outsourcing process that the Alliance referred to was one which was endorsed by the National Department of Health, as well as other provincial health departments, all of which adhere to the prescripts of procurement in public administration.

[496] She further states that the Department has invariably been unable to provide radiation oncology treatment to cancer patients within the stipulated three-month window period. It is this failure and the lack of capacity that has contributed to the creation of the backlog list of cancer patients who are awaiting radiation oncology treatment. Having received funds to clear this backlog, she states that it was incumbent on the provincial health respondents to use the most efficient and effective way to ensure that services are delivered. She clearly implies here that a deviation process would have been more appropriate.

[497] She takes issue with the GDOH in respect of paragraph 16 of its answering affidavit, where the Department denies that it gave different responses in

different *fora*. She more specifically takes issue with the allegations of mootness, same being without merit for the reasons already dealt with, and states that the provincial health respondents failed to appreciate that the forfeiture of the R250 million does not redound in their favour and, in fact, strengthens the Alliance's case for the declaratory and supervisory relief.

[498] I can only agree with this view.

[499] In paragraph 19, the Department dealt with the waiting list which it updates daily on site as new patients come onto the waiting list and others falling out of the waiting list for various reasons, as already dealt with. Hence, the waiting list is fundamentally different at the time the answering affidavit was signed as opposed to the waiting list as it stands at the time the further supplementary affidavit was signed.

[500] Ms Turner takes up a request made by the Court in her answer hereto, to the extent that the Court requested same and the Alliance undertook to furnish a copy of the now outdated March 2022 list, referred to in paragraph 46 of the founding affidavit. Given the sensitivity of the information, the Alliance would furnish the list by memory stick to the Court. To date hereof, I have not received this list, but I assume that, should I conclude that an appropriate order has to be made which involves this list, it will be made available to give effect to the order.

[501] She reiterates that, as stated in paragraph 46 of the founding affidavit, around March 2022 the lists were prepared by the Alliance consultants, with approval from CMJAH. The list was sent to the Provincial Health Respondents, including the CEO, Ms Gladys Bogoshi. In the July answering affidavit, the same deponent noted the contents of this paragraph, which is effectively an admission.

[502] Ms Turner alludes to the fact that a confirmatory affidavit will be provided from the consultant who prepared the lists. Once compiled, the lists were also presented to Dr Kongwana as the Cancer Crisis Task Team Chairperson on 11 March 2022, as evidenced from annexure "RA1". The list was subsequently shared with the task team on 23 June 2022 and on 7 December 2022. She

points out that it is, therefore, incorrect for the provincial health respondents to allege that the waiting list was not shared by the Alliance, and, to this effect, the confirmatory affidavit by Salomé Meyer was annexed as annexure “RA2”.

[503] It is thus stated that the Provincial Health Respondents have been in possession of the backlog list since March 2022 and a further copy could be made available should it be required with the signing of the requisite confidentiality undertakings.

[504] Ms Turner states that, notwithstanding the aforesaid, it is important not to be caught up in the semantics of the backlog list and waiting list. She emphasises that what is of critical importance is that the outsourcing arrangements for radiation oncology services continues to be used for patients who fall outside of the three-month treatment guidelines and who have been waiting for months (if not years) for lifesaving radiation oncology treatment. This is because these funds were allocated to eradicate Gauteng’s oncology treatment backlog and the provincial health respondents funds can be used for new cancer patients. Thus, patients on the backlog lists or waiting lists, who did not receive the radiation oncology services within the three-month oncology treatment guidelines and are placed on the waiting list, must be offered access to the outsourcing arrangements made available to ensure the complete eradication of the backlog. It would appear to me that this is the essence of the issue between the Alliance and GDoH.

[505] The GDoH’s waiting list, in not distinguishing between patients having been on the backlog list for much longer, does not offer any outsourcing as yet, same being subject to all the necessary requisites being put in place. What the Alliance fears is that, once same is in place, the patients on the backlog list will not receive the necessary preference and may well find themselves in the position that patients, who had a shorter waiting period, find their way into the system indicated for outsourcing, whilst the latter were supposed to be for the backlog list. To this extent, the content of the backlog list remains important and some attempt will have to be made to arrive at a reconciliation between the waiting list and the backlog list and the future distinction between new patients and those already on the backlog list.

[506] Ms Turner submits that the complete eradication of the backlog list will result in better outcomes and better service delivery for all cancer patients. New patients would not simply be added to the back of the queue because of an existing backlog. It will ensure the fulfilment of the right to access to health for all cancer patients. This seems to be at the heart of the Alliance's case.

[507] In response to paragraph 19.3 of the supplementary affidavit filed by the GDoH, she denies that the answers to (ii), (iii) and (iv) answer the questions posed. She alleges that the most concerning is that, despite numerous opportunities to be candid with the Court, the provincial health respondents failed to give any detail as to whether they have made progress in eradicating the backlog list and state, in their affidavit, that the list is dynamic and fundamentally different, without even explaining why or in what way. For example, how many patients (backlog list or waiting list patients) have received oncology services, how many have been removed, and how many have been added. None of the information would violate doctor patient confidentiality or POPIA, yet such generic information is not even provided to the Court.

[508] This information she submits is particularly pertinent given that the provincial health respondents readily admit to being under-resourced and understaffed, yet they allege that they have been treating patients on the backlog list without utilising any of the resources made available for this purpose.

