



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division, Kimberley)**

Case number:	1342/2014
Date heard:	26/06/2020
Date delivered:	08/01/2021

In the matter of:

SOPHIA ERASMUS N.O.

Plaintiff/Respondent

and

THE MEC FOR HEALTH, NC PROVINCE

Defendant/Applicant

Coram: Van Tonder, AJ

JUDGMENT

VAN TONDER, AJ

[1] This is an application by the defendant in terms of Rule 35 for an order in the following terms:-

- 1.1 Compelling the respondent to furnish a reply to the Applicant's notice in terms of Rule 35(3) dated 21 April 2020 within ten (10) days of the delivery of

the aforementioned order on the respondent's attorney of record;

- 1.2 Authorising the applicant's attorneys of record to attend to the delivery of the order;
- 1.3 Directing the respondent to pay the costs of this application; and
- 1.4 Granting the applicant further and/or alternative relief as the above Honourable Court may deem fit.

[2] For ease of reference the parties are throughout referred to as in the action.

[3] The plaintiff, Patrick Gert Erasmus, instituted action against the defendant (as first defendant) and one Dr Kruger as second defendant during 2014.

[4] The plaintiff had recently passed away, and is currently represented by Sophia Erasmus N.O. in her capacity as executrix of the estate of the late Patrick Gert Erasmus, in respect of his remaining claim for past medical expenses and general damages.

- [5] The plaintiff's claim against Dr Kruger emanated from the fact that on 13 November 2012, Dr Kruger put a rubber band around the big left toe of the plaintiff to create a bloodless field when he extracted the plaintiff's toenail.
- [6] According to the plaintiff Dr Kruger failed to remove the rubber band and it was left on for 3 days, resulting in gangrene to develop that necessitated the amputation of the plaintiff's left big toe.
- [7] On 20 November 2012 Dr Kruger diagnosed that the toe was gangrenous and immediately referred the plaintiff to Kimberley Hospital, where he was admitted (under the care of the defendant).
- [8] After a series of unfortunate events, the plaintiff's left leg was ultimately amputated above the knee on 6 February 2013.
- [9] In the initial summons (dated 5 August 2014) the plaintiff claimed damages in an amount of R2 000 000-00 from the defendants jointly and severally, the one paying the other to be absolved.

[10] On the 26th of January 2017, the plaintiff and Dr Kruger entered into an agreement in terms of which the plaintiff accepted an undisclosed amount of money from Dr Kruger in settlement of his claim against Dr Kruger, and the case against Dr Kruger was withdrawn.

[11] The matter proceeded against the (first) defendant and the matter went to trial during the first half of 2017. At the commencement of the trial the parties agreed to separate the merits from the *quantum* in terms of Rule 33(4) of the Uniform Rules of Court.

[12] The issue for determination at the trial on the merits was enunciated by Mamosebo J, in her judgment delivered on 13 September 2017, as follows:

"[2] The issue that falls for determination is whether the MEC (Kimberley Hospital) was negligent, and if so, whether such negligence can be causally linked to the damages suffered by Mr Erasmus."

[13] In her judgment Mamosebo J, found in favour of the plaintiff, and made *inter alia* the following order:

"[54] In the result the following order is made:

1. The first defendant, the MEC: Health, Northern Cape Government, is ordered to pay all damages that the plaintiff, Mr Patrick Erasmus, will be able to prove in due course that was caused to the plaintiff by the defendant's failure to render adequate medical services to the plaintiff during the period of 20 November 2012 to 06 February 2013 that led to the loss of the left leg of the plaintiff above the knee."

[14] On the 14th of November 2019, the matter was set down for trial in respect of the *quantum* on the roll of the 26th of June 2020.

[15] On the 3rd of June 2020, the defendant proceeded with the application to compel as referred to above, which was initially set down for the 12th of June 2020, but after it became opposed, on the said date it was postponed to the 26th of June 2020 for argument.

[16] The defendant's application to compel was as a result of the plaintiff's failure to reply to the defendant's Rule 35(3) notice that was electronically served on 21 April 2020.

