

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: **2014/34461**

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
_____	_____
DATE	SIGNATURE

In the matter between:

G[...] P[...] obo N[...] P[...]

Applicant/Plaintiff

and

**MEMBER OF EXECUTIVE COUNCIL FOR
HEALTH, GAUTENG PROVINCE**

Respondent/Defendant

JUDGMENT

NDLOKOVANE AJ

Introduction

- [1] This is an interlocutory application brought by the Applicant in terms of rule 35(7) of the Uniform Rules of Court to compel the Respondent, the Member of the Executive Council for Health, Gauteng Provincial Government ("the MEC")

who is the defendant in the principal action, to comply with a notice for further discovery delivered under rule 35(3).

- [2] The application arises from pending medical negligence proceedings instituted by the Applicant on behalf of her minor child against the MEC. In those proceedings, the Applicant/Plaintiff claims substantial delictual damages arising from alleged negligent obstetric and neonatal treatment at Charlotte Maxeke Johannesburg Academic Hospital and/or Chris Hani Baragwanath Academic Hospital.
- [3] The present application concerns the proper scope of discovery under rule 35(3). It requires the Court to determine whether various financial, procurement and staffing records sought by the MEC are relevant to the issues raised on the pleadings, or whether the request exceeds the permissible limits of discovery and amounts to an impermissible fishing expedition.

Background

- [4] Summons was issued during September 2014. The Applicant seeks damages on behalf of her minor child arising from alleged medical negligence committed by employees of the Gauteng Department of Health.
- [5] The pleadings subsequently closed after amendments exchanged between the parties. Discovery affidavits were exchanged in due course in terms of rule 35.
- [6] On 4 November 2021 the Applicant delivered a notice in terms of rule 35(3), contending that the Respondent remained in possession of further documents relevant to matters in issue.
- [7] The Respondent objected to the notice on the basis that:
 - a. the requests are excessively broad;
 - b. many of the documents are not relevant to the pleaded issues;
 - c. the notice seeks information rather than discoverable documents;

d. portions of the request amount to a general investigation into the financial and administrative affairs of the Gauteng Department of Health.

[8] The Applicant thereafter launched the present application seeking an order compelling compliance with the rule 35(3) notice and ancillary relief.

The Parties' Contentions

[9] The Applicant submits that the Respondent has pleaded what has become known in medical negligence litigation as the "Public Health Care Defence".

[10] Broadly stated, that defence asserts that the Gauteng Department of Health possesses both the infrastructure and institutional capacity to provide the future medical treatment, therapy, equipment and ancillary services required by the minor child at standards equivalent to those available in the private sector.

[11] The Applicant submits that such a defence necessarily places the Respondent's operational capacity directly in issue. It contends that documents relating to staffing levels, procurement systems, budgetary allocations, expenditure patterns and institutional resources are essential in testing the factual correctness of that defence.

[12] The Applicant argues that the requested documents are specifically identified, objectively ascertainable and directly relevant to determining whether the public hospitals concerned possess the practical ability to deliver the future care pleaded.

[13] The Respondent submits that the rule 35(3) notice is impermissibly wide.

[14] It is contended that the notice seeks extensive financial records, procurement documents, staffing data and administrative material spanning several years without demonstrating any real connection between those documents and the issues arising on the pleadings.

[15] The Respondent further argues that rule 35(3) is not intended to permit a litigant to investigate whether some evidence may emerge in support of its case. Rather, the rule permits discovery only of identified documents which are shown to be relevant to issues already joined on the pleadings.

[16] The respondent accordingly characterises the notice as a classic fishing expedition prohibited by the authorities.

Issues For Determination

[17] The following issues arise for determination:

- a. whether the documents sought in the rule 35(3) notice have been identified with sufficient particularity;
- b. whether the requested documents may reasonably be relevant to issues arising from the pleadings;
- c. whether the notice amounts to an impermissible fishing expedition;
- d. whether the lapse of time between the rule 35(3) notice and the present application disentitles the Applicant to relief;
- e. whether any refusal to discover the requested documents warrants an order compelling discovery under rule 35(7);
- f. whether the circumstances justify a punitive costs order.

The Legal Framework

[18] Rule 35 embodies the principle that civil litigation should not be conducted by ambush. Discovery enables each party to identify documentary material relevant to the issues in dispute so that trials are determined upon all relevant evidence rather than tactical concealment.

