

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO.: 43692/2018

- (1) 3. REVISED REPORTABLE: **No**
(2) OF INTEREST TO OTHER JUDGES: **No**
(3) REVISED:

Date: **6 April 2021** Signature: 

In the matter between:

DR MAUREEN ALLEM INC

First Plaintiff / Applicant

SKIN RENEWAL CC

Second Plaintiff / Applicant

and

DR BURT JOOSTE

First Defendant / Respondent

THE LONGEVITY INSTITUTE (PTY)

LTD T/A THE LONGEVITY CENTRE

Second Defendant / Respondent

DR BURT JOOSTE AND

ASSOCIATES INC

Third Defendant / Respondent

ESTEE VEALE

Fourth Defendant/ Respondent

TAMARA MOEN

Fifth Defendant / Respondent

XENEPHIN LUDICK

Sixth Defendant / Respondent

Coram: Molahlehi J

Delivered: This judgment is handed down electronically by circulation to the parties' legal representatives through email and released to the court's library. The date for hand-down is deemed to be 6 April 2021.

Summary: Leave to appeal against the cost order granted in favour of the applicant in the discovery interlocutory application. The court has a discretion which has to be exercised judiciously in considering the issue of costs.

JUDGEMENT- LEAVE TO APPEAL

1. This is an application for leave to appeal by the first, second, third and sixth defendants ("the defendants") against the cost orders, in the interlocutory discovery proceedings, handed down on 13 January 2021 by this court under case number 43692/2018.
2. The interlocutory application was instituted by the plaintiff concerning the demand for the discovery of various documents in terms of rule 35 (7) of the High Court Rules. The one part of the discovery related to various medical information of the patients. The patients were not a party to the application. The other part

concerning personal payslips and bank statements of the defendants is intended to prove quantum. In the broader sense the plaintiff succeeded in showing that it was entitled to the discovery. In this respect the court ordered the defendants to discover some of the requested items for discovery and the request for the others items was postponed *sine die*.

3. Although the costs order technically includes the fourth and the fifth defendants, they were not a party to the proceedings, as the plaintiff withdrew the application against them.

4. In opposing the application, the defendants contended that they were entitled to refuse to discover the requested documents because they were private and confidential. In its judgment the court found that the plaintiff was entitled to the disclosure of the information requested. It, however, also noted that the information was private and confidential and deserved to be protected. It was for this reason that it crafted an order that restricted the manner of the discovery.

5. The critical challenge to the cost order is that the court failed to exercise its discretion properly and fairly in making the order. The defendants contend that the order ought not to have been made because they were seeking to protect the entrenched constitutional and statutory rights of the patients in opposing the interlocutory application.

6. The plaintiff opposed this application and contended that the application should be dismissed because the defendants failed to show that the discretion was

improperly exercised and failed to show special circumstances to demonstrate prospects of success on appeal.

7. The plaintiff's Counsel argued that the plaintiff was entitled to the costs order because it was substantially successful in its interlocutory application. He further argued that the costs are not substantial to warrant an appeal.

8. The fundamental principle governing consideration of the issue of cost is that the successful party that has unjustly been made to initiate or defend proceedings, is entitled to be indemnified for the expenses incurred.

9. It is trite that in awarding costs, the court exercises a discretion which had to be exercised judiciously. It is equally trite that in exercising its discretion, the court has to consider the facts and circumstances of the case to ensure fairness to both parties.

10. I am afraid I have to disagree with the defendant's proposition that their defence had to do with defending the patients' constitutional rights. The patients were not joined as parties neither is there any suggestion that they had authority to assert such rights on their behalf.

11. I am, however, inclined to agree with the defendants that another court would take into account the circumstances relating to their defence and arrive at a different conclusion than that of this court. They opposed the application in the circumstances where they were resisting the release of private and confidential

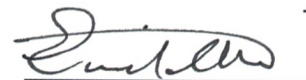
information. It cannot in this regard be said that they acted unreasonably or maliciously in opposing the application. Furthermore, they lost the case in circumstances where the plaintiff was not awarded everything it had asked for in the notice of motion. The other part of the discovery requested by the plaintiff in the notice of motion was postponed *sine die*.

12. Applying the test of reasonable prospects of success test as envisaged in section 17 (1) (a) of the Superior Court Act of 2015, I am persuaded that the defendants have made a case for leave to appeal. In other words, the defendants have prospects of success that the court on appeal would find that the circumstance did not justify the costs order.

Order

13. In the circumstances, I make the following order:

1. The defendant is granted leave to appeal to the Full Court of this Division.
2. The cost shall be in the appeal.



E Molahlehi
Judge of the High
Court,
Gauteng Division.
Johannesburg.

Representation:

Counsel for Plaintiffs: Adv S Miller

Instructed by: Schindlers Attorneys

Counsel for Defendants: Adv G Amm

Instructed by: Fluxmans Incorporated

Heard: 04 March 2021

Delivered: 06 April 2021.