- [17] In the Rule 35(3) notice the defendant requested the correspondence between the plaintiff's attorney and Dr Kruger's attorneys until such date as the action was withdrawn and documentation including correspondence between the plaintiff's attorneys regarding the settlement of the action by Dr Kruger and the settlement agreement between the plaintiff and Dr Kruger which recorded the terms of the settlement of the action with Dr Kruger.
- [18] The plaintiff did not file an answer to the defendant's Rule 35(3) notice, as the plaintiff contend that defendant's erstwhile attorneys had already filed a notice in terms of Rule 35(3) on the 20th of August 2018, requesting full particulars of the settlement between the plaintiff and Dr Kruger including any settlement agreement, to which notice the plaintiff had already formally replied to.
- [19] In the plaintiff's affidavit in terms of Rule 35(3), which was served on the 11th of September 2018, the plaintiff had stated that the settlement agreement has a confidentiality clause, and that the document is privileged, wherefore the plaintiff would only provide a copy thereof to the defendant, in the event of Dr Kruger relinquishing the confidentiality clause. The plaintiff proceeded to attach a copy of the settlement agreement to the plaintiff's answering affidavit, in respect of the

application to compel, with the references to the amount that was paid as compensation redacted.

[20] The defendant alleges that he requires the documents requested as it goes to the heart of the issue of *quantum*, especially in circumstances where the plaintiff has passed away, and the *quantum* of the claim is limited to the past medical expenses and general damages.

[21] The defendant contends that the plaintiff's failure to provide the documentation is hampering the defendant in the quantification of the plaintiff's claim, and his preparation for trial.

[22] The defendant sets it out in his founding affidavit, as follows:

"The documents which the defendant seeks in the Rule 35(3) notice are relevant to the issues which must be determined between the parties and are relevant to the narrowing of the issues between the parties. The defendant is entitled to be informed, with sufficient precision, the extent to which the deceased has been compensated for his damages in order to be placed in a position to properly quantify the deceased's damages and make an appropriate Rule 34 tender (if applicable at all)."

[23] The plaintiff contends that the defendant is precluded from issuing a Rule 35(3) notice in April 2020 for the same documents that it issued a Rule 35(3) notice for in August 2018 to which notice the plaintiff had formally applied to under oath, and which was not followed by an application in terms of Rule 35(7) as the defendant ought to have done.

[24] In his replying affidavit, the defendant relies on the provisions of Rule 35(11) in terms of which the court has a discretion to order the production of the required documents.

[25] The plaintiff however argued that the defendant had elected not to proceed with an application in terms of Rule 35(11), wherefore the defendant cannot rely on the powers of the court in terms of Rule 35(11) to support its application in terms of Rule 35(7).

[26] In the matter of **Eke v Parsons 2016 (3) SA 37 (CC)** at page 53 the Constitutional Court has held the following:

"...Without doubt, rules governing the court process cannot be disregarded. They serve an undeniably important purpose. That, however, does not mean that courts should be detained by the rules to a point where they are hamstrung in the performance of the core function of dispensing justice. Put differently, rules should

not be observed for their own sake. Where the interests of justice so dictate, courts may depart from a strict observance of the rules. That, even where one of the litigants is insistent that there be adherence to the rules. Not surprisingly, courts have often said "[i]t is trite that the rules exist for the courts, and not the courts for the rules".

[40] Under our constitutional dispensation, the object of court rules is two-fold. The first is to ensure a fair trial or hearing. The second is to "secure the inexpensive and expeditious completion of litigation and . . . to further the administration of justice". I have already touched on the inherent jurisdiction vested in the superior courts in South Africa. In terms of this power, the High Court has always been able to regulate its own proceedings for a number of reasons, including catering for circumstances not adequately covered by the Uniform Rules, and generally ensuring the efficient administration of the courts' judicial functions."

- [27] In view of the contradictory views of the plaintiff and the defendant on whether the contents of the settlement agreement ought to be provided to the defendant or not, the court will in any event have to make a ruling thereon, which ought to be done sooner rather than later, in order to finalise the matter expeditiously.

THE PARTIES' CONTENTIONS

- [28] The defendant contends that in view of the fact that the plaintiff claimed damages from the defendant and Dr Kruger jointly and severally, the information as to the amount in which Dr Kruger compensated the plaintiff is

relevant and necessary, as this amount stands to be deducted from the plaintiff's claim against the defendant.

