IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION, MAKHANDA]

CASE NO.: 3572/2021

In the matter between:-

C[....] P[....] K[....]	**FIRST APPLICANT**
E[....] G[....] K[....]	**SECOND APPLICANT**
J[....] M[....] K[....]	**THIRD APPLICANT**

and

DAVID MACKENZIE	**FIRST RESPONDENT**
ST ANDREWS COLLEGE	**SECOND RESPONDENT**
ALAN THOMPSON	**THIRD RESPONDENT**
ST ANDREWS COLLEGE COUNCIL	**FOURTH RESPONDENT**
THE MINISTER OF BASIC EDUCATION, MATSIE ANGELINA MOTSHEGA	**FIFTH RESPONDENT**
THE MEC FOR EDUCATION EASTERN CAPE, FUNDILE DAVID GADE	**SIXTH RESPONDENT**
THE SOUTH AFRICAN COUNCIL FOR	

EDUCATORS **SEVENTH RESPONDENT**

REPORTABLE: YES
OF INTEREST TO OTHER JUDGES: YES

JUDGMENT

NORMAN J:

[1] This is an interlocutory application brought in terms of Rule 30 of the Uniform Rules of Court. The first, second and third applicants, (the plaintiffs in the main action), seek to have, two notices delivered in terms of Rule 36 (4) , by the second and third respondents (the defendants in the action,) on 19 November 2021 ,declared irregular and set aside. They also seek costs of the application on an attorney and client scale.

Background

[2] It is necessary to set out, for context, some of the allegations upon which the claim is founded. The first and second applicants are the parents of a learner, T[....], who was enrolled at the St. Andrews College at the time of his demise. I had raised with the parties at the commencement of the hearing the issue of the full names of the learner being published in court documents and I was advised by Mr Kaplan that his demise is a matter of public knowledge. The third applicant is the younger brother of T[....]. The first respondent was, at the relevant time, a water polo coach and an Assistant - Deputy House Master at St. Andrews College. The applicants allege that the first respondent wrongfully and unlawfully sexually groomed and molested T[....]. As a result of that unlawful conduct , they allege, T[....] became depressed, withdrawn and committed suicide on 18 November 2018.

[3] The second respondent is sued based on , amongst others, vicarious liability for the first respondent's conduct and on various other grounds premised

on alleged breach of the agreement between it and the first and second applicants. The third and fourth respondents are sued based on , *inter alia,* their alleged failure to comply with their undertaking to exercise reasonable care for T[....]'s well- being and exercise the necessary parental powers in *loco parentis* when he was on the school premises. It is alleged that they failed to take reasonable steps to guard against T[....] being sexually groomed and molested by the first respondent. The applicants claim to have suffered damages arising from , *inter alia,* emotional shock, trauma, grief, loss of future support and future medical expenses . The total quantum exceeds R60 million. The action is defended by the first to fourth respondents.

[4] On 19 November 2021 the second and third respondents issued two notices in terms of Rule 36 (4) of the Uniform Rules of Court .The first notice reads as follows:

> '….
>
> *TAKE NOTICE THAT the abovenamed second and third defendants require the plaintiffs, within ten (10) days hereof, and within ten (10) days of receipt by them of any further documents mentioned below:*
>
> *1. To make available insofar as they are able to do so to the second and third defendants any medical reports, hospital records, psychological reports, psychiatric reports or other documentary information of a like nature relevant to the assessment of the damages which are subject of the above action.*
>
> *2. To allow the second and third defendants to inspect all records relating to the plaintiffs in the possession of any hospital, medical practitioner, psychologist or psychiatrist.*
>
> *3. To furnish the second and third defendants at their cost, which costs are hereby tendered, with copies of all medical reports in their possession relating to the relevant claim for damages, such records that pre-dale and post-dale the incident alleged in their Particulars of* Claim.'