[509] She concludes that the provincial health respondents must inform the Court as to what extent it has made progress in eradicating the backlog in oncology treatment – and the Court ought to do so by the exercise of its supervisory discretion. Again, the latter goes to the heart of the issues between the Alliance and the GDoH and one can but wonder whether the failure to reconcile the backlog list with the waiting list or maintaining one list which differentiates between the original backlog list patients and later patients, is deliberate or simply a function of bureaucratic inefficiency. I need not speculate thereon.

[510] Save that Ms Turner here, at paragraphs 20 and 54 of her affidavit, again denies that the GDoH made it clear, in their July answer, that the R250 million was

unspent and returned to provincial treasury at the end of the year, nothing new is added.

[511] To the extent that there is criticism that the GDoH did not refer to the tender to Siemens and is alleged to have obfuscated in their responses to the Legislature, I need not make any finding thereon. Suffice it to state that such a lengthy period has come and gone since the original budget was made available that it is simply not comprehensible why the outsourcing has not taken place as yet. To the extent that there was reliance by the provincial health respondents on annexure "LAM5" (the Siemens contract), this was addressed in the Alliance's replying affidavit.

[512] Issue is further taken by Ms Turner, in her response to paragraph 23 of the GDoH's supplementary answering affidavit, to the extent that same alleges that there is nothing inaccurate in what the GDoH has said in relation to the paragraphs under discussion and the Alliance also does not state what it is that the GDoH has said which is inaccurate. The GDoH is content to state that they have been treating the cancer patients on the waiting list internally and continue to do so and that the outsourcing of these services is intended to complement what the Department is doing internally with the treatment of cancer patients on the waiting list. This is completely at variance with the notion that the backlog list patients should have been outsourced on an urgent basis and that new patients would have been treated as and when they arrive.

[513] To the extent that this paragraph 23 of the GDoH suggests that the tender processes are finalised and all the service providers have been appointed, we know this is not correct because Mr Malotana clearly indicated that it would take another year to obtain sufficient radiotherapists. All this makes the need for outsourcing more pressing.

[514] Ms Turner takes issue with the GDoH to the extent that it failed to specifically say whether cancer patients who are on the backlog list are in fact treated internally. She maintains that the broad reference to "patients on the waiting list" is unhelpful. She maintains that the Provincial Treasury did not allocate funding to address the "treating of cancer patients on the waiting list".

[515] Ms Turner specifically expresses that the allocation was focussed to “address urgently the backlog in surgical and radiation oncology services, emanating from the shortages in both personnel and equipment, and a knock-on effect of the Covid-19 pandemic that stretched the capacity of the Gauteng health system” (02-13, annexure “SJM8, at p 02-206).

[516] She continues, in dealing with paragraph 24 of the supplementary answering affidavit, that the provincial health respondents try to create confusion concerning the R511 million. There is no need to explain this figure again. I have already dealt with same above.

[517] Ms Turner maintains that the Alliance had no knowledge prior to the service of the answering affidavit that the R250 million was unspent and had been forfeited to the Provincial Treasury at the end of March 2024. This fact, it says, was only disclosed to the Court and the Alliance in answer to the supplementary affidavit. I again point out that a proper analysis of the procurement processes, read with the Treasury Regulations, would have placed the Alliance on the correct track, but this, I agree, does not detract from the section 195 obligations of the GDoH. Hence, Ms Turner concludes that it is absurd to suggest that the Alliance tailors its case to meet the new facts when the provincial health respondents concealed this fact up until the time that the answer was served on 28 November 2024. They do not say, in their answer to the main claim, that the R250 million was unspent and, hence, Ms Turner maintains that their insistence to the contrary in their answer is misleading.

[518] Ms Turner addresses the issue of annexure “LT2” allegedly being hearsay and being unconfirmed by confirmatory affidavits and, therefore, having no evidentiary value. She denies same and contents herself with the fact that the contradictions are set out in her supplementary affidavit (presumably that of 20 November 2024) and, hence, she does not repeat same.

[519] As for the rest, Ms Turner takes note of the allegations made by the GDoH in its supplementary affidavit. The fact, however, remains that R261 million of the 2024/2025 fiscal year is currently unspent and will now be spent in terms of the service providers provided for in annexure “AAA4” as long as the GDoH is able

to have commitments made in the form of processing orders before the end of the 2024/2025 fiscal year.

[520] On balance, having had regard to the supplementary affidavit filed by the GDoH, together with the earlier affidavits which I have still to deal with, I am far from persuaded that the spending of any further funds should go unmonitored and without any reference to the issues raised by the Alliance. I will deal with these conclusions in more detail further on.

The Law

[521] Both the Alliance and the GDoH have provided me with extensive heads of argument.

Urgency

[522] I assessed the matter when it was allocated to me and after hearing argument and having read both parties heads of argument and the supplementary heads of argument initially suspected that to some extent the Alliance overestimated the urgency when it set the timeframe within which the GDoH had to file its answering affidavit and it would file its replying affidavit.