[29] If the amount in which Dr Kruger compensated the plaintiff exceeded the amount claimed from the defendant, namely R2 000 000-00, the aforesaid compensation would have effectively extinguished the plaintiff's claim against the defendant.

[30] At the beginning of his argument Mr Reynders indicated that the defendant was not aware of the fact that the plaintiff had in fact amended its particulars of claim during 2018, and that the amended particulars of claim was served and filed on 23 August 2018. He indicated that he was handed a copy of the said amended pages shortly before the commencement of the matter.

[31] The amended particulars of claim had removed any mention of Dr Kruger as second defendant, and throughout only referred to the claim as against the defendant, based on the negligence of the staff at Kimberley Hospital after the 20th of November 2012.

[32] Adv Reynders argued that the said amendment did not detract from the fact that the plaintiff had initially instituted its action against the defendant and Dr Kruger jointly and severally, and that at the time that the settlement agreement was entered into, the pleadings at the time still referred to the claim against both defendants jointly and severally. He furthermore argued that in view thereof, the plaintiff and Dr Kruger were fully aware that any amounts paid to the plaintiff would be relevant in respect of the plaintiff's claim against the defendant.

[33] Mr Botha on behalf of the plaintiff however argued that the confidentiality clause of the agreement had to be respected, as the failure to do so, would effectively negate and nullify such agreements entered into between doctors and patients.

[34] Especially in view of the fact that such agreements are entered into to pay compensation, expressly without any admission of negligence and liability, and with the amount in question remaining confidential and not to be divulged to any other party. If the confidentiality of the contents of such agreements are not upheld, it will be detrimental to the whole manner in which professional

indemnity insurers regularly settle such claims against doctors.

[35] Adv Botha on behalf of the plaintiff also argued that the plaintiff's claims against the defendant and Dr Kruger are two separate and distinct claims, which differ in time and substance.

[36] The claim against Dr Kruger emanated from his negligent treatment since the 13th of November 2012, which resulted in gangrene that had necessitated the amputation of the plaintiff's left big toe. His treatment of the plaintiff then ceased on the 20th of November 2012, when he referred the plaintiff to the Kimberley Hospital.

[37] The claim against the defendant emanated from the fact that the employees of the defendant took over the treatment of the plaintiff on the 20th of November 2012, and which negligent treatment ultimately led to the plaintiff's left leg being amputated above the knee on the 6th of February 2013, with the result that the plaintiff was confined to a wheelchair for the remainder of his life.

- [38] Adv Botha furthermore argued that the defendant did not rely on the provisions of the Apportionment of Damages Act, 34 of 1956 or plead contributory negligence on the part of Dr Kruger, and did the defendant also not join Dr Kruger as a joint wrongdoer in terms of Rule 13, either before or after the case against Dr Kruger was withdrawn.
- [39] In view thereof, he argued that there was no basis upon which the defendant was entitled to simply deduct the amount received from Dr Kruger, in respect of the plaintiff's claim against the defendant, as the defendant intended.
- [40] He also argued that the fact that the settlement entered into between the plaintiff and Dr Kruger was in respect of general damages prior to 20 November 2012, as well as future medical expenses and legal costs, made it impossible to set off the amount against the defendant's liability for past medical expenses after 20 November 2012, as well as general damages.
- [41] In view of the aforesaid arguments, the plaintiff contended that the amount received by the plaintiff from Dr Kruger, was therefore not only confidential but also

irrelevant in respect of the finalisation of the plaintiff's claim against the defendant.