[5] The second notice reads :

> '….
>
> *TAKE NOTICE THAT that the abovenamed second and third defendants*

require the plaintiffs, within ten (10) days hereof, and within ten (10) days of receipt by them of any further documents mentioned below:

1. *To make available insofar as they are able to do* so *to the second and third defendants any medical reports, hospital records, psychological reports, psychiatry reports or other documentary information of a like nature relating to the late T[....] K[....] and relevant to the* assessment *of the damages which are subject of the above action.*

2. *To allow the second and third defendants to inspect all records relating to the late T[....] K[....] in the possession of any hospital, medical practitioner, psychologist or psychiatrist.*

3. *To furnish the second and third defendants at their* cost, *which* costs *are hereby tendered, with copies of all medical reports in their possession relating to the late T[....] K[....].' (my underlining)*

[6] It is common cause that, the applicants object to paragraph 2 , only, in respect of each notice. They registered their objection by delivering a notice in terms of Rule 30(2) (b) ,on the basis that the aforementioned notices were irregular. They accordingly afforded the respondents a period of ten days to remove the cause of complaint.

[7] On 30 November 2021, the applicants further addressed correspondence to the respondents where they raised additional grounds of objection which included, *inter alia,* that the deceased, T[....] , was not a claimant in the action and any request for his records or documents , in terms of Rule 36(4) , was irregular.

[8] Upon receipt of the objections , the respondents raised objections to the rule 30 notice. They advanced the following grounds : that the applicants adopted an overly technical approach with the intention of subverting the objects of the rule; the object of the notices was to enable the respondents to inspect all records relating to the applicants and T[....] which are in possession of any hospital , medical practitioner, psychologist or psychiatrist; the applicants are required to make available to the respondents the documents that are relevant to the assessment of damages and , to do so, in respect of those that they are able

to make available; in the event that the applicants do not have those documents in their possession, they hold the power to allow the respondents access to them; and the fact that the applicants have not advanced any complaint in relation to paragraphs 1 and 3 of the notices , setting aside the entire notice instead of just paragraph 2 is overly technical.

[9] In reply, the applicants submitted that: First, the rule in terms of which the notices were issued does not provide for inspection. Second, the notices are excessively wide and constitute abuse of the process , because the respondents seek the documents that are not necessarily in the possession of applicants and seek also all records in the possession of any hospital, medical practitioner, psychologist or psychiatrist, without specifying the nature of the documents and what their relevance to the matter is.

[10] Mr Kaplan appeared for the applicants and Mr Beyleveld SC with Mr Brown, for the respondents.

Applicants' legal submissions

[11] Mr Kaplan made the following submissions on behalf of the plaintiff:

> 11.1 The respondents sought to inspect 'all *records relating to the plaintiffs'* and *'all records relating to T[....] K[....]'* in the possession of any hospital, medical practitioner, psychologist or psychiatrist. In this regard the documents that are being sought are not limited by the requirement of relevance in relation to the damages claimed.
>
> 11.2 No case has been made out in the answering affidavit for any relief that the court should utilize its inherent power to grant procedural relief not set out in the rules in accordance with paragraph 2 of each of the two notices.
>
> It was further submitted that reliance by the respondents on *Mann* & *Others v Leach*[1] and *Universal City Studios Inc.* & *Others v The Network Videos (Pty) Ltd*[2], is misplaced in that, the inherent jurisdiction of the High Court can

[1] [1998] 2 All SA 217 (ECD) 222 at page 221.
[2] 1986 (2) SA 734 (A) at 781 c2h.

only be applied to address a *lacuna*[3], which , in the absence of judicial intervention, would result in an injustice.

11.3 The respondents failed to deal with some of the numerous rules which entitle them to obtain relevant information, namely, Uniform Rules 21, 35(1), 35(3),36(2), 36(5)(a) and 39(2)(a) and (b); they also failed to disclose to the Court that they have already appointed experts , an Educational Psychologist, Industrial Psychologist and a Clinical Psychologist to assess the applicants in terms of rule 39(2)(a) and (b).

11.4 They contend that bringing the application was the only available option. Had the applicants not done so, then the respondents , would have been content in assuming that the notices were not irregular and would have insisted on compliance therewith.

11.5 The request for all medical records which are (extending to their entire lives which are in possession of any hospital, medical practitioners, psychologists or psychiatrists is highly invasive and has no regard for the privacy, dignity and confidentiality of the applicants and the late T[....].

11.6 That the respondents have been unreasonable in their refusal to remove the cause of complaint, and for that reason, the court must order them to pay costs on a punitive scale. In this regard reliance was placed on the case of *Public Protector v South African Reserve Bank*[4].

