Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: 22455/2019

In the matter between:

DIVINE INSPIRATION TRADING 205 (PTY) LTD	1st Applicant
THE ALPHEN FARM ESTATE (PTY) LTD	2nd Applicant

and

KATHERINE GORDON	1st Respondent
DR KATHERINE LEWIS	2nd Respondent
DR GISELLE RAUSCH	3rd Respondent

MATTER HEARD 25 JANUARY 2021

***Coram*: Mr Acting Justice Hockey**

JUDGMENT: DELIVERED ON 03 MARCH 2021

HOCKEY AJ:

Introduction and background facts

[1] This is an application wherein the applicants seek an order against the second and third respondents directing them to provide the applicants and this court with all medical records, reports and x-rays ("the medical records") held by them in relation to the first respondent.

[2] The applicants require the medical records for purposes of action proceedings ("the main action") wherein the first respondent, as the plaintiff, claims damages from the applicants (the defendants in the main action) as a result of injuries sustained by her in an accident when she visited the premises of the applicants on 2 October 2015.

[3] The second and third respondents are medical practitioners, namely a general practitioner and a psychiatrist, respectively. Both of them had treated the first respondent for certain medical conditions.

[4] The second and third respondents are restricted from disclosing the medical records of the applicant by virtue of section 14 of the National Health Act, 61 of 2003 ("the NHA"), but may do so in terms of subsection (2)(b) when *"a court order or any law requires that disclosure"*.

[5] The second and third respondents do not oppose the relief sought by the applicants, but the first respondent does so on the grounds that (a) the medical records are irrelevant to the dispute between the parties in the action proceedings, (b) the discovery of the medical records would infringe on her right to dignity and privacy, and (c) the disclosure of the medical record would impinge on her rights under the Protection of Personal Information Act, 4 of 2013 ("POPI").

[6] The merits in the action proceedings between the applicants and the first respondent was settled on 27 September 2017. The settlement provides that the applicants are to pay 70% of the first respondent's proven damages resulting from the incident described in the particulars of claim.

[7] Subsequent to the settlement, the first respondent amended her particulars of claim, the important amendment being in respect of her past and future loss of income, from R500 000.00 to R7 028 100.00.

[8] The applicants engaged an expert, Dr Johan Lourens, a clinical psychologist and human resources consultant, to examine the first respondent and to deliver a report on the first respondent's employment prospects.

[9] Dr Lourens subsequently consulted with the first respondent, and thereafter informed the applicants' attorneys that he required the complete medical records and history of the first respondent as held by the second and third respondents. An exchange of correspondence between the respective attorneys for the applicants and the first respondent followed, wherein the former requested the medical records which request was refused by the latter.

[10] This issue came before the case managing judge, Cloete J in terms of rule 37, who in her directives stated that it *"is open to the [applicants] to subpoena such documents [ie the medical records]* duces tecum *in accordance with rule 38."*

[11] Following Cloete J's directives, the applicant caused subpoenas *duces tecum* to be issued for the medical records held by the second and third respondents. The subpoenas were duly served on them, but, concerned about the provisions of the NHA, they consulted attorneys, who wrote to the applicants' attorneys confirming that their clients are medical practitioners who are bound by the Ethical Rules for Conduct for Practitioners Registered under the Health Professions Act 56 of 1974 ("the HPA") which dictates the circumstances where a practitioner may divulge information. The attorneys confirmed that their clients were unable to get the requisite consent from the first applicant and they were therefore unable to comply with the subpoenas. It was suggested in this letter that rule 35(3), being a request for better discovery, would be an appropriate step to take by the applicants.

[12] The applicants' attorneys subsequently caused a rule 35(3) notice to be served wherein they requested discovery of the same documents referred to in the subpoenas directly from the first respondent. This notice was met with a response from the first respondent's attorneys that the requested medical records were not within the possession of the first respondent or her legal advisors.

[13] In the light of the above, the applicants brought the present application.

