REPUBLIC OF SOUTH AFRICA

HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES

..... 13/11/2013.

CASE NO 2011/46091

THE GOVERNING BODY OF HOERSKOOL FOCHVILLE	FIRST APPLICANT
HOERSKOOL FOCHVILLE	SECOND APPLICANT
AND	
CENTRE FOR CHILD LAW	RESPONDENT
IN RE:	
THE GOVERNING BODY OF HOERSKOOL FOCHVILLE	FIRST APPLICANT
HOERSKOOL FOCHVILLE	SECOND APPLICANT
THE MEC, EDUCATION, GAUTENG	FIRST RESPONDENT
THE HOD, EDUCATION, GAUTENG	SECOND RESPONDENT
PETER SKOSANA	THIRD RESPONDENT
JUDITH N DUBE	FOURTH RESPONDENT
MRS M BILLITANE N O AND 52 OTHER PERSONS	FIFTH TO FIFTY THIRD RESPONDENTS
GREENSIDE HIGH SCHOOL GOVERNING BODY	AMICUS CURIAE

JUDGMENT

SUTHERLAND J:

Introduction

1. The controversy in this case is about compliance by the respondent with Rule 49(12) of the Uniform Rules. The text provides:

> "Any party to any proceeding may at any time before the hearing thereof deliver a notice as near as may be in accordance with Form 15 in the First Schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording to produce such document or tape recording for his inspection and to permit him to make a copy or transcription thereof. Any party failing to comply with such notice shall not, save with the leave of the court, use such document or tape recording in such proceeding provided that any other party may use such document or tape recording."

2. The debate ranges far wider than the mere application of the Rule itself. The respondent refuses to comply on several grounds, consisting of several issues of law and fact which are addressed in turn. It was accepted that the respondent was duty bound to justify a refusal.

The origins of the current application

3. The critical facts are these; (the parties are called by their names to avoid confusion arising from the multiplicity of proceedings):

3.1. The School launched an application against the Gauteng Education Department to secure orders that would recognise that the school governing body had the power to decide the language medium of teaching. The School wanted an exclusive medium of Afrikaans. The Education Department wanted both Afrikaans and English to be used. This is the *Main Application*. It is pending. The Department of Education responded with a counter application, but it plays no part in this controversy.

3.2. The Centre for Child Law (CLL), a component of the University of Pretoria is an organisation devoted to the protection of childrens' rights in the public interest, which engages in litigation to further such aims. It brought an application to intervene as a co-applicant. The founding affidavit thereof is deposed to by Carina du Toit. This application is opposed by the School. *This is the Intervention Application.* The relief sought, if the intervention is successful, includes, in essence:

3.2.1. A joinder of the National Minister of Education as a co-respondent.

3.2.2. An order directing the National Minister to make regulations about minimum norms and standards, as contemplated in Sections 5A(1) (b) and 5A (2) (b) of the South African Schools Act 84 of 1996.

3.2.3. A declaratory order that the children whose names are listed in annexure NOM 1 [ie, of the School's Main Application, and who were cited, via their parents or guardians *nomine officio* as respondents] have a 'right to receive education at Hoerskool Fochville with English being their medium of instruction.'

3.2.4. The School and the Gauteng Education Department 'engage meaningfully' together with the parents or guardians of the School's learners, about a range of matters having a bearing on the policy decision to retain or jettison English as a medium of instruction, the capacity of the School to teach in English, and the provision of infrastructure and other resources to facilitate English tuition for those learners who want it.

3.3. The School has not yet filed an answering affidavit. Instead, the school served a Rule 35(12) notice. The CLL refused to comply. The School then brought an application in terms of Rule 30A(1) to compel discovery. In that application the school has filed a founding affidavit, the CLL has answered, and the School has replied. This is the *Discovery Application* and is the matter now before court.

3.4. The relief sought in the Discovery Application is for:

> " true copies of the questionnaires to which [the CLL] refers in para 28 of its founding affidavit [in the Intervention application]...

3.5. In the founding affidavit, running to 55 pages, in support of the intervention, Du Toit, among other allegations, alleged that she, on behalf of the CLL with others

went to Fochville and met 37 of the children referred to above. Paragraph 28 of the affidavit reads:

> " We divided the children up into groups of approximately 6 - 8 learners. Each child was asked to complete the questionnaire. They were permitted to complete a questionnaire without affixing their names to it. The questionnaire listed specific questions but the children could also write additional comments."

3.6. Paragraphs 21 – 79, extending over some 21 of the 55 pages of Du Toit's affidavit is devoted to an exposition or synopsis of what, according to Du Toit, the children put down in the questionnaires. Du Toit does not purport to have first hand information to present; the entirety of the exposition is hearsay. The burden of the exposition is a critique of life as a learner at the School from the perspective of the learners. Some of it is positive, some of it negative. Some of it is mere generalisation, some of it describes incidents. Du Toit has marshalled the information into themes. The really controversial part relates to accusations of racism. The alleged racism emanates from other children and from the teachers, the latter apparently targeting Black children and scape-goating them as habitually doing wrong (Paragraph 43). Further, the Afrikaans language is said to be dominant and the use of English, outside of the English medium class, is either neglected or suppressed. (Paragraph 48). Other topics include the adverse implications of attending the nearest English Medium School which is some 20 Kms away. Du Toit offers contentions (in paragraphs 73 – 79) about what the information proves or illustrates which, according to her, includes the children experiencing racism daily and experiencing bullying, ostensibly motivated by racism. She opines that the girls seem to have better inter-racial dynamics than the boys, and Black boys seem to experience more racism. She contends that the way Afrikaans is used as the dominant language of school official communication is

isolating the English speaking learners. She says that the children feel victimised because they are the usual suspects when disturbances occur. However, she states, despite these happenings, the learners are committed to the school, and recognise the calibre of their teachers even though 'a teacher may be racist' towards them.

3.7. Elsewhere in this affidavit (at paragraph 9), Du Toit states that the contents of this affidavit are relevant not merely to showing grounds to intervene but will also be relied upon to substantiate the substantive relief sought (set out above), if the CLL is permitted to intervene.

3.8. The School, in bringing the Discovery Application, had its attorney depose to a supporting affidavit. The utility of this affidavit is the traverse of the correspondence between the School and the CLL about why the CLL refused to discover the documents. The stand- off at that stage was articulated in relation to claims of privilege by the CLL. The CLL's attorney is the Legal resources Centre, who in correspondence states that it represents the CLL as such, but does not represent the 37 children. The answering affidavit of the CLL addresses these themes again, and motivates further reasons why the documents should not be discovered. The substance will be addressed in relation to the arguments advanced.

The Intervention application and the Discovery application

4. Rule 35(12) does not require the requesting litigant to justify a need for the document. The default position is that once a litigant refers to a document in an affidavit or pleading, that litigant must discover it upon demand, unless it can put up a cogent reason to refuse.

This procedure is endorsed by several authorities. (See: **Unilver plc & Another v Polagric 2001 (2) SA 329 at 340I-J**) The Rule exists to serve an immediate and practical need; ie an answering or a replying affidavit is required to be filed by the requesting litigant and it wishes to consider the document before it decides what to say in response.

5. It cannot be a legitimate reason to excuse compliance that the requesting party does not need the document to state its case in response. That qualitative enquiry simply does not arise. (See: **Unilever (Supra) at 335H – 336I.**)

6. The CLL has created, probably inadvertently, an unforeseen complexity by rolling into one affidavit its basis for joining and the evidence in support of the relief it will seek, if allowed to join, rather than, as is more customary, distinguishing the two legs. The School will get an opportunity, if the CLL is joined, to address the substantive relief sought by the CLL, and the basis laid for it, at that later stage.

7. The Discovery Application, logically, must be adjudicated upon in relation to the *pending* Intervention Application, and does not require any assessment of the merits or demerits of the Intervention Application because the forensic or procedural function of Rule 35(12) is to facilitate that very contest. It follows that whether the CLL should be excused from discovering the documents (eg, because they irrelevant or privileged, or any other reason) must be tested against that measure; ie a fair debate in legal proceedings about the issue of intervention.

The key issues for decision

8. The primary issues are these:

8.1. The CLL contends that questionnaires ought not to be discovered because they are:

8.1.1. Irrelevant to the issues in the main proceedings.

8.1.2. Privileged documents.

8.1.3. Confidential documents.

8.2. The School disputes that status, but if the documents are irrelevant or privileged, it contends:

8.2.1. Rule 49(12) trumps irrelevance,

8.2.2. Rule 49(12) trumps privilege,

8.2.3. alternatively, privilege was waived by CLL.

8.2.4. Confidentiality is not a cogent reason to refuse to disclose.

8.3. Ancillary to these issues is the question of fact about whether or not the respondent is a 'representative' of the 37 children mentioned, among others, in the Main Application, and in that regard, what range of models exists, in law, to represent children in litigation, whether any are appropriate in this case, and the role of the CLL *qua* a 'legal representative' or *qua* a 'representative litigant' of the 37 children.

