

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

22/11/2021

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

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## JUDGMENT

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### **DIPPENAAR J:**

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**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 22nd of November 2021.

[1] The applicant, the defendant in the trial proceedings applies for leave to appeal against the whole of the judgment and order granted by me on 1 September 2021. In terms of the order granted, the defendant's application against the respondent was dismissed with costs, including the costs of the plaintiff. The application is opposed by the respondent and by the plaintiff in the trial action.

[2] The application pertained to a subpoena *duces tecum* served by the defendant on the respondent ("the subpoena application"). The defendant had sought an order compelling production of the documentation referred to in the subpoena and a declaratory order that the respondent has no lawful basis to claim privilege or confidentiality in respect of the documentation referred to in the subpoena, together with ancillary relief. The plaintiff had not been joined as a party to those proceedings, but opposed it.

[3] My judgment is comprehensive and I stand by the reasons set out therein.

[4] It must be considered whether there is a sound and rational basis for reaching a conclusion that there are prospects of success on appeal<sup>1</sup>, considering the higher threshold test<sup>2</sup> envisaged by s17 of the Superior Courts Act<sup>3</sup> (“the Act”).

[5] I have considered the papers filed of record and the grounds set out in the application for leave to appeal as well as the parties’ extensive arguments for and against the granting of leave to appeal. I have further considered the submissions made in their respective heads of argument and the authorities referred to by the respective parties.

[6] The defendant argued that she has reasonable prospects of success on appeal as envisaged by s 17(1)(a)(i) of the Act and that I had erred in dismissing the application. The defendant did not propose what order should have been granted. The defendant challenged various of the findings made in the judgment resulting in the conclusions reached that the plaintiff had *locus standi* to oppose the application and that costs should be awarded to the respondent and the plaintiff.

[7] The defendant further argued that there were compelling reasons to grant leave to appeal as envisaged by s 17(1)(a)(ii) of the Act. She argued that the issues raised in the application impact the defendant’s rights to a fair hearing and her right to access to information. It was further argued that as another court had determined in *MEC: Health Northern Cape Province v Advocate Lindy Lou Norman NO obo Mercia Lott*<sup>4</sup> (“Lott”) that as the patient’s medical and hospital records had been waived, the confidential character of the raw data had been waived<sup>5</sup>, there were now conflicting judgments on the issue which requires clarification.

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<sup>1</sup> Four Wheel Drive Accessory Distributors CC v Rattan NO 2019 (3) SA 451 (SCA) at para 34

<sup>2</sup> Acting National Director Public Prosecutions and Others v Democratic Alliance [2016] ZAGPPH 489 (24 June 2016) at para 25

<sup>3</sup> 10 of 2013

<sup>4</sup> (2720/20) (22 September 2021) unreported decision of the Northern Cape Division, Kimberley

<sup>5</sup> Para [39]

[8] The plaintiff had relied on the reasoning and legal conclusions drawn in *Lott* in opposing the application. In *Lott* an application to compel discovery of essentially the same documents sought by the defendant in the present instance was dismissed on the basis that the documents would not be relevant and would raise collateral issues. The plaintiff's basis of opposition to the subpoena application was that the documents would not be relevant and would raise collateral issues which would be irrelevant and inadmissible at trial. No findings were made on those issues in my judgment.

[9] The plaintiff argued that the grounds of appeal are largely academic and there were no reasonable prospects of success on appeal. She sought dismissal of the application with costs, including the costs of two counsel.

[10] The respondent similarly sought the dismissal of the application. The respondent contended that there were no reasonable prospects of success on appeal and disputed that there were any compelling reasons to grant leave to appeal. He argued that as a matter of fact, the application could never have succeeded as it was undisputed that the respondent did not have the documentation sought in the subpoena, thus rendering the main relief sought in the subpoena application moot. The respondent further argued that the relevance of the legislative framework was only relevant at the hearing in the context of costs and that any appeal would be directed at best for the defendant against the costs order granted.

[11] There is merit in the arguments raised by the respondent and the plaintiff. Considering all the facts and the relevant factors requiring consideration, I am not persuaded that there are reasonable prospects of success on appeal. The defendant sought declaratory relief absent a proper factual foundation being laid in her founding papers and seeks to challenge certain findings which underpin a costs order.

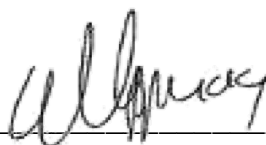
[12] I am further not persuaded that the defendant has established compelling reasons to grant leave to appeal as envisaged in s 17(1)(a)(ii) based on the case made out in her founding affidavit or based on her reliance on *Lott*. The finding in *Lott* relied on by the

defendant does not appear to constitute the *ratio decidendi* of the court. In the judgment here in issue, no findings were made on the issues raised by the plaintiff pertaining to the admissibility and collateral evidence issues. The findings in the judgment here in issue regarding confidentiality were further made only in the context of the determination of an appropriate order as to costs.

[13] For these reasons the application must fail. The normal principle is that costs follow the result. There is no basis to deviate from this principle.

[14] I grant the following order:

The application for leave to appeal is dismissed with costs, including the costs of two counsel, where so employed.



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**EF DIPPENAAR**  
**JUDGE OF THE HIGH COURT**  
**JOHANNESBURG**

**APPEARANCES**

<b>DATES OF HEARING</b>	:	18 November 2021
<b>DATE OF JUDGMENT</b>	:	21 November 2021
<b>APPLICANT/ DEFENDANT'S COUNSEL</b>	:	Adv. V. Soni SC
<b>APPLICANT/ DEFENDANT'S ATTORNEYS</b>	:	State Attorneys Ms L Mahlangu

<b>RESPONDENT'S COUNSEL</b>	:	Adv. R.J. Steyn
<b>RESPONDENT'S ATTORNEYS</b>	:	Cluver Markotter Inc Mr B Hess
<b>PLAINTIFF'S COUNSEL</b>	:	Adv. J Wessels SC
	:	Adv. C. Mckelvey
<b>PLAINTIFF'S ATTORNEYS</b>	:	Nonxuba Inc. Mr Nonxuba