The nature of this application

[14] This application follows the issuing and service of subpoenas *duces tecum* on the second and third respondents after these respondents, purportedly in compliance with their professional and ethical duties in terms of the NHA and the HPA declined to comply with the subpoenas. The application therefore is for an order in terms whereof the second and third respondents are directed to provide the medical records of the first respondent in their possession to the applicants as well as to this court.

[15] The first respondent is clearly an interested party, as the requested medical records pertain to her. She is the only respondent opposing the application.

[16] Counsel for the first respondent stated in his heads of argument that the application is brought *"under the guise of rule 35(3)",* but this is clearly not so. Any proceedings under rule 35 can only be brought by and against the parties *inter se*, and not against third parties such as the second and third respondents in the present application, who are not parties in the main action proceedings.

[17] Rule 38 requires a receiver of a subpoena *duces tecum* requiring the production of documents described in the subpoena to lodge such documents with the registrar unless such a person claims privilege. One cannot doubt the *bona fides* of the second and third respondents in refusing to disclose the medical records. *Bona fides*, however, is not enough to refuse compliance with the subpoena served on them. They have to convince the registrar or the court that the claim of privilege is justified. On this, it was held in **Trust Sentrum (Kaapstad) (Edms) Bpk and Another v Zevenberg and Another** 1989 (1) SA 145 at 150G:

> *"...a person's genuinely (but wrongly) held belief can never serve to avoid complying with what is effectively a summons to produce to the Registrar of the Court the information called for therein. He must satisfy the Registrar (or conceivably the Court) that his claim of privilege is not merely* bona fide*, but legally justified."*

[18] In the present matter, the second and third respondents' *bona fide*s is unquestionable. They base their refusal to disclose the medical records on a legislative injunction, namely section 14(2) of the NHA (in addition to their ethical duties), which prohibits them from disclosing the medical information without the consent of their patient (the first respondent) unless, under subrule 2(b), *"the court or any law requires that disclosure".* Whether the second and third respondents are correct in their reliance on the provisions of the NHA or their ethical rules in their refusal to make the medical records available, is another matter, which I shall deal with below.

[19] It is common cause that the first respondent did not give consent for the release of her medical records. It is against this background that the present application was launched. Although the relief sought is principally against the second and third respondents, it is the first respondent, who has a direct interest who opposes this application.

[20] The above is not to say that the general principles relating to discovery are not applicable in the present matter. In fact, from what I can gather by their argument, both counsel for the respective parties agree, that the issue of relevance is pivotal. But relevance is not the only issue that this court must determine – the first respondent also relies on the restriction to disclosure of her information contained in provisions of the NHA and the ethical rules of health practitioners, and also that disclosure of her records would amount to transgression of provisions of POPI and would also infringe on her constitutional rights to privacy and dignity.

The reliance on section 14 of the NHA, the HPA and Ethical Rules

[21] The Health Professions Council of South Africa ("the HPCSA") is established under the HPA with a number of objectives and functions, including *"to uphold and maintain professional and ethical standards within the health professions",* in terms of s 3(m) of the HPA. In furtherance of this objective, the HPCSA issued "Ethical guidelines for good practice in the health care professions" by way of several booklets covering specific topics of ethics.

> In Booklet 1, it is stated in para 5.2.1 that *"[h]ealth care practitioners should …[r]espect the privacy and dignity of patients."* Further, at para 5.4.2, it is stated that health care practitioners should *"[r]ecognise the right of patients*

to expect that health care practitioners will not disclose any personal and confidential information they acquire in the course of their professional duties, unless the disclosure thereof is: made in accordance with patient's consent; made in accordance with the (sic) court order to that effect; required by law; or in the interest of the patient."

[22] Booklet 5 deals in more detail about patient confidentiality, but it is unnecessary to deal with its content in detail for present purposes. The important point is that the privacy and dignity of patients should be respected, and that disclosure of patient information, including medical records may be disclosed only in limited circumstances, including where the law requires such disclosure. Such circumstances include where a court orders disclosure and where any law requires disclosure.

[23] As already stated, besides reliance on ethical rules to which they are bound, the second and third respondents also rely on section 14 of the NHA in their refusal to disclose the medical records under the subpoenas which were served on them.

