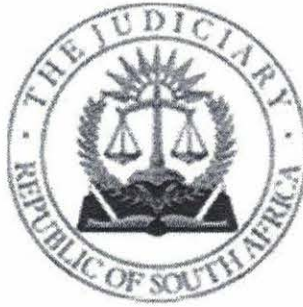




IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED
DATE:	6/3/2018
SIGNATURE:	<i>[Signature]</i>

6/3/18

Case No. 41629/2014

In the matter between:

MARASIRO, RUDO PRESCILLA

APPLICANT

and

**MEMBER FOR THE EXECUTIVE COUNCIL
FOR HEALTH GAUTENG**

RESPONDENT

JUDGMENT

MILLAR AJ

1. The applicant applied to compel the respondent to deliver a proper response to a request for further particulars for purposes of trial, in terms of rule 21 of the uniform rules of court.
2. The main action, in which the applicant is the plaintiff and the respondent the defendant, is one for damages arising out of the alleged negligence of the respondent and its employees at the time of the birth of the applicant's minor child.
3. The minor child is profoundly disabled and will never be able to live independently. The outcome of action is accordingly one of great importance to the applicant and to the interests of the minor child.
4. The main action was set down for trial and pursuant thereto the respondent delivered three expert medico legal reports shortly before the trial. It is the contents of these reports that prompted the applicant to request further particulars for trial.
5. The present application is the result of attempts over the period June 2016 to September 2016 on the part of the applicant to obtain the particulars she sought. A first request was delivered on 2 June 2016 and a reply delivered on 28 September 2016. The reply was inadequate and so on 30 September 2016, the applicant delivered a further request in

which she set out which of the particulars she asserted had been properly replied to and which not.

6. The particulars still sought, in the main relate to the identity of persons who treated the minor or wrote or completed forms which comprise the medical records relating to the birth of the minor child. So, for example paragraph 2 of the request read:
"Defendant is required to identify which of the above personnel completed (wrote down) the following entries appearing in the records, as this information does not legibly appear therein. For ease of reference, the page number of the documents bundle is noted and a paginated copy thereof is attached hereto to avoid confusion. If the person who completed the entry is not the same as the signatory to the entry, the name of the person who completed the entry and also the person who signed the entry is requested. If different persons are involved, a clear indication of each entry is required. Plaintiff will accept clear handwritten notes in red pen/marker alongside respective entries, in order to avoid confusion."
7. The applicant went so far as to draw the respondent's attention to the specific requests where particulars had not been forthcoming and even provided an indication as to why those particulars were necessary – for example in paragraph 5.6 of the request stating *"The relevance of the question is that such observations are indicative of the important issue of 'neonatal encephalopathy'"*
8. The respondents reply to this detailed request was: *"The particularity sought therein amounts to evidence. It is accordingly refused."*

9. The purpose of requesting further particulars for trial is "(a) to prevent surprise; (b) that the parties should be told with greater precision what the other party is going to prove to enable his opponent to prepare his case to combat counter allegations" see *Thompson v Barclays Bank D.C.O* 1965 (1) SA 365 (W) at 369 C-D.
10. Furthermore it was held in *Schmidt Plant hire (Pty) Ltd v Pedrelli* 1990 (1) SA 398 (D) at 402 – 403 that "... the Court is entitled in an enquiry such as the present to go beyond the pleadings and look at the matter forming part of the record such as expert witnesses' summaries and even (as in this case) evidence at an earlier hearing which forms part of the record, since the pleadings alone do not necessarily contain sufficient to determine whether a party may be taken by surprise and what the other party intends to prove in the circumstances referred to in Thompson's case *supra*. Not to have regard to matter such as expert summaries filed of record wherein information sought may be adequately set out would, in my view, be an unduly blinkered approach and not a proper application of the test in Thompson's case since such summaries might well remove the element of surprise and show what is sought to be proved."
11. I am of the view that the identity of parties to documents, particularly where those documents, the medical records in the present case, are to be considered and tested with reference to expert evidence, are not matters for evidence in the sense asserted by the respondent. Even if they were, it would still not entitle the respondent to refuse to furnish the particulars sought. (*Annandale v Bates* 1956 (3) SA 549 (W) at 551.)
12. In its reply to the first request, the respondent did provide some of the particularity sought, which seems to me to overlap with what was not furnished and it is for that reason difficult

to imagine what prejudice there could be to the respondent in furnishing all the particulars requested.

13. The respondent has provided no cogent reason as to why some of the particulars were furnished and others, of the same nature, not. It contented itself to simply state that the applicant must prove the averments of negligence in the main action.
14. The applicant argued for the granting of a punitive costs order in this application. The various previous punitive orders granted against the respondent in the same matter, amounting to hundreds of thousands of Rand were argued, point to *mala fides* and a course of conduct. While that may be, it is not something to be taken into account in the present application. The respondent did reply to the request albeit in a manner that was unsatisfactory to the applicant. The fact that some of the particulars were furnished in the first reply to my mind militates against a finding of *mala fides*.
15. The respondent failed to file any heads of argument or a practice note in this matter. There was furthermore no appearance for the respondent. Counsel for the applicant informed me that heads of argument dated 24 January 2018 had been delivered to his attorney on 28 February. He also attempted, this morning and shortly before the matter was called, to contact counsel, the author of the heads who he was informed was on an airplane flight. Calls to the attorney went to voicemail. In my view the applicant should not have to bear the costs of an opposed application in consequence of the tardiness of the respondent.
16. In the circumstances I make the following order:

- 16.1 The respondent is ordered to furnish the particulars sought by the applicant in paragraphs 2 to 6 (including their respective sub-paragraphs) of the request for further particulars for trial dated 30 September 2016.
- 16.2 The particulars referred to in paragraph 15.1⁶ above are to be delivered within 10 days of the service of a copy of this judgment upon the respondent.
- 16.3 In the event of non-compliance, the applicant is granted leave to apply to this court on the same papers, duly supplemented, for further relief.
- 16.4 The respondent is ordered to pay the costs of this application on the scale as between attorney and client.



A MILLAR
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON: 6 MARCH 2018

JUDGMENT DELIVERED ON: 6 MARCH 2018

COUNSEL FOR THE APPLICANT: ADV B STEYN

INSTRUCTED BY: GARY AUSTIN INC.

REFERENCE:

MR G AUSTIN

COUNSEL FOR THE RESPONDENT:

NO APPEARANCE

INSTRUCTED BY:

MOTHLE JOOMA SABDIA INC.

REFERENCE:

MR T MOTHLE