Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) Reportable: Yes (2) Of interest to other Judges: Yes (3) Revised: Yes Date: 27/06/2023 _________ Signature

CASE NO: 2022/A5070

In the matter between:

MEMBER OF THE EXECUTIVE COUNCIL
FOR HEALTH GAUTENG PROVINCE Appellant

and

DR. REGAN SOLOMONS Respondent

In re:

LINDIWE URGINIA VULANGENGQELE
obo M V Plaintiff

and

MEMBER OF THE EXECUTIVE COUNCIL
FOR HEALTH GAUTENG PROVINCE Defendant

Summary
Application for enforcement of subpoena *duces tecum* so as to compel disclosure by a medical practitioner of private and confidential medical information of patients –It remains open to litigants to employ the procedure provided for in Rule 38, being a process that does not require a court order or judicial oversight, in the appropriate circumstances – Use of process that directs medical professional to produce private and confidential medical

information (i) in the absence of patient consent; and (ii) absent proper inquiry by a court, including a proper weighing of the need for disclosure against the privacy interests of the patient; and (iii) in circumstances where the medical professional is statutorily and ethically duty bound to resist compliance, inappropriate - judicial oversight required when disclosure of private and confidential medical information absent patient consent is sought - an application to court as envisaged in section 14(2)(b) of the National Health Act appropriate in such circumstances – guiding principles for purposes of determining whether or not to authorise the disclosure discussed - factual foundation required to be laid to enable court to conduct the necessary enquiries.
Divine Inspiration Trading 205 (Pty) Ltd v Gordon and Others 2021 (4) SA 206 (WCC) not endorsed and not followed in so far as that court sanctioned an approach whereby an administrative process in issuing a subpoena could override a patient's constitutional right to privacy.

J U D G M E N T

MAIER-FRAWLEY J (Wepener J and Malungana AJ concurring):

Introductory background

1. This appeal lies with leave of the Supreme Court of Appeal against the whole of the judgment and order granted on 1 September 2021 by Dippenaar J in the court below.

2. The appellant (the MEC for Health Gauteng) is the defendant in an action for damages instituted against her by the plaintiff (Lindiwe Urginia Vulangengqele) on behalf of her minor child. The plaintiff's claim is based on the alleged negligence of the medical staff at a clinic in failing to monitor the plaintiffs labour in accordance with the required medical standards, which had the result that probable foetal distress (decelerating heartrate) went undetected, ending in her baby being born with hypoxic ischemic brain injury, conventionally referred to as 'acute profound' hypoxic ischemic injury. The trial is currently partly-heard in the court below since the plaintiff was granted leave to re-open her case prior to judgment being delivered.

3. The respondent (Dr Regan Solomons) is not a party to the action nor is he a prospective witness for either party at trial. He is one of eight co-authors[1] of a research paper titled '*Intrapartum Basal-Ganglia-Thalamic Pattern Injury and Radiological Termed "Acute-Profound Hypoxic-Ischemic Brain Injury" are not Synonymous'* (the 'article') which was published in the December 2020 American Journal of Perinatology. The respondent was identified therein as the person to whom correspondence may be addressed.

4. The principal author of the article is Professor Smith, a proposed witness for the plaintiff at the resumption of the trial. Prof Smith will seemingly testify in support of the conclusions arrived at by the authors in the article. In the article, the authors challenge the conventional view that basal ganglia-thalamic brain injury in the term or near-term infant is the result of an 'acute profound' ischemic event. Under the rubric of 'Study Design' on p1 of the article, the authors record that the article presents a retrospective analysis of 10 medicolegal cases of neonatal encephalopathy-cerebral palsy survivors who sustained Intrapartum Hl basal ganglia-thalamic (BGT) pattern Injury in the absence of an obstetric sentinel event. Page 1 of the article also records the précised conclusion of the authors, namely, that: '*The study shows that if a non-reassuring fetal status develops during labour and is prolonged, a BGT pattern Hl injury may result, in the absence of a perinatal sentinel event. Intrapartum BGT pattern injury and radiologically termed acute profound Hl brain injury are not necessarily synonymous. A visualized magnetic resonance imaging (MRI) pattern should preferably solely reflect the pattern's description and severity, rather than a causative mechanism of injury*.'

[1] The co-authors are medical experts from South Africa in the fields of obstetrics, paediatric neuroradiology, paediatric neurology and neonatology.

5. The appellant caused a subpoena *duces tecum* ('the subpoena') to be issued and served on the respondent during May 2021. In terms of the subpoena, the respondent was required, in the absence of asserting privilege in respect of a document or thing, to hand over to or inform the Registrar of this Court of the whereabouts of the following documents:

    (i) 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 medicolegal actions that are referred to on page 2 of the article;[2] and

    (ii) all supporting documentation including but not limited to, raw data, expert reports, medical records and MRI scans relating to the 63 cases referred to on page 3 of the article.[3]

6. In a letter dated 4 June 2021, addressed by the Legal Advisor: Legal Services of the Division of the Registrar of Stellenbosch University to the appellant's attorneys, compliance with the subpoena was resisted on the basis that the information requested was privileged because of the confidentiality of

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[2] Under the rubric of "Materials and Methods" on p2 of the article, it is recorded that "*The authors reviewed 195 medicolegal actions arising from the development of neonatal encephalopathy-cerebral palsy in term gestations. The cases were identified by the authors based on their involvement as expert witnesses in the cases, either as part of the plaintiff or defendants' legal teams. Detailed medico- legal reports submitted by neonatologists, obstetricians, paediatric neurologists, and clinical genetic experts (both defendant and plaintiff) were considered*."