[24] Section 14 of the NHA provides:

> *"(1) All information concerning a user, including information relating to his or her health status, treatment or stay in a health establishment, is confidential.*
>
> *(2) Subject to section 15, no person may disclose any information contemplated in subsection (1) unless –*
>
> *(a) the user consents to that disclosure in writing;*
>
> *(b) <u>a court order or any law requires</u> that disclosure; or*
>
> *…"* (my underlining)

[25] The medical records were required in terms of subpoenas *duces tecum* which were served on the second and third respondents in terms of rule 38(1). The question is whether this rule constitute *"any law"* as referred to in section 14(2)(b) of the NHA. In **Industrial Development Corporation of South Africa Ltd v PFE International Inc (BVI) and Others** 2012 (2) SA 269 (SCA), Theron JA stated the following at 275 B-C:

"It must be borne in mind that rule 38 (1) is contemplated by s 30 of the Supreme Court Act 59 of 1959, which provides that a party to civil proceedings 'may procure the attendance of any witness or the production of any document or thing in the manner provided for in the rules of court'."

[26] The **PFE International** matter concerned the interpretation of section 7 of the Promotion of Access to Information Act 2 of 2000 ("PAIA"), which contains an ouster clause, in terms of which PAIA is not applicable *"to a record of a public body or a private body"* if, in terms of subsection 7(1)(c), *"the production of or access to that record … is provided for in any other law."* In considering this ouster provision, Theron JA had this to say at 275C-F:

"Section 7(1)(c) does not stipulate, as a condition for the application of the ouster provision contained in that section, that the 'other law' should provide for the production of or access to the record concerned at the time when it might be obtained if the provisions of PAIA were to apply. The section simply requires that 'the other law' (in this instance rule 38(1)) should provide for the production of or access to the record. Rule 38 achieves that purpose. The rules of court relating to subpoenas are laws which provide for 'the production of or access to' records and these include records held by persons who are not parties to the litigation. To find otherwise would be contrary to the basic principle established in Unitas Hospital that PAIA was not intended to have an impact on court procedure. It is so that the court in Unitas Hospital was dealing with discovery while this matter concerns the issue of a subpoena. However, both of these procedures are provided for in the Uniform Rules."

[27] Theron JA's judgment went on appeal to the Constitutional Court and was confirmed by Jafta J (the citation being **PFE International and Others v Industrial Development Corporation of South Africa Ltd** 2013 (1) SA 1 (CC), and quoted the following paragraph of Theron JA with approval at para 21:

"The purpose of s 7 is to prevent PAIA from having any impact on the law relating to discovery or compulsion of evidence in civil and criminal proceedings. In the event that 'the production of or access to' the record 'is provided for in any other law' then the exemption takes effect. The legislature has framed s 7 in terms intended to convey that requests for access to records, made for the purpose of litigation, and after litigation has

commenced, should be regulated by the rules of court governing such access in the course of litigation."

[28] In **Unitas Hospita v Van Wyk and Another** 2006 (4) SA 436 (SCA) (the case referred to by Theron JA in **PFE International**), Brand JA dealt with the right of access to records under section 50 of PAIA, and the ouster clause in section 7 and concluded (at para 21):

> *"The deference shown by s 7 to the rules of discovery is, in my view, not without reason. These rules have served us well for many years. They have their own built-in measures of control to promote fairness and to avoid abuse. Documents are discoverable only if they are relevant to the litigation, while relevance is determined by the issues on the pleadings. The deference shown to discovery rules is a clear indication, I think, that the Legislature had no intention to allow prospective litigants to avoid these measures of control by compelling pre-action discovery under s 50 as a matter of course."*

[29] The principles relating to PAIA *vis-a-vis* the rules of discovery as discussed in **PFE International** and **Unitas Hospital**, in my view, applies equally to section 14 of the NHA. The reference to *"any law"* in section 14(2)(b) of the NHA includes the rules, and in particular rule 38 for present purposes. Section 14(2)(b) of the NHA, like section 7 of PAIA, demonstrates a clear show of deference to the rules, and health practitioners, whose patients refused to consent for the disclosure of their medical records, cannot therefore rely on section 14, without more, when they are served with a subpoena *duces tecum* under rule 38. It goes without saying that ethical rules are subject to these principles.