[42] Mr Botha also argued that, even if the court were to find that the amount received in settlement was relevant to the proceedings, the court should exercise its discretion against the discovery of the document and the information therein. In this regard he relied on the matter of **Venmop 275 (Pty) Ltd & Another v Cleverlad Projects (Pty) Ltd & Another**.¹

THE RELEVANCE OF THE INFORMATION SOUGHT

[43] The object of discovery was described by Tredgold J in the matter of **Durbach v Fairway Hotel Limited**, as follows:

*"A party is required to discover every document relating to the matters in question, and that means relevant to any aspect of the case. This obligation to discover is in very wide terms. Even if a party may lawfully object to producing a document, he must still discover it. The whole object of discovery is to ensure that before trial both parties are made aware of all the documentary evidence that is available. By this means the issues are narrowed and the debate of points which are incontrovertible is eliminated."*²

¹ Venmop 275 (Pty) Ltd & Another v Cleverlad Projects (Pty) Ltd & Another 2016 (1) SA 78 (GJ) at p 93

² Durbach v Fairway Hotel Limited 1949 (3) SA 1081 (SR) at 1083

[44] The broad meaning ascribed to relevance is circumscribed by the requirements in both subrules (1) and (3) of Rule 35, namely that the document must be one “*relating to*” (35(1)) or which “*may be relevant to*” (35(3)) any matter in question which in turn is determined from the pleadings.³

[45] Joffe J in his aforesaid judgment in the matter of **Swissborough Diamond Mines v Government of the RSA** referred to the test for relevance as follows:

"The requirement of relevance, embodied in both subrule 35(1) and 35(3), has been considered by the courts on various occasions. The test for relevance, as laid down by Brett LJ in Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co (1882) 11 QBD 55, has often been accepted and applied. See, for example, the full bench judgment in Rellams (Pty) Ltd v James Brown & Hamer Limited 1983 (1) SA 556 (N) at 564A, where it was held that:

"After remarking that it was desirable to give a wide interpretation to the words 'a document relating to any matter in question in the action', Brett LJ stated the principle as follows:

'It seems to me that every document relates to the matter in question in the action which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly" because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document

³ Swissborough Diamond Mines v Government of the RSA 1999 (2) SA 279 (T) at 316-317

*which may fairly lead him to a train of enquiry which may have either of these two consequences."*⁴

[46] The learned Judge also referred to the well-established principle that:

"It is well-established law that courts are reluctant to go behind a discovery affidavit, which is prima facie taken to be conclusive. In Marais v Lombard 1958 (4) SA 224 at 227G it was held that

"when a party making discovery has sworn an affidavit as to the irrelevancy of certain documents, the Court will not reject that affidavit unless a probability is shown to exist that the deponent is either mistaken or false in his assertion ..."

This approach was held in Richardson's Woolwasheries Ltd v Minister of Agriculture 1971 (4) SA 62 (ECD) at 67C-F to be also applicable when possession, as opposed to the relevance of a document, is in issue. In Continental Ore v Highveld Steel & Vanadium Limited supra the following was held at 597E-H:

*"It has further been held in a series of cases before the enactment of the present Rules that when a party to an action refuses to make discovery of or to produce for inspection any documents on the ground that they are not relevant to the dispute, the Court is not entitled to go behind the oath of that party unless reasonably satisfied that the denial of relevancy is incorrect. Caravan Cinemas (Pty) Ltd v London Film Productions 1951 (3) SA 671 (W) per Murray AJP at 675-77. The affidavit denying relevance is generally taken as conclusive, and the Court will not reject it unless a probability is shown to exist that the deponent is either mistaken or false in his assertion. Marais v Lombard 1958 (4) SA 224 (E) per O'Hagan J at p 227G; Lenz Township Co (Pty) Ltd v Munnick and others 1959 (4) SA 567 (T) per Williamson J at 572-573. See also the authorities collected in Federal Wine and Brandy Co Ltd v Kantor 1958 (4) SA 735 (E) at 745-748, a judgment of Wynne J, which was described in the Lenz case (at p 573) as a veritable thesaurus of the decision on discovery."*⁵

⁴ Swissborough Diamond Mines v Government of the RSA supra at 316 E-G

⁵ Swissborough Diamond Mines v Government of the RSA supra at 317E-I

[47] As stated by Mamosebo J, in her judgment against the defendant on the merits:

"[45] It must be borne in kind that the claim against the MEC is compensation for damages suffered as a result of the amputation of his left leg above the knee and based on contract or alternatively, on delict. The MEC has not pleaded contributory negligence."