Respondents' legal submissions

[12] Mr Byleveld SC, made the following submissions:

12.1 The medical records that are requested in the notices are relevant to the assessment of damages claimed by the applicants in respect of emotional shock, trauma and grief , because, the respondents need to assess the claim and to do so, it is necessary to consider the psychological state of the applicants prior to , at the time of and after the suicide of T[....].

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[3] Standard Bank and Others v Ezra Makikole Mpongo and Others Case Nos 38/2019; 47/2019 and 999/2019 (SCA); CCT Case No. 291/2021

[4] CCT 107/18 [2019] ZACC 29 (22 July 2019 para 221).

12.2 They need to assess any diagnosis and treatments received after T[....]'s suicide against the psychological state prior thereto and it is also necessary to assess whether any psychological change is attributable solely to T[....]'s suicide or whether it is linked to pre-existing psychological conditions.

12.3 The medical records sought in the first notice are relevant to the assessment of the damages claimed by the applicants in respect of future loss of support and their ability to provide for themselves into the future.

12.4 The second notice requested certain documents relating to T[....] , in respect of whom the first and second applicants exercised parental control. There is no suggestion that the parents are unable to provide the documents or are unable to provide their permission to the institutions in question to release the information. It is necessary to determine T[....]'s physical and psychological state in order to assess the damages claimed and in determining whether T[....] would have been able to provide for his parents.

12.5 T[....]'s psychological state is very relevant to the determination of the causation relied upon by the applicants in the action proceedings. In this regard reliance was placed on , *Mann and others v Leach*[5] and *Universal City Studio Inc. & Others v The Network Video (Ply) Ltd*[6] for the argument that this court has inherent power to order more than what the rules provide, if to do so , would be in the interests of justice.

12.6 In interpreting the provisions of Rule 36(4) , the court , must adopt the approach of the Supreme Court of Appeal in *Endumeni judgment*[7]*,* and have regard to the nature of the document, its meaning, the words used, the context in which they appear and their apparent purpose.

12.7 Rule 36(4) does not refer to possession but to making documents available in so far as the applicants are able to. There is nothing irregular about the first and second notices and that the application should be dismissed with costs including costs of two counsel where employed.

Discussion

[5] Supra.
[6] Supra.
[7] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) (18-20] and

[13] First , I wish to dispose of two of the objections raised by the applicants , namely, that the respondents failed to deal with some of the numerous rules which entitle them to obtain relevant information, namely, Uniform Rules 21, 35(1), 35(3),36(2), 36(5)(a) and 39(2)(a) and (b); and they also failed to disclose to the Court that they have already appointed experts , an Educational Psychologist, Industrial Psychologist and a Clinical Psychologist to assess the applicants in terms of rule 39(2)(a) and (b). Courts cannot dictate to litigants how to conduct their cases , how to conduct their investigations in relation to claims against them and which rules they must employ in doing so . The fact that there are experts employed by the respondents in terms of rule 39 (2), does not preclude the respondents from invoking the provisions of rule 36 (4). Those are different rules serving different purposes. There is accordingly no merit in these two objections.

[14] Rule 36(4) provides:

> 'any party to such an action may at any time by notice in writing require any person claiming such damages to make available in so far as he is able to do so to such other party in ten (10) days,' medical reports, hospital records, X-Rays, photographs, or such other documentary information of a like-nature relevant to the assessment of such damages, and to provide copies thereof upon request." *(* my emphasis)

[15] Rule 36 (4) was designed with the full appreciation that medical records are, by their nature , confidential . The ability to give the medical records depends , in my view , on whether they are available and whether the requestee wishes to make them available or to claim privilege and thus resist the request. The availability of medical records depends on possession (are they in the requestee's possession ?) and accessibility (if they are not with the requestee, is he or she able to access them?) The records may be available but the requestee may claim privilege. They may not be in the requestee's possession at the time of the request

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[25-26].

but he or she may be able to access them from the clinicians or the hospitals.

[16] The ground of objection advanced by the applicants based on the fact that, they are not in possession of the medical records requested , is not consistent with the purpose of the rule . If one has regard to the literal grammatical meaning of rule 36 (4), one would realize that ,it would defeat the purpose of the rule , if, only those medical records that are in the possession of the requestee are to be requested. The wording : *"To make available in* so *far as they are able to do* so ", is cognizant of that fact.