The reliance on POPI

[30] Counsel for the first respondent argues that disclosing the medical records sought would unjustifiably trample upon the first respondent's rights under POPI. Both counsel for the applicants and the first respondent refer to section 11 of POPI in advancements of their respective arguments. The relevant provisions under section 11 provide:

"(1) Personal information may only be processed if –

…

(c) processing complies with an obligation imposed by law on the responsible party;

…

(f) processing is necessary for pursuing the legitimate interests of the responsible party or of a third party to whom the information is supplied."

It is common cause that the medical records constitute personal information as per the definition in Section (1) of POPI, and also that the processing of information includes the dissemination thereof in any form.

[31] Counsel for the applicants argues that section 11(1)(c) and (f) provide for instances where information can be disclosed, whereas counsel for the first respondent argues that the exception under subsection (c) does not apply as the applicants are not a *"responsible party"* required to process the first respondent's personal information, and subsection (f) is also not applicable in this matter on the basis that the medical records are not relevant to the first respondent's claim for loss of earning capacity, and they are not necessary to pursue the applicants' defence in the main action.

[32] I do not agree with the contentions by the first respondent's counsel. A responsible party in POPI, *"means a public or private body or any person which, alone or in conjunction with others, determines the purpose of and means for processing personal information."* The second and third respondents are such responsible parties, and it is in fact on them that obligations have been "*imposed by law*" by virtue of the subpoenas served on them in terms of rule 38(1).

[33] Furthermore, subrule (3) provides that a data subject, which in this case would be the first respondent, may object to the processing of personal information *"in terms of subsection(1)(d) to (f), in the prescribed manner, on reasonable ground relating to his, or her or its particular situation, unless legislation provides for such processing…".*

[34] There is a good reason, in my view that subrule (c), which provides for the processing of information where it complies with an obligation imposed by law on the responsible party, was excluded in subrule (3). That is, that the legislature never intended to exclude the processing of information where the law requires such processing. The rules, being delegated legislation, and in particular rule 38(1) for present purposes, constitute *"law"* which imposed a duty on the second and third respondents to process the medical records of the first respondent. In terms of subrule (c), therefore, the processing of information is allowed irrespective of an objection from the data subject.

[35] As for the contention that the exception under subrule (f) is not applicable, the general principle is that, in terms of (f), where the processing of information is necessary for the pursuing of a legitimate interest of a third party (ie the applicants in *casu*), to whom the information is to be supplied, the exception is applicable. However, subrule (4) provides that if a data subject (ie the first respondent) objected to the processing of the personal information in terms of subrule (3), which allows for an objection under (f), the responsible party may no longer process the personal information.

[36] To sum up as far as section 11 is concerned, the section makes provision for the processing of information in certain instances. Two such instances are (i) where there is a legal obligation to do so, imposed by law, on the responsible party, and (ii) where processing is necessary for pursuing the legitimate interest of the responsible party or of a third party (in this case the applicants) to whom the information is to be supplied. The data subject may object in respect of the second instance, but not in respect of the first.

[37] first respondent's reliance on subsection (f) is good, but not so in respect of subsection (c) where a duty has been imposed on the second and third respondents, as responsible parties, in accordance with an obligation imposed on them by law, to process the information. Such duties have been imposed by way of the subpoenas *duces tecum* which were served on them in terms of rule 38.

[38] There is another compelling reason why the first respondent's reliance on POPI is bad in law. Section 12(2)(d)(iii) permits the collection of data from a

source other than the data subject *"for the conduct of proceedings in any court or tribunal that have commenced or are reasonably contemplated."* Furthermore, section 15(3)(c)(iii) provided:

> *"(3) The further processing of personal information is not incompatible with the purpose of collection if –*
>
> *(c) further processing is necessary –*
>
> *(iii) for the conduct of proceedings in any court or tribunal that have commenced or are reasonably contemplated;…"*

In other words, once personal information has been collected, POPI makes provision for the further processing thereof for purposes of proceedings of any court or tribunal proceedings.