[19] Rule 35(3) supplements the ordinary discovery process. It permits a litigant who believes that additional relevant documents exist to require the opposing party either to produce those documents or to state on oath that they are not in its possession and, if known, where they may be found.

- [20] The rule does not create an unrestricted right to inspect the records of one's opponent. Its purpose is confined to securing discovery of documents that are relevant to issues properly arising from the pleadings.
- [21] The principles governing Rule 35(3) are long been settled. In *The MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd and Others*,¹ the court held that rule 35(3) is directed at circumstances where a litigant knows, or at least reasonably believes, that identifiable documents relevant to the issues are in the possession of the opposing party. The rule does not authorise a litigant to conduct a speculative search in the hope that useful material might emerge.
- [22] The requirement of relevance remains central. A document need not itself constitute evidence that will ultimately be admissible at trial. It is sufficient if the document may directly or indirectly advance the case of the party requiring discovery or may fairly lead to a train of enquiry having that consequence. However, relevance must always be assessed against the issues as defined by the pleadings and not by reference to wider investigative objectives.

Analysis

The proper approach to rule 35(3)

- [23] The starting point is that rule 35(3) does not create an independent right to investigate an opponent's affairs. Its purpose is to supplement an inadequate discovery where there is reason to believe that specific documents relevant to matters in issue have not been disclosed. The sub-rule therefore requires three jurisdictional facts, namely:
- a. a reasonable belief that further documents exist;
 - b. that such documents are in the possession or control of the opposing party; and

¹ 1999 (3) SA 500 (C) ("MV Urgup").

- c. that the documents may be relevant to a matter in question in the action.

[24] Relevance is the controlling consideration. In *MV Urgup*, the court explained that rule 35(3) is intended to supplement discovery which has already taken place but which is alleged to be inadequate, it does not afford a litigant “a licence to fish in the hope of catching something useful”.² That principle has consistently been endorsed in subsequent decisions.

[25] Equally well established is that relevance is determined objectively with reference to the pleadings. The court is not concerned with whether the documents will ultimately prove decisive, but whether they may fairly assist either party in proving or disproving an issue that has been raised on the pleadings.

[26] Discovery is therefore not confined to documents which themselves constitute evidence. It extends to documents which may directly or indirectly advance a party's case or lead to a line of enquiry capable of doing so. At the same time, the rules do not permit speculative requests for extensive categories of documents merely because they might reveal something useful.

The pleaded “Public Health Care Defence”

[27] The Applicant submits that the Respondent has pleaded what is now known as the Public Health Care Defence, namely that the Gauteng Department of Health possesses the institutional capacity to provide the future treatment, therapy, assistive devices and ancillary services required by the minor child at public health facilities.

[28] That defence has become increasingly common in medical negligence litigation concerning future medical expenses. Where such a defence is pleaded, the defendant places directly in issue not merely the theoretical availability of treatment, but its practical ability to deliver such treatment consistently, timeously and to an appropriate standard.

² Id at 515D-E.

[29] The factual foundation of such a defence necessarily includes the existence of suitable facilities, appropriately qualified personnel, procurement mechanisms, equipment and funding sufficient to deliver the future care relied upon.

[30] It follows that documentary material demonstrating the actual operational capacity of the relevant institutions may, depending upon its nature and scope, be relevant to issues arising on the pleadings.

The BAS reports and recorded accruals

[31] The Applicant seeks production of Basic Accounting System ("BAS") reports together with recorded accruals relating to the Gauteng Department of Health and the hospitals upon which the Respondent relies.

[32] The Applicant contends that these documents demonstrate the financial capacity of the relevant institutions to procure specialised equipment, medication, orthotic devices and other services which the Respondent alleges can be provided within the public health system.

[33] There is force in the submission that financial capacity forms part of the factual matrix underlying the Public Health Care Defence. A hospital that is unable to procure specialised equipment because of chronic budgetary constraints or substantial unpaid accruals may face practical difficulties in delivering future treatment.

[34] That does not, however, mean that every financial record maintained by the Department becomes discoverable. Rule 35 requires relevance to the pleaded issues, not disclosure of the Department's entire financial administration.

[35] The notice, insofar as it seeks all BAS reports and accrual records from 2015 to date, is framed in exceptionally broad terms. It is not confined to expenditure relating to the treatment or services upon which the defence

relies, nor is it limited to the period reasonably relevant to the future care of the minor child.

