THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1089/2023

In the matter between:

MEC FOR HEALTH: GAUTENG PROVINCE **APPELLANT**

and

DR REGAN SOLOMONS **RESPONDENT**

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

Coram: MABINDLA-BOQWANA, KGOELE and KEIGHTLEY JJA and MAKUME and MOLITSOANE AJJA

Heard: 15 November 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website, and released to SAFLII. The date for hand down is deemed to be 30 December 2024 at 11h00**.**

Summary: Practice and procedure – subpoena *duces tecum* – cause of action ceased to exist before judgment at first instance – court not entitled to proceed and grant order on the merits.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Maier-Frawley and Wepener JJ and Malungana AJ, sitting as court of appeal):

1 Save for what is stated below the appeal is dismissed.

2 The appellant is ordered to pay the costs of the appeal.

3 The order of the full court is set aside and replaced with the following order:

'1 The appeal is dismissed save to the extent set out in paragraph 3 below.

2 The appellant is ordered to pay the costs of the appeal.

3 The order of the court of first instance under case number 13523/2018 is set aside and replaced with the following:

"1 The application is struck from the roll.

2 The defendant is directed to pay the costs of Dr Regan Solomons and the plaintiff from 11 June 2021 onwards.

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.".'

JUDGMENT

Mabindla-Boqwana JA (Kgoele and Keightely JJA and Makume and Molitsoane AJJA concurring):

[1] On 21 May 2021, the appellant, 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 the respondent, Dr Regan 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 R29 million medical negligence claim brought in the high court against the MEC.

[2] At the relevant time, Dr Solomons was a Professor in the Department of the Paediatrics and Child Health within the Faculty of Medicine and Health Sciences at Stellenbosch University. He was a co-author of an article titled, 'Intrapartum Basal Ganglia-Thalamic Pattern Injury and Radiologically Termed "Acute Profound Hypoxic-Ischemic Brain Injury" Are Not Synonymous.' In the article, he was identified as the person to whom correspondence was to be addressed. The information required in the subpoena included names of parties, case numbers and judgments in various medicolegal actions referred to in the article. In addition, raw data, expert reports, medical records and MRI scans relating to cases referred in the article were also required to be handed over to the registrar.

[3] On 4 June 2021, the legal advisor from the University of Stellenbosch, Ms Charmaine Wing, addressed a letter to the Office of the State Attorney. In this letter she stated that Prof Solomons claimed *privilege* to the information sought because of:

(a) the confidentiality of patient information; and

(b) 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.

For these reasons, Ms Wing requested the State Attorney to withdraw the subpoena.

[4] This led to the MEC launching an urgent application in the high court seeking an order in the following terms:

'1 It is declared that the Respondent (Dr Regan Solomons) has no lawful basis to claim privilege in respect of the documentation or tape recordings identified in the annexed subpoena *duces tecum*, which was served on him on 25 May 2021.

2 Directing Respondent to forthwith hand over to the Registrar of this Honourable Court the documentation or tape recordings.

3 Granting Applicant further and/or alternative relief.

4 Directing that Respondent pays the cost of this application.'

[5] On 10 June 2021, Prof Solomons' attorneys (per Mr Hess), addressed a letter to the State Attorney. In it, Mr Hess decried the urgency with which the application was brought, leaving Prof Solomons little time in which to respond. Mr Hess further stated that, in terms of the relevant legislation, Prof Solomons could not provide or disclose any information that had a bearing on a patient's treatment, unless the relevant patient had given his or her consent thereto, and/or a court had directed him to do so. In this regard he referred to ss 14(2)*(a)* and *(b)* of the National Health Care Act 61 of 2003 (National Health Care Act); Regulation 13 of the Ethical Rules of Conduct of Practitioners Registered under the Health Professions Act 36 of 1974; and the Health Professions Council of South Africa's Ethical Guidelines for good practice.

[6] Mr Hess also pointed out that the information sought in the subpoena was vague and general in terms, making it impossible in all instances to establish what exactly was sought. Further, that no case had been made out regarding the relevance of the documentation to the dispute in the main action; how the MEC intended to

use the documentation sought during the trial; and what safeguards were tendered to protect the privacy of the relevant patients.

[7] Most importantly, for the purposes of this case, Mr Hess mentioned the following:

'In any event, after consulting with Associate Professor Solomons, it became evident that he *does not have in his possession or under his control* the vaguely described documents required in the subpoena. Associate Professor Solomons' *contribution to the article was limited to his work on de-identified data, which he is prepared to share with your clients*, but purely on a without prejudice basis.' (Emphasis added.)