[3] After listing various categories of exclusions from their case analysis, the authors record, on p3 of the article that "*Sixty-three (33.5%) cases with BGT pattern HII remained. However, in only 21 cases were there limited electronic reviews by cardiotocography (CTG) during labour. The image findings of delayed MRI scans in these cases were subsequently reviewed in a blinded and separate assessment by two experienced neuroradiologists...This revealed that only 15 of 21 cases could strictly be categorized with BGT pattern injury (in isolation). <u>Ten</u> of these term gestation neonatal encephalopathy-cerebral palsy survivors with a radiologically reported "acute profound" HII pattern on MRI had clearly documented evidence of an assessment of the fetal admission status and intermittent electronic fetal monitoring during the labour. <u>These cases were then retrospectively analyzed</u>. Of the 10 cases, in 6 of the matters, liability was established in a court of law; two are waiting determination on trial and in two matters liability was conceded prior to trial*." (emphasis added)

patient information and a legal and ethical obligation of researchers and research institutions to protect the identities of research participants.

7. The appellant thereupon launched an application to compel compliance with the subpoena. The following relief was sought in the Notice of Motion:

> "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 costs of this application."

8. The case made out in the founding affidavit was that the respondent was not entitled to resist compliance with the subpoena on the basis of privilege or confidentiality of patient information or the obligation of researchers to protect personal information of research participants, firstly, because the documents identified in the subpoena did not relate to communications between a client and his or her legal practitioner; and secondly, because the said documents related to or formed part of documents that were used in medico-legal actions that had been or may still be before the courts, as such, they were public documents, which are not subject to a claim of privilege or confidentiality by *anyone*.

9. In his answering affidavit, the respondent conceded that the only legally recognized privilege is that of attorney and client privilege. He pointed out that his contribution to the article was only in relation to *de-identified* data, which data he had in his possession. Albeit that *de-identified* data was not required in terms of the subpoena, he tendered to produce same. He

opposed the application on, *inter alia*, the following grounds: (i) that he did not have the documentation sought in terms of the subpoena in his possession; (ii) that even if he were to have had the documents sought in his possession, in terms of the relevant legislative framework,[4] which regulates the disclosure of confidential medical information of a patient (patient information) in the absence of the patient's consent, he was not allowed to disclose patient information unless so ordered by a court; and (iii) that the applicant had failed to make out a proper case for the disclosure of patient information, firstly, because the documents identified in the subpoena were described in vague and general terms, making it impossible in all instances to establish what was being sought from the respondent; secondly, because the appellant had failed to make out a case in her founding affidavit as to why the documentation sought was relevant to the disputes in the main action; and thirdly, because the appellant had failed to tender safeguards to protect the privacy of the relevant patients.

10. In the replying affidavit, the appellant reiterated that the respondent's claim of confidentiality was without foundation, as the documents sought were 'public documents from cases selected by the authors to be used for the purposes of compiling the article,' and therefore no longer confidential and subject to disclosure. Alternatively, the appellant alleged that 'to the extent that confidentially may apply', any such confidentiality was waived when the documents were used in court and made part of the court record in each of the 195 cases. As regards the issue of the relevancy of the documents sought, the appellant adopted the stance that *'Whether or not the documents are relevant is with respect a matter for this Court to determine'* and *'insofar as it is suggested that the relevance of the documents may be in*

[4] Being duties or obligations imposed on medical practitioners under relevant provisions of the National Health Act 61 of 2003, the Ethical Rules of Conduct pertaining to medical practitioners registered under the Health Professions Act 36 of 1974 and the ethical guidelines, specifically, booklet 5 thereof. The relevant legislative framework is more fully discussed later in the judgment.

issue, I refer to the reports that have now been filed of Applicant's [appellant’s] *experts.’*

11. The appellant ostensibly accepted that the respondent was not in possession of the documents sought in the subpoena, when regard is had to the contents of paragraphs 43 to 45 of the replying affidavit, where the following was said:

“I submit that the Applicant has made out a case to be granted the order set out in the Notice of Motion, with one amendment.
That amendment is this: Paragraph 2 of the Notice of Motion, as it presently reads, falls to be replaced with a new paragraph 2 that reads as follows: "Directing Respondent to inform the Registrar [and this Court] of the whereabouts of the documents identified in the subpoena."
<u>A formal application for that amendment will be made at the hearing of this application</u>.” (emphasis added)

12. The appeal record reflects that no formal application for the proposed amendment was made, nor that such amendment was informally requested from the bar at the hearing of the matter in the court below. Nor is it apparent from the judgment of the court below that any such amendment was formally granted. This created somewhat of a conundrum at the hearing of the appeal. After hearing submissions from counsel for the parties, and given that the proposed amendment was mentioned in paragraph 26 of the judgment of the court below, we will assume in favour of the appellant, without finding, that the proposed amendment was impliedly granted by the court below.

13. 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 the 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)*'.

14. The court below ultimately dismissed the application to enforce the subpoena inter alia on the basis that the ambit of '*just excuse*' envisaged in section 36(1)(c) of the Superior Courts Act, No. 10 of 2013 ('the Act') was wide enough to cover the confidentiality obligations imposed upon the respondent in terms of the relevant legislative framework, and, that it could therefore not be concluded that the respondent was in wilful disobeyance of the subpoena or that the appellant was without more entitled to the documentation sought. Moreover, the court below upheld the respondent's contention that the appellant had utilised the wrong procedure by simply issuing a subpoena and seeking to enforce compliance therewith, as opposed to launching an application under section 14(2)(b) of National Health Act, 61 of 2003 ('the NHA') for a court order directing disclosure of the documents sought.

Grounds of appeal

15. The grounds of appeal are set out in the notice of appeal filed of record. Only those germane to a determination of the central issues in the appeal need mentioning. These include the following:

“(i) Given that the documents sought are public documents (as they had been disclosed in previous legal proceedings) the court below erred in holding that the alleged confidentiality obligations continued after such disclosure and could be a "just excuse" for the respondent not to produce them;

(ii) The court below erred in finding that the description of the documents in the subpoena were in general and broad terms and had not been sufficiently specified as envisaged by Rule 38, or that the documents sought in par 2 of the subpoena had not been sufficiently described or had necessarily been discovered in the legal proceedings [to which the article referred];

(iii) The court below erred in holding that in respect of subpoenas there is a distinction between "the right to obtain" documentation and "the obligation to produce" documentation and accordingly further erred in holding that the appellant had failed to draw that distinction;

(iv) The court below misdirected itself in upholding the respondent’s contention that the appellant ought to have used other mechanisms to obtain the documents and that the service of the subpoena and the institution of the application were ‘misconceived’;

(v) The learned Judge ought to have: issued the declaratory order sought in paragraph 1 of the Notice of Motion; directed the respondent to inform the Registrar of the whereabouts of the documents; and ordered the respondent and the Plaintiff to pay the costs of the application.”