[523] As the enormity of the task became apparent and it was forced to invoke relief from the DJP to obtain a special motion date on short notice, an indulgence which is difficult to obtain in this division it became clear to me that the concept of urgent redress on the facts of this matter is more fact specific than usual. If the Court had the capacity the matter would probably have been heard much earlier given the plight of the patients on the backlog list who have been deprived of radiation oncological treatment for so long that repeated surgeries and repeated chemotherapy virtually became routine and early death at times became inevitable because the GDoH for the reasons dealt with above cannot cope with the influx of cancer patients. To add insult to injury these patients' constitutional rights have been trampled upon by the GDoH in that the ring fenced funds specifically intended for these patients and made available in April 2023 were lost due to the GDoH's failure to outsource the radiation oncology

service and spend such funds urgently before the annual obligation to return funds to Treasury came up.

[524] Given that the need for redress became dire in the above context and the test stated in *East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd* [4] is in my opinion of persuasive force i.e.

> "The correct and the crucial test is whether, if the matter were to follow its normal course as laid down by the rules, an Applicant will be afforded substantial redress."

[525] It is a normal requirement that parties should at least try and resolve their issues before they come to court. This the Alliance attempted to do as we saw in the various exchanges of correspondence dealt with above and in particular on 5 June 2024 reached a stage where the GDoH simply ignored their emails and specific requests to make use of a deviation process to acquire the requisite outsourcing of the radiation oncological service. The above attempts led to the Alliance only launching the present proceedings on 27 June 2024. This created the impression of unnecessary delays which may at times preclude a finding of urgency.

[526] The Alliance's reliance on the decision in *Quick Drink Co (Pty) Ltd and Another v Medicines Control Council and Others* [5] addresses this as follows:

> "[12] When one has regard to the time line of events, to which reference has already been made, then the first applicant, from the time the consignment was seized, acted reasonably and prudently in pursuing its rights and trying to resolve the matter. This included correspondence and meetings with the respondents, as well as its own enquiries with regard to the manner in which the Medicines Act had been applied and enforced. I am accordingly satisfied that the matter is urgent, regard being had both to the nature of the relief claimed, as well as the manner in which the first applicant acted to assert and protect against what it regarded as an infringement of its proprietary rights."

[527] I do not believe the delays before coming to Court were excessive.

[528] Any urgent application should always be scrutinised for queue -jumping. Given that it passed the above tests same does not arise.

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[4] 2011 JDR 1832 (GSJ) par 8

[5] 2015(5) SA 358 on p 362

[529] The GDoH submitted i.a. that it is prejudiced and that the interim relief in Part "A" could have waited till the relief sought in Part B is heard. The facts scrutinised above suggests that these submissions are baseless.

[530] In the circumstances I find that the matter is urgent as meant in Rule 6(12) of the Uniform rules of Court;

[531] Given that the Alliance is litigating against a State Organ and the State should be setting the example as far as compliance with its Constitutional duties are concerned the standards a State Organ should adhere to are onerous. The conduct of the GDoH at times did not meet these high standards. I do not refer to any case law in this regard given that the aforesaid is by now trite law. Its conduct on the merits have been referred to in appropriate places hence I will not repeat same here.

[532] It should nevertheless be stated that the taking of technical points such as the raising of baseless hearsay objections, far-fetched non-joinder points, delaying the production of a record of decision in a review matter (even where the court is not seized of same) and the failure to comply with a Rule 35(12) notice are all examples of conduct a State Organ should not lightly become involved in.

[533] There were other objections raised by the Alliance which led to a strike out application by the Alliance which was successfully warded off by the GDoH for the reasons set out above. The fact that it made objections of abuse of process and conducts itself as if it is a law unto itself and play loose and fast with confidential and medical information which may affect a person's dignity does not suggest that the GDoH is as far as this case is concerned the Constitution's primary agent who does right and does it properly.

[534] I have referred to the Strike out Application and have dismissed same for the reasons given above. The costs must follow the result and the provincial health respondents is awarded costs against the Alliance on the party and party scale "C" and the costs are to include that of 2 counsel one of which is Senior Counsel.

[535] I have analysed the National Health Act and POPIA above and concluded that neither is an obstacle preventing the Alliance or the GDoH from sharing the backlog list with each other. Interestingly the GDoH did not invoke POPIA when the Alliance shared and compiled the backlog list with its help. The type of information that is shared is done so between a private and public body for statistical reasons and will be authorised by a Court Order. I have held that Mses "V", "W" and "X" waived their rights when they filed their detailed affidavits given the extensive disclosures made and cannot expect the GDoH to defend itself with its hands tied behind its back. In any event the hospital records disclosed a minimal of additional facts regarding their health and medical history. In addition POPIA permits the use of such information in defence of the GDOH's rights.

[536] I must also determine whether the relief sought in paragraph 5 of Part "A" of the Notice of Motion is moot. The R250 million ring-fenced funds have been returned to Treasury as per the usual practice. Interdicts are for future events and not intended for cases where the horse has already bolted. Nobody made out a case for rollover of the unspent funds. The Court cannot interfere with the functioning of the usual principle that unspent funds reverts to Treasury at the fiscal year end. I have considered the issues raised in this regard in *AB and Another v Pridwin Preparatory School and Others* [6] where the Constitutional Court said the following about mootness:

"[50] The general principle is that an application is moot when a court's ruling will have no direct practical effect. Courts exist to determine concrete legal disputes and their scarce resources should not be frittered away by entertaining abstract propositions of law, however engaging. Typically, this court will not adjudicate an appeal if it no longer presents an existing or live controversy, and will refrain from giving advisory opinions on legal questions which are merely abstract, academic or hypothetical and have no immediate practical effect or result. This principle was recently reiterated in *President of the Republic of South Africa*. There, it was held that 'courts should be loath to fulfil an advisory role, particularly for the benefit of those who have dependable advice abundantly available to them and in circumstances where no actual purpose would be served by that decision'.

