REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 13523/2018

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED

01/09/ 2021 .....

DATE **SIGNATURE**

In the matter between:

MEMBER OF EXECUTIVE COUNCIL FOR HEALTH GAUTENG PROVINCE Applicant

and

DR. REGAN SOLOMONS Respondent

In re:

LINDIWE URGINIA VULANGENGQELE obo MILANI VULANGENGQELE Plaintiff

and

MEMBER OF EXECUTIVE COUNCIL FOR HEALTH GAUTENG PROVINCE Defendant

JUDGMENT

DIPPENAAR J:

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 1st September 2021.

[1] The present application concerns a subpoena *duces tecum* issued by the applicant[1], the defendant in the action, (hereinafter referred to as "the defendant"), on 21 May 2021 ("the subpoena application"). The subpoena was served on the respondent, ("Professor Solomons") on 25 May 2021. Therein, Professor Solomons is referred to as "Dr Solomons". A similar subpoena was issued for one of the plaintiff's witnesses in the trial, Dr Smith. That subpoena was not served.

[2] In the subpoena application, the defendant sought orders: (i) declaring that professor Solomons has no lawful basis to claim privilege in respect of the documentation or tape recordings identified in the subpoena, (ii) directing him to forthwith hand over the documents to the registrar and (iii) ancillary relief.

[3] On 1 March 2021, I granted an order granting the plaintiff leave to reopen her case in the trial proceedings between her and the defendant. The plaintiff was directed to deliver her supplementary r36(9) expert summaries and discovery affidavits by 12 March 2021 and the defendant to do so by 21 May 2021. The ambit of the further evidence to be led pertained to a research paper (hereinafter referred to as "the article") and was defined in the judgment as:

[1] The applicant is a major female and shall be referred to as "her" where appropriate

> "Evidence on the research paper titled: *"Intrapartum Basal-Ganglia-Thalamic Pattern Injury and Radiological Termed "Acute Profound Hypoxic-Ischemic Brain Injury" are not Synonymous"* by Smith *et al*. published in the December 2020 American Journal of Perinatology and the implication of this research paper on the issues of timing and causation in the trial matter."

[4] The article is authored by eight medical experts from South Africa in the fields of obstetrics, paediatric neuroradiology, paediatric neurology and neonatology. The principal author is Professor Smith, a proposed witness for the plaintiff in the trial.

[5] The trial was enrolled for hearing during the period 14 to 18 June 2021. The application was argued before the commencement of the trial. During the hearing, the defendant indicated that absent the determination of the application and the provision of the documentation sought, the trial could not proceed as the defendant would be hampered in her cross examination. Judgment in the application was reserved and the trial was postponed. Costs were reserved. The parties were directed to deliver comprehensive heads of argument. I further requested and received additional heads of argument from the parties[2] regarding whether the Protection of Personal Information Act ("POPIA")[3] was applicable.

[6] The subpoena here in issue pertained to certain statements made in the article and specifically to references to 195 cases and 63 cases under the heading "Materials and Methods".

[7] In its terms, the subpoena called upon Professor Solomons to provide to the registrar:

> *" 1 documents setting out the names of the parties, the division of the High Court that heard the matter, the case numbers and the judgments in each of the 195 medico legal actions that are referred to on page 2 of the article titled "Intrapartum Basil Ganglia-Thalamic Pattern Injury and Radiologically Termed 'Acute Profound Hypoxic-*

[2] On 25 June 2021
[3] Act 4 of 2013, which came into force on 1 July 2021, after the application was argued but before judgment was delivered.