[39] Clearly the legislature never intended POPI to be in conflict with the rules relating to discovery or the procurement of evidence for trial by way of subpoenas under rule 38, and the first respondent's reliance on provisions of POPI in her objection to the release of her medical records held by the second and third respondents to the applicants must fail.

Relevance of the medical records

[40] The issue of concern in the present matter is whether the injuries sustained by the first respondent and the consequences thereof impacted her earning capacity. In **Dippenaar v Shield Insurance Co of SA** 1979 (2) SA 904 (A), it was held (at 917B-C):

> *"In our law, under the* lex Aquilia*, the defendant must make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed. The capacity to earn money is considered to be part of a person's estate and the loss or impairment of that capacity constitutes a loss, if such loss diminishes the estate."*

[41] But it is not always so that a physical disability impacts upon earning capacity. As held in **Rudman v Road Accident Fund** 2003 (2) SA 234 (SCA) at 241 I – 242 A;

> *"A physical disability which impacts upon capacity to earn does not necessarily reduce the estate or patrimony of the person injured. It may in some cases follow quite readily that it does, but not on the facts of this case. There must be proof that the reduction in earning capacity indeed gives rise to pecuniary loss."*

[42] Counsel for the first respondent, in arguing that unrelated injuries are irrelevant to the enquiry whether the injuries suffered have resulted in the loss of earning capacity, relies on the above dictum from **Rudman**, as well as from the dictum from **Bane and Others v D'Ambrosi** 2010 (2) SA 539 (SCA), at 547 F, as follows:

> *"When a court measures the loss of earning capacity, it invariably does so by assessing what the plaintiff would probably have earned had he not been injured and deducting from that figure the probable earnings in his injured state…"*

[43] In arguing that the medical records are not relevant for purposes of the main action, counsel for the first respondent contends that the enquiry is whether the injuries suffered have resulted in a loss of earning capacity, and there must be an evidentiary correlation between the injuries sustained and the loss of earning capacity. If there is no such correlation, then the plaintiff would have failed to prove a loss of earning capacity. Hence, the argument goes, as a matter of basic logic, unrelated injuries are irrelevant to the enquiry.

[44] Counsel for the applicants, on the other hand, argues that the information sought from the second and third respondents are highly relevant as the applicants cannot be expected to bear the financial burden of pre-morbid medical conditions of the first respondent which could and likely would impact on the first respondent's earning capacity. I am in agreement with this.

[45] When assessing loss of earning capacity, the court has no crystal ball to look into to determine the future but must take into consideration available

information when applying contingencies. In **Allie v Road Accident Fund** [2003] 1 All SA 144 (C), the court had this to say para 31:

> *"In assessing prospective loss, the court is virtually called upon to ponder the imponderables, yet it must do its best with material available even, if in the result, each award might be described as an informed guess (Boberg: The Law of Delict, vol 1 at 531). It is recognized that the trial court has a wide discretion to determine an amount which is fair to both parties, neither denying the plaintiff just compensation nor pouring out largesse from the horn of plenty at the defendant's* expense."

[46] To determine the extent to which a plaintiff's earning capacity has been compromised by an injury, it makes sense that the pre-morbid earning capacity has to be estimated. It is not possible to do this with full accuracy and contingencies are generally applied. A pre-morbid medical condition may be one of the factors a court will take into account when applying a contingency to the pre-morbid scenario, ie what a plaintiff would have earned but-for the injury.

[47] In **BEE v Road Accident Fund** 2018 (4) SA 366 (SCA) at 399 B - D, the court took several factors into account for justifying an above average contingency deduction, including the fact that the appellant in that case was – pre-morbidly – somewhat more at risk of injury and disability than the average 54-year-old, given his passionate involvement in cycling and surfing. The court held that these are activities with which the appellant would have continued, but for his accident. Another factor was the fact that the appellant was diabetic, and although the evidence was that his diabetes was under control, it was held that it was a condition which could give rise to health complications.