[51] But that is not the end of the matter because 'mootness is not an absolute bar to deciding an issue . . . the question is whether the interests of justice require that it be decided'. In class actions or public interest litigation, the decisions pertaining to the rights contained in the Bill of Rights can have a far-reaching practical effect on many others.

[6] 2020 (5) SA 327 (CC) par 50 -53

> [52] In *Langeberg Municipality*, this court formulated the test for adjudicating a moot matter in these terms:
>
> > 'This court has a discretion to decide issues on appeal even if they no longer present existing or live controversies. That discretion must be exercised according to what the interests of justice require. A prerequisite for the exercise of the discretion is that any order, which this court may make, will have some practical effect either on the parties or on others. Other factors that may be relevant will include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity and the fullness or otherwise of the argument advanced.'
>
> [53] The interests of justice test, to determine mootness, has been reiterated several times by this court. In *POPCRU*, it was held that the discretion is based upon a number of factors which include, but are not limited to, considering whether the order may have some practical effect, and if so, its nature or importance to the parties or to others. The prospects of success are an additional consideration, which, although important are not decisive in determining whether it would be in the interests of justice to adjudicate the matter, notwithstanding its mootness"

[537] I have scrutinised the above matters and accept that to the extent that the interests of justice calls for interference I am at large to do so but not where I am interfering with the normal functioning of Treasury exercising its statutory powers. I may of course scrutinise the events that resulted in the forfeiture to see if same speaks of constitutional compliance and if not utilise the fact of such a failure to justify any other type of order such as a declarator.

Requirements for Interim Relief

[538] The requirements for interim relief have crystallised over the years and are trite.

[539] The existence of a prima facie right although open to some doubt.

[540] The existence of a well- grounded apprehension of irreparable harm if the interim relief is not granted and the final relief is ultimately granted.

[541] Whether the balance of convenience favours the granting of the interim relief and the party has no other satisfactory remedy.

[542] The purpose is usually to preserve or to restore the status quo.

[543] The requirements for the grant of mandatory relief are the same as those for the granting of ordinary interdictory relief.

[544] The above elements are also as stated in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* [7]

[545] The elements are interrelated: the stronger the prospects of success the lower the prejudice required. The Alliance has to prove its right although open to some doubt. For this I am to consider the case made out by the Alliance together with the facts that the GDoH cannot dispute having regard to the inherent probabilities and consider whether the Alliance will on those facts establish final relief at trial and decide if the applicants can succeed.

[546] In *Simon NO v Air Operations of Europe Ab and Others* [8] the court held as follows as regards interim interdicts:

> "Insofar as the appellant also sought an interim interdict pendente lite it was incumbent upon him to establish, as one of the requirements for the relief sought, a prima facie right, even though open to some doubt (Webster v Mitchell 1948 (1) SA 1186 (W) at 1189). The accepted test for a prima facie right in the context of an interim interdict is to take the facts averred by the applicant, together with such facts set out by the respondent that are not or cannot be disputed and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered and, if serious doubt is thrown upon the case of the applicant, he cannot succeed. (Gool v Minister of Justice and Another 1955 (2) SA 682 (C) at 688B—F and the numerous cases that have followed it.)"

[547] In *South African Informal Traders Forum and Others v City of Johannesburg and Others* [9] it was held that:

> "[25] A prima facie right may be established by demonstrating prospects of success in the review."

[548] The harm must be anticipated or ongoing harm. This follows from *Tshwane City v Afriforum and Another*[10] and in the same matter at para 55 it was held that

> "Within the context of a restraining order, harm connotes a common-sensical, discernible or intelligible disadvantage or peril that is capable of legal protection. It is the tangible or intangible effect of deprivation or adverse action taken against someone. And that disadvantage is capable of being objectively and universally appreciated as a loss worthy of some legal protection, however much others might doubt its existence, relevance or significance. Ordinarily

[7] 2012 (6) SA 223 (CC)

[8] 1999 (1) SA 217 (SCA) at 228 F-I

[9] 2014 (4) SA(C016C) at para 25

10 2016 (6) SA 279 (CC)

the harm sought to be prevented through interim relief must be connected to the grounds in the main application"

[549] At para 59 of the same matter the Court said the following about the "irreparable harm":

"Irreparable implies that the effects or consequences cannot be reversed or undone. Irreparable therefore highlights the irreversibility or permanency of the injury or harm. That would mean that a favourable outcome by the court reviewing allegedly objectionable conduct cannot be an order that would effectively undo the harm that would ensue should the interim order not be granted"

[550] At least two competing interests have to be weighed.[11]

[551] "**Balance of convenience**

[62] Afriforum is required to establish that the balance of convenience favours the grant of the interim interdict. This requirement recognises that in an application for a temporary restraining order there will invariably be at least two competing interests. And those interests are inextricably linked to the harm a respondent is likely to suffer in the event of the order being granted and the harm likely to be suffered by an applicant if the relief sought is not granted."