Ischaemic Brain Injury' are not Synonomous' dated 4 November 2020, which article was authored by Johan Smith MD, PhD, Regan Solomons, MD PhD, Lindi Vollmer, MD, MMed, Eduard J Langenegger MD, PhD, Jan W Lotz, MD, MMed, Savvas Andronikou, MD, PhD, John Anthony, MD, MPhil and Ronald van Toorn, MD, PhD (hereinafter "the Article"); and

2 all supporting documentation including but not limited to, raw data, expert reports, medical records, and MRI scans relating to the 63 cases referred to in the sentence on page 3 of the article that reads: "Sixty-three (33.5%) cases with BGT pattern HII remained. However, in only 21cases were there limited electronic reviews by cardiotocography (CGT) during labour. The image findings of delayed MRI scans in these cases were subsequently reviewed in a blinded and separate assessment by two neuro radiologists (SA and JWL)"

[8] Professor Solomons by way of letter dated 4 June 2021 objected to the production of the documents, the relevant portion of which provided:

"3. *Prof Solomons claims privilege to the information requested by your client. The information is privileged because of:*

3.1 the confidentiality of patient information; and

3.2 the ethical and legal obligation of research institutions and researchers to protect personal information of research participants, in order to ensure that their identities are not revealed."

[9] The subpoena application was launched on 9 June 2021, to be heard prior to the commencement of the trial on 14 June 2021. The plaintiff was not cited as a party to the application.

[10] The case made out by the defendant in her founding papers was a narrow one. In sum, it was contended that Professor Solomons had no lawful basis on which to legitimately claim privilege to the documents. The documents sought in the subpoena formed part of documents in medico legal actions which have been or are still pending before the courts and as such those documents were public documents and not subject to a claim of confidentiality or privilege. Professor Solomon's reliance on privilege and/or

confidentiality was thus misplaced. Reliance was placed on s35 of the Superior Courts Act[4] and Uniform rule 38, which regulates the issuing of subpoenas *duces tecum* as well as the open court principle and access to justice under s34 of the Constitution. That was the case Professor Solomons was called upon to meet[5].

[11] In her replying papers, the defendant for the first time raised the relevance of the documents sought in the subpoena. The defendant contended: *"However, insofar as it is suggested that the relevance of the documents may be in issue, I refer to the reports which have been filed by the applicant's experts".* This constitutes a reference to expert reports filed in the trial proceedings by the defendant's experts, Professors Bolton, Cooper and Smuts, which did not form part of the application papers. The replying affidavit went on to provide various reasons why the documents would be relevant.

[12] The answering affidavit of Professor Solomons was preceded by a letter articulating the basis of his opposition to the application after receipt thereof. The main grounds of opposition raised were: (i) a lack of urgency, justifying the striking of the application from the roll; (ii) the undisputed averment that Prof Solomons was not in possession of the documentation sought in the subpoena and (iii) in support for his entitlement to costs, it was contended that even if Professor Solomons had the documentation sought, he was prohibited from disclosing patient information absent the patient's consent in terms of the relevant legislative provisions. In his answering affidavit, Professor Solomons tendered the production of certain de-identified documents in his possession. That tender was not accepted by the defendant.

[13] The application was also opposed by the plaintiff who was not cited as a party to the application and who did not deliver any answering papers. After being directed to do so, heads of argument were filed on her behalf, in which she sought an order dismissing the subpoena application; first, on the grounds advanced by Professor Solomons and second, on the basis that disclosure of the documents and other material sought and to

[4] 10 of 2013
[5] Administrator Transvaal and Others v Theletsane 1991 (2) SA 192 (A)

be sought from Professor Smith in terms of his unserved subpoena when he testifies at the trial is not permitted as it would give rise to collateral issues which are not admissible in evidence. She further sought the costs of the application as well as the wasted costs of the postponed trial, including the costs of two counsel.

[14] In dealing with the collateral evidence issue raised by the plaintiff in her heads of argument, the defendant challenged the plaintiff's locus standi to oppose the application. In the alternative, it was argued that the issue whether the documents may be used during the trial and in cross examination and whether defendant's experts can comment thereon are matters that will have to be determined during the trial.