[48] What the counsel for the first applicant does not address is that in calculating a loss of earning capacity, contingencies need to be applied to both the first respondent's pre-morbid earning capacity as well as her earning capacity post-morbid. In the pre-morbid scenario, factors including age, general life hazards, qualifications, work history and career prospects must be taken into account.

[49] The applicants appointed an expert, Dr Johann Lourens, a psychologist and human resources consultant to examine the first respondent and to deliver a report on her employability. Dr Lourens only provided a preliminary report wherein he reported that the *"procurement of essential collateral information is of critical importance. This information is currently being followed up."*

[50] Dr Lourens had insight into various documents pertaining to the first respondent, including the report of the first respondent's expert from Burger Consulting Industrial Psychologists ("Burger Consulting"). From this report, it could be gleaned that the first respondent developed anxiety when her first marriage was dissolved, she consulted a psychiatrist who prescribed medication, she had a family history of anxiety and during her second marriage she partook in recreational and illicit drug use, smoked cigarettes and drank heavily.

[51] Dr Lourens also took account of the first respondent's employment history and noted the various positions she held since she entered the labour market in 1992. He concluded:

> *"It would be reasonable to describe this employment history as rather erratic/'unstable' in nature. Together with this, certain other aspect are of importance. These are:*
>
> - *The amount of time elapsed between certain work positions;*
> - *The specific period of time in a certain position."*

[52] Dr Lourens concluded his preliminary report as follows:

> *"The erratic/unstable employment record and related info of the claimant makes it extremely risky to provide any specific recommendation/opinion pertaining to a possible work placement/position and related remuneration."*

[53] It is in the light of the conclusions of Dr Lourens in his preliminary report, the attorneys for the applicants sought access to the medical records of the first respondent as held by the second and third respondents. These records, in my view, are clearly relevant to the enquiry as to the first respondent's earning potential 'but for' the injuries that she sustained and especially for purposes of attaching a contingency in relation thereto. It

might be that the first respondent's medical history of anxiety, drug and alcohol use may have had an impact on her career without the injury. If this is so, a contingency for these factors may have to be applied.

[54] It needs be noted that Burger Consulting also noted the first respondent's history of anxiety, alcohol and drug use, but they too did not have sight of the medical records of the first respondent as held by the second and third respondents, but it seems that they only reported on these on the basis of what they have been told by the first respondent.

[55] It may well be that the medical records sought in this application will have no impact on the conclusions reached by Burger Consulting, or on any contingency to be applied to the first respondents earning capacity *sans* her injury, but this does not detract from the fact that the records should have regard to in order to make a determination to these effects or otherwise.

[56] The Constitutional Court in **PFE International** concluded:

> *"It is difficult to imagine how a party that is still to have access to a document can positively tell that a document would definitely be tendered as evidence at the trial. It seems to me that access must precede the formulation of an opinion regarding whether a particular document would have any evidential value at the trial."*

The first respondent's rights to dignity and privacy

[57] It is without doubt that the medical record of an individual consist of sensitive and personal information that is private and confidential. It is for these reasons that the NHA provides a framework for the dealing with medical records and imposes a duty of confidence in respect of a person's health records. Section 14, however provides for limited circumstances where medical information may be disclosed. I have already dealt with the circumstance where disclosure is required by law and concluded that a subpoena *duces tecum* falls in this category.

[58] Counsel for the first respondent relies heavily on the cases of **Tshabalala-Msimang and Another v Makhanya and Others** 2008 (6) SA 102 (WLD) and

NM and Others v Smith (Freedom of Expression Institute as Amicus Curiae) 2007 (5) SA 250 (CC). In both these cases the courts accentuated the confidentiality of medical records, but both cases concerned the unlawful publication of such information.

[59] The present matter is different. The medical records are sought for purposes of litigation and not for other purposes such as for general publication as in the **Tsabalala- Msimang** and **NM v Smith** matters. The disclosure is required in terms of the law (ie Rule 38) which I have already dealt with.