[552] The harm that will be suffered by the applicant if the interim relief is not granted must be weighed first as against the harm a respondent would bear if the interdict is granted[12]

[553] In striking the balance, the prospects of either party being successful are weighed against the prospect of each party suffering harm as a result of the Court either interfering or alternatively not granting interim relief, the seriousness and irreparability of the harm, the difficulties of proving the extent of any harm, and the risk of not recovering the amount thereof. [13]

The exercise of the discretion on a balance of a convenience has been expressed as follows:[14]

It thus appears that where the applicant's right is clear, and the other requisites are present, no difficulty presents itself about granting an interdict. At the other end of the scale, where his prospects of ultimate success are nil, obviously the Court will refuse an interdict. Between those two extremes fall the intermediate cases in which, on the papers as a whole, the applicants' prospects of ultimate success may range all the way from strong to weak. The expression '*prima facie* established though open to some doubt' seems to me a brilliantly apt classification of these cases. In such cases, upon proof of a well grounded apprehension of irreparable harm,

[11] 2016 (6) SA 279 (CC) para 62
[12] National Treasury supra para 55
[13] Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another - 1973 (3) SA 685 (A) at 691 D-E

[14] Olympic Passenger Service (Pty) Ltd v Ramlagan - 1957 (2) SA 382 (D) at 383D-G

and there being no adequate ordinary remedy, the Court may grant an interdict - it has a discretion, to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience - the stronger the prospects of success, the less need for such balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him. I need hardly add that by balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted."

[554] Where the Application is brought in two parts the Court need not determine the cogency of the review grounds.[15]

Prima facie right

[555] When the allocation of R 784 million was announced in March 2023, Gauteng Provincial Treasury explicitly stated that the money would be used to *"clear the backlog".* GDOH then on the basis that this was the full 3 year MTEF budget ensured that R250 million was ring-fenced for purposes of outsourcing radiation oncology services for clearing the backlog of cancer patients awaiting same. It then with the full knowledge that it may use Treasury Regulation 16A6.4 as a basis to procure services in other ways than tenders in urgent cases embarked on a tender process which ultimately delivered only an award of category 3 planning services and for the reasons disclosed above failed in respect of category 1 and 2 of the tender. This it did under circumstances where it was made aware of the urgency of the cancer backlog patients plight (some received no radiation oncology treatment post surgery on multiple occasions). The GDoH was aware of the fact that approximately 3 months post surgery such patients should receive radiation oncology treatment. Prior hereto it was exposed to a Mr Manning from National Health who demonstrated to the Task Team how urgent procurement can be done by way of using a "call for services" as was done during Covid-19. To equate the crisis of the cancer patients on the backlog with Covid-19 is not an exaggeration in my view given that the failure to supply the radiation oncology treatment timeously often leads to earlier death.

[556] The tender was advertised on 20 October 2023 – approximately 6 months after the funds referred to above was made available. The numerous interruptions in

[15] National Treasury supra para 31

the tender process led to so many delays that only the limited award was possible whilst a process applying deviation as suggested by Mr Manning was lawful and achievable in the period the tender process struggled on. I am satisfied that the procurement process as suggested by Mr Manning would be compliant with section 217 of the Constitution given the prevailing urgency. The fundamental purpose behind the ring-fenced funds were to ensure that the radiation oncology treatment is outsourced to benefit the cancer patient on the backlog list as originally compiled in late 2022 (and was even updated by the GDoH in 2023).

[557] The award of the Category 3 planning services was made to Siemens whilst no technical radiation oncological service was awarded or any category 1 outsourced radiation treatment service could ultimately be awarded. Prior to this tender the Alliance expected that an expedited deviation methodology for procurement would be followed as it thought was agreed with the provincial health respondents.

[558] The cancer patients on the backlog list enjoy the same section 27 rights any other citizen enjoys. They however became the beneficiaries of the ring-fenced funds which was to be used for outsourcing to benefit them on an urgent basis. Whilst this was the expectation their Constitutional rights under sections 7(2), 33 and section 195 also remained in place, Notwithstanding the aforesaid and without any justifiable reason the provincial health respondents ignored their right to enjoy an outsourced radiation oncology treatment which also flowed from the ring-fenced funds made available for the specific purpose, the underlying reasoning being that the situation is so urgent that this outsourcing could be procured by way of deviation and by motivating an approval for the use of Treasury Regulation 16A6.4 to authorise deviation.

[559] Further all attempts by the Alliance to persuade the GDoH to communicate about the tender approach was ignored as well as the demands made by Ms Mapipa on its behalf to rather use a deviation process, as referred to and urgently procure the outsourced radiation oncology treatment. In so doing the Alliance and the patients on the cancer backlog list's rights under section 195 of the Constitution was infringed by the provincial health respondents in that a

high standard of professional ethics were not maintained, efficient, economic and effective use of resources were not promoted, services were not provided impartially, fairly, equitably and without bias. and their needs were not responded to, they were not accountable and transparency was not fostered by providing timely, accessible and accurate information.

[560] All the aforesaid infringements ultimately caused the ring-fenced funds to be returned to Treasury given that by the end of the fiscal year all R250 million remained unspent.

[561] This while the State is obliged in terms of section 7(2) of the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights, including the section 27 right to healthcare.

[562] The obligation incorporates negative and positive duties: the State has positive obligations to take active steps to promote and ensure the right is protected and fulfilled; and negative obligations in that it may not take steps that undermine that right,

[563] As a matter of law, all decision-making by the State constituting the exercise of a public power or performance of a public function (as is the case here) must, at a minimum, comply with the prescripts of the rule of aw, and more particularly the constitutional principle of legality.