[15] The challenge to the plaintiff's locus standi can be disposed of succinctly. In her replying affidavit, the defendant attempted to bolster the case made out in her founding papers substantially by extensive references to the relevance of the documentation sought to the trial proceedings and the proposed subpoena which could not be served on one of the plaintiff's witness, Professor Smith, straying outside the ambit of the application papers and making reference to the expert reports delivered by the defendant in the trial proceedings. In my view, the plaintiff does have a direct and substantial interest in the subject matter of the application, which will have a direct impact on the ambit of the trial and should have been joined as a party to the application. The challenge thus lacks merit.

[16] As a general principle, it is trite that a court should not range beyond that which it has been asked to adjudicate; in other words, it should adjudicate the case made out in the papers and the issues raised therein. It is for the parties to identify the dispute and for the court to determine that dispute[6]. Our courts have further held that there are cases where the parties may expand those issues by the way in which they conduct the proceedings and instances where a court may *mero motu* raise a question of law that emerges fully from the evidence and is necessary for the decision of the case, albeit

[6] City of Cape Town v South African National Roads Authority Ltd and Others ("SANRAL") paras 9 and 10 and the authorities quoted therein; Fischer v Ramahlele 2014 (4) SA 614 (SCA) paras 13 and 14 as quoted in SANRAL para 10

subject to the proviso that no prejudice would be caused to any party by it being decided. This is not one of those cases.

[17] The defendant's founding papers focused on Professor Solomons and made out no case for relief against the plaintiff or against Professor Smuts. The relevance issue was only raised in reply, thereby raising a host of issues relevant to the trial action, which were dealt with in argument and not on the application papers. The debate between the plaintiff and defendant centered around the admissibility and relevance of the documents and whether they would constitute collateral issues in the pending trial proceedings. The plaintiff argued that "*it has thus become pertinent for the court to come to a definitive decision notwithstanding the finding in regard to the application against Professor Solomons, what route the trial will take when Professor Smith gives evidence when reliance will be placed on the findings in the article*". The defendant, although initially contending that such issues were to be dealt with in due course in the trial proceedings, ultimately presented substantial argument in her heads of argument on the issue and adopted the position that it was in the interests of justice to determine the defendant's entitlement to the documents and the claim for confidentiality therein.

[18] The fundamental difficulty with such an approach is that both the defendant and the plaintiff traversed various issues ranging outside the ambit of the issues raised and dealt with comprehensively in the application papers. It may well be that these issues arise during the course of the trial proceedings, but it is not in my view appropriate or possible to determine those issues now and in the present application.

[19] This is so for various reasons. First, the founding papers in the subpoena application are squarely based at obtaining an order against a third party, Professor Solomons, who is not a party to the action proceedings and is not even a witness in those proceedings. Second, those issues traversed by the plaintiff and defendant were not expressly raised or dealt with comprehensively in the application papers, other than a limited reference in the defendant's replying papers to the relevance of the documents. Third, those issues arise, not in the context of the present application and the subpoena

served on Professor Solomons, but rather in the context of the proposed subpoena to be served on Professor Smith and the evidence which is to be presented at trial. Fourth, it was argued by both the plaintiff and the defendant that the issues raised may affect many litigants in other cases. As such it would be inappropriate to attempt to determine issues of broad impact absent a proper application which expressly raises and canvasses such issues. Fifth, the subpoena is cast in very broad and general terms and it cannot be determined from the application papers exactly what information is in issue without resorting to speculation. The subpoena is aimed at obtaining all the underpinning information used for the preparation of the article to challenge the cogency and correctness of the article and covers a wide ambit of unknown documents.

[20] If the plaintiff and defendant require these issues to be addressed before the trial resumes, it is open to them to consider the launching of appropriate proceedings to address and obtain clarity on these issues. I shall thus refrain from making any findings on the issues of admissibility and relevance of the documents sought. The defendant's view was that the trial could not proceed until the issue was decided as it was central to the defence the defendant would be entitled to make. That meant the inevitable postponement of the trial.