[48] As appears from the aforesaid judgment, in respect of the merits of the plaintiff's claim, no mention was made of any possible contributory negligence on the part of Dr Kruger. This much is also confirmed by the learned Judge's formulation of the dispute between the parties:

"[1] ... The hearing proceeded against the MEC for health only since the dispute between the plaintiff and the second defendant, Doctor Kruger, was settled out of court and Mr Erasmus withdrew the case against him."

[2] The issue that falls for determination is whether the MEC (Kimberley Hospital) was negligent, and if so, whether such negligence can be causally linked to the damages suffered by Mr Erasmus."

[49] The learned Judge also stated the following regarding the case against Dr Kruger:

"44.1. It is common cause that Erasmus had pain on the left toe for which he consulted Dr Kruger. While the case against Dr Kruger was settled and was not before me, I take judicial notice of the settlement even though I was not privy to the contents."

[50] The question then arises, on what basis is the defendant entitled to the details of the settlement agreement and specifically the amount (and possible set-off) thereof, and on what basis does it stand to be taken into account when establishing the *quantum* of the plaintiff's claim against the defendant?

[51] As a result of the aforesaid, I find the plaintiff's argument very persuasive that in view of the fact that the defendant did not rely on the provisions of the Apportionment of Damages Act, 34 of 1956, or pleaded contributory negligence on the part of Dr Kruger, or joined Dr Kruger as a joint wrongdoer in terms of Rule 13, the details of the settlement agreement is not relevant to the plaintiff's claim against the defendant.

[52] Is the fact that the plaintiff had initially instituted action for damages against the defendant and Dr Kruger jointly and severally sufficient to establish that the details and amount of the settlement agreement need to be taken

into account in respect of the *quantum* of the claim against the defendant?

- [53] Also having regard to the fact that the initial particulars of claim were in any event amended subsequent to the settlement and withdrawal of the claim against Dr Kruger, without any objection thereto by the defendant.
- [54] However, even if cognisance is taken of the initial particulars of claim, prior to its amendment, the damages claimed against Dr Kruger and the defendant is therein expressly pleaded with regard to two separate sets of fact.
- [55] The claim against Dr Kruger stems from the breach of an agreement *alternatively* delict by way of his negligent treatment of the plaintiff's septic ingrown toenail which led to gangrene setting in in his left toe, that ultimately resulted in the amputation of his left toe. Dr Kruger's treatment ceased on the 20th of November 2012, when he referred the plaintiff to Kimberley Hospital where the plaintiff was then admitted.

[56] The claim against the defendant stems from the breach of an agreement *alternatively* delict by way of the employees of Kimberley Hospital's negligent treatment of the plaintiff's gangrenous left toe, after his admission on the 20th of November 2012, as well as the failure to timeously amputate his left toe, that ultimately resulted in the amputation of his left leg above the knee on 6 February 2013.

[57] In the matter of **Minister of Communications and Public Works v Renown Food Products** 1988 (4) SA 151 (CPD) at 153 D-H the following was stated in respect of joint wrongdoers:

"Section 2(1) of the Apportionment of Damages Act provides as follows:

'Where it is alleged that two or more persons are jointly and severally liable in delict to a third person (hereinafter referred to as the plaintiff) for the same damage, such persons (hereinafter referred to as joint wrongdoers) may be sued in the same action.'

To fall within that Act the two defendants must have caused the same damage. There is no evidence in the present case, nor was it suggested in argument, that the two defendants in fact caused the same damage.

...

The normal rule is that, where separate wrongdoers each cause separate damage to the plaintiff, at common law each can be held

liable for the damage which he has caused. This appears from the judgment of Van Winsen AJA in Makwanazi v Van der Merwe and Another 1970 (1) SA 609 (A) at 622B-D. Mr Kirk-Cohen argued that the Makwanazi case was distinguishable from the present case because of the time separation between the two collisions in Makwanazi's case as opposed to the time separation of one or two seconds in the present case. It is correct that such a distinction does exist but whether the time separation be ten minutes or a few seconds the principle, to my mind, remains the same, namely that where two separate acts of negligence have caused different damage and resultant loss to a plaintiff each defendant will be liable at common law only for such damage and loss as he himself has caused. There is nothing in the Apportionment of Damages Act which detracts from that position."