[8] Mr Hess invited the State Attorney to withdraw the application and tender costs. In the event that the proposal was not accepted, he threatened to seek a punitive costs order in Prof Solomons' favour. Mr Maleka of the State Attorney's Office replied in a letter dated 11 June 2021. He did not respond to the specific aspects raised in Prof Solomons' attorneys' letter. Instead, he merely stated:

'In view of the fact that a process has been put in motion to ensure that the documents identified in the subpoena *duces tecum* are handed to the Registrar, it is my respectful view that Dr Solomons must explain in his answering affidavit to the application set down to be heard on Monday, 14 June 2021, why the documents were not or could not be handed over to the Registrar as directed by the subpoena *duces tecum,* why they will not or cannot be handed over to the Registrar even now.'

[9] Prof Solomons therefore filed an answering affidavit specifically repeating what he had said in the letter dated 10 June 2021, through his attorney, that he did not have copies of the requested information in his possession nor were they under his control. Further, that he had in his possession or under his control certain de-identified information relating to the subject matter, which he had freely tendered to the MEC. He listed the said de-identified data.

[10] Prof Solomons further stated that, even if he had the requested documentation in his possession, in terms of the relevant legislative provisions, he was not allowed to disclose it in the absence of the patient's consent, unless so ordered by a court. Fundamentally, as regards the issue of privilege, he averred that he had been advised that the only legally recognised privilege is that of attorney and client. At this stage, it was clear that he no longer resisted disclosure of the information required in the subpoena on this basis.

[11] In the replying affidavit, the MEC persisted in seeking an order in terms of the notice of motion. She however stated that instead of pursuing the grant of a directive for Prof Solomons to hand over the documents to the registrar, she would seek an amendment at the hearing of the application to the effect that Prof Solomons be directed to inform the registrar of the whereabouts of the documents.

[12] The application served before the high court at first instance. It made this pertinent finding:

'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 the defendant's motion moot.'

[13] Despite this finding, the court went on to state the following:

'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. (Emphasis added.)

[14] The court then examined Prof Solomons' contingent argument that he was prohibited by legislation from disclosing patient information without consent or a court order, which the court stated was raised in the context of costs. In this regard, the court found:

'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.'

[15] The court of first instance found that Prof Solomons' defence would fall within the ambit of 'just excuse' under s 36 of the Superior Courts Act 10 of 2013. It found merit in the argument that he was prohibited from disclosing the information sought to the registrar under the subpoena.

[16] It further found that no proper factual foundation had been laid for declaratory relief on the question of 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 respect of the documents. Finally, it observed that the subpoena was cast in very broad and general terms, such that it could not be determined from the application papers exactly what information was at issue without resorting to speculation. It accordingly dismissed the application and ordered the MEC to pay

the costs of the application. The court subsequently refused leave to appeal. Leave was, however, granted by this Court, on petition to it, to the full court of the same Division on 24 March 2022.

[17] At the outset, the full court observed that the appeal record had reflected no formal application for the proposed amendment to the notice of motion, nor was such amendment informally requested from the bar at the hearing of the matter in the court of first instance. The full court also recorded that it was not apparent from the judgment of the court of first instance that any such amendment was formally granted. This, according to the full court, created a conundrum 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, in my view, as the court of first instance had firmly made a finding that prayer 2 of the notice of motion was moot.

[18] In any event, the finding of the full court itself was instructive on this issue. It said the following:

'Since the respondent was not in possession of the documents sought, the relief sought in paragraph 2 of the notice of motion (i.e. directing production of the documents) was, for all intents and purposes, rendered moot. The respondent's opposition to the application compelling the production of documents, was impelled and pursued in the court below for purposes of vindicating his entitlement to costs, the respondent's contention being that appellant "*would be well aware of the legislative framework given its office and should not have served the subpoena and launched the current application being fully aware that I am prohibited from freely disclosing patient information (had I been in possession thereof)*".' (Original emphasis.)

[19] Despite recognising the fact that the issue of 'legislation-imposed confidentiality obligations' on Prof Solomons was pursued only for purposes of costs, the full court delved into the merits in detail and made, inter alia, the following remarks:

'If parties were entitled to obtain patient information by way of subpoena, thereby bypassing judicial oversight, the legislature would not have made provisions for a court order or the relevant patient's consent to be obtained.'