[21] I turn to a consideration of the case made out on the application papers. It is apposite to first deal with the urgency challenge. Seen from the perspective of Professor Solomons, the application was launched with great urgency, without a proper case being made out for urgency in the founding papers. Even if the application, seen in the context of the action proceedings, is an interlocutory one incidental to the main action proceedings, Professor Solomons is not a party to those proceedings and the plaintiff was not joined as a party thereto. I am however not persuaded that the application should be struck for lack of urgency. The fashion in which the application was launched, however has an impact on an appropriate order of costs, an issue to which I later return.

[22] Turning to the merits, the defendant's argument that no privilege or confidentiality vested in the documents sought in paragraph 1 of the subpoena, was based on the trite

principle that they were matters of public record and the default position is one of openness, unless a court otherwise orders. The right to open justice must include the right to have access to papers and written arguments which are an integral part of court proceedings.[7] In short, the open court principle in practice entails that court proceedings including the evidence and documents disclosed in proceedings should be open to public scrutiny and that judges should give their decisions in public[8]. S34 of the Constitution affords litigants the right to a public hearing. Reliance was placed on *City of Cape Town v South African National Roads Authority Limited & Others*[9] where the relevant principle is stated thus[10]:

> *"The animating principle therefore has to be that all court records are, by default, public documents that are open to public scrutiny at all times. While there may be situations justifying a departure from that default position-the interests of children, State security or even commercial confidentiality-any departure is an exception and must be justified."*

[23] Under r38 a party is of right entitled to issue a subpoena. Neither of the opposing parties invoked the provisions of s36(5) of the Act to have the subpoena set aside as an abuse, neither did the plaintiff. Under s36(5) a subpoena may be set aside if it appears (i) that the person concerned is unable to give any evidence or produce any document which would be relevant to any issue in the proceedings (ii) such document could properly be produced by some other person; (iii) to compel the person to attend would be an abuse of the process of the court.

[24] Although I agree that the documents filed of record in trial proceedings are matters of public record, no case has been made out in the founding papers exactly what such documents would encompass and to what extent they have been discovered in those legal proceedings. The description of the documents in the subpoena are in general and broad terms and I am not persuaded that the documents have been sufficiently specified

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[7] SANRAL para 19
[8] SANRAL para 12-17
[9] (2078/2014) [2015] ZASCA 58 (30 March 2015) para [47]
[10] Para 47

as envisaged by r38[11]. I am further not persuaded that the documents sought in item 2 of the subpoena have been sufficiently described or that they were necessarily discovered in the legal proceedings and thus constitute public documents. From the founding papers it cannot be ascertained which of these document would in fact constitute matters of public record.

[25] Professor Solomons' version that he was not in possession of the documents sought in the subpoena was not disputed, which rendered the relief sought in prayer 2 of defendant's notice of motion moot.

[26] In the defendant's heads of argument, focus was placed primarily on the declaratory order sought and amended relief that Professor Solomons was obliged to inform the registrar of the whereabouts of the documents sought in the subpoena, despite Professor Solomons' counsel placing on record his instruction that the whereabouts of the documents were unknown by him. Despite being challenged in defendant's heads of argument, no further affidavit was filed by Professor Solomons. That issue is not however dispositive of the application. The defendant argued that the declaratory relief should be determined because of the unserved subpoena on Professor Smith and the plaintiff's reluctance to comply with defendant's reasonable request to inform Professor Smith that he would have to produce the documents and the issue of costs. The defendant however failed to draw any distinction between the right to obtain documentation and the obligation to produce documentation.