[564] Where such decision-making constitutes administrative action, the State's decision-making must be lawful, reasonable and procedurally fair in accordance with section 33 of the Constitution, read with PAJA.

Irreparable harm

[565] The cancer patients on the backlog list are facing life-threatening illness. If they do not receive the radiation oncology treatment, they may not survive. In the absence of such treatment, their health continues to deteriorate significantly.

[566] Backlog list patients have already passed away**,** waiting for such treatment that has not been forthcoming. Actual, irreparable harm has already occurred, continues to occur and is reasonably apprehended.

[567] The provincial health respondents, however, ignore this. They allege that the applicant suffers no harm with the awarding of the tender to Siemens Healthcare.

[568] To the extent that the Alliance's constituency may suffer harm, that harm they say is minimised in that it has launched a review application and all the issues raised will be dealt in the review. The harm is not a "real" harm because the review will address the issues raised .

[569] The provincial health respondents simply do not engage with the case made out in that regard. The provincial health respondents appear insensitive and dismissive of the actual harm that has been - and is being - suffered by the cancer patients on the backlog list, to whom they owe (undisputed) constitutional obligations.

[570] Cancer patients who are on the backlog list are facing life-threatening illness.

[571] The Alliance has a reasonable apprehension of imminent and irreparable harm that the cancer patients who are on the backlog will suffer, if this Court does not intervene to ensure that they receive potentially life-saving radiation oncology treatment.

The balance of convenience favours the applicant

[572] In considering where the balance of convenience lies, a court must first weigh the harm to be endured by an applicant, if interim relief is not granted, as against the harm the provincial health respondents will bear. if the interdict is granted. Importantly, a court must assess all relevant factors carefully in order to decide where the balance of convenience rests.

[573] The provincial health respondents maintain that it is not convenient for the interim interdict to be granted. The issues raised by the Alliance will be dealt with in due course when the review application is heard.

[574] The Alliance denies that the balance of convenience falls against it. The interim interdict is intended to ensure thar the backlog patients actually receive some outsourced treatment.

[575] The provincial health respondents have done nothing meaningful since the money was allocated in March 2023 to actually provide radiation oncology treatment to the cancer patients. On the other hand, the health and general well-being of the cancer patients has significantly deteriorated There is a clear, imminent and ongoing irreparable harm that cancer patients who are on the backlog list are suffering. That has now become worse since the ring-fenced funds have been returned to Treasury.

[576] If the interim interdict is not granted, there is a real risk that -the backlog list patients will not receive radiation oncology treatment in the immediate future (and at least until the tenders for the delivery of radiation oncological treatment are actually being executed);

[577] The provincial health respondents have done nothing meaningful since March 2023 to provide radiation oncology treatment to cancer patients who are on the backlog list.

[578] If the Alliance is successful under Part A and does not succeed under Part B, there can be no prejudice to the provincial health respondents.

[579] There can be no prejudice to the provincial health respondents if the interim relief is granted - they are in any event constitutionally obliged to provide radiation oncology treatment to the backlog list patients in respect of whom money has already been allocated for that specific purpose. Whether that money is spent now or at a later date after the review application is determined (even if the Alliance is unsuccessful) will have no impact on the provincial health respondents. The provincial health respondents are not called upon to allocate more funds than have already been allocated, or to re-prioritise their policy or other objectives to accommodate the backlog patients. They are not called upon to spend the allocated funds for any purpose other than that for which the allocation was made. Even if the applicant is ultimately unsuccessful in the relief in Part B, the money spent will have been used in the meantime to provide potentially life-saving treatment to the backlog list patients.

[580] The balance of convenience favours the grant of the interim interdict.

No other remedy

[581] The provincial health respondents maintain that if the Alliance is not granted relief at this stage, it will have the opportunity to ventilate its case on its review application.

[582] The Alliance has been trying since 2020 to engage with the provincial health respondents, to ensure that cancer patients on the backlog list receive radiation oncology treatment.

[583] Since June 2023, the provincial health respondents have refused to engage with the applicant. On 4 June 2024, the Alliance sent a further letter to the provincial health respondents, in the effort to avoid litigation.

[584] The provincial health respondents failed to respond. 151

[585] The Alliance had no other remedy but to approach this Court for interim relief.

The Declaratory Relief

[586] The Alliance seeks a declarator that the provincial health respondents failure to devise and implement a plan to provide radiation oncology treatment to cancer patients who are on the backlog list, is unconstitutional and unlawful.

[587] The requirements in respect of the granting of declaratory order are two-fold. [16] The court must be satisfied that the applicant has an existing, future or contingent right or obligation, and once a court is so satisfied, it must be considered whether or not the order should be granted.

[588] When considering the grant of declaratory relief, the court will not grant such order where the issue raised before it is hypothetical, abstract and academic, or where the legal position is clearly defined by statute.

[589] The provincial health respondents have a constitutional obligation to provide access to health care services as set out in section 27 of the Constitution.

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[16] Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd - 2005 (6) SA 205 (SCA)

[590] In this case, the provincial health respondents received R784 million in March 2023 to address the radiation oncology backlog in the province. The applicant's case is that having received this funding, the provincial health respondents are yet to provide timeous radiation oncology treatment to cancer patients who are on the back log list.

