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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 15914/2021

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
REVISED: YES
DATE 07 APRIL 2026
SIGNATURE

In the matter between:

**THE MEMBER OF THE EXECUTIVE COUNCIL
FOR HEALTH OF THE GAUTENG
PROVINCIAL GOVERNMENT**

Applicant

and

N[...], A[...] N[...]

1st Respondent

MASUKU, PHINDA COMFORT

2nd Respondent

Heard on: 24 March 2026

Delivered on: 07 April 2026

*This judgment was prepared and authored by the Judge whose name is reflected and is electronically circulated to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be **24 March 2026**.*

REASONS FOR COURT ORDER

KEKANA AJ

Introduction

[1] On 24 March 2026, the following order was issued by this Court:

- 1.1 The application in terms of Rule 36(3) is dismissed;
- 1.2 The Applicant is ordered to pay the first Respondent's costs of the application on a scale as between attorney and client, including the costs of 2 (two) counsel on Scale C.
- 1.3 Reasons for this order will follow at a later date.

[2] These are the reasons for that order. This is a special interlocutory application brought in terms of Rule 36(3) of the Uniform Rules of the Court, in which the Applicant (the Defendant in the main action) seeks an order that the first Respondent (first Plaintiff in the main action) should make herself available to be interviewed, medically examined and tested for purposes of a medico-legal examination by the Defendant's obstetrician, Dr Mbokota. The Respondent is opposing the application.

Background

[3] The first Plaintiff in the main action is the biological mother of a 12-year-old N[...] who, due to his lack of capacity, cannot sue alone and in his own name, and his parents are doing so on his behalf. The first Plaintiff has abandoned the initial action she instituted on her own behalf and is currently pursuing an action for and on behalf of her 12-year-old son. N[...] was born on 16 March 2014 in Jabulani Dumane Clinic in Vosloorus and was later transferred to the Natalspruit hospital.

[4] The *fons et origo* was the discovery that N[...] suffers from a global hypoxic ischaemic injury to his brain. The first Plaintiff alleges that this was a result of the negligence of the medical doctor and the nursing personnel employed by the Defendant. The Defendant denied both wrongfulness and negligence. The Defendant served and filed a Rule 36(2) notice, to which the first Plaintiff objected.

[5] For purposes of these current proceedings, the Defendant in the main action will be referred to as the Applicant, and the first Plaintiff in the main action will be referred to as the first Respondent. In this special interlocutory application before me, the Applicant is in terms of Rule 36(3) asking the court to order the first Respondent, the biological mother of N[...], to subject herself to medical examination by the obstetrician and gynaecologist, Dr Mbokota. The first Respondent has objected to the Rule 36(2) notice on the grounds that the medical examination would not result in any medical diagnosis, and that the proposed medical examination would result in the unnecessary violation of the first Respondent's personal privacy and bodily integrity.

[6] The following issues are before this Court:

- (a) whether the first Respondent is a party within the context of Rule 36;
- (b) whether the objections raised by the first Respondent not to subject herself to medical examination are unreasonable and definitely not in the interest of justice.

Submissions by parties

[7] The first Respondent raised an objection to the admissibility of Dr Mbokota's supporting affidavit on the grounds that it was filed late and that she would be prejudiced as a result of it being filed late. Again, that the Applicant did not even attempt to address the late submission thereof. Consequently, the court should not grant condonation for the late filing of the said affidavit.

[8] The Applicant agrees that the supporting affidavit was late, but argues that an explanation is provided for the reasons for lateness in the same affidavit.

[9] The Applicant submits that the first Respondent, as the biological mother of N[...], is a party to the proceedings and, as such, she will be covered by Rule 36 in the context of a party whose state of health is relevant to the proceedings.

[10] The Applicant also submits that the objections raised by the first Respondent not to subject herself to medical examination are not reasonable, material or substantial and definitely not in the interest of justice.

[11] The Applicant further submits that Rule 36 is there to ensure no surprises on the part of the Applicant during trial. To have a clear picture of the issues to enable it to advise the MEC of options available if it were to consider, maybe to settle.

[12] The first Respondent contends that she is instituting these legal proceedings for and on behalf of her minor child, and for that reason, she is not a party in the context of Rule 36; medical examination, if any, will have to be on the minor child and not the biological parent.

[13] The first Respondent also contends that for Dr Mbokota to interview the first Respondent will amount to cross-examination if not interrogation. The first Respondent has already made available a written narrative detailing the events, including the pregnancy and the experiences encountered during the delivery of her son. Non-pregnancy-related health issues of the female reproductive system of the first Respondent at present are not relevant on the first Respondent's pregnancy with N[...], which was more than 11 (eleven) years ago.