[27] Professor Solomons' argument centered around the confidentiality obligations imposed on him in terms of s 14(2) (a) and (b) of the National Health Care Act[12], regulation 13 of the Ethical Rules of Conduct of Practitioners registered under the Health Professions Act[13] and the Ethical Guidelines for good practice of the Health Professions Council of SA relating to patient confidentiality. It was argued that even if he had been in

[11] Beinash v Wixley 1997 (3) SA 721 (SCA)
[12] 61 of 2003
[13] 36 of 1974, regulations published in GN R717 Government Gazette 29079 of 4 August 2006

possession, he was not at liberty to provide them absent consent of the patients involved or a court order due to the confidentiality restrictions The latter issue was raised in the context of costs. It was argued that the defendant should be aware of the relevant legislation and should not have issued the subpoena but should rather adopted a different procedure and should have approached the court justifying why the documentation sought is relevant and tendering safeguard regarding protection of the confidentiality of patient information.

[28] S 14(1) of the National Health Act deems it imperative and mandatory to afford the information recorded on the health records protection against unauthorised disclosure. The private information contained in the health records of a user is worthy of protection as an aspect of human autonomy and dignity under the Constitution[14] . S14(2) renders all of a patient's information relating to his or her health status, treatment or stay in a health establishment confidential. The prohibition may be lifted in three instances, if (i) the patient consents to the disclosure; (ii) a court orders the disclosure or (iii) the disclosure is in the interests of public health. In each instance, the need for access should be weighed against the privacy issue.[15]

[29] Reliance was further placed on regulation 13 of the Ethical Rules of Conduct of Practitioners registered under the Health Professions Act 36 of 1974[16] and the ethical guidelines, specifically booklet 5, paragraphs 3.1 and 3.2, 8, dealing with the disclosure of information other than for treatment, including research, and paragraph 8.2.3 which draws a distinction between "identifiable patient data", which can only be disclosed "with informed consent of the patient" and "de-identified data". Reliance was also placed on paragraphs 8.2.3.4 and 9.1.3 requiring that data should be anonymized if it is not practical to contact patient to seek consent for the use of identifiable data or samples and

[14] Tshabalala-Msimang and Another v Makhanya and Others 2008 (6) SA 102 (W) para [27]
[15] NM and Others v Smith and Others 2007 (5) SA 250 (CC) paras 40-43

[16] Published under government notice R717 in GG 29079 of August 2006 ("the ethical rules")

paragraphs 10.2 and 10.3 which refers to the disclosure of information if ordered to do so by a judge or presiding officer of a court.

[30] In the present application, the defendant has simply not placed all the relevant information before the court to enable it to perform that exercise and to determine whether an order should be granted directing the disclosure of the documents sought. I agree with the argument advanced by Professor Solomons that the defendant utilised the wrong procedure by simply issuing a subpoena.

[31] Under s36(1)(c) of the Superior Courts Act, a party is required to produce documentation unless there is a just excuse for the production thereof. The ambit of a just excuse is wide enough to cover the confidentiality obligations imposed upon Professor Solomons. It can therefor not be concluded that Professor Solomons was in willful disobeyance of the subpoena or that the defendant is without more entitled to the documentation sought.

[32] The defendant's argument was that on a proper interpretation of each of the relevant statutory provisions, individually or collectively, a person in possession of information relating to a patient, whether the person concerned is a medical person or not, is not entitled to claim confidentiality in respect of that information, if such information is required to be disclosed in terms of a statutory provision. The statutory basis on which the subpoena was issued is s35 of the Superior Courts Act. That argument disregards that s35 cannot be viewed in isolation but must also be considered in the context of all other relevant statutory provisions and that a litigant is not always entitled to production of documents. As held in *Beinash v Wixley*[17]:

[17] 1997 (3) SA 721 (SCA)

"Ordinarily a litigant is of course entitled to obtain production of any document relevant to his or her case in the pursuit of the truth, unless the disclosure of the document is protected by law."