9. If the CLL cannot refuse to discover the questionnaires on any of the grounds set out above, it invokes certain 'Public interest' motivations to refuse to discover. These issues arise in regard thereto:

9.1. Does the public interest require that these questionnaires be kept confidential and not be disclosed, and in this regard, does the court have an inherent jurisdiction to exercise such a discretion, or a discretion conferred by statute law or conferred by the Constitution, and if so, is such a decision warranted in this case?

9.2. Do the 'best interests of the children' who filled in the questionnaires and who were promised anonymity, trump the entitlement of the School to compliance by the CLL with Rule 35(12)? (This assumes, of course, that anonymity is indeed arguably in the best interests of the children in question)

The proper interpretation of Rule 35(12): Does irrelevance or privilege or confidentiality afford a cogent reason to refuse disclosure?

10. Prima facie, there is little room for debate: if a litigant sees fit to refer to a document in an affidavit or pleading, then upon bring served with a Rule 35(12) notice, that litigant must disclose the document to its adversary.

11. However, the question of whether or not the Rule must be literally (and mechanically) construed is contested. The authorities are at odds with one another about whether or not a reference to an irrelevant or to a privileged document falls within the purview of the Rule.

12. The resistance of the CLL to disclose the requested documents is based primarily on their allegedly privileged status, and secondarily, their irrelevance and confidentiality. The applicant contends that none of these are sound reasons to refuse.

13. The School invokes as support for its view, the most recent reported pronouncement on this question, the decision in **Machingawuta & Others v Mogale Alloys (Pty) Ltd & Others 2012 (4) SA 113 (SGJ) at [27] and [28].** Notshe AJ held as follows:

> "[27] In my view the express requirement of relevance in subrules 35(1), (3) and (11), and absence of such in subrule 35(12), is a clear indication that relevance is not a requirement in respect of subrule 35(12). Otherwise it would have been expressly required as in other subrules. There is no other plausible explanation.
>
> [28] I am not even convinced that privileged documents are excluded from the ambit of rule 35(12). Why would a document be referred to in an affidavit or pleadings if it is privileged? How does the other party deal with the contents of that document if he is prohibited from demanding that it be produced? These questions demonstrate that, once a document is referred to in the pleadings or affidavit, it is liable to be requested to be produced."

14. In reaching this conclusion, Notshe AJ was compelled to consider two divergent lines of authority, one favoured by the Transvaal courts and the other by the Cape courts. He preferred the Transvaal view. The point of departure for the divergent views, itself differed. The Transvaal view was influenced by a reading of all the provisions in Rule 35 and observing that Rule 35(12), unlike the text in Rule 35(1), makes no reference to a qualification about what needs to be discovered by use of the phrase ' relating to any matter in question in such action' which appears in the text of Rule 35(1):

> "Any party to any action may require any other party thereto, by notice in writing, to make discovery on oath within twenty days of all documents and tape recordings relating to any matter in question in such action (whether such matter is one arising between the party requiring discovery and the party required to make discovery or not) which are or have at any time been in the possession or control of such other party. Such notice shall not, save with the leave of a judge, be given before the close of pleadings."

15. Notshe AJ followed the judgment of Vermooten J in **Magnum Aviation Operations v Chairman, National Transport Commission & Another 1984 (2) SA 398 (W),** where it was held that irrelevance is not a reason to refuse to disclose financial statements alluded to in an affidavit. However, no decision was made in that case about whether the financial statements in issue were indeed irrelevant or not. Instead Vermooten J held, in sweeping terms, at 400C:

> "In my opinion the ordinary grammatical meaning of the words is clear: once you make reference to the document, you must produce it. Even more is it so in this case where the implication in paras 19.4 and 19.6 [of the affidavit] is that, if the NTC had called for and looked at the financial statements of *Operations* [*an epithet for one of the parties*], it might well have come to a different conclusion.
>
> It is significant that, while in Rule 35 (1), the notice calling for discovery, it is said that discovery must be made of documents "relating to any matter in question in such action", in Rule 35 (12) there is no such, nor indeed any other, qualification. I am consequently of opinion that, having made reference to the financial statements, *Operations* is obliged to produce them for inspection".

16. Van Dijkhorst J made a passing reference to the **Magnum Aviation case** in **Gehle v McLoughlin 1986 (4) SA 543 (W) at 546F,** with ostensible approval, but without relying on it as authority in support for the decision he made to order disclosure in **Gehle.**

17. In my view, it is not readily apparent why this distinction between the text in Rule 35(1) and Rule 35(12) ought to be dispositive of the question. The principal sentence in the Rule, literally interpreted, is indeed capable of supporting a mechanical approach, but why a mechanical approach ought to be preferable is obscure. The so-called 'qualification' in Rule 35(1) draws a line between relevant material and irrelevant material. The purpose of that phrase must be to oblige the disclosure of relevant material and no more. Why in Rule 35(12) an allusion in an affidavit to a document that is not relevant means, willy nilly, because it is requested under Rule 35(12), it should be

discoverable, but need not be volunteered in terms of Rule 35(1), is not explained in the judgment of Vermooten J. In my respectful view, the outcome is dysfunctional to the business of litigation. The complete answer to the perspective that once a document is mentioned, discovery must follow regardless of relevance, was given by Booysen J in **Universal City Studios v Movie Time 1983 (4) SA 736 (DCLD) at A – C:**

> "Mr Gordon submitted that the literal meaning of Rule 35 (12) was that a party who has referred to a document in his pleadings or affidavits is obliged to produce such document in compliance with the notice; that there cannot exist any grounds which may justify him refusing to produce it. It seems to me though that it must be implied that the document should be relevant to the issues between the parties and therefore reasonably required by the opposing party before it can be said to be hit by the provisions of this Rule. So, for example, if a wife seeking an interdict to prevent her husband from assaulting her were to allege that he assaulted her shortly after she had read the evening newspaper, there being no relevance alleged of the paper, one could hardly imagine that her husband, the respondent, would be entitled to production of that newspaper."

18. Moreover, the decision in the **Magnum Aviation case** was unnecessary as the documents were indeed relevant, a point made by Friedman J in **Gorfinkel v Gross , Hendler & Frank 1987 (3) SA 766 (C) at 772A.** In my view, the reasoning in the **Magnum Aviation case** is in any event materially flawed, and I am not inclined to defer to it, in contrast to the choice exercised by Notshe AJ in the **Machingawuta** case.

19. It must follow that if the literal text of Rule 35(12) must yield to a qualitative dimension then there is room for a litigant to refuse to disclose a document referred to. The examples of a genuinely irrelevant document of the extreme variety used by Friedman J to illustrate the point will certainly be rare. More likely, the true controversies will be about the irrelevance of a document to an issue before the court, pleaded or attested to, but which may be useful to an adversary for other purposes, and perhaps for other litigation.

Relevance as such will have to assessed by an examination of the issues pertinent to the relief claimed. That exercise, in this case, is addressed hereafter.

20. The line of authorities endorsing a qualitative dimension to the proper meaning of Rule 35(12) begins with the decision in **Gorfinkel v Gross , Hendler & Frank (supra).** Importantly, in reading that judgment, it must be emphasised that the demand for documents being sought, expressly excluded from the demand any privileged documents (see: at 773I). The passage alluding to this aspect is omitted from the citation of Gorfinkel's case in the **Machingawuta** case. The complete passage in **Gorfinkel,** which is obiter, is at 773 I – J:

> "There are undoubtedly differences between the wording of Rule 35(12) and the other subrules relating to discovery, for example subrules (1), (3) and (11) of Rule 35. The latter subrules specifically refer to relevance whereas subrule (12) contains no such limitation and is prima facie cast in terms wider than subrules (1), (3) and (11).
>
> It is nevertheless to my mind necessarily implicit in Rule 35(12) that there should be some limitation on the wide language used. One such limitation is that a party cannot be compelled under Rule 35(12) to produce a document which is privileged. It is common cause that the question of privilege does not arise in the present application. *Mr Hodes informed the Court that he does not seek production of privileged documents and Mr Jacobs has indicated that none of the documents which the respondent refuses to produce is in fact privileged".*
> (Emphasis supplied)

21. The notion that privilege trumps the obligation to disclose in Rule 35(12) puts the Rule on a par with Rule 35(1). Indeed, having regard to the fact that very purpose of Rule 35 is to facilitate fair legal proceedings within an adversarial system, it would in my view be dysfunctional to suppose that there were instances when privilege itself, nowadays

thought to be a principle of substantive law rather than a mere procedural rule, was trumped by a Rule of court. (See, eg; **Zeffert & Paizes, The South African Law of Evidence, 2d Ed (2009) at pp 640-643**)

22. There are cases which address the problem of confidential information, which is not privileged, in respect of which disclosure presents a dilemma for the owner of the confidential material. Schutz AJ (as he then was) recognised this issue in **Crown Cork & Seal Co Inc & Another v Rheem South Africa (Pty) Ltd & Others 1980 (3) SA 1093 (W).** A litigant demanded discovery of admittedly confidential information and offered to restrict access thereto by allowing a limited number of persons to inspect and copy the documents.