- [36] Such a request extends beyond what rule 35 contemplates. It seeks wholesale disclosure of financial records without demonstrating why and how every document within that category bears upon the pleaded issues.

The PERSAL reports

- [37] The Applicant similarly seeks PERSAL reports reflecting staffing information relating to the relevant public hospitals. Staffing levels may be relevant where the Respondent asserts that specialised services are available, as the availability of specialists, therapists, nurses and other allied healthcare professionals may bear directly on whether the pleaded future care can in fact be provided.
- [38] However, PERSAL constitutes the Department's personnel administration system, and a request for all staffing records from 2015 to date extends well beyond what is necessary to test the pleaded defence. Unless the requested records are linked to the specific services and healthcare professionals whose availability is relied upon, the request assumes the character of a fishing expedition. Discovery should accordingly be confined to those staffing records capable of demonstrating whether the relevant specialists or allied healthcare professionals necessary for the pleaded treatment are available at the institutions identified by the Respondent.
- [39] Nevertheless, the request before Court is not confined to the categories of healthcare professionals whose availability is relied upon in the pleaded defence. Rather, it extends generally to staffing information across the institutions.
- [40] Rule 35 does not authorise discovery of documents merely because they may reveal information about institutional administration. Unless the requested staffing records are linked to the specific services alleged to be available to

the minor child, the request assumes the character of an impermissible fishing expedition.

Procurement records

[41] The Applicant further seeks procurement records relating to medical equipment, assistive devices and related services.

[42] Unlike the broader financial records, procurement documents relating specifically to equipment and services which the Respondent alleges it can provide may well be relevant. Such documents may objectively demonstrate whether the Department has procured, maintained or contracted for the very services relied upon in the pleaded defence.

[43] However, procurement records of an unrestricted nature extending across unrelated services and multiple financial years are insufficiently confined to satisfy rule 35(3).

RWOPS information

[44] The Applicant also seeks information concerning practitioners authorised to perform remunerated work outside the public service ("RWOPS").

[45] It is argued that such information demonstrates the migration of skilled personnel away from public facilities.

[46] In my view, that submission is too remote from the issues joined on the pleadings. Whether practitioners participate in RWOPS does not, without more, establish whether the relevant treatment required by this particular minor child can or cannot be provided.

[47] The connection between RWOPS authorisations and the pleaded defence is indirect and speculative. Discovery cannot be ordered on so attenuated a basis.

Alleged fishing expedition

- [48] The Respondent submits that the notice constitutes an impermissible fishing expedition.
- [49] That submission cannot be accepted in its entirety. Certain categories of documents sought by the Applicant are capable of bearing directly upon the pleaded Public Health Care Defence.
- [50] Equally, however, it cannot be said that every category of document sought satisfies the requirements of rule 35(3). The notice seeks extensive financial, procurement and staffing information over prolonged periods without sufficient limitation.
- [51] Rule 35 requires specificity. A litigant must identify documents or classes of documents with sufficient precision to demonstrate their relevance to issues arising on the pleadings. Generalised demands for broad categories of administrative records fall outside the purpose of the rule.

POPIA and PAIA

- [52] The Respondent also relied upon the Protection of Personal Information Act³ (“POPIA”), the Promotion of Access to Information Act⁴ (“PAIA”) and confidentiality obligations.
- [53] Those submissions cannot be upheld.
- [54] Discovery in civil proceedings is governed principally by the Uniform Rules of Court. Neither POPIA nor PAIA was enacted to restrict the ordinary discovery process conducted under judicial supervision.
- [55] Confidentiality concerns may justify appropriate safeguards or redactions where necessary, but they do not create a general immunity from discovery where documents are otherwise relevant.

³ 4 of 2013.

⁴ 2 of 2000.

Delay

- [56] The Respondent further contends that the application was instituted after an unreasonable delay following delivery of the rule 35(3) notice.
- [57] Rule 35 prescribes no period within which an application to compel must be brought. Delay remains relevant to the exercise of the court's discretion.
- [58] In the present matter no material prejudice arising solely from the lapse of time has been demonstrated. While the delay is regrettable, it does not in itself justify refusing relief where otherwise appropriate.