Central issues in the appeal

16. The central issues arising for determination in the appeal which became crystallized during the hearing of the matter, are the following:

(i) Does a patient's right to privacy in respect of confidential medical information override the right of a party to obtain access to such information by means of a subpoena?

(ii) Whether the patient's right to privacy (and a medical practitioner's confidentiality obligations in relation to private patient information) is subservient to a litigant's public fair trial rights to obtain disclosure. [5]

Relevant legislative framework concerning patient information

17. Section 14(1) of the NHA renders all of a patient's information relating to his or her health status, treatment or stay in a health establishment confidential. Section 14(2) of the NHA creates a statutory prohibition against the disclosure of information relating to a patient's health status, treatment or stay in a health establishment, save in three instances only, namely, (a) if the patient consents to the disclosure; (b) if the court orders disclosure or any law requires the disclosure; or (c) if the disclosure is in the interests of public health. [6] The instances mentioned in (a) and (c) above do not find application

[5] That is, where the disclosure of confidential medical information of patients (none of whom are parties to the action pending in the court below) is sought.

[6] Section 14 provides as follows:

"14. **Confidentiality**

(1) All information concerning a user, including information relating to his or her health status, treatment or stay in a health establishment, is confidential.

(2) Subject to section 15, no person may disclose any information contemplated in subsection (1) unless—

(a) the user consents to that disclosure in writing;

(b) a court order or any law requires that disclosure; or

(c) non-disclosure of the information represents a serious threat to public health.

In terms of s 1 of the NHI, **"user"** means the person receiving treatment in a health establishment, including receiving blood or blood products, or using a health service, and if the person receiving treatment or using a health service is—

in *casu*. This matter involves an application for a court order compelling disclosure, albeit by dint of an application to enforce compliance with a subpoena *duces tecum* as opposed to an application as envisaged in (b) above.

18. The limited instances in which disclosure of medical records can be compelled accords with the ethos of the medical profession whereby '*Health care practitioners should …respect the privacy*, *confidentiality and dignity of patients.'*[7]

19. Booklet 5 of the HPCSA's Guidelines for Good Practice in the Health Care Professions contains ethical guidelines to direct the practice of health care professionals which form an integral part of the standards of professional conduct against which complaints of professional misconduct will be evaluated. The preamble thereof calls attention to the duty of a health care professional to meet the standards of conduct, care and competence set by the HPCSA in relation to patient information, which is acknowledged to be private, confidential and sensitive. Paragraph 3 thereof confirms a patient's right to confidentiality and a health practitioner's duty in relation thereto in reference to section 14(2) of the NHA and Rule 13 of the Ethical Rules of Conduct for health professionals registered under the Health Professions Act,

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(a) below the age contemplated in section 39(4) of the Child Care Act, 1983 (Act 74 of 1983), "user" includes the person's parent or guardian or another person authorised by law to act on the first mentioned person's behalf; or

(b) incapable of taking decisions, "user" includes the person's spouse or partner or, in the absence of such spouse or partner, the person's parent, grandparent, adult child or brother or sister, or another person authorised by law to act on the first mentioned person's behalf;

[7] The Health professions Council of South Africa ('HPCSA'), Booklet 1, '*Guidelines for Good Practice in the Health Care Professions'* (September 2016) at par 5.2.1.

1974, same being consistent with a patient's right to privacy in terms of the Constitution of the Republic of South Africa, 1996.[8]

20. Paragraph 8 of booklet 5 deals with the disclosure of patient information other than for the treatment of individual patients, (which includes '*research*').[9] Paragraph 8.2.3 distinguishes between '*identifiable patient data*' - which can only be disclosed with the informed consent of the patient - and *'de-identified information'*. In terms of paragraphs 8.2.3.4 and 9.1.3, patient data should be anonymised if it is not practical to contact the patient to seek consent for the use of identifiable data or samples.[10]

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[8] Paragraph 3 of booklet 5 provides as follows:

"**3. Patients' Right to Confidentiality**

3.1 The National Health Act (Act No. 61 of 2003) states that all patients have a right to confidentiality and this is consistent with the right to privacy in the South African Constitution (Act No. 108 of 1996).

3.2 Rule 13 of the Ethical Rules of the HPCSA states that a practitioner may divulge information regarding a patient only if this is done:

3.2.1 In terms of a Statutory provision,

3.2.2 At the instruction of a court,

3.2.3 In the public interest,

3.2.4 With the express consent of the patient,

3.2.5 With the written consent of a parent or guardian of a minor under the age of 12 years,

3.2.6 In the case of a deceased patient with the written consent of the next of kin or the executor of the deceased's estate."

[9] Par 8.1.1 thereof.

[10] Para 8.2.3.4 provides as follows:
"Where health care practitioners have control of personal information about patients, they must not allow anyone access to that information for study, research or medical audit unless the person obtaining access has been properly trained and authorised by a health establishment, a health care provider or comparable body and is subject to a duty of confidentiality in their employment or because of their registration with a statutory regulatory body."

Para 9.1.3 determines that:

21. Paragraph 10 of booklet 5 deals with disclosure of patient information in connection with judicial or other statutory proceedings. It provides, in relevant part, as follows:

> "10.1 Health care practitioners may be required to disclose information to satisfy a specific statutory requirement, such as notification of a notifiable disease or suspected child or elder abuse.
>
> 10.2 Health care practitioners must also disclose information if ordered to do so by a judge or presiding officer of a court…
>
> 10.3 **Health care practitioners should not disclose personal information to a third party such as a lawyer**, police officer **or officer of a court without the patient's express consent**, except in the circumstances described in paras 9.3, 9.4.2 and 9.5.2." (emphasis added)

(It should be noted that none of the exceptions provided for in paras 9.3, 9.4.2 and 9.5.2 of booklet 5 find application in *casu*)

Discussion

Declaratory relief

22. The appellant complained in her replying affidavit and heads of argument filed in the appeal that the respondent's assertion (in correspondence preceding the litigation) that the information sought in the subpoena was 'privileged,' is what prompted her to seek a declarator and enforcement of the subpoena by way of application to court. The appellant's argument in the appeal was, in effect, that the court below had no legitimate reason to refuse to grant the declaratory relief in view of the respondent's concession in the answering affidavit to the effect that no legal professional privilege attached to the documents sought. The argument is in my view contrived.