[60] In any event, our law encourages full disclosure of documents for purposes of litigation, with the understanding that such documentation would be used for the purpose of litigation only and not for any other purpose. In this regard, it has been held in **Cape Town City v South African National Roads Authority and Others** 2015 (3) SA 386 (SCA) (at para 37):

> *"Discovery impinges upon the right to privacy of the party required to make discovery. According to Lord Denning MR, 'compulsion is an invasion of a private right to keep one's documents private'. But while there is an interest in protecting privacy there is also the public interest in discovering the truth. The purpose of the rule therefore is to protect, insofar as may be consistent with the proper conduct of the action, the confidentiality of the disclosure. Litigants must accordingly be encouraged to make full discovery on the assurance that their information will only be used for the purpose of the litigation and not for any other purpose. In that sense, so the thinking goes, the interests of the proper administration of justice require that there should be no disincentive to full and frank discovery."* (internal references removed)

[61] In the circumstances, I am of the view that the medical records held by the second and third respondents should be disclosed in terms of the subpoenas served on them, such disclosure being permitted in terms of section 14(1)(b) of the NHA, as rule 38 constitute "law" which requires such disclosure.

The medico-legal report of Dr FJD Steyn

[62] This matter was heard on 25 January 2021, but two days thereafter, the applicants' attorney made available a medico-legal report of Dr FJD Steyn in respect of the first applicant. As a result, an affidavit was filed by the first respondent's attorney attaching Dr Steyn's report with a request that the court has regard to the content of the report. I also received supplementary submissions from the first respondent's counsel for the admission of the report and the relevance thereof. I also received, on behalf of the applicants, an affidavit opposing the admission of the report as well as the supplementary submission. The affidavit itself contain legal argument as to why the contents of Dr Steyn's report is not relevant for present purposes.

[63] It seems that Dr Steyn's report was not made available earlier than it was because of an oversight by the applicant's attorney. If it were timeously made available, it would have been part of the record in these proceedings (it must be noted that the report is dated 17 December 2018), and for this reason alone I am inclined to admit the report and have regard to it.

[64] Counsel for the first respondent argues that Dr Steyn's report is of vital importance in considering whether the first respondent had made out a case against the relief sought in the present application, as the report deals with both the first respondent's pre- and post-morbid health, and therefore speaks directly to whether the applicants need the first respondent's medical records that are unrelated to her injuries. This argument, in my view, misses the point that the medical records are sought for purposes of an enquiry into the first respondent's earning capacity without the injuries she suffered. Dr Steyn expressed an opinion on the extent of the first respondent's injuries and how these will impact on her physical ability to work in future. Dr Steyn, being an orthopaedic surgeon, correctly did not consider factors other than the injuries which may have an impact on the first respondent's earning capacity, such as may be divulged through a study of the medical record unrelated to the injuries in question. In fact, it is apparent from his report that the first respondent reported no other injuries or illnesses of note to Dr Steyn.

[65] Dr Steyn's report, therefore does not take the present matter any further.

Costs

[66] In the alternative to the prayer for costs, counsel for the applicants generously submitted that costs could stand over for later determination depending on whether the medical records are found to be relevant for purposes of the inquiry relating to the loss of earning capacity of the first respondent. The correct approach, however, in my view, is whether the first applicant correctly or reasonably refused disclosure of her medical records. I think not. The applicants are clearly entitled to these records in terms of the law, and the records are clearly relevant for purposes of the inquiry into the first respondent's loss of earning capacity. For this reason, costs should follow the result in the present matter.

Order

In the result, I make the following order:

1. The second and third respondents are ordered to, within 10 days of this order, file with the registrar of this court, all the hospital records and documents, inclusive of medical records, reports and x-rays, held in relation to the first respondent, with identity number 730[…], Liberty Medical Scheme membership number 988[…].

2. The first respondent shall pay the applicants' costs.

Signed on 03 March 2021

S HOCKEY
ACTING JUDGE OF THE HIGH COURT

Legal Representation:

Applicant: Adv. Roelof Steyn

Respondent: Adv. PS MacKenzi