

NOTE: ORDER THAT NO SEARCH OF THE COURT FILE IS PERMISSIBLE WITHOUT THE PERMISSION OF A JUDGE AS PER THE TERMS SET OUT IN [2021] NZHC 3064 AT [83] REMAINS IN FORCE.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

**SC 150/2021
[2021] NZSC 189**

BETWEEN

NZDSOS INCORPORATED
First Applicant

NZTSOS INCORPORATED
Second Applicant

AND

MINISTER FOR COVID-19 RESPONSE
First Respondent

DIRECTOR-GENERAL OF HEALTH
Second Respondent

ATTORNEY-GENERAL
Third Respondent

Court: O'Regan, Ellen France and Williams JJ

Counsel: W C Pyke for First Applicant
S K Green for Second Applicant
D J Perkins and R M McMEnamin for Respondents

Judgment: 22 December 2021

JUDGMENT OF THE COURT

There is no order as to costs.

REASONS

[1] In our judgment dealing with this application for leave to bring a direct appeal to this Court, we reserved the issue of costs.¹

¹ *NZDSOS Inc v Minister for COVID-19 Response* [2021] NZSC 163 at [12].

[2] We have since received an application from the respondents seeking an award of costs of \$2,500.

[3] The applicants argue that no award of costs should be made, on the basis that the matters in issue in relation to the notice of application to appeal are matters of public interest and the applicants acted reasonably in seeking leave for a direct appeal, given the urgency occasioned by the mandatory vaccination orders affecting the applicants being issued at short notice.

[4] The respondents accept that the case involves a matter of general or public importance, but argued that the applicants have not acted reasonably in seeking leave for a direct appeal to this Court. Rather, they argue that a reasonable party would have exercised their right to appeal to the Court of Appeal.

[5] Since we received the submissions relating to costs, the High Court has issued its judgment dealing with costs in relation to the proceedings in the High Court leading to the judgment against which the applicants sought to appeal to this Court.²

[6] The High Court declined to make an award of costs against the applicants, on the basis that they were pursuing a matter of public importance and have acted responsibly in the way they pursued the proceedings.³

[7] As there is no dispute that the proceedings involve a matter of public importance, the only issue in relation to costs is whether the applicants acted reasonably in seeking leave for a direct appeal to this Court. We see that as finely balanced. We found that there was not a proper basis for a direct appeal, and that the normal appellate pathway should be followed, involving consideration of the case by the Court of Appeal before bringing the case to this Court for consideration. But we do not think the applicants' conduct in seeking leave for a direct appeal is such that they should be classified as acting unreasonably. In those circumstances, we consider the fair outcome is to direct that costs should lie where they fall.

² *Four Midwives v Minister for COVID-19 Response* [2021] NZHC 3420 (Palmer J).

³ At [8].

[8] We therefore decline the respondents' application for costs and make no order as to costs.

Solicitors:

Haigh Lyon, Auckland for First Applicant

McKenna King, Hamilton for Second Applicant

Crown Law Office, Wellington for Respondents