"*Where research projects depend upon using identifiable information or samples, and it is* ***not practicable to contact patients to seek their consent****, the* ***data should be anonymised*** *and this should be drawn to the attention of a research ethics committee."* (emphasis added)

23. In the correspondence addressed on the respondent's behalf after service of the subpoena and prior to the launch of the application, the reference to 'privilege' was limited to 'confidentiality', as is plainly evident from the assertion in the letter that the information was privileged '*because of the confidentiality of patient information and a legal and ethical obligation of researchers and research institutions to protect the identities of research participants*.'

24. In a further letter addressed by the respondent's attorneys of record to the state attorney (representing the appellant) in response to the application but before delivery of the answering affidavit, the respondent asserted the confidentiality of patient information and his legal, statutory and ethical obligations in relation thereto as the basis for his inability to comply with the subpoena, that is, had the documentation been in his possession, which it was not.

25. The respondent's counsel submitted in these proceedings that nothing turns on the unfortunate use of the word 'privilege' in the earlier correspondence, as the respondent resisted compliance with the subpoena on the basis of patient confidentiality (not privilege) from the moment his attorneys came on record. The application was also argued on this basis in the court below. Therefore, for purposes of determining whether the court below was correct in declining to issue the declarator sought in paragraph 1 of the notice of motion, the word 'privilege' must be taken to mean 'confidentiality'. At the hearing of the appeal, I did not understand the appellant's counsel to disagree with the respondent's submissions, nor did the appellant proffer any argument in opposition thereto.

26. That the court below was considering whether the respondent's opposition - based on confidentiality obligations imposed upon him in terms of the legislative framework (outlined above) - to the declaratory relief in para 1 of the notice of motion, is evident from paragraph 34 of the judgment, where the following was recorded: *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.'*

27. The correctness of the finding that 'there is confidentiality in the documentation *ex lege'* was not challenged on appeal. What was challenged is the correctness of the decision to take into account the 'wide import' of the declaratory order sought in refusing to grant such relief.[11] This complaint is, however, not understood. The judgment of the court below records that the appellant had contended that it was in the interest of justice to determine the appellant's entitlement to the documents sought in the subpoena and the respondent's claim for confidentiality therein.[12] Both the appellant and the plaintiff had moreover argued that the issues raised may affect many litigants in other cases.[13]

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[11] The appellant's complaint in this regard is recorded as follows in the Notice of appeal:
"*The learned Judge erred in holding that the declaratory order sought had 'wide import' and in taking that into account in refusing to grant the declaratory order that was sought against Prof Solomons, regard being had to the stated basis of his objection to production of the documents, namely privilege or confidentiality*."

[12] Par 17 of the judgment. Moreover, in par 26 of the judgment, the court below recorded that the defendant (appellant) had 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.

[13] Par 19 of the judgment of the court below. Dealing with the contention that the issues arising in the application against the respondent may affect many litigants in other cases, including the evidence to be tendered by Prof Smith at the trial, the learned judge held that '*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."*

28. It is trite that the grant of declaratory relief is discretionary.[14] Since there was no controversy between the parties about the clear provisions of the NHA, regulation 13 of the Ethical Rules of Conduct of Practitioners registered under the Health Professions Act or the Ethical Guidelines for good practice of the HPCSA relating to patient confidentiality, the finding by the court below, namely, that there was confidentiality in the documentation *ex lege* and that a declaratory order was unnecessary, cannot be faulted.[15] If granted, the declaratory relief would only have served to confirm what all the parties are aware of and in agreement with, in so far as the legislative framework pertaining to patient confidentiality is concerned.

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[14] Section 21(1)(c) of the Superior Courts Act, which provides:

"**Persons over whom and matters in relation to which Divisions have jurisdiction**

21 (1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognizance, and has the power –

(c) in its discretion, and at the instances of any interested person, to enquire into and determine any existing, future, or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination." (Emphasis added)"

As pointed out by the Constitutional court in *JT Publishing (Pty) Ltd & Another v Minister of Safety & Security:*

"*I interpose that enquiry because a declaratory order is a discretionary remedy, in the sense that the claim lodged by an interested party for such an order does not in itself oblige the Court handling the matter to respond to the question which it poses, even when that looks like being capable of a ready answer. A corollary is the judicial policy governing the discretion thus vested in the Courts, a well-established and uniformly observed policy which directs them not to exercise it in favour of deciding points that are merely abstract, academic or hypothetical ones. I see no reason why this new Court of ours should not adhere in turn to a rule that sounds so sensible. Its provenance lies in the intrinsic character and object of the remedy, after all, rather than some jurisdictional concept peculiar to the work of the Supreme Court or otherwise foreign to that performed here*."

[15] The question of whether the documents sought were indeed confidential was not finally determined by the court below, given its findings that the documents were not sufficiently described in the subpoena and that '*From the founding papers it cannot be ascertained which of these document[s] would in fact constitute matters of public record.*' Relevant information, amongst others, about whether or not the documents identified in the subpoena had in fact been 'discovered' in the 195 medico-legal actions referred to in the article had not been disclosed in the appellant's founding affidavit. A reference to the word 'discovered' was clearly a reference to whether the documents in question formed part of the court records and evidence in each of the actions. In this regard, the appellant's generalised statement that they did, being unsupported by primary facts in the founding affidavit, could not ground a conclusion that the documents in fact constituted matters of public record.