[33] There is also merit in professor Solomons' argument that the defendant, by virtue of her office, is fully aware of the relevant legislative framework and should have approached the court by way of an application justifying why the documentation sought is relevant and tendering certain safeguards for the protection of personal information. It was argued that it is not a question of a court declaring the patient information confidential or not as patient information is confidential by virtue of the legislative framework and can only be disclosed under very specific instances. There is merit in the argument that the defendant should at least reasonably have been aware that professor Solomons was prohibited from disclosing the information sought to the registrar under the subpoena. I agree that the service of the subpoena and the present application was misconceived and that a court should have been approached for an order directing disclosure as contemplated in the legislative framework. The defendant's argument that confidentiality had been waived lacks merit. No such case was made out in the defendant's founding papers and no indication has been given what the documents sought entails, whether consent was provided or whether any conditions were imposed safeguarding disclosure of patient information.

[34] The declaratory relief sought in the application, although ostensibly limited to Professor Solomon's claim to confidentiality may have much wider import on other cases. There is merit in his contention that there is confidentiality in the documentation *ex lege* and that the declaratory order is unnecessary. Whether disclosure of the documentation should be directed by a court order, is an entirely different issue. No case for such relief was made out in the founding papers. Declaratory relief with wide import absent a proper factual foundation being laid for such relief, cannot be countenanced. The defendant in my view manifestly failed to make out a case in her founding papers for the production of the documentation sought in the subpoena or for the granting of the declaratory relief

sought as she was obliged to do[18]. On this basis, her application is doomed to failure and it is not necessary to make a definitive determination in this application regarding whether confidentiality can be claimed in the documents. It was argued by both the plaintiff and the defendant that the issues raised may affect many litigants in other cases. As such it would be inappropriate to attempt to determine issues of broad impact absent a proper application which expressly raises and canvasses such issues. As previously stated, the subpoena is cast in very broad and general terms and it cannot be determined from the application papers exactly what information is in issue without resorting to speculation. The subpoena is aimed at obtaining all the underpinning information used for the preparation of the article to challenge the cogency and correctness of the article, without giving sufficient content to the documentation required to undertake the necessary enquiries.

[35] For these reasons the application must fail.

[36] Turning to the costs of the application, the defendant sought to cast aspersions on the conduct of the respondent in not disclosing earlier than in his answering papers that he was not in possession of the documents sought in the subpoena. I am not persuaded that these allegations have merit. Considering all the facts, including the fashion in which the application was brought, there is no reason to deviate from the normal principle that costs follow the result.

[37] The last issue is the determination of costs for the postponement of the trial on 15 June 2021. It was the belated launching of the subpoena application heard on the morning of the trial that resulted in its postponement. In such circumstances, the defendant should be held liable for the wasted costs. Considering the complexities of the matter, the employment of two counsel by the plaintiff was justified.

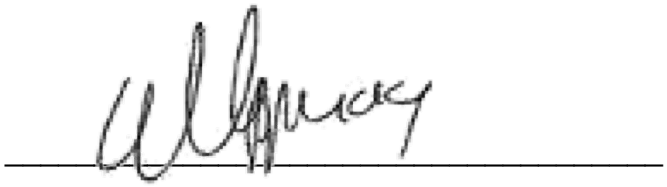
[18] Hart v Pinetown Drive-In Cinema (Pty) Ltd 1972 (1) SA 464 (D); Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd 1974 (4) SA 362 (T)

[38] I grant the following order:

[1] The application is dismissed.

[2] The defendant is directed to pay the costs of the respondent and the costs of the plaintiff, including the costs of two counsel.

[3] The defendant is directed to pay the plaintiff's wasted costs occasioned by the postponement of the trial, including the costs of two counsel.



EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

DATES OF HEARING	:	14 and 15 June 2021
DATE OF JUDGMENT	:	01 September 2021
APPLICANT/ DEFENDANTS COUNSEL	:	Adv. V. Soni SC Adv. T. Masevhe
APPLICANT/ DEFENDANTS ATTORNEYS	:	State Attorneys Ms L Mahlangu
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