At 1095 F – 1096B Schutz AJ observed:

"It will be seen at once that two principles are in conflict. The one relied upon by the second plaintiff is that it has property in confidential documents, confidential in the sense that they are not the subjects of public knowledge and such that a reasonable businessman might wish to keep to himself (cf Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd and Another 1977 (1) SA 316 (T) at 321 in fine) and that merely because there is an action in progress they should not be available to a competitor for possible misuse, but that its proprietary rights should be protected.
The other principle, relied upon by the defendants, is that no limits should be placed upon their procedural rights in terms of the Rules to make full use of relevant documents in the second plaintiff's possession in order to present their defence without being hampered at all.

It is rightly emphasised how important the steps associated with discovery may be in an action. Indeed discovery is classified as a pre-trial step. It is the pre-trial on the documentary evidence. The object of discovery is thus admirably summed up by STEPHENSON LJ in Church of Scientology of California v Department of Health and Social Security (1979) 1 WLR 723 (CA) at 733C - E:

> "The object of mutual discovery is to give each party before trial all documentary material of the other party so that he can consider its effect on his own case and his opponent's case, and decide how to carry on his proceedings or whether to carry them on at all... Another object is to enable

> each party to put before the Court all relevant documentary evidence, and it may be oral evidence indicated by documents,..."

Moreover, the public interest demands that the truth be discovered. As was stated by Lord DENNING MR in Riddick v Thames Board Mills Ltd (1977) 3 All ER 677 (CA) at 687:

> "The reason for compelling discovery of documents in this way lies in the public interest in discovering the truth so that justice may be done between the parties. That public interest is to be put into the scales against the public interest in preserving privacy and protecting confidential information. The balance comes down in the ordinary way in favour of the public interest of discovering the truth, ie in making full disclosure."

23. The sensitivities sought to be regulated by Schutz AJ in **Crown Cork** were among the considerations that Thring J was called upon to weigh when, in **Unilever PLC & Another v Polagric (Pty) Ltd 2001 (2) SA 329 (C),** he endorsed the **Gorfinkel** decision in preference to the **Magnum Aviation** decision. In that matter the litigants were at odds about trade mark infringements and alleged passing off of goods. In asserting its rights were violated, the applicant had alluded to its records and archives which contained important data. The respondent demanded discovery in terms of Rule 35(12) which the applicant refused. The court held the documents were appropriately identified in the applicant's affidavit, were not privileged, and ordered disclosure. At 337E – 338E, Thring J approved the **Gorfinkel** decision including the allusions to privilege trumping the Rule, but as is apparent, the decision in **Unilever** did not need to make a decision on privilege *per se*.

24. Lastly, Bozalek J in **Penta Communication Services (Pty) Ltd v King & Another 2007 (3) SA 471 (C) in [30]** endorsed the **Gorfinkel** dictum that privilege trumps the Rule. However, in this matter, as with all the others mentioned, the documents at the heart of the controversies were not, on the facts, held to be privileged. This decision too, is obiter.

25. To sum up the law:

25.1. There is clear authority that confidentiality does not trump the Rule.

25.2. There is some authority for the proposition that Rule 35(12) must be literally interpreted and irrelevant and privileged documents must be disclosed. I am in firm disagreement with such a view.

25.3. There is some authority, which is nevertheless obiter, to support the idea that an irrelevant or privileged document, if referred to in a pleading or affidavit, cannot be subjected to compulsory disclosure in terms of Rule 35(12). I am in firm agreement with this view.

25.4. Therefore, I hold that, upon a proper interpretation of Rule 35(12), a party called upon to comply with Rule 35(12) is excused from so doing, if that party shows that the document sought is irrelevant to the issues in the matter, or is privileged, but cannot refuse on the grounds of confidentiality.

The Status of the CLL in this litigation and its relevance to a claim of privilege

The status issue

26. The focus of the enquiry in this respect is about the existence of a relationship between the CLL and the 37 children in question only, and does not implicate the category of

indentified children whose interests the CLL might wish to advance through intervention in the litigation.

27. The Notice of Motion of the CLL seeks leave for the CLL to be admitted as the third applicant. This is an unequivocal assertion that *the CLL is the intended litigant*. In the founding Affidavit, paragraph 8.1 it is stated that the intervention is

> ' ..on behalf of the 37 children listed on NOM 1 as well as all other children who might have an interest'.

In paragraph 10.2 the deponent states that these listed children are persons ..

> ' who cannot litigate on their own behalf due to their status as minors, have a direct and substantial interest in the subject matter of this [Main Application] having regard to the relief sought by [the School] in the Main Application. Section 38(b) [of the Constitution] is relied on.'

Further reference is made in paragraph 10.3 to a class of interested children yet to attend the school who, it is alleged, have an identical interest to the 37 children already mentioned. Lastly, it is alleged in paragraph 10.4 that it is in the public interest that:

> 'the interests of the children to be represented in this matter in terms of Section 38(d) of the Constitution'

More of the same is reiterated in further passages, in paragraphs 12, 13, 14, 15 and 20.

28. In paragraphs 17 – 19 the CLL is itself addressed and is described as possessed of experience in litigating 'on the protection of childrens' rights to basic education' and has in-depth knowledge and expertise in representing children.

29. *What* exactly is the role of the CLL and *who* exactly does the CLL claim to represent and, indeed, what does the CLL mean when it claims to '*represent*' the 37 children?

30. The 37 children mentioned are already respondents via their parents and guardians, who are cited 'in their representative capacity' or, in a few instances, the child is cited as duly 'assisted by a parent or guardian' (Paragraph 11 of the founding affidavit in the main application and annexure NOM 1). There is no rebuttal of this fact by the CLL. What the CLL does allege is that "*SECTION 27*," another civil society organisation that acts in the public interest in education policy matters is representing the parents, although quite is meant by this is not explained, and *SECTION 27* did not appear in any form on the Record before me. There is nothing in the founding papers of the CLL to support any basis to represent these children *qua legal representative, ie attorney.* Indeed, if the CLL was intent on acting as a *legal representative,* it would not be itself a litigant and aspirant third applicant. The role of the CLL as a litigant to represent an 'interest' or a 'class of persons' must of course, be distinguished from being the legal representative of particular persons. The CLL seems to have muddled these important distinctions.

31. **Section 38 of the Constitution** provides:

> " Anyone listed in this section has the right to approach a competent court alleging that a right in the bill of rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-

(a) Anyone acting in their own interest;
(b) Anyone acting on behalf of another person who cannot act in their own name;
(c) Anyone acting as a member of, or in the interest of, a group or class of persons;
(d) Anyone acting in the public interest; and
(e) An association acting in the interest of its members.
(Section 15 of the Childrens' Act 38 of 2005 has the identical text)

32. **Section 38 of the Constitution** has nothing to do with legal representatives, either as attorneys or as counsel. Moreover, the invocation by the CLL of **Section 38(b)** is misdirected. The words are not to be read literally and mechanically. Minors (whose parents or guardians represent them in litigation, and whose parents and guardians are cited *nomine officio,*) are not, and cannot be, persons who 'cannot litigate in their own name'. Manifestly, the children are *de facto* litigating in the Main Application through the *sui generis* agency of their parents and guardians *qua* litigants, who are not 'legal representatives' of the children. Even if these children had not been represented in this sense by their parents and guardians, Section 38(b) would not be triggered, as the minors would not be *unable* to litigate in their own name. The choice of phraseology in the subsection must be understood to acknowledge the role of other persons who act *Nomine officio*, and that when that occurs, the minors are indeed *de facto* litigants. The subsection has nothing to do with styles of citation in court proceedings. Children can litigate in their own names and be 'assisted' by their parents or guardians. In my view, the category of persons who 'cannot litigate in their own name' is likely to be confined to matters where the persons in question are the masses who cannot be feasibly mobilised, or who are persons who are incarcerated and are, practically, unable to access the courts on their own initiative.

33. The fact that the children are already litigants is a complete bar to the CLL being their representative *nomine officio.* Were it otherwise, the result would be to facilitate an extraneous entity, however well intentioned, being able to hijack from parents or guardians, the authority to act on behalf of their own children. (The very special circumstances where childrens' interests are at odds with the interests of their parents is addressed elsewhere)

34. **Section 28(1)(h) of the Constitution** was invoked by the CLL to justify its claims to represent the children. That section provides that:

> "Every child has the right to have a legal practitioner assigned to the child by the state and at state expense, in civil proceedings affecting the child, if substantial *injustice would otherwise result"*

Further, **Section 14 of the Childrens' Act** was also invoked. That provides:

> " Every child has the right to bring and to be assisted in bringing a matter to court provided that matter falls within the jurisdiction of that court." (See too **Section 28(6) of the Children's Act)**
>
> (A submission on behalf of the CLL stressed that it is notable that, unlike the Constitutional provisions, no requirement exists for injustice to have to be thwarted, to apply Section 14.)