29. In *Association for Voluntary Sterilization of South Africa v Standard Trust Limited and Others* (325/2022) [2023] ZASCA 87 (7 June 2023), the Supreme Court of Appeal affirmed the test for interference by a court of appeal with a lower court's exercise of a discretion. It held as follows:

"The test for interference by this Court, as an appellate court, is set out in *Reinecke v Incorporated General Insurance Ltd*. At 99B-E Wessels JA said:

> "It follows, in my opinion, that counsel's contention that the Court *a quo* lacked jurisdiction to make a declaratory order cannot be upheld. In conclusion, there remains for consideration Mr Wulfsohn's alternative argument relating to the exercise of its discretionary power by the Court *a quo*, which proceeded from the assumption that the learned Judge had misdirected himself in the respect to which I have already referred to earlier in this judgment. It was submitted on respondent's behalf that, even if it appeared that the learned Judge had misdirected himself in the exercise of his discretion, this Court would not allow the appeal if the order appealed from is, notwithstanding the misdirection, clearly consistent with the proper exercise of a judicial discretion. This approach necessarily requires this Court to bring a judicial discretion to bear upon the question whether or not the case is a proper one for the granting of a declaratory order. *In the absence of misdirection or irregularity, this Court would ordinarily not be entitled to substitute its discretion for that of the Court a quo*.' (Own emphasis)"[16] (footnotes excluded)

[16] See too: *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa* 2015 (5) SA 245 (CC); (*Trencon*) at par 88, the following was said:

"When a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised—

'judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles'."

30. No misdirection or irregularity has been relied upon in this case. Thus, we are not simply at large to interfere with the discretion exercised by the court below. Suffice it to say that the appellant proffered no good reason for this court to interfere with the discretion exercised by the court below in declining to grant the declaratory relief.

31. In any event, the court below found that the appellant had failed to lay a proper factual foundation for the grant of declaratory relief.[17] Its finding in this regard is unassailable. It is trite that the existence of a dispute is not a prerequisite for the exercise of a power conferred upon the High Court by the s21(1)(c) of the Superior Courts Act. What is required, however, is that 'there must be interested parties on whom the declaratory order would be binding. [18] An applicant for such relief must satisfy the court that he/she is a person interested in an 'existing, future or contingent right or obligation', and if the court is satisfied that the existence of such conditions has been proved, it has to exercise the discretion by deciding either to refuse or grant the order sought. This does not, however, mean that the court is bound to grant a declarator but that it must consider and decide whether it should refuse or grant the order, following an examination of all relevant factors.[19]

32. It follows that the appeal against the decision not to grant declaratory relief cannot succeed.

Amended relief for disclosure of whereabouts of documents

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[17] See par 34 of the judgment, where the court below went on to say that '*The defendant* [appellant] *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] *Ex parte Nell* 1963 (1) SA 754 (A); *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA) para 16.

[19] Id, par 17.

33. This relief presupposes that the respondent was obliged to produce the documentation in the first place. If not, then it follows that he would likewise not be obligated to disclose their whereabouts.[20]

Obligation to produce / 'Just excuse'

34. In considering the issue of the respondent's obligation to produce the documents within the context of his confidentiality obligations under the relevant legislative framework, the court below accepted that there is a difference between a party's right to obtain documentation and an obligation on the recipient of a subpoena to produce same.[21] The appellant complains that the court below erred in so holding. The complaint lacks merit.

35. Section 35 of the Superior Courts Act provides for a party's right to obtain documentation. [22] Rule 38 of the Uniform Rules of court provides for the manner in which a party may procure production of documents, i.e., by the issuing of a subpoena *duces tecum*. Whilst a party is of right entitled to issue a subpoena under the rule, in terms of section 36(1)(c) of the Superior Courts Act, a recipient of a subpoena may refuse to produce the documentation sought (i.e., resist compliance with the subpoena) provided he/she has a 'just excuse' for such refusal.[23] In such event, the recipient would be justified in

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[20] It should be remembered, however, that the application sought to compel production of documents and *not* disclosure of their whereabouts. The respondent's opposition was therefore directed against the production of documents and not the disclosure of their whereabouts. Put simply, the respondent dealt only with what he was required to do, based on the terms of the notice of motion.

[21] See paras 26 and 27 of the judgment. In par 23 of the judgment, the court below recognized that a party is of right entitled to issue a subpoena under rule 38.

[22] Sec 35 provides, in relevant part, as follows:
"35(1) A party to proceedings before any Superior Court in which…the production of any document… is required, may procure …the production of any document …in the manner provided for in the rules of that court."

[23] Legal professional privilege is recognized as a 'just excuse' for purposes of resisting compliance with a subpoena.

not complying with the subpoena and *a fortiori*, would not be obliged to produce the documentation sought.

36. The court below recognised that a litigant is not always entitled to production of documents, based on the trite principle enunciated in *Beinash v Wixley,*[24] namely, that '*Ordinarily a litigant is of course entitled to obtain production of any document relevant to his or her case in the pursuit of truth, unless the disclosure of the document is protected by law.'* For purposes of establishing whether the production is '*protected by law'*, account would have to be taken of the relevant legislative framework outlined above.

37. The court below held that the ambit of a 'just excuse' is wide enough to cover the confidentiality obligations imposed upon the respondent by virtue of the relevant legislative framework and that it could therefore not be concluded that the appellant was without more entitled to the documentation sought or that the respondent was in wilful disobeyance of the subpoena.[25] As demonstrated below, this conclusion was indubitably correct. The appellant's complaint in this regard is that *'Given that the documents sought are public documents (as they had been disclosed in previous legal proceedings) the court below erred in holding that the alleged confidentiality obligations continued after such disclosure and could be a "just excuse" for the respondent not to produce them.'*

38. The appellant's argument on appeal remained largely as that which was encapsulated by the court below in paragraph 22 of the judgment.[26] In effect,

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[24] *Beinash v Wixley* 1997 (3) SA 721 (SCA).

[25] The respondent's case was essentially that, had he been in possession of the documentation (which he was not), he would have been statutorily obliged to resist compliance with the subpoena.

