THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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MEC for Health, Gauteng v Dr Regan Solomons (1089/2023) [2024] ZASCA 184 (30 December 2024)

Today the Supreme Court of Appeal (SCA) handed down judgment in which it dismissed the appellant's appeal against an order of the Gauteng Division of the High Court, Johannesburg (the high court).

The MEC for Health, Gauteng Province (the MEC) caused a subpoena *duces tecum* to be issued in the Gauteng Division of the High Court, Johannesburg (high court) against Dr Regan Solomons (Dr Solomons), requiring him to hand over to the registrar of the high court, documentation or tape recordings identified in the subpoena. The information in the subpoena was required for an action pertaining to a medical negligence claim against the MEC. At the relevant time, Dr Solomons was a Professor at the University of Stellenbosch. The information required in the subpoena included, *inter alia* medical records, names of parties, case numbers and judgments in various medicolegal actions referred to in an article co-authored by Dr Solomons.

The legal advisor from the University of Stellenbosch addressed a letter to the Office of the State Attorney, wherein she stated that Dr Solomons claimed privilege to the information because of the confidentiality of patient information; and the ethical and legal obligation of research institutions and researchers to protect personal information of research participants. Due to these reasons, the legal advisor requested the State Attorney to withdraw the subpoena. This caused the MEC to launch an urgent application in the high court seeking an order declaring that Dr Solomons' had no lawful basis to claim privilege in respect of the documentation or tape recordings identified in the subpoena *duces tecum*; directing Dr Solomons' to hand over to the registrar of the high court the documentation or tape recordings; granting the MEC further/alternative relief; and directing Dr Solomons' to pay the costs of the application.

Following this, Dr Solomons' attorneys addressed a letter to the State Attorney wherein they decried the urgency within which the application was brought, leaving Dr Solomons little time in which to respond. The attorneys further stated that in terms of the relevant legislation, Dr Solomons could not provide or disclose any patient information unless the patient had given their consent and/or he was directed by court order. The attorneys also advised that Dr Solomons did not possess the documents required in the subpoena, only de-identified data, which he was prepared to share with the MEC.

The high court at first instance found that since Dr Solomons' version that he was not in possession of the documents sought in the subpoena was not disputed, it rendered the relief sought in prayer 2 (ie directing Dr Solomons' to hand over the documents to the registrar) of the MEC'S notice of motion moot. The high court

examined Dr Solomons' argument that he was prohibited by legislation to disclose patient information without consent or a court order and found that Dr Solomons' defence was a 'just excuse' under s 36 of the Superior Courts Act 10 of 2013. It further found that no proper factual foundation had been laid for declaratory relief on the question whether disclosure of the documentation should be directed by a court order. In its view the application was doomed to failure, and it was not necessary to make a definitive determination regarding whether confidentiality could be claimed in the documents. Finally, it observed that the subpoena was very broad and general, making it unclear what specific information was being sought. As a result, the court of first instance dismissed the application and ordered the MEC to pay the costs of the application. The court refused leave to appeal. Leave was granted by the SCA, on petition to it, to the full court of the same Division of the high court.

The full court observed that the appeal record had reflected no formal application for the proposed amendment to the notice of motion, which proposal was mentioned in the MEC's replying affidavit, nor was such amendment informally requested from the bar at the hearing of the matter in the court of first instance. The full court recorded that it was not clear from the judgment of the court of first instance whether such amendment was formally granted. The full court was of the view that this created a challenge at the hearing of the appeal. Since a proposed amendment was mentioned in the judgment of the court of first instance, the full court assumed in favour of the MEC that the proposed amendment was impliedly granted. Nothing turned on this point, however, since the court of first instance had firmly made a finding that prayer 2 of the notice of motion was moot. Despite recognising that the issue of 'legislation-imposed confidentiality obligations' on Dr Solomons was pursued only for purposes of costs, the full court delved into the merits and remarked that if obtaining patient information by subpoena bypassed judicial oversight, there would not be legislative provisions requiring a court order or patient consent.

The MEC sought special leave to appeal the full court's order to the SCA, which was granted. The MEC persisted in seeking a declarator that Dr Solomons had no lawful basis to claim privilege even though privilege was no longer the issue. Also, that he should be directed to inform the registrar of the whereabouts of the documents identified in the subpoena. The SCA required counsel for the parties to address it as to whether a live dispute or *lis* existed between the parties when the matter was heard in the court of first instance and judgment delivered. This issue was raised considering the findings of the court of first instance, confirmed by the full court, that Dr Solomons' statement that he was not in possession of the documents identified in the subpoena rendered prayer 2 moot.

The SCA found that there was no live issue between the MEC and Prof Solomons when the matter served before the court of first instance. Both prayers 1 and 2 had become academic. Relying its previous authority on the issue, it distinguished between a case having become moot because it no longer presented an issue to be determined on appeal on the one hand and that of a claim having been extinguished before the judgment at first instance on the other. It found that there was no cause of action at all before the court of first instance at the time it made its order.

In this case, the SCA found that the court of first instance and the full court ought not to have entered upon the merits. Related to this, the two courts stated that the merits were determined for the purposes of costs. The SCA further held that costs could have been dealt with purely on the basis that the cause of action the MEC was pursuing had been extinguished at first instance. For these reasons, the SCA declined to consider the merits. Save for amending the full courts order, it dismissed the appeal.

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