[17] In ***Zandry v Randol Yachts*** [8] the court, faced with an admiralty claim, engaged in the interpretation of the provisions of Rule 36 where there is reference *'to make available the yacht Madia'.* The court at paragraph 18 remarked : *'The everyday dictionary meaning of the words 'make available' in the context is to cause the property in question to be placed* al *the disposal of or to be accessible to the litigant requiring its inspection or examination. (see The Shorter Oxford English Dictionary; The Random House Dictionary of the English Language; and Webster's Third International Dictionary sv 'make' and 'available').*

[18] In *casu,* one is not dealing with property as in the context of a yacht that was in Madagascar as in the *Zandry* matter. However, one is dealing with medical records. In my view, the requested medical records and / or documents need not be in the possession of the requestee at the time of the request. If he or she is able to access them that would suffice. The requestee must make them available if he or she is able to do so. If the requestor wishes to have copies of those medical records , it must specifically request such copies, from the requestee. I accordingly agree with the submissions made by Mr Byleveld SC in this regard. It follows that this objection by the applicants must also fail.

Does rule 36 (4) envisage a request of medical records or documents of a like nature, that belong to a person who is not a party to the litigation?

[8] CC 2006 (5) SA 302 CPD.

[19] Rule 36 (4) provides that the request for medical records may be made by any party to the action (against whom damages are claimed) .The request must be directed to the party claiming damages. This means that both the requester and the requestee must be parties to the litigation. That is the position herein. The rule controls the extent of the requested medical records by specifying that those records should be relevant to the assessment of claimed damages. The rule makes reference to 'any medical records'. In my view, 'any' means medical records , documents or X-Ray photographs , irrespective of their origin or relation, for as long as they are relevant to the assessment of the damages in the action, they will fall within the ambit of the rule. However , there must be a *nexus* between those medical records and the damages claimed. That means that those records do not necessarily need to belong to the parties to the litigation . They may belong to a third party as long as they are relevant to the assessment of damages in the action. For example , if the applicants wish to rely on medical records in another case , which bears similarities to their case, those records would fall within the scope of the request. If the purpose of the rule was to limit the medical records to those of the litigants it would have stated so in express terms.

Are T[....]'s medical records covered by the rule ?

[20] The allegations made in the particulars of claim indicate clearly that the demise of T[....] is the source of the applicants damages claim. The second notice refers specifically to T[....]. In the first paragraph of the notice , a request is directed to the applicants to make available any medical records relating specifically to T[....] that are relevant to the assessment of the damages which are the subject of the action. There is no objection to this paragraph by the applicants. However, the objection is that T[....] is not a party to the action and therefore production of his medical records may infringe his rights to privacy and dignity. It seems to me that the applicants in this regard are approbating and reprobating. This objection was not pertinently argued by the parties but was not abandoned either. It is for that reason that I have to consider it.

[21] It is apparent from the claim itself that the applicants do not purport to act

on behalf of T[....] nor do they purport to claim damages on his behalf. If, T[....] is not a party to the litigation on what basis would his medical reports be relevant to the assessment of damages in the action? This question is answered by the applicants who elected not to take issue with paragraph 1. The next question would be if his medical records are made available what about his rights to dignity and privacy? Litigation by its very nature limits privacy and dignity rights depending on the nature of the claim. However, I find comfort in the remarks of Harms JA[9] when dealing with the provisions of Rule 36(4) recorded:

> *"This sub-rule does not override the rules of evidence relating to privilege[10].*

[22] The sentiments expressed by Harms JA , above, are an indication that the fact that there are requests for medical records and documents as envisaged in the rule , does not mean that any rights that the person has to , *inter alia,* privilege, are forfeited.

[23] As aforementioned , the applicants cause of action , largely , if not exclusively, is based on the demise of T[....] , his mental state and the wrong caused to him as alleged in the particulars of claim. By so doing , the applicants, caused T[....] to be inextricably linked to the cause of action. Therefore , the respondents have a right to investigate the cause of action and rule 36 (4) enables them to pursue those investigations. How else are they to know T[....]'s mental state if they are denied access to his medical records? How will the court know the truth and T[....]'s mental state if the respondents are precluded from requesting his medical records and yet he is central to the claim, according to the pleadings? However, in permitting the request that does not mean that the respondents investigations should entitle them to T[....]'s medical records from birth until his death.