[26] There, the following was recorded:

the argument is that the appellant was entitled as of right to issue a subpoena *duces tecum*,[27] which the respondent could either comply with or apply to court to set it aside. He did neither. The appellant argues that the respondent failed to set out a proper basis for his refusal to comply with the subpoena in that the documents sought comprised public documents which were in the result not subject to a claim of privilege or confidentiality by anyone. This argument appears to me to be premised on the notion that the appellant has a unassailable right of access to documents containing otherwise confidential patient information once such documents are disclosed in (unrelated) court proceedings (medico-legal actions) and thus comprise public records.[28] Such a proposition is not, however, supported by the authorities.

39. In *Sanral*,[29] the court recognised that:

"...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. 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 . 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* where the relevant principle is stated thus:

> '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' " (emphasis added)

[27] In terms of rule 38(1)(a)(i) & (iii) read with 38(1)(b).

[28] *Cape Town City v South African National Roads Authority* 2015 (3) SA 386 ('Sanral), par 16, where it was said that the principle of open courtrooms requires that evidence and documents disclosed in court proceedings should be open to public scrutiny and that the principle of open courtrooms is constitutionally entrenched by virtue of s34 of the Constitution. The court acknowledged in par 14 of the judgment that 'even though it has often been urged that "privacy" of litigants requires that the public be excluded from court proceedings…covertness is the exception and openness the rule.'.

[29] Id, par 18.

'As a general rule litigants are prejudiced when their proceedings are not held in public. That is not to say that litigants may not sometimes wish to keep their litigation private or that there may not be situations where a court may justifiably depart from the default rule that court proceedings are public... It needs be emphasised that courts are open in order to protect those who use the institution and to secure the legitimacy of the judiciary, not to satisfy the prurient interests of those who wish to examine the private details of others... Moseneke DCJ accepted in Independent Newspapers (para 43) that 'the default position is one of openness'. Accordingly, court proceedings should be open unless a court orders otherwise. The logical corollary must therefore be that departures should be permissible when the dangers of openness outweigh the benefits.' (emphasis added)

40. In *Tshabalala*,[30] the court explained why the right to privacy in respect of medical records is of paramount importance:

"The reason for treating the information concerning a user, including information relating to his/her health status, treatment or stay in a health establishment as confidential is not difficult to understand. The confidential medical information invariably contains sensitive and personal information about the user. This personal and intimate information concerning the individual's health, reflects sensitive decisions and the choices that relate to issues pertaining to bodily and psychological integrity as well as personal autonomy. Section 14(1) of the National Health Act imposes a duty of confidence in respect of information that is contained in a user's health record. This is simply because the information contained in the health records is information that is private. *"Individuals value the privacy of confidential medical information because of the vast number of people who could have access to the information and the potential harmful effects that may result from disclosure. The lack of respect for private medical information and its subsequent disclosure may result in fear of jeopardising an individual's right to make certain fundamental choices that he/she has a right to make. There is*

[30] *Tshabalala-Msimang and another v Makhanya and others* 2007 (5) SA 8 (6) SA 102 (W) at par 27.

therefore strong privacy interest in maintaining confidentiality." [31] Section 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. Here, the right to the user's privacy is paramount. The unlawful disclosure of the information contained in the health record will cause extreme trauma as well as pain to the user. This information is confidential because it is the user who has control over the information about himself or herself. It is also the user who can decide to keep it confidential from others. In the National Health Act, the legislature considered the confidentiality of the information important enough to impose certain criminal sanctions in the event of the breach of the confidentiality. In terms of the Constitution, as well as the National Health Act, the private information contained in the health records of a user relating to the health status, treatment or stay in a health establishment of that user is worth protecting as an aspect of human autonomy and dignity. This in turn includes the right to control the dissemination of information relating to one's private medical health records that will definitely impact on an individual private life as well as the right to the esteem and respect of other people." (emphasis added)

41. In *NM and others,*[32] the Constitutional court had earlier determined that the disclosure of medical records is not just a question of privacy but also one of dignity. The court explained as follows:

"Private and confidential medical information contains highly sensitive and personal information about individuals. The personal and intimate nature of an individual's health information, unlike other forms of documentation, reflects delicate decisions and choices relating to issues pertaining to bodily and psychological integrity and personal autonomy.

Individuals value the privacy of confidential medical information because of the vast number of people who could have access to the information and the potential harmful effects that may result from disclosure. The lack of respect for private medical information and its subsequent disclosure may result in fear jeopardising

[31] *NM and others v Charlene Smith and others* 2007 (5) SA 250 (CC).
[32] Id, at paras 40-43.

an individual's right to make certain fundamental choices that he/she has a right to make. There is therefore a strong privacy interest in maintaining confidentiality.
...
As a result, it is imperative and necessary that all private and confidential medical information should receive protection against unauthorised disclosure. The involved parties should weigh the need for access against the privacy interest in every instance and not only when there is an implication of another fundamental right, in this case the right to freedom of expression." (emphasis added)

The court went on to emphasize the right to dignity as follows: [33]

"...While it is not suggested that there is a hierarchy of rights it cannot be gainsaid that dignity occupies a central position...

If human dignity is regarded as foundational in our Constitution, a corollary thereto must be that it must be jealously guarded and protected. As this Court held in *Dawood and Another v Minister of Home Affairs and Others*, *Shalabi and Another v Minister of Home Affairs and Others*, *Thomas and Another v Minister of Home Affairs and Others*:

> "The value of dignity in our Constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a *value* fundamental to our Constitution, it is a justiciable."”
> (footnotes omitted) (emphasis added)

42. The guiding principles to be extracted from the aforegoing authorities concerning the disclosure of private and confidential medical records, may be summarized as follows:

[33] Id, at paras 49-50

42.1. Medical records inherently affect the rights to dignity and privacy of individuals. Those rights must, by default, be respected and protected;

42.2. There is a strong privacy interest in maintaining confidentiality over medical records;

42.3. The need for access to medical records must be weighed against the patient's privacy interest in every instance; and

42.4. A court must therefore carefully consider whether there is a genuine need for access to medical records sought. This would per force entail a consideration of the relevance of the documentation sought in each case, the potential harmful effects that may result from disclosure, and whether the benefits of the principle of openness outweighs the dangers inherent in the disclosure of private information, amongst others, the conceivable violation of the dignity and psychological integrity of the patient/s. If the records are not genuinely necessary, then, by default, the court ought to protect the individual's rights to dignity and privacy.