[14] The first Respondent further contends that the existing medical reports are sufficient for the Applicant to meet the first Respondent's pleaded case, and there can be no surprises for the Applicant, as it has access to all these medical expert reports.

[15] The first Respondent further contends that Dr Mbokota will not be able to conduct other medical examinations; he will have to source out the services of other medical experts, who are unknown to the first Respondent and who are not specified in the notice, and again, it is not clear which physical examinations are to be conducted. Also, it is not clear what type of blood tests, if any, are to be conducted.

[16] The making of a video, as suggested by the Applicant, while examining the private part of the first Respondent, will amount to a complete invasion of privacy on the part of the first Respondent, for something that is not even necessary.

Legal principle and analysis

[17] The first aspect for determination is the Applicant's late filing of Dr Mbokota's supporting affidavit. The contents thereof required the first Respondent to consult with its own expert so it could deal with the issues raised therein, but because it was filed late, the first Respondent was not able to do so.

[18] It is trite that condonation cannot be for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or the court's directions. Of great significance, the explanation must be reasonable enough to excuse the default¹. No such full explanation was provided by the Applicant for the late filing of this supporting affidavit.

[19] The court noted that the contents of the said affidavit are such that the late filing, if condoned, will prejudice the first Respondent. The standard for considering an application for condonation is the interests of justice. What follows now is the interests of justice, which is regarded as the standard for considering an application for condonation.² With the first Respondent being able to show prejudice on its part, I am of the view that it will not be in the interests of justice to grant condonation for the late filing of the supporting affidavit, the effect being that the case will proceed without any consideration of the supporting affidavit from Dr Mbokota.

[20] Another issue for determination is whether the first Respondent is a party to the proceedings in the context of Rule 36. Rule 36(1) states that:

¹ *Von Abo v President of the Republic of South Africa* [2009] ZACC 15; 2009 (5) SA 345 (CC); 2009 (10) BCLR 1052 (CC) at para 20.

² *Grootboom v National Prosecuting Authority and Another* (CCT 08/13) [2013] ZACC 37 at para 22.

“A party to proceedings, in which damages or compensation in respect of alleged bodily injury is claimed, shall have the right to require any party claiming such damage or compensation, whose state of health is relevant for the determination thereof, to submit to a medical examination.”

[21] It is common cause that the first Respondent is not instituting these legal proceedings in her personal capacity nor for her own benefit but is doing so for the benefit and on behalf of her 12-year-old biological son, who lacks the capacity to do so on his own. It was stated in ***Mokhesi NO, v Demas***³ that:

“Where a father institutes legal proceedings on behalf of his daughter, the summons are not a claim by the father personally for the payment of any damages. He claims purely in his capacity as the father and natural guardian of his biological daughter. The action is her action, and any damages awarded will enure to her benefit and not the benefit of her father”.

[22] In this instance, since the first Respondent is not instituting legal proceedings on her behalf nor for her own benefit, she is not a party to the proceedings. A party to the proceedings is her son, to whom Rule 36 should be applied and not the first Respondent. Reference to “*any party claiming such damage*” and whose state of health is relevant for the determination should be understood to refer to the son.

[23] The crisp issue is whether the objections raised by the first Respondent to the Rule 36(2) notice are unreasonable and not in the interests of justice. Rule 36(2) states that:

“(a) A party requiring another party to submit to a medical examination shall deliver a notice to such other party that—

(i) specifies the nature of the examination required;

(ii) specifies the person or persons who shall conduct the examination;

³ 1951 (2) SA 502 (T).

(iii) specifies the place where and the date (being not less than 15 days from the date of such notice) and time when it is desired that the examination shall take place; and

(iv) requires the other party to submit himself or herself for the medical examination at the specified place, date and time.”

[24] Rule 36(3) states that:

“.....Should the person receiving the notice not deliver an objection within the said period of five days, such person shall be deemed to have agreed to the examination upon the terms set forth by the person giving the notice. Should the person giving the notice regard the objection raised by the person receiving it as unfounded in whole or in part the person giving the notice may on notice make application to a judge to determine the conditions upon which the examination, if any, is to be conducted.”

[25] While the court has to ensure that any Defendant has a right to a fair assessment of the claim, this must be weighed against the constitutional rights of the claimant, particularly their rights to dignity, privacy, and freedom from invasive, unfair questioning. Most importantly, the relief sought by the Applicant must be granted only if there is no other way it can obtain the said information. I agree with Sher J in **Cape Town City v Kotze**⁴ that:

“Where a court is of the view that a medical examination is likely to result in an invasion of a party's personal privacy and bodily integrity in circumstances where this is not necessary and the information can be obtained in another manner, or it will cause the party to suffer undue hardship or inconvenience, or physical, emotional or psychological distress or pain, it should not allow the examination to go ahead...”