35. Relying upon these provisions, an argument was presented on behalf of the CLL that new models of representation have evolved and have been recognised by the courts to achieve constitutional imperatives about protecting the rights of children. I doubt that these two provisions address that idea. It seems to me that they contemplate more simply, that the State must pay for conventional legal representation when the injustice test is satisfied, and that 'assistance' in bringing a matter may be claimed, though in what form is not

prescribed. The argument runs further that children may be litigants independently of their parents or guardians. In addition to the traditional device of a court appointed *Curator Litis*, it was argued that **Section 38(1)(c) and Section 38(1)(d)of the Constitution** (cited above) read with **Section 15(2)(d) of the Childrens'** Act create a 'public interest model of representation' On this footing, the contention is advanced that the CLL can, as it asserts, 'represent' the 37 children.

36. The intellectual platform to advance this thesis is thinly mentioned in the Intervention Application and is not materially mobilised in the answer to the Discovery Application. The critical issue is the existence of a legally cognisable representative relationship with the 37 children, not the propriety of acting *qua* litigant for children at large, in the public interest, which is what Section 38(d) seems to cover. None of these general propositions, by themselves, assist in establishing, as a fact, that a professional client relationship exists between the CLL and the children or that a vicarious representative relationship exists between the CLL and the children.

37. There are indeed instances where children litigate independently of parental or guardian 'assistance', but those instances are all examples where the interests of the parent or guardian are adversarial to, or out of kilter with, that of the children. In **Soller v G 2003 (5) SA 439 (W),** the issue was the child's wishes about primary residence with which parent and the desire of both parents to have the child, but who were not necessarily motivated by the child's best interests. In **State v M 2008 (3) SA 232 (CC),** a parent was being sentenced to imprisonment and the impact on the child was to be evaluated. **In FS v JJ 2011 (3) SA 126 (SCA)** a *curator litis* was appointed to represent a child in a custody tussle. **In legal Aid Board v R 2009 (2) SA 262 (DCLD)** counsel was appointed

(not *qua curator litis*) to represent a child in a custody dispute, where the child had taken the initiative to reach out for outside help. In **Du Toit v Minister of Welfare & Population Development & Others 2003 (2) SA 198 (CC)** a *curator litis* was appointed to represent the interests of minor children who a lesbian couple sought to adopt.

38. The predicament of adversarial parental interests does not exist here nor is there a basis for such an allegation. A faint whisper was offered to suggest the parents' interests in their childrens' education differed in some sense from the interests of their children but this notion was not substantiated. It was suggested that there are matters the children wish to conceal from their parents but are willing to have ventilated anonymously, and, in this regard, the CLL can facilitate such disclosures. Even if true, that does not establish the justification to contend that the parents and children are at odds with one another, even subliminally, or to purport to represent the children without any mandate from the parents. A further line of argument was advanced to bolster this contention, premised on the facilitation of 'participation' by children in matters affecting them. In this regard, certain observations of Sachs J in **Christian Education South Africa v Minister of Education 2000 (4) SA 757 (CC)** were alluded to. In that matter the issue was whether not the enactment, in **Section 10 the Schools Act 4 of 1996**, of a prohibition against corporal punishment violated the constitutional rights of parents in private schools whose allegedly Christian beliefs required their children to be beaten. The challenge was defeated. Sachs then noted at [53]:

> "There is one further observation to be made. We have not had the assistance of a curator ad litem to represent the interests of the children. It was accepted in the High Court that it was not necessary to appoint such a curator because the State would represent the interests of the child. This was unfortunate. The children concerned were from a highly conscientised community and many would have been in their late teens and capable of articulate expression. Although both the State and the parents were in a

position to speak on their behalf, neither was able to speak in their name. A curator could have made sensitive enquiries so as to enable their voice or voices to be heard. Their actual experiences and opinions would not necessarily have been decisive, but they would have enriched the dialogue, and the factual and experiential foundations for the balancing exercise in this difficult matter would have been more secure."

Subsequently **Langa CJ in MEC for Education Kwazulu Natal v Pillay 2008 (1) SA 474 (CC),** dealing with the impact of school dress codes on cultural practices, and the wearing of certain ornamentation by learners stated at [55] – [57]

"[55] The second debate I mentioned earlier related to the absence of any evidence from Sunali. The school argued that Sunali's failure to testify in the equality court or to provide any affidavit renders it impossible for a court to determine what her beliefs are and this court is accordingly precluded from making a finding of discrimination.

[56] It is always desirable, and may sometimes be vital, to hear from the person whose religion or culture is at issue. That is often no less true when the belief in question is that of a child. Legal matters involving children often exclude the children and the matter is left to adults to argue and decide on their behalf. In Christian Education South Africa v Minister of Education this court held in the context of a case concerning children that their 'actual experiences and opinions would not necessarily have been decisive, but they would have enriched the dialogue, and the factual and experiential foundations for the balancing exercise in this difficult matter would have been more secure'. That is true for this case as well. The need for the child's voice to be heard is perhaps even more acute when it concerns children of Sunali's age who should be increasingly taking responsibility for their own actions and beliefs.

[57] However, as an analysis of the evidence shows, Sunali's failure to testify is not fatal to Ms Pillay's case. It is important to note that the school does not directly challenge the veracity of Ms Pillay's testimony; it simply argues that we should have heard Sunali as well. I agree with Ms Pillay that any difficulties they had with her testimony should have been raised in the equality court during cross-examination, and not for the first time on appeal. It is possible that if Ms Pillay had been challenged on whether she correctly represented Sunali's belief, she would have called Sunali, who was present in court, as a witness."

39. No express reference was made in either judgment to **Section 10 of the Childrens' Act 38 of 2005** which provides:

> " Every child that is of such an age , maturity and stage of development as to able to `participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration"

40. In my view, what is envisaged for children by way of participation is a dimension not previously given too much attention in litigation and is a timely recognition of the appropriateness of the dignity of children. The 37 children in this matter are in high school and are indeed persons who may be regarded as of an age and maturity to express a view. Participation however is distinct from being a litigant, and as the examples show, it was the absence of direct testimony that, in one instance, provoked a question about the fullness of the proceedings. However in the present dispute, there is no doubt that the children have the fullest opportunity to participate. They are *de facto* litigants albeit through the vicarious representative role of their parents, as in **Pillay.** There is no stricture on them deposing to affidavits or later testifying. Nothing that the CLL purports to do to effect participation, cannot be done by the parents or guardians of the 37 children. The mere fact that the CLL may in law 'represent' their interests, in certain circumstances, does not translate into an automatic right on the part of the CLL to unilaterally arrogate to itself that role in this particular matter, for to do so, would be, indeed, to hijack that role from the parents of the children.

41. There is little reason to doubt that the opportunities created for intervention by **Section 38(d) of the Constitution** in which Civil Society Organisations advance, in the public interest, the cause of persons who cannot otherwise be mobilised to put forward a case to protect their legal rights, ought to be welcomed by the courts. The CLL, itself, has demonstrated its benefits, by its role, for example, in **Centre for Child Law v MEC**

for Education 2008 (1) SA 223 (T) where at its initiative, the living conditions of children at the JW Luckoff High School were addressed. Similarly, the initiative shown by a single concerned person in **Jonker v The Manager, Gali Tembani School (unreported: Case No 2011/94 Eastern Cape High Court, 19 March 2012)** to address the circumstances of children achieved social justice for those children. However, such interventions are not premised on any legal relationship between the public interest litigant and the persons who interests that litigant seeks to assert.

42. Accordingly, regardless of what is alleged by the CLL about its allegedly beneficial role, the CLL is, in law, neither the representative of the 37 listed children *nomine officio* nor their legal representative or attorney.

Privilege derived from an attorney and client relationship

43. There are several cases which stress the point that communications that achieve the status of being privileged reach that status upon the twofold basis of (1) the reason for the communication and (2) the existence of a relationship of legal adviser and client.

44. In **H Heiman, Maasdorp & Barker v Secretary for Inland Revenue & Another 1968 (4) SA 160 (W)**, at 162 D-F, it was held that :

> "This privilege accorded to litigants or possible litigants has been devised by the Courts and is based on public policy. It is part of our common law. The reason for it may be stated briefly as being essential for the proper administration of justice so that a litigant may be able to take his legal adviser fully into his confidence and to make full disclosure to him of the circumstances of his case without fear of betrayal. Furthermore, as a litigant cannot be compelled to give evidence against

himself, he must know and be assured that his legal adviser also will not without his consent be able to give evidence against him in regard to disclosures made in the course of consultation. This well-established rule is to be found throughout our jurisprudence and has repeatedly been described as sacrosanct and inviolate."