Costs

- [59] The Applicant seeks punitive costs on the basis that the Respondent has acted obstructively and contrary to Practice Directive 1 of 2024.
- [60] Punitive costs remain an extraordinary remedy reserved for conduct deserving of judicial censure.
- [61] The Respondent raised substantial legal objections concerning relevance, overbreadth and the permissible scope of rule 35(3). Those objections cannot be characterised as frivolous or vexatious. Indeed, the Court has found merit in several of them.
- [62] It follows that no basis exists for a punitive costs order.
- [63] Discovery is intended to facilitate the fair and expeditious resolution of litigation by ensuring that parties have access to documents relevant to the issues defined on the pleadings. It is not a mechanism by which one litigant may conduct a general investigation into the affairs of another.
- [64] The Respondent's Public Health Care Defence places in issue its ability to provide the future medical treatment, equipment, therapeutic interventions and ancillary services required by the minor child through the public health system. To that extent, documentary material evidencing the existence of

such services, procurement arrangements, staffing resources and operational capacity may be relevant.

- [65] The Applicant is therefore entitled to seek discovery of documents that bear directly upon those pleaded issues. However, rule 35(3) requires that the documents sought be identified with reasonable particularity. The rule does not permit blanket demands for extensive financial and administrative records in the hope that relevant material may emerge.
- [66] Much of the rule 35(3) notice is cast in exceptionally wide terms. The requests for all BAS reports, all PERSAL reports, all procurement records and related financial documentation over an extended period are insufficiently confined to the issues arising on the pleadings. Compliance with such requests would impose an unreasonable and disproportionate burden upon the Respondent and would exceed the proper limits of discovery.
- [67] At the same time, the Court is satisfied that documents relating specifically to the procurement, funding and provision of the medical treatment, equipment and services relied upon in the Public Health Care Defence are relevant and discoverable. Those documents go directly to the Respondent's pleaded case and are capable of assisting the Court in determining whether the defence is factually sustainable.
- [68] The Respondent's reliance on the POPIA and PAIA as complete bars to discovery cannot be sustained. Discovery in civil proceedings is governed by the Uniform Rules of Court and remains subject to the supervision of the court. Legitimate concerns relating to confidentiality may be addressed through appropriate redactions or confidentiality undertakings where necessary.
- [69] The Applicant has not established grounds for the punitive costs order sought. The Respondent's opposition was founded upon legitimate objections concerning the scope and relevance of the Rule 35(3) notice. Although those

objections have not succeeded in every respect, they cannot be characterised as frivolous, vexatious or amounting to recalcitrance warranting censure.

[70] In the exercise of the Court's discretion under rule 35(7), the interests of justice are best served by granting limited relief directed at documents relevant to the pleaded Public Health Care Defence while refusing those portions of the notice that are impermissibly broad.

Order

[71] In the result, the following order is made:

1. The application to compel is granted in part.
2. The Respondent shall, within 20 (twenty) days of the date of this order:
 - 2.1. make available for inspection, or produce copies of, all documents presently in its possession or under its control which relate specifically to the procurement, funding, availability or provision of the medical treatment, assistive devices, medication, therapeutic interventions and ancillary healthcare services relied upon in support of the Public Health Care Defence pleaded in the main action;
 - 2.2. where any such documents are no longer in its possession or under its control, deliver an affidavit stating their present whereabouts, if known, in accordance with rule 35(3).
3. The Respondent is not required to discover:
 - 3.1. general Basic Accounting System (BAS) reports unrelated to the pleaded medical services in issue;
 - 3.2. general PERSAL reports or personnel records unrelated to the healthcare professionals whose services are relied upon in the Public Health Care Defence;

- 3.3. general procurement records, tender documents or departmental financial records that are not directly connected to the services, treatment or equipment relied upon in the Respondent's pleaded defence;
- 3.4. documents sought solely for the purpose of investigating the Respondent's general financial administration or institutional affairs.
4. The Applicant is granted leave, should it contend that the Respondent has failed to comply with this order, to enrol the matter again on supplemented papers for such further relief under rule 35(7) as may be appropriate.
5. The Applicant's claim for punitive costs is dismissed.
6. Each party shall pay its own costs of this interlocutory application.

N NDLOKOVANE AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

APPEARANCES

FOR THE APPLICANT: Adv Brown & Adv Molope-Madondo
Instructed by: Sepamla Attorneys

FOR THE RESPONDENTS: Adv Chabane
Instructed by: The State Attorney, Johannesburg

HEARD ON: 23 July 2026

DATE OF JUDGMENT:

10 September 2026