⁴ 2017(1) SA 503 at 606.

[26] The court must enquire whether the information to be obtained from the examination cannot be obtained in any other manner. If it is found that it cannot be obtained in another manner, then an order ought to be granted; however, if it is found that it can be obtained in another manner, then the relief sought in terms of Rule 36(3) ought to be refused.

[27] There are several expert reports already in existence. Prof Anthony (obstetrician) was able to formulate an expert opinion from the narrative received from the first Respondent and the MRI report compiled by Dr SO Hagan. There was no physical examination of the first Respondent. Amongst the conclusions made by Prof Anthony is intrapartum hypoxic fetal brain injury; he also reports that an examination 10-years after the fact will be of no assistance. Dr Mbokota should be able to use the same information relied upon by Prof Anthony to medically discard and or challenge Prof Anthony's report and its conclusions, which is what is required to meet the first Respondent's case as pleaded.

[28] If Dr Mbokota, believes that it is difficult for Prof Anthony to make such a conclusion without physical examination, then such may be stated in his own expert report. The Applicant can use the gaps, if any, in Prof Anthony's report to exonerate itself from liability. In paragraph 2.3 of Rule 36(2) notice of Dr Mbokota, it is stated that he intends to deal broadly with the same issues that were dealt with by Prof Anthony. In which case, it is my view that it will be fair, just and equitable for him to use the same information used by Prof Anthony to deal with those issues.

[29] Dr SO Hagan, was able to make conclusions based on the MRI report, confirming a pattern of hypoxic ischaemic injury. Also reporting that this pattern establishes around 36 weeks of gestation onwards, and it was in the chronic stage of evolution at the time of MRI.

[30] Dr Diana Du Plessis, (nursing expert) reports that the first Respondent is a low-risk patient whose blood screening was normal. She reports that the baby was born in severely compromised conditions. That warning signs must have existed, and if the

FHR was assessed ½ hourly during the active phase of labour according to protocol, the midwives would have been alerted to the deterioration in the foetal conditions and called for medical assistance. According to the first Respondent, she was not assessed, and the midwives were uninvolved.

[31] Prof Smith, concluded that it appears that the antenatal period was uncomplicated and that a normal head circumference is a reasonable corollary of brain growth and being normal, and infers that brain growth was probably normal until labour and birth occurred. He also concludes that an early onset neonatal encephalopathy developed, establishing a doorway through intrapartum asphyxia (hypoxic ischaemia), which resulted in the development of neuro disability/cerebral palsy. That foetal distress was probably not timeously detected or managed because of the substandard obstetric practice during labour.

[32] Dr PZ Mteshana, a paediatric neurologist and medical expert for the Applicant, examined N[...] and compiled a report on 12 February 2026. In this report, she concludes that the MRI reported by two experts confirms the acute profound pattern of hypoxic brain injury. Also, any genetic cause of N[...]’s cerebral palsy has been excluded by the Defendant’s own genetic expert.

[33] With such findings from various experts, even by the Applicant’s own medical experts (Dr PZ Mteshana, a paediatric neurologist) who conducted the medical examination on the son, the medical examination of the first Respondent will be an abuse of this Rule. Particularly where the Applicant’s own medical experts also ruled out any genetic cause. With such findings made, a conclusion is strong that the son’s condition or the cause of his condition cannot be traced back to the first Respondent’s state of health. To subject and refer the first Respondent for medical examination will be a complete futile exercise. Henning J in **Durban City Council v Mndovu**⁵ pointed out that:

⁵ 1966 (2) SA 319 (D) at 324 G-H.

“The Rule constitutes a drastic invasion of the Plaintiff’s rights. Our law requires a strict construction to be placed on the provision in question, not only in interpreting the provision but also in ascertaining the intent thereof.”

[34] The very purpose of Rule 36(3) is for the court to assist a litigant to obtain by way of medical examination information that is not currently available, but which is relevant for the determination of the dispute before it. It cannot be correct that the medical examination is undertaken to help the first Respondent, as argued by counsel for the Applicant, to advise the MEC on the appropriate decision to make. The Rule is there to assist litigants not to have any surprises and, most importantly, the court in the determination of the dispute before it.

[35] There is nothing that Dr Mbokota, alone with his limited expertise as an obstetrician and gynaecologist, can do to outwit the already existing multiple medical expert reports from various medical fields. If they were able to formulate expert opinions and produce expert reports, he should also be able to do same without having to subject the first Respondent to medical examination.