43. It stands to reason that a factual basis for a finding that access to medical records is warranted in a particular case has to be laid by an applicant for purposes of enabling a court to conduct the relevant enquiries.

44. The relevant facts required for a court to undertake the necessary enquiries, *inter alia*, for purposes of weighing the need for access against the patients'

privacy interests, were not provided in the appellant's papers. It therefore comes as no surprise that the court below found that the appellant had '*manifestly failed to make out a case in her founding papers for the production of the documentation sought in the subpoena…On this basis, her application is doomed to failure*.' The finding was undoubtedly justified, as the following example illustrates: if only 10 cases were ultimately analysed and relied on for purposes of supporting the authors' conclusion in the article, then one wonders why documentation pertaining to 165 medico-legal actions or 63 cases would be necessary or relevant for a determination of the issues in the pending trial?

45. The finding by the court below, namely, that the subpoena was cast in very broad and general terms so that it could not be determined exactly what information was in issue without resorting to speculation, was likewise warranted. To illustrate, does the reference to 'raw data' in the subpoena pertain to data collected from 195 or 63 or 10 sources? Does it exclude data that had been collected but not processed? It is impossible to tell. Is the reference to expert reports only those compiled by the authors in question or does it include reports filed by all experts in the actions, even those that did not inform the analysis performed for purposes of the research paper? It is impossible to tell. What does '*all supporting documentation'* refer to, given that same is not limited to 'raw data, expert reports, medical records and MRI scans' that relate to 63 cases? The same anomaly befalls the reference to 'medical records' and 'MRI scans'. *Which* medical records? And *which* MRI scans?

Wrong procedure employed by appellant in the court below

46. Section 14(1) of the NHA deems it imperative and mandatory to afford the information recorded on a patient's health records protection against unauthorised disclosure.[34]

47. Section 14(2)(b) of the NHA empowers a court (as opposed to the Registrar) to authorise the disclosure of private and confidential medical information in the absence of patient consent to the disclosure. Since it is a court that needs to consider the question of whether patient information is to be disclosed after inter alia weighing the need for access against the patient's privacy interests, and not the Registrar, it is axiomatic that judicial oversight is required when disclosure of private and confidential medical information absent patient consent is sought.[35] This is in line with the legislative framework outlined above, more specifically, paragraphs 10.2. and 10.3 of booklet 5. Paragraph 10.3 of booklet 5 lists an 'officer of court' (such as the Registrar) as one of the persons to whom patient information should *not* be disclosed absent a patient's consent. It is also in line with the authorities referred to above, from which important guiding principles in relation to the disclosure of medical records have been extracted, which authorities largely echo what has been stipulated in the Ethical Rules and Ethical Gudelines, more specifically, booklet 5 thereof.

48. It stands to reason therefore that when it comes to the disclosure of private and confidential patient information absent patient consent, an order as envisaged in section 14(2)(b) of the NHA ought to be sought from the court. It is the court that will make the ultimate decision as to whether or not to authorise the disclosure thereof, having regard to all the relevant factors indicated in the guiding principles summarized above.

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[34] See *Tshabalala,* quoted in par 40 above.

[35] It is noteworthy that the section makes no provision for oversight by the Registrar of a court.

49. Instead of bringing an application in terms of section 14(2)(b) of the NHA, the appellant chose to enforce compliance with the subpoena (authorised by the Registrar) in terms of which the respondent was directed to disclose private and confidential patient information to the Registrar, thereby opting for a process that essentially served to circumvent the judicial oversight required.

50. It is of course open to litigants to employ the procedure provided for in Rule 38 in the appropriate circumstances. Ultimately, the appellant's choice to issue a subpoena against a medical professional to produce private medical information (i) in the absence of patient consent; and (ii) absent proper inquiry, including a proper weighing of the need for disclosure against the privacy interests of the patient; and (iii) in circumstances where the medical professional is statutorily and ethically duty bound to resist compliance, more particularly, under threat of a costs order, was inappropriate.

51. Had an application as envisaged in s14(2)(b) of the NHA been brought, a different test would have been applicable, which if satisfied, may well have resulted in a different outcome in the matter. Stated differently, the process envisaged in s 14(2)(b) of the NHA provides for a court to authorise disclosure providing a factual foundation is laid to enable the court to conduct the necessary enquiries, as opposed to a process that directs the medical professional to disclose private and confidential patient information without the need for a court order.

52. The appellant relies on the case of *Divine Inspiration*[36] to justify the process she chose to employ in *casu*. There, Hockey AJ held that:

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[36] *Divine Inspiration Trading 205 (Pty) Ltd v Gordon and Others* 2021 (4) SA 206 (WCC), par 29.

"Section 14(2)(b) of the NHA, like section 7 of PAIA, demonstrates a clear show of deference to the rules, and health practitioners, whose patients refused to consent for (sic) the disclosure of their medical records, cannot therefore rely on section 14, without more, when they are served with a subpoena duces tecum under rule 38. It goes without saying that ethical rules are subject to these principles."

53. Suffice it to say that *Divine Inspiration* is distinguishable on its facts and as such, we are not bound to follow it. Firstly, it did not concern an application to enforce compliance with a subpoena *duces tecum*, rather it involved an application in terms of s14(2)(b) of the NHA, where the relevancy of the documents sought, coupled with appropriate safeguards offered to protect the privacy of patients, ultimately informed the decision to order disclosure. Secondly, the medical information of the first respondent (who was a party in that case) was sought, as opposed to the present case where someone else's private information is sought. The 195 cases referred to in the article that was co-authored by the respondent do not involve a party in this case to which the information pertains. Thirdly, in so far as that court was considering an application in terms of s14(2)(b) of the NHA, its finding that rule 38 of the Uniform Rules of court constitutes a 'law requiring disclosure' of private and confidential patient information, was merely *obiter*.