[58] In view of the aforesaid, I am of the view that the defendant had failed to establish that the amount of compensation agreed upon between the plaintiff and Dr Kruger, is relevant to the *quantum* of the plaintiff's claim against the defendant.

THE EFFECT OF THE CONFIDENTIALITY CLAUSE OF THE AGREEMENT ON THE EXERCISE OF THE COURT'S DISCRETION

[59] Even if I were wrong in the aforesaid finding, and the information sought was indeed relevant to the *quantum*

of the plaintiff's claim against the defendant, then the court still has a discretion to order or refuse discovery, notwithstanding that the documents sought are relevant.

[60] As set out by Peter AJ, in the matter of **Venmop**:

*"[30] Mr Segal, who appeared for Venmop, submitted that where the documents are relevant there is no longer a discretion to order compliance with the rule; an order of compliance ought to follow as a matter of course. The import of such submission is that where the documents are not relevant the court retains a discretion to order compliance with the rule on discovery. I cannot agree with the submission on three bases. First, the case authority referred to above suggests the discretion to refuse discovery of documents, notwithstanding that they are relevant. Secondly, rule 35 requires a party to make discovery of relevant documents. Compliance with the rule requires the discovery of relevant documents. Where the documents are not relevant, ordering a party to make discovery or produce such documents cannot be said to be ordering compliance with rule 35 in circumstances where there has been a failure to give discovery in terms of the provisions of subrules 35(1) to 35(6). Thirdly, it is difficult to conceive of a situation where the discretion would be exercised to order a party to give discovery of irrelevant documents. In my view the discretion in rule 35(7) is predicated on the documents, in respect of which discovery is sought, being relevant."*⁶

⁶ Venmop 275 (Pty) Ltd & Another v Cleverlad Projects (Pty) Ltd & Another 2016 (1) SA 78 (GJ) at 93E-H

[61] In exercising this discretion, the argument of Adv Botha that the consequences of an order being granted to discover the information regarding the settlement amount, would have a severely detrimental effect on future settlement agreements, bears further scrutiny.

[62] Especially with regard to such agreements being entered into, expressly without any admission of negligence and liability, and with the amount in question remaining confidential and not to be divulged to any other party. As well as what the effect of such an order would be on the whole manner in which professional indemnity insurers regularly settle professional negligence claims against doctors.

[63] In the matter of **Spies v Vorster**, Bale C.J. dealt with an appeal against an order made against the proprietor, printer and publisher of a tri-weekly newspaper, who was ordered to disclose the name and address of the writer of an anonymous letter, which had appeared in the newspaper, and which was allegedly defamatory.⁷

[64] He remarked as follows:

⁷ Spies v Vorster (1910) 31 NPD 205

"There are, apart from authority, objections in principle against such a disclosure. Newspapers have long been the medium for the ventilation of public or private grievances by letter or otherwise, sometimes anonymously and sometimes bearing the author's name. The proprietor, printer, and publisher of the newspaper are all liable for any defamatory matter so given to the public. The responsibility for any injurious statements which have been sown broadcast is rightly theirs. They are not entitled to shelter themselves behind anonymity, nor by modern practice are they freed from liability upon disclosure, though possibly the amount of damages might be reduced. If the writer's identity be known he too can be made liable, but it would, we think, strike at the root of the modern idea of journalistic ethics, and in our opinion contrary to law and just principles, if the offending proprietor could be made to disclose the name of the contributor who has confided in his discretion and so shift responsibility upon the latter, who might be an impecunious person. The editor is the recognised medium between the contributor and the public, and he is supposed to know what may and what may not safely be given to the world, and the proprietor of the paper takes responsibility for what is published. If he does his duty, he will either suppress altogether or remove the sting from any defamatory matter, and no tangible harm is done. It is right that the burden should be cast upon him rather than upon the unknown contributor. **If an editor were bound to disclose the name of his correspondent there would be an end of confidential relationship between correspondent and newspaper which has existed for generations, to the advantage of the public, and many an abuse would go unremedied and many a grievance unredressed because those who knew, for reasons good or bad, were unwilling or unable to allow their names to be published.** However much it may be abused, as it often is, to air personal grievances and to injure, there can be no doubt that many anonymous communications have been the means of effecting valuable and wide-reaching reforms. **A decision in favour of the applicant if applied in other cases might lead to very serious consequences and do much to restrain freedom of communication and breeds suspicion and distrust. Its application to other causes of action might destroy that freedom of communication which is so essential to comfort and well-being.** It might give occasion for applications grounded merely on well-founded suspicions."⁸