[20] The MEC was granted special leave to appeal the full court's order, by this Court on 4 October 2023. In her notice of appeal, the MEC persisted in seeking a declarator that Prof Solomons had no lawful basis to claim privilege even though privilege was no longer the issue. Secondly, that he should be directed to inform the Registrar of the whereabouts of the documents identified in the subpoena.

[21] At the hearing of the appeal, counsel for the parties were required to address the Court, at the outset, 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 Prof Solomons' statement that he was not in possession of the documents identified in the subpoena nor with those under his control rendered prayer 2 moot.

[22] It must be noted that the only reason the court of first instance proceeded to entertain the merits of the contingent or secondary defence raised by Prof Solomons was in the context of costs. The ambivalence raised by the full court as to whether an amendment of prayer 2 of the motion was sought at the hearing on granted, was

irrelevant because the court accepted that the prayer was moot, and the merits of the secondary alternative defence were only relevant to the determination of costs.

[23] This much is confirmed by the judgment of the court of first instance in the application for leave to appeal, where it said:

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

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 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 will be directed at best for the defendant against the costs order granted.

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 the founding papers and seeks to challenge certain findings which underpin a cost order.'

[24] If prayer 2 was moot, it follows that prayer 1 would also fall, as it would not be necessary to determine the question of privilege if Prof Solomons was not in possession or control of the required documents. In any event, he had indicated in his answering affidavit that he had by then been advised that the only recognised privilege, is that pertaining to attorney and client.

[25] To the extent it is argued that the amendment, which was not perfected, brought life back to prayer 2, this argument does not withstand scrutiny. The matter was not determined based on an 'amended prayer 2', as firm findings were made on the original (and still existing) notice of motion. Further, the confidentiality inquiry would only be relevant if Prof Solomons had the documents in his possession, as only then would it be necessary for him to claim doctor-patient confidentiality. If the documents were with another doctor, the dispute would no longer be between the MEC and Prof Solomons but with the possessor of those documents.

[26] Even if prayer 2 had been amended, it was clear that the MEC proceeded with the matter primarily because she wanted the declaratory relief in prayer 1. What is more, she did not want the relief as it was detailed in the notice of motion. What the MEC really wanted was for the court to clarify which procedure was to be followed in securing the information sought: was it ss 14(2)*(a)* and *(b)* of the National Health Act, or, conversely, would the issue and service of a subpoena suffice?

[27] There was clearly no live issue between the MEC and Prof Solomons when the matter served before the court of first instance. Mr Hess's letter, as well as the answering affidavit, were clear on the issue. Both the relief sought in prayers 1 and 2 of the notice of motion had become academic.

[28] This Court, in *Minister of Justice and Correctional Services and Others v Estate Late James Stransham-Ford and Others (Stransham-Ford)*,[1] made it clear that it was not open to high courts sitting as courts of first instance to make orders on

[1] *Minister of Justice and Correctional Services and Others v Estate Late James Stransham-Ford and Others* [2016] ZASCA 197; [2017] 1 All SA 354 (SCA); 2017 (3) BCLR 364 (SCA); 2017 (3) SA 152 (SCA) para 24. See also *Solidariteit Helpende Hand NPC and Others v Minister of Cooperative Governance and Traditional Affairs* (104/2022) [2023] ZASCA 35 para 18.

causes of action that had been extinguished merely because they think that their decision would have broader societal implications. The Court in *Stransham-Ford* said courts of first instance are not vested with the same power conferred upon a court of appeal, which may exercise its jurisdiction to determine a matter because 'a discrete legal issue of public importance arose that would affect matters in the future and on which the adjudication of this court was required.'[2]

[29] The Court distinguished between a case having become moot because it no longer presented a live issue for determination on appeal, on the one hand, and that of a claim having been extinguished before the judgment at first instance, on the other. The expression 'mootness' in the jurisprudence of the appellate courts, so the Court found, was not used in the latter case. It said:

'Mootness is the term used to describe the situation where events overtake matters after judgment has been delivered, so that further consideration of the case by way of appeal will not produce a judgment having any particular effect. Here we are dealing with a logically anterior question, namely, whether there was any cause of action at all before the high court at the time it made its order. Was there anything on which it was entitled to pronounce? The principles governing mootness have little or no purchase in that situation.'[3]

[30] The present case plainly falls into the latter category, as by the time the matter came before the court of first instance, it was common cause that Prof Solomons did not have possession of the information pertinent to the relief sought. Consequently, in the words of the above extract, there was no cause of action at all before the court at the time it made its order. This means that the high court had no jurisdiction to enter into the merits of the matter. This being so, the full court likewise had no jurisdiction to exercise its discretion, as a court of appeal, to consider the merits of

[2] Ibid para 25.
[3] Ibid para 26.

the matter either. The question that remains is, what is the status of the high courts' determinations on these merits? In other words, can and should this Court pronounce upon them.