[24] The respondents have a right, in my view, in terms of rule 36 (4) , to request the medical records of T[....] that are relevant to the assessment of the damages in the action, based on a specified period. If there is no period

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[9] in his work entitled "Civil Procedure in the Supreme Court" issue 24 page b-263.
[10] Minister of Safety & Security v Kekana [1996] 2 ALLSA 324 W.

stipulated the request would be from birth until his demise. That is not what is envisaged in the rule. Nothing stops the applicants from objecting to specific medical records and claim privilege, if they so wish. That would entail a decision by the trial court, on the privilege issue , based on the nature of the medical records sought to be protected and the reasons therefor. Having said that the request for T[....]'s medical record , in the context of this case , falls within the ambit of the rule . In the *Mann* & *Others v Leach decision* [11], Leach J (as he then was) , stated at page 224:

> " *The primary function of this Court is after all, to administer justice in the fight of the particular facts in each case, and it will be harmstrung in this task unless it is able to ascertain the truth. In State of Ohio ex Van Camp v Welling (1936) 22 Ohio L Abs 448 at 450, in a passage cited by Didcott Jin Seetal's case (supra), Conn J said:*
> *'When we adopt the maxim that for every legal wrong there is* a *remedy, we must also apply the corollary that every remedy shall be founded on truth and justice. Ways and means for the ascertainment of truth are not statical. The value of scientific research*, *and the truth thus revealed, ought to be available to the Courts. If this be true, then the Courts must have the power*, *soundly exercised to bring the fight of scientific research and knowledge to bear upon the issues of fact as a further aid in arriving at the truth and in doing complete justice. If this be unsound, then the Courts in the application of the remedial law may fail to keep abreast of the march of progress, and thereby fail to command uniform confidence and respect . It is no answer to say that there is a lack of express authority, unless we conceive that the law is static and lacks the merit of an expansive flexibility, both in respect to the recognition of rights and their invasions, and in respect to the power of the Court to discover and apply methods of ascertaining the truth whereby the remedy may be appropriate and coincide with justice"*

Is the request for all medical records in both notices overbroad?

[11] [1998]2 ALL SA 217 (E)

[25] Mr Kaplan submitted that the request for all medical records of the plaintiff and T[....] would amount to invasion of their rights to privacy.

[26] In *Durban City Council v Mndovu*[12] where counsel for the respondent objected to a notice for him to submit to medical examination relied on the same argument that to order the medical examination would amount to drastic invasion of his rights to be examined only with his consent. Addressing that Henning J[13] stated that 'as *to first submission of Mr Broome, it is true that the obligation of a claimant to submit himself to medical examination is a drastic invasion of his rights; but that is exactly what is contemplated. The wording of the Rule is plain and unambiguous, and should be given effect to in its full extent. The only qualifications in the Rule to the right conferred upon to* a *person to require* a *claim and to submit to medical examination, are those which are already mentioned.'*

[27] At page 324 B- D , the court stated the following:

> *'[in the past],* a *defendant could not insist upon the opportunity of gaining information relating to* a *plaintiff's injuries or the effects thereof on his mental or physical health, save by way of asking for further particulars in the course of the pleadings or for the purpose of trial, or, possibly by way of discovery application ...*
> *As I interpret the Rule, not only in relation to* a *medical examination required in terms of subrule(1) but* as a *whole, it is mainly designed to avoid* a *litigant being taken by surprise in relation to matters with respect to which he would in the normal course of events be unable, before trial, to prepare his case effectively so* as *to meet that of his opponent. Subrule(1) of Rule 36 confers* a *right, albeit* a *qualified right, upon the party against whom the claim is made, but in no sense can it be said to confer any right upon the claimant. The right thus created is subject to compliance with sub-rule* 2 *and also to the right of the claimant to object in terms of sub-rule* 3.'

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[12] 1966 (2) SA page 319 Durban Coast Local Division page 232 para F.
[13] At page 324 para B-D.

[28] The overall purpose of rule 36 (4) is to enable the respondents to investigate the extent and veracity of the claim against them. It also ensures that it limits such investigations only to those medical records or documents that are relevant to the assessment of damages. It stands to reason that the respondents are not given *carte blanche,* to call for all medical records whether they are relevant or not to the claim. When a party makes a request in terms of rule 36(4), the notice that it issues must be in line with the provisions of the rule. If it decides to change the wording of the rule, that too, must be in line with its purpose.