(Own emphasis added)

⁸ Spies v Vorster (1910) 31 NPD 205 at 217-218

[65] When a claim of confidentiality is made over information that is sought to be discovered, considerations of fairness arise, as formulated by Deputy Chief Justice Moseneke in as follows:

"[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: 1980 (3) SA 1093 (W)

*"[A conflict arises] between the need to protect a man's property from misuse by others, in this case the property being confidential information, and the need to ensure that a litigant is entitled to present his case without unfair halts. And, although the approach of a Court will ordinarily be that there is a full right of inspection and copying, I am of the view that our Courts have a discretion to impose appropriate limits when satisfied that there is a real danger that if this is not done an unlawful appropriation of property will be made possible merely because there is litigation in progress and because the litigants are entitled to see documents to which they would not otherwise have lawful access. But it is to be stressed that care must be taken not to place undue or unnecessary limits on a litigant's right to a fair trial, of which the discovery procedures often form an important part."*⁹

[66] The conflict between the defendant's right to discovery, must therefore be weighed against the plaintiff's (and Dr Kruger's) right to confidentiality, with fairness to the parties being the overriding factor.

[67] The consideration of the two opposing rights have been phrased in the following manner by Patel J:

⁹ Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masethla v President of the RSA & Another 2008 (5) SA 31 (CC) at 42D-G also reported as 2008 (8) BCLR 771 (CC) at par 27

*"In event of a challenge a court will only order production of documents for inspection if this is necessary either for disposing of the matter or for saving costs. The burden of proof must be on the party making the challenge. The court has a discretion to order production, which discretion must be exercised judicially. A court will in each case have to strike a balance between the importance of ordering production, from the point of view of doing justice or saving costs in the proceedings in question, and respecting confidentiality. A distinction must be drawn between confidentiality as between the immediate parties to the litigation and confidentiality involving third parties. In my view the discretion to refuse production of documents should most commonly be applied where disclosure would breach confidentiality involving a third party. See Science Research Council v Nassé [1980] AC 1028."*¹⁰

- [68] In view of the effect that an order compelling the plaintiff to provide the defendant with the information sought, would have on future settlement agreements being entered into, (specifically entered into expressly without any admission of negligence and liability, and with the amount in question remaining confidential and not to be divulged to any other party) I would exercise my discretion against the defendant.

¹⁰ Santam v Segal 2010 (2) SA 160 (NPD) at 164J – 165C

[69] In the circumstances of the present matter, it is difficult to fathom any unreasonable prejudice that the defendant would suffer if the order compelling discovery is refused, whereas immense prejudice would be suffered by Dr Kruger, and to a lesser extent the plaintiff, if an order compelling discovery is granted, which order would effectively destroy the confidentiality of the settlement agreement and negate the whole purpose and object of entering into such an agreement.

COSTS

[70] Although the plaintiff asked for a punitive cost order against the defendant by way of attorney and client costs, I am not persuaded that a punitive cost order is warranted herein.

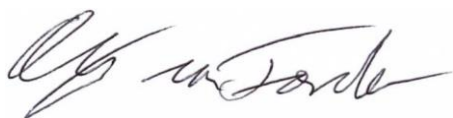
[71] There is nothing to detract from the trite principle that the successful party is normally entitled to his costs, wherefore the costs will follow the result herein.

CONCLUSION

[72] Wherefore I make an order in the following terms:-

1. The defendant's application is dismissed.

2. The costs of the application are to be paid by the defendant.



AG VAN TONDER
ACTING JUDGE

On behalf of the Applicant/Defendant:	Adv. S.J.Reynders SC (oio Robert Charles Attorneys)
On behalf of Respondent/Plaintiff:	Adv. C.H. Botha (oio Elliott, Maris, Wilmans & Hay)