45. In **Zuma v National Director of Prosecutions 2009 (1) SA 1 (CC) at [184]** the Constitutional Court decided that.:

> "The right to legal professional privilege is a general rule of our common law which states that communications between a legal advisor and his or her client are protected from disclosure, provided that certain requirements are met. The rationale of this right has changed over time. It is now generally accepted that these communications should be protected in order to facilitate the proper functioning of an adversarial system of justice, because it encourages full and frank disclosure between advisors and clients. This, in turn, promotes fairness in litigation....."

46. As no such attorney and client relationship exists between the CLL and the children, it must follow that any claims to client confidentiality that rely on an attorney and client relationship between the 37 children and CLL must fail.

47. It must be noted however, that the absence of a legal nexus between the CLL and these 37 children, or their parents, who are cited as respondents, does not mean that there is no room for the CLL to intervene, on other grounds, in the Main Application. The question of whether or not, for example, the CLL has made out a case to represent an 'interest' relevant to the litigation remains wholly open and the decision about that issue belongs to the debate about the Intervention Application *per se,* for example, acting in the public interest (Section 38(d)) or acting in the interest of a class of persons (Section 38(c)). In these instances, there is no need for a mandate from the class nor any relationship of privity with anyone who falls within that class, as defined. Ostensibly, the category of children who are prospective learners at the School might constitute such persons or a

class of persons. However, prior certification must be obtained to act for such a class, as comprehensively addressed in **Childrens' Resource Centre Trust v Pioneer Foods 2013 (2) SA 213 (SCA) at esp [17] and [23] ff**, an option not exercised in this case.

Are the questionnaires privileged Third party communications?

48. The claim of privilege was pressed on further ground: ie that the questionnaires fell into a category of document prepared and exchanged between the litigant and a third party. In this context, the CLL put itself forward as a litigant who obtained the questionnaires to procure information to litigate.

49. In **Potter v South British Insurance Co Ltd 1963(3) SA 5 (W)** after alluding to a report procured by the defendant insurer from another insurer, prior to litigation being contemplated, it was held at 6F- 7D: "

> " The question to be considered is whether the company can rely on privilege on these facts. I think it may be stated as a general and fundamental principle that there is a general duty to give what testimony one is capable of giving. The exemption on which Mr. Freeman relies, or purports to rely, is what is known as legal professional privilege. The basis and limitations of this form of privilege have been fully discussed in our Courts and more particularly in the cases of General Accident, Fire and Life Assurance Corporation Ltd v Goldberg, 1912 T.P.D. 494 and United Tobacco Companies (South)Ltd. v. International Tobacco Company of SA Limited, 1953 (1) SA 66 (T). The object of the privilege is that as, by reason of the complexity and the difficulty of our law, litigation can only properly be conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating of his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in his professional agent, and that communications that be so makes to him should be kept secret, unless with his consent (for it is his privilege, and

not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation.

In the preparation for litigation it is sometimes necessary for the litigant to prepare documents, either by himself or by his agents, for submission to his lawyers, and there is an extension of the scope of the privilege to cover such documents, with safeguards to ensure that the documents covered should fall within the protection of the privilege. Where the communications pass not between the party and his lawyers but between the party and a non-professional agent or third party they are not privileged unless made (1) for the purpose of litigation existing or contemplated, and (2) in answer to enquiries made by the party as the agent for or at the request or suggestion of his legal adviser, and though there has been no such request for the purpose of being laid before the legal adviser with a view to obtaining his advice or to enable him to conduct the action, e.g. to prepare the brief.

In the present case the privilege claimed must fail on both these requirements, in that the statement was not obtained from the second defendant for the purpose of litigation, existing or contemplated, and for the purpose of being laid before the insurance company's legal adviser for advice in or the conduct of the defence to that litigation."
(emphasis supplied)

50. It manifestly clear that the 37 children were not contemplated by the CLL to be potential witnesses and the disclosures in the form of the questionnaires are not witness statements, despite assertions to the contrary; were it otherwise, the protection of anonymity would not arise. It was argued on behalf of the School that no case was made out that the documents were generated in contemplation of litigation but that submission is incorrect on the facts, as it is plain the sole purpose for which the CLL garnered the information in the form of questionnaires was to litigate in this very matter. It was submitted that the children were not the agents of the CLL, and thus, what they gave, fell outside the ambit of the principles in **Potter.** They were indeed not agents of the CLL, but I do not agree that 'agency' is a prerequisite and to read that as a requirement in **Potter** is incorrect. A litigant who gets an expert report from a purported expert in contemplation of litigation is entitled to privilege in respect of it, whether the expert is required to testify or not. A

'reporter' need not be acting in the interests of the litigant to qualify a report as privileged. In this case, the children are sole source of the information marshalled by the CLL to present to the court and the questionnaires are in the nature of reports gathered in the course of evidence gathering by the CLL. Indeed, the reports were gathered from existing litigants about the substance of the already launched litigation. In my view, the circumstances of engagement between the CLL and the children seem indeed to be embraced by the kind of privilege described in **Potter.**

51. In my view, the questionnaires, on these grounds, are privileged documents.

Was the privilege waived by the CLL?

52. Privilege is, however, not absolute and it is manifestly in the public interest that it is not absolute. This is admirably illustrated by the decision **Van Niekerk v Pretoria City Council 1997 (3) SA 839 (T) at 849H ff,** concerning the contest between an allegation of professional privilege and a request for access to information as contemplated by **Section 23 of the Constitution.**

53. The very fact that, upon a proper interpretation of Rule 35(12), despite an allusion to a privileged document, it need not, necessarily, be disclosed, means self evidently, that more than mere reference in an affidavit is required to establish a waiver.

54. The contentions on behalf of the CLL advancing a rationale for why there was no waiver are misconceived in so far as the argument assumes that the waiver had to be by the children. The children are not 'the litigant' who made the disclosure, the CLL is the

'litigant'. (See **Competition Commission of South Africa v Arcelormittal South Africa Ltd & Others [2013] ZASCA 84 (31 May 2013) at [20]) (Arcelor)** What is to be determined is whether or not the CLL, whatever it promised the children about confidentiality, in respect of its own rights to privilege, has *qua* litigant, waived its rights to privilege in respect of the questionnaires that it gathered to make its case for intervention.

55. In **Arcelor** the Commission refused to disclose a leniency application given to it by a company, Scaw Metals, in the prosecution against Arcelormittal. At [31] – [38] the disclosure was ordered and the following was held by Cachalia JA:

> "[31] I therefore consider that the circumstances under which Scaw created the document and the Commission obtained it are inseparable. The document came into existence at the instance of the Commission for the purpose of prosecuting firms alleged to be part of a cartel. And the fact that there was, in the process, to borrow from the tribunal's phraseology in the *Pioneer Food's* case, 'an ancillary outcome of indemnity' does not detract from this purpose. Furthermore, the accepted facts support the Commission's averment that litigation was likely when the document was procured, that its lawyers were involved in the process – including advising on the leniency application, and that the purpose for the preparation of the leniency application was to support the envisaged litigation. The leniency application was, in substance, Scaw's witness statement in the contemplated litigation. The document was therefore privileged in the hands of the Commission.
>
> [32] In the light of this finding the question that arises is whether the Commission waived its privilege by referring to the leniency application in the referral affidavit, as the respondents' contend it did. Under rule 35(12) a document becomes disclosable if reference is made to it in a pleading. The tribunal dismissed this contention somewhat cursorily: waiver, it said, is not lightly inferred and the 'oblique references' to the leniency application in the referral affidavit are not sufficient to constitute a waiver. The CAC did not consider the point.
>
> [33] Waiver may be express, implied or imputed. It is implied if the person who claims the privilege discloses the contents of a document, or relies upon it in its pleadings or during court proceedings. It would be implied too if only part of the document is disclosed or relied upon. For a waiver to be implied the test is objective,

meaning that it must be judged by its outward manifestations; in other words from the perspective of how a reasonable person would view it. It follows that privilege may be lost, as the English courts have held, even if the disclosure was inadvertent or made in error. Imputed waiver occurs when fairness requires the court to conclude that privilege was abandoned. The respondents contend that in this case the loss of privilege is implied or to be imputed to the Commission. The Commission submits that the bare references to the leniency application in the referral affidavit did not amount to a waiver of privilege.

[34] I appreciate that a bare reference to a document in a pleading, without more, may be insufficient to constitute a waiver, whereas the disclosure of its full contents may constitute a waiver. Where the line is drawn between these extremes is a question of degree, which calls for a value judgment by the court. When that line is crossed the privilege attached to the whole document, and not just the part of the document that was referred to, is waived. The reason is that courts are loath to order disclosure of only part of a document because its meaning may be distorted. But it must also be so that it does not inevitably follow that because part of document is disclosed, privilege is lost in respect of the whole document. This would be so where a document consists of severable parts and is capable of severance. I turn to the facts here.