[31] The Court in *Stransham-Ford* found that setting aside the judgment alone may not be sufficient, in that case, as there was a reasoned and reported judgment by the high court which may have some precedential effect. In my view, it is not necessary in this present case to deal with the merits, simply because both the court of first instance and the full court suggested that their entering into the merits was simply to vindicate the issue of costs.

[32] It suffices to say, to the extent that it is necessary to do so, that the findings on the merits by both the court of first instance and the full court cannot have any precedential value. In the first place, this is because in the absence of jurisdiction, they ought never to have entered upon the merits. Related to this point, is that they considered the merits for the purposes of costs. However, the aspect of costs could have been dealt with purely on the basis that the cause of action that the MEC was pursuing had been extinguished before the matter served at first instance. This, on its own, would have justified an order of costs against the MEC.

[33] In any event, the essence of the judgment of the court of first instance was that declaratory relief could not be made in the vacuum. To the extent the full court determined the legislation imposition issue *vis-a-vis* the subpoena even though not sought in the notice of motion, and a proper basis being laid for it, it erred. The question whether patient information may only be disclosed through an application brought under s 14(2)*(b)* of the National Health Act, as opposed to simply by way of subpoena, was not the relief sought in the notice of motion.

[34] Even if this Court were to consider whether it should, in any, event determine the merits of the matter, as requested by counsel for the MEC, it would be confronted by the same difficulties. Reliance by the MEC on *Spilhaus Property Holdings (Pty) Ltd & Others v MTN (Pty) Ltd & Ano (Spilhaus)*,[4] is misplaced. Apart from the jurisdictional issue in this case, which distinguishes it from *Spilhaus*, there is a further hurdle in that there was no basis laid in the papers for a declarator of the sort argued.

[35] In conclusion, the court of first instance ought to have struck the matter from the roll as the cause of action had been extinguished before it served before it. The issue of costs, (which ended up motivating the court's determination of Prof Solomons' alternate defence), could have been dealt with by asking which party was responsible for the pursuance of the matter that was no longer live before the court.

[36] In my view, Prof Solomons was to blame from when he asserted privilege up to the point when it was stated on his behalf that he was not in possession of the documents. From that point on, the MEC was informed about the situation, but insisted on flogging a dead horse. The real reason she persisted with the application was for future purposes and had nothing to do with Prof Solomons. It was about the unserved subpoena against others, such as Prof Smith. That much appears in the judgment of the court of first instance and was conceded by counsel at the hearing of the appeal. I must say it did not help that Prof Solomons raised the contingent defence as a basis for costs.

[4] *Spilhaus Property Holdings (Pty) Ltd & Others v MTN (Pty) Ltd & Ano* 2019 (4) 406 (CC).

[37] As regards costs of the appeal in the full court and in this Court, the MEC must be ordered to pay the costs, simply on the basis that the court below should not have determined her application. The question whether there was any live issue at first instance, and at further stages should have occupied the minds of both parties. Unlike the MEC, to a certain extent Prof Solomons' heads of argument addressed this issue.

[38] In the result, the following order is issued:

1 Save to the extent stated below, the appeal is dismissed.

2 The appellant is ordered to pay the costs of the appeal.

3 The order of the full court is set aside and replaced with the following:

'1 The appeal is dismissed save to the extent set out in paragraph 3 below.

2 The appellant is ordered to pay the costs of the appeal.

3 The order of the court of first instance under case number 13523/2018 is set aside and replaced with the following order:

"1 The application is struck from the roll.

2 The defendant is directed to pay the costs of Dr Regan Solomons and the plaintiff from 11 June 2021 onwards.

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.".'

_____

N P MABINDLA-BOQWANA

JUDGE OF APPEAL

Appearances

For the appellant:	V Soni SC
Instructed by:	State Attorney, Johannesburg
	State Attorney, Bloemfontein
For the respondent:	R J Steyn
Instructed by:	Cluver Markotter Inc, Stellenbosch
	McIntyre Van der Post, Bloemfontein.