[29] The drafters of rule 36 (4) used the words *'relevant to the assessment of such damages',* those words, in my view, are the safeguard to the medical records under request. They are there to prevent unguided demands for a person's medical records, even if they are not relevant to the claim. The language employed in rule 36 (4) is permissive. That demonstrates that the drafters of the rule were alive to the constitutional imperatives attached to medical records. No party may therefore utilize the rule to demand <u>all</u> medical records without qualifying those as ' *being relevant to the assessment of damages'.* Any interpretation given to rule 36 (4) cannot clothe it with the power to undermine those constitutionally entrenched rights.

[30] Leach J (as he then was) in *Mann v Leach at page 224 B*- C held:

> *"The view that the inherent jurisdiction of the court should only be sparingly used to direct a party to submit to* a *medical examination is, in my opinion, correct. It should not be exercised as a matter of course merely because the Rules omit to make provision for the relief sought. Instead* , *<u>this Court will onlv come to an applicant's assistance outside the Rules when satisfied that justice cannot be properlv done unless relief is granted ..."</u> (my underlining)*

[31] The court in *Mann v Leach* granted the relief on the basis that without such an examination the real truth could not be ascertained and that justice between the parties would not have been properly done.[14]

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[14] **See: Muller v Groenewald (2624111**) **[2011] ZAECGHC 50** (**22 September 2011) at paragraph 13.** Smith J refused relief that was sought to direct the respondent to submit to psychological

[32] The facts of the case in *Mann v Leach* related to medical examination. I appreciate the fact that had the court refused to order the examination , the respondents would have been seriously prejudiced. In this case a proper notice may still be issued as long as it accords with the wording and purpose of the rule. There is no time period provided in paragraph 2 of the respective notices. There is no reference that those medical records are relevant to the assessment of the damages which are the subject of the action . The "all medical records" is so overbroad that it goes beyond the period of the action itself (from birth to date). If the third applicant once fell and injured his toe at creche when he was three years old , what relevance would those medical records have to assessment of damages in this action ? What relevance would T[....]'s neonatal or dental medical records have to this litigation?

[33] The request amounts to what is usually referred to as "a fishing expedition". In essence , the request places the applicants at the mercy of the respondents who simply want to fish for anything and everything that they could find from any medical records available throughout the country. That is clearly not the intention of the rules, and , in particular, rule 36(4). In this case, unlike in the *Mann* case, above, the interests of justice dictate that there can be no legitimate demand for all medical records of a litigant whether they are relevant to the assessment of damages or not.

[34] I agree with the submission that in interpreting the notice one must follow the *Endumeni* principles of interpretation, however, in the context of the impugned notices , giving them a generous interpretation (namely , directing production of all medical records) would affect the constitutional rights of the applicants and T[....]. That is not what is envisaged in the *Endumeni* judgment. Further , by giving the notices a generous interpretation as contended for by the respondents, I will be extending the territory of the notice , way beyond what is envisaged in rule 36 (4). I am satisfied that the request for" all medical reports or documents" is too broad and the notices in their present form cannot be saved

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examination to determine the suitability of the respondent as the custodian parent of the minor children.

even by the court's inherent power.

[35] I agree with Mr Kaplan that a request for all the medical records is invasive and would tamper with the applicants and T[....]'s right to privacy and dignity. The request is not based on relevance and for that reason it is contrary to the purpose of the rule and thus irregular.

Does Rule 36 (4) envisage inspection of medical records?

[36] First, Rule 36(4) , makes no provision for inspection and in this regard the notice is not consistent with the provisions of the rule. Second, the rule does not entitle a requestor to all medical records of a claimant. It allows the request only in relation to those medical records that are germane to the assessment of damages. I have dealt fully with the second point , above.

[37] As aforementioned , paragraph 2 in respect of each notice , requests inspection of fill medical records relating to the applicants and T[....] , without any qualification of 'relevance'.

[38] There is a specific rule which provides for inspection processes and that is rule 36(6). As is apparent from that rule it makes no reference to medical reports. If it did , in my view, it would mean that , a party may issue a notice such as the one impugned herein and simply seek to inspect medical records of another litigant, without specifying whether or not they are relevant to the litigation. That inspection would , in my view, have a wide ranging effect as it would cover any period and the requestee would lose control over his or her own medical records. That, as I see it, may be the reason that the inspection rule , (rule 36 (6)) does not include medical records. An inspection by its very nature gives control of the process to the party conducting the inspection. He or she will decide what he or she finds useful for his or her case . That could not have been the intention of those who drafted the rules relating to medical records. I accordingly find that the applicant's objection that the relevant rule does not provide for inspection has merit. The two notices , therefore , on this basis alone, are irregular.