[35] The Commission referred to the leniency application in its referral affidavit in these terms:

> '8.7 . . . Scaw applied for leniency in terms of the Commission's CLP for price fixing and market allocation in relation to rebar, wire rod, sections (including rounds, squares angles and profiles).
> 8.8 Scaw confirmed in the application for leniency that there has been a long standing culture of cooperation amongst the steel mills regarding the prices to be charged, and discounts to be offered, for their steel products such as rebar, wire rod, sections (including rounds and squares, angels and profiles). The cooperation extended to on market division.
> 8.9 In addition to information submitted by Scaw in its leniency application, the Commission conducted its own investigations which largely confirmed the allegations made by Scaw and provided further evidence of anticompetitive practices in contravention of section 4(1)(b) of the Act – involving both price fixing and market division.
> 8.10 It is as a consequence of information contained in the Scaw application for leniency and that obtained from the Commission's investigations that this referral is made.'

[36] These paragraphs, in my view, amount to much more than a bare or oblique reference to the leniency application. The allegation in para 8.8 that a long standing culture of cooperation was 'confirmed in the application for leniency' makes it clear

that the application contained a full recital of facts that supported that conclusion. Whether the application indeed contained those facts is a matter that the respondents will be called upon to respond to in their answering affidavits. It is precisely to enable it to do so that rule 35(12) requires documents referred to in pleadings to be disclosed.

[37] The Commission must be taken to be aware of the rule and the circumstances under which the privilege that attaches to a document may be lost or waived. It must be borne in mind that a complaint referral requires no more than a concise statement of the grounds of the complaint and the material facts or point of law relied on.30 The referral is in the form of an affidavit and it may contain evidence that is intended to be led in the proceedings. The tribunal may adopt a more flexible approach to pleadings than is the practice in the high court.31 This means that the Commission is under no obligation to refer to any documents and was under no obligation to refer to the leniency application; it needed to set out only the material facts that supported the allegation of collusive conduct against the respondents. Objectively viewed, therefore, the Commission's reference to the leniency application in the referral affidavit is consistent with an implied waiver of the privilege, and I so hold.

[38] Once it is accepted that the Commission waived its privilege to the leniency application, it follows that any entitlement of the Commission to claim the information as restricted information under rule 14(1)(e) was similarly waived."
(Footnotes omitted)
(Emphasis supplied)

56. Counsel for the School and for the CLL emphasised different passages from that part of the judgment cited above. The factual parallels must not be allowed to mesmerise the observer of the dispute between the School and CLL, though they do illuminate the difficulty which the CLL experiences.

57. As to the value judgment on the threshold of waiver which **Arcelor** requires, it should be appreciated that the mere wholesale reproduction of the contents of a document is not *per se* enough, and Cachalia JA, with delicate caution, stipulates only that such an extensive disclosure *may* meet the level set. It follows that a fact-specific assessment is the realm within which the value judgment must be made.

58. In **Arcelor** the claim of privilege failed because in addition to an extensive reference to the leniency application, the substance of the document was the substance of the prosecution. In my view, the same observation is true of the CLL's application: without the synthesised hearsay evidence of Du Toit derived from the questionnaires she has nothing valuable to say. Plainly, if she had not revealed the source of the allegations made in her affidavit, she would have been unable to substantiate her allegations of a relationship with the 37 children in question justifying the claim to represent them or their interests. (Whether the intervention application says enough to demonstrate a cogent claim to a role in the litigation on other grounds is not an issue necessary for me to decide in this matter and nothing should be understood in this judgment to trespass on that debate.)

59. It was argued on behalf of the CLL that the extensive reproduction of the information in the questionnaires should not result in a direct comparison with the exposition of the leniency application in **Arcelor.** The argument did not seek, so much, to diminish the weight to be attributed to the extensive references, but rather, it was argued that it was possible to apply the notion of severability, **(Cf Arcelor at [34])** to the information in the questionnaires, and therefore, the omitted information deservedly could remain concealed. Precisely what that omitted detail extends to is not wholly clear, but what is clear is that part of the omitted detail would enable the remarks made by the children to be linked back to the individuals. This is the very outcome that the CLL seeks to prevent. This is the very objective of the School is to find out and to investigate and address the allegations of fact.

60. In my view, severability must have an objective, naturally occurring character. What could establish that condition ought not to be the subject of hard and fast rules. However, in my view, it does not call for a value judgment, as does fixing a threshold test to determine when the extent of references to a document tips over into a waiver.(See **Arcelor at [34]**.) What it does call for is a finding of fact. In my view, the notion of severability must relate to subject matter, not the identity of the writer of a document. It is unsound to suppose that a condition of severability exists between the identity of the informant and the rest of the questionnaire. The severability argument cannot succeed on these grounds.

61. Accordingly, I take the view that there was indeed a waiver and severance cannot be applied.

Are the questionnaires irrelevant?

62. Although not stated explicitly, the CLL's answering affidavit implies that the school ought to justify a need for the documents. As alluded to earlier, that assumption would be incorrect. The onus to show irrelevance as a reason to refuse compliance rests on the CLL.

63. The CLL does not allege 'irrelevance' in the sense of 'unimportant' or 'peripheral', rather the CLL contends, seemingly, that the allegations are inconsequential. It states:

63.1. The allegations in the affidavit are not based only on the questionnaires (Paragraph 13)

63.2. The School does not need to answer the childrens' allegations (Paragraph 20)

63.3. All the information in the questionnaires has been accurately reproduced save the names of the children who filled them in (Paragraphs 13.5, 13.6 and 20)

63.4. No prejudice will befall the School if the questionnaires are not disclosed (Paragraph 30)

64. The School counters the thrust of these contentions by stating that it seeks to verify the truth or accuracy of the allegations that the children said these things and, if so, the truth and accuracy of the allegations themselves. Moreover, the School points out that the impact of the allegations of racism is to vilify the School and its staff and cannot be left to stand unchallenged, if, indeed, a cogent rebuttal can be put up.

65. Perhaps the appropriate point of departure is to examine what purpose the reference to the questionnaires was intended to serve. The answer must be to establish the authenticity of the allegations about the school. Upon that platform the CLL purported to be able to synthesise the information and present a case in support of the relief it seeks, not only against the National Minister of Education but also against the School and the Gauteng Department of Education. The credentials of the CLL as an intervening party are founded on its alleged capacity to distil such data and present it to a court. If that is so, how could the questionnaires be irrelevant if the case of the CLL to represent the children is based on them, no less if they constitute the platform for the substantive relief sought in the Main Application?

66. The claim to accurate reproduction is the very matter to be tested. Moreover, the allegations of institutional racism cannot logically be said to a matter in respect of which the persons and the Institution accused of such behaviour can be glibly told that a rebuttal is unnecessary. Unlike the recently read newspaper of the battered spouse which Booysen J identified as *per se* irrelevant, the questionnaires are indeed relevant to the debate about the legitimacy of the CLL's endeavour to intervene. The CLL's claim of irrelevance must fail.

Public Interest Considerations about the confidentiality of the identity of children who filled in the questionnaires, the role of the CLL and whether or not there is a cogent public interest reason to excuse the CLL from compliance with Rule 35(12)

67. The true rationale for the CLL's refusal to discover the questionnaires in terms of Rule 35(12) is its stance that the questionnaires ought to be anonymous to protect the identities of the children who supplied the information. (Paragraph 29 of the Answer) As already addressed above, confidentiality *per se* is no reason not to discover. What rationale within the realm of the public interest might alter that outcome?

68. Two lines of enquiry are pertinent.

68.1. The First line of enquiry relates to the whether or not effective public interest litigation *per se* requires a protection about confidential information gathered, which might not be privileged, in order to realise the promise of the Constitution.

68.2. The Second line of enquiry is about the implications of the social status of children and the protections in the Constitution and in certain statutes to address the needs of children as vulnerable members of society in relation to keeping confidential reports made by children to a public interest litigant.

69. What distinguishes these issues from the earlier evaluations of the position of the CLL in relation to Rule 35(12) as a litigant, is that the focus shifts to the interests of the persons caught up in the litigation and not only the litigant's legitimate interests.

Does public interest litigation require a protection about confidentially gathered information to facilitate organisations such as the CLL to effectively function in order to realise the promise of the Constitution?

70. The creation of space for litigation in the public interest by entities whose sole purpose for existence is to advance the public interest is one of the hallmarks of our Constitutional Era. It is valuable for Public Discourse generally, and more narrowly, it is invaluable in Legal Discourse. In keeping with the obligation to honour the promise of constitutional values, courts ought to be alert to the appropriateness of applying procedural rules in ways to facilitate effective public interest litigation. **Section 38 of the Constitution** goes a long way to enabling that outcome.