[36] The first Respondent states in her affidavit that the written narrative relied upon by these experts contains everything she had to say about the pregnancy, labour and the birth of her son and that there is nothing more she can say. Everything that Dr Mbokota intend to get from interviewing her is already contained in the said written narrative. There will be no surprises; the first Respondent cannot bring new evidence at trial, especially as she has already stated in her affidavit that there is nothing more to say than what is contained in her written narrative. This is 11 years after the fact, and worse, the first Respondent has undergone another pregnancy, resulting in a baby born in 2025.

[37] Again, the Applicant must specify the nature of the medical examination to be done. This is found in the wording used in Rule 36 “*specify the nature of the examination*”. It cannot be correct that the sought medical examination is used as a

fishing expedition. If a blood test is to be done, it must be clear what type of blood test is to be done. If a physical examination is to be conducted, it must specify the type of physical examination to be conducted. The Applicant should have, with the help of their medical expert, Dr Mbokota, specified the medical persons to conduct all these medical examinations, and also state the specific nature of the medical tests to be conducted.

[38] Specificity of the nature of the medical examination is required to assist the court when granting an order. The order must have a list of all the medical tests to be conducted, so that the medical practitioner limits himself only to those medical tests as listed in the court order. It will not be enough for the Applicant to simply say that blood tests will be conducted. As regards physical examination, the nature of the physical examination must be specified in the notice. This is intended to preserve the first Respondent's rights. Other medical conditions not relevant to the dispute should not be examined; those should only be known to the first Respondent's medical doctor of choice and be protected under doctor-patient confidentiality. If it may later be found that other medical examinations not listed in the court order were conducted, the admissibility of such evidence may be questionable since those medical examinations were not authorised by the court.

[39] The specificity referred to above also extends to the specific medical practitioner to conduct the examination. On the reading of the Applicant's Rule 36(2) notice, only the name of Dr Mbokota (obstetrician and gynaecologist) is specified, while some of the medical examinations and tests are outside of her area of expertise. This would mean that the first Respondent will be examined by other medical practitioners whose names are not specified on the Rule 36(2) notice, which would be against the provisions of Rule 36(2)(a)(ii), which requires the name of the person or persons to conduct the medical examination to be specified.

Conclusion

[40] I conclude, therefore, that the first Respondent is not a party to these proceedings; consequently, she is not a party within the context of Rule 36. She is instituting legal proceedings for and on behalf of her son, who lacks the requisite capacity to do so. A party whose state of health is relevant is the son and not the first Respondent. Several medical examinations were conducted on the son as a party to the proceedings whose state of health is relevant.

[41] The Applicant's Rule 36(2) notice does not specify the nature of the examination to be made. Again, the person specified in the notice does not have the capacity to do some of the medical examinations; he will have to utilise other medical experts whose names are not specified in the notice. For these reasons, the notice does not meet the specificity required in both Rule 36(2)(a)(i) and Rule 36(2)(a)(ii).

[42] The Applicant is substantially in possession of the necessary information required to enable it to prepare for trial and to meet the first Respondent's case. I am of the view that the court should refuse the medical examination of the first Respondent, keeping in mind the objective of the Rule.

[43] To subject the first Respondent to medical examination will amount to an invasion of a party's personal privacy and bodily integrity in circumstances where this is not necessary. There were about five experts from the first Respondent's side and five from the Applicant's side, and of the many available expert reports, not a single one suggested any causal link between the son's condition and the first Respondent's health or medical condition. Various tests were done on the first Respondent during labour in 2014, and no infections were detected on the first Respondent. Again, in her more recent pregnancy, which was as late as 2025, medical tests were conducted on the first Respondent, and again, no infections were detected. All this information is available to the Applicant.

[44] It will be an unnecessary invasion of privacy and not in the interests of justice for this court to grant the order. For these reasons, the Rule 36(3) application by the Applicant is dismissed.

Costs

[45] It is my view that it was very frivolous for the Applicant to bring this application. The Applicant had in its possession all the necessary information required to enable it to prepare for trial and to meet the first Respondents' case. The Applicant's own expert discarded any infections on the part of the first Respondent, but the Applicant still decided to bring this application. The first Respondent is not a party to the proceedings.

[46] The alleged injury that triggered the damages the Applicant is being sued for was on the son, and several medical tests were done on the son, all exonerating any link to any condition or infection to the first Respondent. The Applicant continued to embark on a shotgun approach with the hope that one bullet would hit the target, that somehow miraculously it will find something on the first Respondent, which could not be found on the son, is an aspect that this court frowns upon. It being found that it was so unreasonable, unnecessary for the Applicant to institute this application, any such punitive costs against the Applicant will be warranted.

[47] It is under such circumstances that the order issued on 24 March 2026 was granted.