[591] The provincial health respondents failure, in the present circumstances, to provide radiation oncology treatment to cancer patients who are on the backlog list, is in breach of section 27 of the Constitution and is unconstitutional and unlawful. The issue as to whether the violation is justifiable under section 36 of the Constitution does not arise, because the provincial health respondents do not concede that their conduct is in violation of section 27 of the Constitution.

[592] A declarator ought to be issued to protect the health care rights of cancer patients

Requirements for a Structural Interdict

[593] A declaratory order, as set out in prayer 2 will not, of itself amount to "effective relief' within meaning of section 38 of the Constitution, to address the violation of the health-care rights of cancer patients who are on the backlog list. Section 38 of the Constitution, to the extent relevant, provides:

> "38 Enforcement of rights
>
> Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights."

[594] The Alliance submitted that the provincial health respondents ought to be ordered to file reports with this Court to describe the steps it will take to ensure that timeous radiation oncology treatment is provided to cancer patients who are on the backlog list and, in the long-term to provide radiation oncology treatment to cancer patients.

[595] Our courts have imposed supervisory orders where there has been a breach of constitutional rights and a need to ensure accountability by the State.

[596] Our courts have grappled with what amounts to effective relief in cases where there has been a violation of constitutional rights. It is beyond dispute, that our courts have recognised that where the need exists, a supervisory order, coupled with a reporting obligation, may be ordered. In *Minister of Health v Treatment Action Campaign (No.2),* the Constitutional Court recognised that a structural interdict falls within a court's power when granting effective relief. Although the Constitutional Court did not impose a supervisory order, it held:

> " ... We thus reject the argument that the only power that this Court has in the present case is to issue a declaratory order. Where a breach of any right has taken place, including a socio-economic right, a court is under a duty to ensure that effective relief is granted. The nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in a particular case. Where necessary this may include both the issuing of a *mandamus* and the exercise of supervisory jurisdiction. "[17]

160. The Constitutional Court went on to hold that:

> "[129] The order made by the High Court included a structural interdict requiring the appellants to revise their policy and to submit the revised policy to the Court to enable it to satisfy itself that the policy was consistent with the Constitution. In *Pretoria City Council* this Court recognised that Courts have such powers. In appropriate cases they should exercise such a power if it is necessary to secure compliance with a court order. That may be because of a failure to heed declaratory orders or other relief granted by a Court in a particular case. We do not consider, however, that orders should be made in those terms unless this is necessary. The government has always respected and executed orders of this Court. There is no reason to believe that it will not do so in the present case."[18]

[597] The Constitutional Court has developed the supervisory interdict to include a reporting obligation in cases where there was a need to ensure accountability, transparency and openness.[19]

[598] In *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* the Constitutional Court held that:

> "Apart from these aspects, further disciplined accountability is needed in the initiation and execution of the new tender process. This needs to be monitored. This court has wide remedial powers to ensure effective relief for a breach of a constitutional right. In light of the importance of the right to social security and the impact on and potential prejudice to a large number of beneficiaries, the public clearly has an interest in ensuring that the tender is rerun properly. In

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[17] Minister of Health and Others v Treatment Action Campaign and Others (No 2) 2002 (5) SA 721 para 106 and see also at para 113.

[18] See also para 129

[19] 2014 (4) SA 179 (CC)

these circumstances it is appropriate to impose a structural interdict requiring SASSA to report back to the court at each of the crucial stages of the new tender "

[599] I was also referred to the decision in *Pheko v Ekurhuleni Metropolitan Municipality (Socio-Economic Rights Institute of South Africa Amicus Curiae)* where the Court held that[20]

"Supervisory orders arising from structural interdicts ensure that courts play an active monitoring role in the enforcement of orders. In an appropriate case, this guarantees commitment to the constitutional values of accountability, responsiveness and openness by all concerned, in a system of democratic governance. By granting the structural interdict a court secures a response in the form of reports and thereby prevents a failure to comply with the positive obligations imposed by its order. Generally, the court's role continues until the remedy it has ordered in a matter has been fulfilled"

[600] In *Mwelase v DG Department of Rural Development* [21] the Constitutional Court held

[601] "In cases that cry out for effective relief, tagging a function as administrative or executive, in contradistinction to judicial, though always important, need not always be decisive. For it is crises in governmental delivery, and not any judicial wish to exercise power, that has required the courts to explore the limits of separation of powers jurisprudence. When egregious infringements have occurred, the courts have had little choice in their duty to provide effective relief. That was so in *Black Sash I*, and it is the case here. In both, the most vulnerable and most marginalised have suffered from the insufficiency of governmental delivery.

[49] The vulnerability of those who suffer most from these failures underscores how important it is for courts to craft effective, just and equitable remedies, as the Constitution requires them to do. In cases of extreme rights infringement, the ultimate boundary lies at court control of the remedial process. If this requires the temporary, supervised oversight of administration where the bureaucracy has been shown to be unable to perform, then there is little choice: it must be done. Here, the fact that the Department's tardiness and inefficiency in making land reform and restitution real has triggered a constitutional near-emergency, as explained earlier. This fact underscores the need for practically effective judicial intervention

[602] The facts in the present matter fall within the meaning of *"egregious infringements"* as discussed above. The cancer patients who are on the backlog list are vulnerable and remain on the margins of the public healthcare system. Their health continues to deteriorate in the absence of tlmeous radiation oncology treatment. Absent judicial intervention and oversight, there remains no other meaningful method for cancer patients who are on the backlog list to access potentially life-saving radiation oncology treatment. The Alliance, despite its best efforts since 2020, has been unable to meaningfully engage

[20] 2016 JDR 1357 (CC) para 1

[21] 2019 (6) SA 597 (CC)

with the provincial health respondents to get it closer to formulating and/or implementing a plan to treat cancer patients who are on the backlog list.