[39] The respondents contend that the applicants are being technical by not complying with paragraphs 1 and 3 of each notice , since those were not objected to. In paragraph 3 of the second notice the applicants are requested *"to furnish the second and third defendants at their cost, which costs are hereby tendered, with copies of <u>all</u> medical reports in their possession relating to the late T[....] K[....].' (my underlining).* In my view, this paragraph , although not objected to, falls within the objection raised relating to the privacy of T[....]. It is similar to the request made in paragraph 2 , as it relates *to* copies of all medical reports in their possession relating to T[....], and is similarly overbroad.

[40] The respondents contend that these notices cannot be properly construed as hindrances to the conducting of further litigation which is what Rule 30 notices in respect of irregular proceedings are aimed at preventing. In this regard they relied on *SA Metropolitan Lewensversekeringmaatskapy Bpk v Louw NO*[15]. In the same paragraph relied upon by the respondents in the *Louw case* , above, the Court held , *inter alia,* that " *A party who takes a procedural step which advances the finalization of the case may not, unless he is unaware of the irregularity, ask for the setting aside of the relevant irregularity."* That is not the case herein . The notice in terms of Rule 30 which preceded this application was issued timeously and adequate time frames were afforded to the respondents. Any request for all medical records from birth to date in respect of all the three applicants and T[....] , would cumbersome and until it is consistent with the provisions of rule 36 (4) , it would continue to hinder progress in the action. It would cause the applicants to be in the same position as Mr Wixley in Beinash v Wixley [16]where Mahomed CJ remarked about an impugned subpoena as follows:

> *"The first is the generality and wide ambit of the demands contained in the subpoena. The language used is of wider possible amplitude, including within its sweep every conceivable document of whatever kind, however remote or tenuous be its connection to any of the issues which require determination in the main proceedings ...*
>
> *The second conspicuous feature is that it is left to Wixley to make* a *judgment*

[15] SA Metropolitan Lewensversekeringmaatskapy Bpk v Lauw NO 1981 (4) SA 239 (0) at 333 G-H.
[16] 1997 (3) SA 721 SCA @ 735 para C,G&H.

as to what he should or should not produce. He has continually to carry the risk of criminal sanctions in making that judgment. The impugned subpoena does not identify the particular documents which Wixley is required to produce. It leaves it to him to search and determine how any of/he thousands of documents involved might or might not be related in some direct or indirect way to 'matters' which appear to concern Beinash. It must be oppressive to put a witness who is not even a party to the main proceedings under this kind of very generalized and onerous duty".

[41] The remarks made by the Chief Justice in the Beinash case apply equally herein. To expect the applicants to trawl through all of their medical records over many years without any indication of relevance to the damages claim will be onerous.

[42] I reject the submission that the applicants should have complied with paragraphs 1 and 3 . It is incumbent upon the requester to make the request clear , simple and in line with the wording and purpose of the rule.

[43] I am satisfied that the applicants have made out a case for the relief they seek . It follows that both notices are irregular and should be set aside.

Costs

[44] The applicants are seeking costs on an attorney and client scale on the basis that the respondents could have removed the cause for complaint and thus prevented the launching of the application. The applicants were obliged to approach this court for relief .They have not succeeded in all of the objections they raised ,as shown in this judgment. It is for that reason that I am not disposed to accede to Mr Kaplan's request that costs should be paid on an attorney and client scale. Based on the findings , made above, that the notices are irregular and are liable to be set aside , the applicants have achieved substantial success. There is no reason to depart from the general rule that costs should follow the result.

[45] **make the following Order** :

45.1 The two notices delivered by the respondents , in terms of Rule 36 (4) dated 19 November 2021, are declared irregular and are accordingly set aside.

45.2. The second and third respondents are ordered to pay costs of this application.

T.V NORMAN
JUDGE OF THE HIGH COURT

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Date of Hearing **15 SEPTEMBER 2022**

Date of Delivery **01 NOVEMBER 2022**