71. However, litigation remains a public process that must serve all who, either chose to litigate or who are hauled unwillingly into litigation. The Rules of Court, no less than the statutes that deal with the courts and its processes are constructed to afford all litigants even-handedly, the opportunity to ventilate their causes. The Civil Society Organisations

that have marshalled resources to tackle issues of social significance and on their own initiative embroil themselves in litigation must accept that the same rules of engagement apply to them as to any other litigant, great or small.

72. No sensible basis can be constructed within a fair adversarial litigation system that affords public interest litigants differential treatment, or for that matter, affords the persons whose interests they represent, differential treatment. In **Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis 1979 (2) 457 (W)** Botha J addressed the propriety of invoking the inherent jurisdiction of the court to regulate litigation. At issue was a deviation from the Rules of court. At 461F – 463B the implications of a court doing so were extensively addressed:

> "The next major question of law that was debated before me related to the second and the third categories of the relief applied for by the applicant. This question is whether the Court can order a party to produce for inspection documents not referred to in that party's affidavit or affidavits, and also whether the Court can order a party to produce for inspection items of machinery, ie objects not being documents. In broader terms, the question relates to the Court's inherent jurisdiction to grant relief not specifically provided for in the Rules. In my opinion there can be no doubt at all that, generally speaking, the Court has such inherent power. The cases relied upon by counsel for the applicant make this quite clear. He referred, inter alia, to the following cases: MacKenzie v Furman & Partt 1918 WLD 62 at 66; Cohen & Tyfield v Hull Chemical Works 1929 CPD 9 at 10; Van der Merwe v De Villiers and Another 1953 (4) SA 670 (T) at 672; Neal v Neal 1959 (1) SA 828 (N) at 832 - 833; and, finally, Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others H 1974 (4) SA 362 (T) at 368G - H. Examples of the Court's inherent power to grant relief outside the terms of the Rules of Court afforded by these cases are the ordering of production for inspection of machinery, including allowing the presence at such inspection of an expert of the party desiring the inspection (MacKenzie's case supra); the authorisation of the presence at the inspection of documents of experts to assist the party requiring the inspection, such as accountants or other experts (Cohen & Tyfield's case supra); the ordering of matter to be struck out of an affidavit on grounds other than those specifically mentioned in the Rules of Court, namely vexatious, scandalous or irrelevant matter (Titty's Bar & Bottle Store (supra)).

The argument for the respondents with regard to these cases was that they were distinguishable from the situation in the present case. Counsel for the respondents said that the cases relied upon by the applicant rested on a situation where a gap was found to exist in the Rules of Court, or, in other words, where there was a total hiatus in relation to a certain situation. So, for instance, in MacKenzie's case counsel said there was no provision in the Rules for an inspection of objects as opposed to an inspection of documents, and the Court could step in and fill that gap by using its inherent jurisdiction. In the present case, however, counsel said the position was not the same, taking again the example of the inspection of items of machinery. Counsel relied in this respect on the provisions of Rule 36 (6), which provides for the inspection of objects with an express limitation of the remedy to an action. The Rule refers expressly to "any action", and counsel argued that that showed conclusively that the framers of the Rules could not have contemplated that a similar type of procedure would be possible in the case of an application.

This appears on the face of it to be an attractive argument, but I am nevertheless unable to accede to it. I do not consider that if justice demands such a course in appropriate circumstances, the Court would decline to come to the assistance of a party where that party requires inspection of an object referred to in the opposing party's affidavits, simply because Rule 36 (6) is limited by its wording to actions and does not expressly include within its ambit applications. If justice requires an inspection of an object, in application proceedings, I consider that the Court will exercise an inherent jurisdiction to order production for such inspection. I should add, however, that I have no doubt that such a situation would be an unusual one and that this is a power that the Court would exercise very sparingly. The point is, however, that I believe that it is something that can be done. The cases referred to earlier support my conclusion, in my view. In Neal's case supra, for instance, the Court was prepared to grant relief to a peregrinus to bring an application in forma pauperis although the Court accepted, in the part of the judgment relevant for present purposes, that the Rule in question did not apply to a peregrinus. In other words, the Court was prepared to grant relief in spite of the fact that the Rule did not cover the situation and that the Rule in question was limited to another type of situation. The other case to which I would refer in this regard is the case of Titty's Bar & Bottle Store (supra). In that case, too, the Court was not deterred from granting relief on a ground not specifically mentioned in the Rule in question, but on a ground outside the terms of the Rule.

Similarly, in my view, in the present case the Court has inherent power to grant the relief sought by the applicant in the second and third categories of its prayers as summarised earlier.

I would sound a word of caution generally in regard to the exercise of the Court's inherent power to regulate procedure. Obviously, I think, such inherent power will not be exercised as a matter of course. The Rules are there to regulate the practice and procedure of the Court in general terms and strong grounds would have to be advanced, in my view, to persuade the Court to act outside the powers provided for specifically in the Rules. Its inherent power, in other words, is something that will be

> exercised sparingly. As has been said in the cases quoted earlier, I think that the Court will exercise an inherent jurisdiction whenever justice requires that it should do so. I shall not attempt a definition of the concept of justice in this context. I shall simply say that, as I see the position, the Court will only come to the assistance of an applicant outside the provisions of the Rules when the Court can be satisfied that justice cannot be properly done unless relief is granted to the applicant.
> (Emphasis supplied)

73. From the tenor of this judgment, it seems plain that a court ought to be hesitant to tread along this path, and the invocation of inherent jurisdiction or the invocation of Constitutional values ought to be cautiously invoked to vary or amplify the procedural regime for litigation. It seems to me to be no real case for special treatment of the kind sought. Moreover, if it might be asked: can a public interest litigant who has waived privilege, claw back on disclosure for other public interest reason, the answer, in my view, must be No. Public interest litigants must shape their presentations to court within the same range of strictures and opportunities as any other litigant.

Ought the social status of children, having regard to the protections that are provided for in the constitution and in certain statutes addressing the needs of children as vulnerable members of society, afford a basis to resist disclosure of information obtained from children to be used in litigation in the interest of children ?

74. The premise for this question is that 'ordinary grounds' are not capable of being relied upon. In the context of providing substantive relief to assuage a violation of a constitutional right, Ackermann J in **Fose v Minister of Safety and Security 1997 (3) SA 786 (CC) at [18] and [19]** remarked that a court might fashion an 'appropriate' remedy, if one did not already exist.

"[18] In essence the issues raised by the plaintiff turn on the proper construction of s 7(4)(a) of the interim Constitution, which entitles any (relevant) person 'to apply to a competent court of law for appropriate relief, which may include a declaration of rights'. The interim Constitution is the supreme law. It confers rights on persons and tells them that they may look to the courts for the protection and enforcement of such rights. The interim Constitution is prescriptive as to how rights should be enforced or protected only to the extent that it requires the competent court, if it finds that 'any law or any provision thereof' is inconsistent with the interim Constitution, to 'declare such law or provision invalid to the extent of its inconsistency'. But even then, the Court is given the power by s 98(5) to direct that the unconstitutional law shall remain in force for a period of time to enable Parliament to correct the law and bring it into conformity with the interim Constitution. Otherwise, the only requirement of the interim Constitution is that the relief given by a competent court in any particular case should be 'appropriate relief'. It is left to the courts to decide what would be appropriate relief in any particular case.

[19] Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights."

75. Taking up such an approach to this issue, which, in my view, ceased to be a mere procedural matter when the enquiry became orientated towards public interest considerations, it must be asked: Is it proper that a litigant must deal with an adversary's case and be denied the supporting documentation on the grounds that a child composed them? Will the CLL be, generically, inhibited from protecting childrens' rights if it cannot keep confidential what children reveal to it in its investigations and does it need to be specially licensed to present, to a court, hearsay evidence, cloaking its sources with anonymity, which the court is then expected to receive and treat as safe to rely upon? Can such conduct be sanctified under the rubric of the "best interests' of the child?

76. I am not confident that the random deployment of the phrase 'the best interests of the child' to set up a test for *any decision affecting* a child, regardless of the circumstances, is appropriate. The 'best interests' idea is one that arose initially in the context of how a child was to be treated in, principally, a domestic environment, whether family based or institutionally based. In that context the child's best interests are self-evidently paramount. I do not rail against the phrase being used more widely than that, but it seems to me that caution must be exercised. The more a child steps out into the world, or is led out into the world by well intentioned persons, the more likely it is that the rights that society would confer on the child come into contestation with the rights of other people.

77. A passage in the judgment by Pickering J in **Jonker v The Manager, Gali Thembani School (supra)** at pp10-11 states that:

> '....a child's best interests are of paramount importance in every matter *concerning* the child'

That matter was indeed about the treatment of children and, in particular, a cavalier attitude to moving them about from one place to another. Pickering J was not invited in that matter to consciously lay down a universal and absolute principle, and the choice of phraseology in this passage cannot be read as deliberately doing so. In that case the constitutional rights of the children were allegedly imperilled. In this case, what the CLL puts in issue (in this part of the analysis), is whether a child can invoke a right to make claims anonymously and have the allegations taken seriously in a court of law. At its extreme, a blithe employment of the 'best interests' test can become a mantra that could support virtual immunity for a child's conduct in relation to the invasion of the rights of others. That is not what the concept is for. Moreover, it is now trite that under our Constitution, no single right is absolute and there is no hierarchy of rights.