[603] The provincial health respondents have conducted themselves as a law unto themselves and have decided it inappropriate to be held to account to the applicant, who has been acting in the public interest. Underpinning all of this, is the compelling need for a mechanism to be put in place to ensure that the provincial health respondents are indeed held to account for their constitutionally imposed obligation to provide health-care services, which by its very nature, includes the provision of life-saving radiation oncology treatment to cancer patients who are on the backlog list.

[604] I accept that it is necessary for a supervisory interdict to be issued in this matter. The provincial health respondents have not been providing radiation oncology treatment timeously.

[605] The backlog has developed to such an extent that some cancer patients have been placed on the list and have been awaiting treatment for the past three years (if not longer). The Alliance has repeatedly requested that updates in relation to the backlog lists be made only to hear about the notional waiting lists.

[606] This Court's supervisory role, with reporting obligations imposed on the provincial health respondents, is in my view warranted in this matter.

Costs

[607] The provincial health respondents may have not conducted themselves as showcase Constitution compliant litigants but I do not believe an attorney and client costs order against them is warranted. The Courts are under pressure to keep am eye on costs inflation and therefore I am more inclined towards a party and party scale order. The matter is complex and therefore I believe a party and party costs order is warranted but on Scale "C" including the costs of two counsel.

Hence I make the following order:

Interim Order

1. The matter is urgent and heard as one of urgency in terms of Rule 6(12) of the Uniform Rules of Court, and forms and service provided for in the rules are dispensed with to the extent necessary;

2. The Strike out Application is dismissed and the provincial health respondents are awarded costs against the Alliance on the party and party Scale C same to include the costs of 2 Counsel one of which is Senior Counsel;

3. The First, Second, Seventh and Eighth Respondents' failure to devise and implement a plan to provide radiation oncology services at Charlotte Maxeke Johannesburg Academic Hospital and Steve Biko Academic Hospital timeously (after receiving ring-fenced funding for same) in Gauteng to cancer patients on the backlog list is declared to be unlawful and unconstitutional and in breach of sections 7(2), 27, 33 and 195 of the Constitution.

4. The Applicant is directed deliver to the Second Respondent a copy of the backlog list as it existed after it was compiled by itself;

5. The First, Second, Seventh and Eighth Respondents are directed to update the backlog list of cancer patients who are awaiting radiation oncology services in Gauteng within 45 days from the date of this order and maintain its POPIA compliancy and broken down by hospital;

6. The First, Second, Seventh and Eighth Respondents are directed to take all steps necessary to provide radiation oncology services to backlog list patients who are awaiting treatment at Charlotte Maxeke Johannesburg Academic Hospital and Steve Biko Academic Hospital in Gauteng at a public and/or private facility;

7.The First, Second, Seventh and Eighth Respondents are directed to file an updated report within 3 months from date of this order detailing the following:

7.1. A progress report on the steps taken to provide radiation oncology services to cancer patients who are on the backlog list in Gauteng;

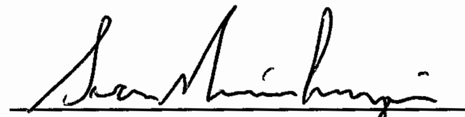
7.2. A progress report on the First Respondent's long-term plan to provide radiation oncology services to cancer patients at Charlotte Maxeke Academic Hospital and Steve Bike Academic Hospital.

8. In the event that the First Respondent fails to comply with the orders set out in paragraphs 4 to 7 above, the Applicant is entitled to re-enroll the matter on the same papers duly supplemented to the extent necessary and where necessary to make use of oncology radiotherapy medical experts;

9. The Applicant is granted leave to supplement the application in relation to the relief sought in Part B of the application;

10. Orders 2 – 9 will remain in place until the relief sought in Part B as it stands at present or may be amended has finally been disposed of;

11. The First, Second, Seventh and Eighth Respondents are directed to pay the Applicant's costs under Part A, on scale C as between party and party with such costs to include the costs of 2 counsel..



S VAN NIEUWENHUIZEN, AJ
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of Hearing: 21 November 2024
Date of Judgment: 27 March 2025

Representation for Applicant	Adv L Zikalala Adv J Griffiths Adv F Mahomed
Instructed by:	Section 27, Attorneys for the Applicant, First Floor,

South Point Corner Building,
87 De Korte Street,
Braamfontein,
Johannesburg,
Tel:011 356 4100
Email:
mapipa@section27.org.za

Representation for First, Second Seventh and Eight Respondent

Adv W Mokhare S.C.
Adv M.H. Mhambi

Instructed by

Motsoenemg Bill Attorneys Inc,
First, Second, Seventh and Eighth Respondents' Attorneys,
85 Western Service Road
Wendywood, Sandton 2190,
Tel: 011 463 9401
E-Mail:aristidis@mbaincorporated.co.ca
admin@mbaincorporated.co.za
tamara@mbaincorportated.co.za
REF: MAT 3085