54. Notwithstanding these distinguishing features, in so far as the court in *Divine Inspiration* endorsed an approach whereby an administrative process in issuing a subpoena could override a patient's constitutional right to privacy, we do not endorse it. If the particular finding in *Divine Inspiration* is to be accepted and followed, it would render the requirement of a court order in s 14(2)(b) of the NHA nugatory. If parties were entitled to obtain patient information by way of a subpoena, thereby by-passing judicial oversight, the Legislature would not have made provision for a court order or the relevant patient's consent to be obtained.

55. Although the respondent submitted that the reference to '… *or any law requires that disclosure* ' in s14(2)(b) of the NHA can only be a reference to where the law requires of a medical practitioner to breach patient confidentiality, for example, in scenarios involving the reporting of gunshot wounds; child or other abuse; communicable diseases; where the patient is incompetent or incapacitated; and/or where the aim is to protect third parties,[37] it is neither necessary nor appropriate to make a final determination in regard thereto. Having regard to the provisions of par 10.1 of booklet 5 of the HPSCA's Ethical Guidelines, the submission may well carry weight. But that is a debate for another day.

56. It was not the appellant's case that patient consent to the disclosure of the documents sought was obtained. The appellant sought an order compelling disclosure of patient information solely on the basis that the information sought was not confidential because it formed part of court records which comprise public documents, alternatively, if the information was confidential, then confidentiality was waived by the patients by virtue of the fact that the relevant medical information was contained in court files which remain open to public scrutiny.

57. This brings to the fore the question whether confidentiality is lost in respect of patient information once it is contained in public records? Fortunately, the Constitutional Court has already provided the answer.

58. *NM and Others*[38] concerned the publication of Ms Patricia de Lille's biography titled '*Patricia de Lille'* in which the names of three women who

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[37] Kling, S "*Confidentiality in Medicine*" published in "*Current Allergy & Clinical Immunology*" November 2010 Vol 23, No. 4.

[38] Cited in fn 31 above.

were HIV positive were disclosed. They alleged that their names had been published without their prior consent having been obtained. They brought an action for damages in the High court against Ms de Lille and the author of her biography, Ms Smith, claiming that their rights to privacy, dignity and psychological integrity had been violated. The High Court dismissed the action with costs. In denying liability, the defendants had raised a not dissimilar argument to the one advanced by the appellant in *casu*, namely, that the publication of their HIV status was already in the public domain when the book was published and was therefore not a private fact, given that the plaintiffs had appeared before various commissions of inquiry, including the Strauss inquiry, and had brought an application in their own names in the High court for an order interdicting the inclusion of their names in a book.

59. In respect of these contentions, the Constitutional Court in *Nm and Others*[39] held as follows:

"In my view, when they made their application for the interdict in their names, they were not thereby saying their names should be published in a book having a wide circulation throughout South Africa, which would be the position since the second applicant is a national figure. Similarly by attending the various inquiries they were not giving blanket consent to the publication of their status.

…

The assumption that others are allowed access to private medical information once it has left the hands of authorised physicians and other personnel involved in the facilitation of medical care, is fundamentally flawed. It fails to take into account an individual's desire to control information about him or herself and to keep it confidential from others. It does not follow that an individual automatically consents to or expects the release of information to others outside the administration of health care. As appears from what has gone on before there is

[39] At paras 39 & 44 - 47.

nothing on the record to suggest that the applicants' HIV status had become a matter of public knowledge.

This protection of privacy in my view raises in every individual an expectation that he or she will not be interfered with. Indeed there must be a pressing social need for that expectation to be violated and the person's rights to privacy interfered with. There was no such compelling public interest in this case.

The High Court held that the first and second respondent were not liable for any damage suffered at the time of publication of the book. I disagree with this finding of the High Court. The first respondent did not sufficiently pursue her efforts to establish if the necessary consents had been obtained, despite having ample time to do so. More importantly she could have used pseudonyms instead of the real names of the applicants. The use of pseudonyms would not have rendered the book less authentic. The same position applies to the second respondent.
I am, therefore, persuaded that the publication by the respondents of the HIV status of the applicants' constituted a wrongful publication of a private fact and so the applicants' right to privacy was breached by the respondents. The need for access to medical information must also serve a compelling public interest." (emphasis added)

60. Applied to the facts in *casu*, the fact that a patient's private and confidential medical information is disclosed in a court file for purposes of that specific litigation (in which the patient is involved as a party) does not mean that the patient has provided blanket consent to the publication of their health information in any future unrelated litigation instituted between third parties going forward. Simply stated, it does not mean that medical evidence employed in their specific cases may now be utilized and thereby publicized in any or all other cases. The appellant's submission that confidentiality was waived by the patients simply because their medical information was

disclosed in their own cases, is therefore, as the Constitutional Court put it, ‘fundamentally flawed’.

61. In all the circumstances, the conclusion reached by the court below, namely, that the appellant had utilised the wrong procedure[40] is unassailable.

62. This leaves the final submission of the appellant that the court below erred in granting a costs order against it in the application. This was not pressed before us in argument. It is clear that, in doing so, the high court exercised a discretion. The reasons for doing so were clearly set out by Dippenaar J and do not afford a basis on which to interfere on appeal. On the contrary, it is my view that the costs order was warranted.

63. In the result, the following order is to be granted:

63.1. The appeal is dismissed with costs.

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AVRILLE MAIER-FRAWLEY
JUDGE OF THE HIGH COURT,
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree and it is so ordered:

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LÖTTER WEPENER
JUDGE OF THE HIGH COURT,
GAUTENG LOCAL DIVISION, JOHANNESBURG

[40] Paras 27 & 34 of the judgment.

I agree

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PATRICK MALUNGANA
ACTING JUDGE OF THE HIGH COURT,
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing:	5 May 2023
Judgment delivered	27 June 2023

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 27 June 2023

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