78. The source of the mischief in this particular case was the CLL's promise of anonymity. There is no reason to question the bona fides of the CLL, but much reason to question the prudence of that promise. The decision of the court cannot turn simply on the answer to the question what would be better for the children and whether their expectations should be preferred. A value judgment has to be made whether the interests of the children in this specific situation are such that they trump the rights of a litigant to due discovery. Counsel for the CLL acknowledged the legitimacy of that contestation and invited a judicial peek to assess the materiality of the, as yet, concealed data. That is not of any help here, as the very point of the disclosure is to dig into the source of the allegations.

79. In **Independent Newspapers v Minister for Intelligence Services IN RE Mosetlha v President of the RSA 2008 (5) SA 31 (CC) at [esp 25] – [26] and [44]** certain values were articulated in the context of securing an open judicial process. A trial had taken place in camera and the press wanted access to the record which was refused on grounds of national security. Moseneke DCJ held:

> "[25] Ordinarily courts would look favourably on a claim of a litigant to gain access to documents or other information reasonably required to assert or protect a threatened right or to advance a cause of action. This is so because courts take seriously the valid interest of a litigant to be placed in a position to present its case fully during the course of litigation. Whilst weighing meticulously where the interests of justice lie, courts strive to afford a party a reasonable opportunity to achieve its purpose in advancing its case. After all, an adequate opportunity to prepare and present one's case is a time-honoured part of a litigating party's right to a fair trial.
>
> [26] In the context of civil litigation the right of access to information which is under the control of another litigating party is regulated by discovery procedures applicable in various courts. For instance, rule 29 of the rules of this court specifically incorporates rule 35(13) of the Uniform Rules for purposes of discovery, inspection and production of documents in application proceedings in this court. It has long been recognised that adequate but

equitable discovery procedures form an indispensable and integral part of a fair civil trial.

[27] Even before the advent of the Constitution, courts often, and correctly in my view, recognised that when there is a claim of confidentiality over information that is sought to be discovered or disclosed other considerations of fairness arise. These are well recognised by Schutz AJ in Crown Cork & Seal Co Inc and Another v Rheem South Africa (Pty) Ltd and Others (Crown Cork): [- *the passage cited above*]

And further on:

[42] More recently in Shinga v The State, Yacoob J explained the constitutional interest in open courtrooms in the following terms:

> 'Seeing justice done in court enhances public confidence in the criminal-justice process and assists victims, the accused and the broader community to accept the legitimacy of that process. Open courtrooms foster judicial excellence, thus rendering courts accountable and legitimate. Were criminal appeals to be dealt with behind closed doors, faith in the criminal-justice system may be lost. No democratic society can risk losing that faith. It is for this reason that the principle of open justice is an important principle in a democracy'.

There is much to be said for the contention of Independent Newspapers and the amicus that open justice is a crucial factor in any consideration of a request to limit public disclosure of a court record. That is particularly so when one deals with an appeal record the disclosure of which to the public was not restricted by an order of the court from which the appeal emanates.

[43] I am, however, unable to agree with the submission that a restriction placed on public access to proceedings is only permissible as an exceptional occurrence and that the party seeking to restrict the court record bears a true onus of demonstrating that the restriction is justifiable. The logical consequence of this stance is that all court records may not be restricted, except in exceptional circumstances, by a court order after a formal application, on notice to interested parties and after a hearing in an open court. In other words, I accept that the default position is one of openness. My difficulty arises in defining the circumstances in which that default position does not apply. As will become apparent later, I cannot accept the argument that the default position may only be disturbed in exceptional circumstances.

[44] The 'exceptional circumstances' standard advanced is inconsistent with the design of our Constitution and the jurisprudence of this court on several counts. The better approach, I think, is to recognise that the cluster of rights that enjoins open justice derives from the Bill of Rights and that, important as these rights are individually and collectively, like all entrenched rights, they are not absolute. They may be limited by a law of general application provided

> the limitation is reasonable and justifiable. It is not uncommon that legislation and the common law in this country, and elsewhere in open and democratic societies, limit open court hearings when fair trial rights or dignity or rights of a child or rights of other vulnerable groups are implicated."

80. From these passages it follows, in my view, that a court, engaged in the delicate act of balancing contending rights, indeed has the authority to limit disclosure for proper reasons, but knows no favourites in exploring what outcomes serve the public interest. In **Mosethla** an important factor weighed by the court was whether or not the applicant was unsuited without the information it requested. It held on the facts that a case for that outcome not made out.

81. In the dispute between the School and the CLL can the School make do without the questionnaires? Unlike in the application of Rule 35(12) where the School need not justify is demand, the onus, if there us one, on this approach, must be reversed. The critical issue is the avowed wish to rebut, if it can, the allegations of racism. Two considerations loom large in my view:

81.1. How can a litigant rebut anonymous allegations of wrongdoing?

81.2. The intrinsic seriousness and social implications of allegations of racism in South African society.

82. Can it be right that a litigant can transpose anonymous allegations of wrongdoing into a hearsay affidavit which is in turn to be regarded as usable evidence, in a fair adversarial litigation system? It seems to me, fundamental to the character of fair litigation that such conduct is untenable. It ought not to matter if the source of the anonymous allegations is a

person or entity who or which can exercise authority over vulnerable people or the source is the vulnerable people whose interests are sought to be advanced.

83. Moreover, as a matter of principle, the way in which allegations of racism in South Africa are dealt with demands care. Undoubtedly, vestiges of racism, overt or covert, vulgar or subtle, wherever they continue to exist are deservedly to be exposed for the purpose of eradication. Precisely because that objective is important the very real risk of allegations, made bona fide, but mistakenly, or allegations which remain unproven one way or another, means that no person engaged in litigation who is alleged to have been a party to racist conduct can be reasonably expected to meet such allegations on the basis of anonymous claims. Even more so, a person so accused cannot be expected to meet such allegations in a hearsay form and be denied access to the source. To approach the matter otherwise cannot conceivably be in the public interest because it is fundamentally subversive of a fair adversarial litigation system.

84. In the result, no public interest grounds have been advanced to justify non-disclosure of the questionnaires in this case.

Conclusions

85. Accordingly I hold that:

85.1. Upon a proper interpretation, it is implied in Rule 35(12) that documents alluded to which are proven by the litigant who made reference thereto to be irrelevant to the issues or privileged need not be discovered.

85.2. The questionnaires are privileged.

85.3. The CLL waived privilege.

85.4. No public policy or public interest rationale exists to justify the CLL refusing to discover the questionnaires, in terms of Rule 35(12).

85.5. No rights which might be invoked on behalf of the children who composed the questionnaires trump the norms of fair litigation norms.

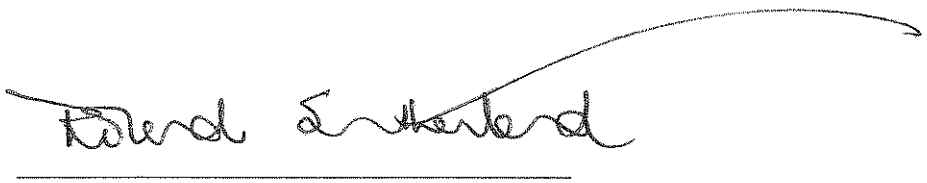
86. The question of whether or not the burden of a costs order should be made against the CLL, given its status and role requires attention. The School, it must be borne in mind, is not an amply resourced entity any more than is the CLL. The nature of the factors that have led me to the order made, and considerations of fairness appropriate to weigh, have however also led me to conclude that there is no proper rationale to justify the costs not following the result.

The Order

87. The Respondent, the Centre for Child Law, is ordered to comply with paragraph 1.3 of the Rule 35(12) notice of the first and second applicants, dated 1 February 2013, and deliver up for inspection and copying, the original questionnaires, which were referred to in paragraph 28 of the application to intervene.

88. For the purposes of compliance, the date of service of the Rule 35(12) notice, upon the Respondent, the Centre for Child Law, shall be deemed to be the date of delivery of this judgment.

89. The costs of these proceedings shall be borne by the Respondent, the Centre for Child Law, which shall include the costs of two counsel.



ROLAND SUTHERLAND
Judge

Hearing: 8 October 2013.
Judgment Delivered 19 November 2013.

For the first and second Applicants:
Adv A Kemack SC, with him,
Adv C Dreyer
Instructed by Erasmus De Klerk Inc
Ref J Erasmus

For the respondent (Applicant in the Intervention application)
Ad J Brickhill,
Instructed by the Legal Resources Centre
Ref M Mnguni