



**IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)**

CASE NO.

1150/2021

In the matter between:

NOZIZWE MBIKO obo UVIWE MBIKO

APPLICANT

and

**MEC FOR DEPARTMENT OF HEALTH, EASTERN
CAPE PROVINCE**

RESPONDENT

REASONS FOR THE ORDER

GQAMANA J:

[1] For convenience, the parties shall be referred to as cited in the main action. On 15 June 2022, I issued an order in favour of the applicant with the reasons to follow and below herein are such reasons.

[2] The plaintiff, acting on behalf of her minor child caused summons to be issued against the defendant, MEC for department of Health, Eastern Cape Province for damages arising out of an alleged negligence by the defendant's employees who attended to the plaintiff during her admission and birth of her minor child at Frere hospital during November 2003. For present purposes, the plaintiff seeks an order in terms of Rule 35(3) of the Uniform Rule of Court, to compel the defendant to reply to her notice requesting further records as well as costs of such application.

[3] The case made out by the plaintiff in the founding affidavit is that after pleadings were closed, a discovery affidavit was filed on behalf of the defendant on 17 January 2022. On receipt the defendant's discovery affidavit, the plaintiff held an opinion that the documents so discovered were incomplete and that the defendant was in possession of further documents. As a result, on 31 January 2022, the plaintiff's attorney served the defendant with a notice in terms of Rule 35(3) requesting copies of *inter alia*, the neo-natal records, histology, birth register, labour admission book, medical register and CTG scan taken during birth of the plaintiff's minor child. In terms of the aforesaid notice, the defendant was required to make available for inspection within 5 days of such notice the aforesaid documents or to state under oath within 10 days that same were not in her possession.

[4] Rule 35(3) of the Uniform Rules reads:

“If a party believes that there are, in addition to documents or tape recordings disclosed as aforesaid, other documents (including copies thereof) or tape recordings which may be relevant to any matter in question in the possession of any party thereto, the former may give notice to the latter requiring such party to make same available for inspection in accordance with subrule (6), or to state on oath within 10

days that such documents or tape recordings are not in such party's possession, in which event the party making the disclose shall state their whereabouts, if known. ”

- [5] There being no response to the plaintiff's Rule 35(3) notice, her attorney penned a letter on 15 January 2022, to the defendant's attorneys putting them on terms to comply with the aforesaid notice.
- [6] On 23 March 2022, the defendant was served with the application to compel her reply to the plaintiff's aforesaid Rule 35(3) notice.
- [7] In the opposing affidavit deposed to by the defendant's attorney of record, Mr *Dlanjwa* it is alleged that, the erstwhile attorney who was seized with the matter, Mr *Ngwenya*, responded to the plaintiff's attorney on 14 February 2022, and advised the latter that the defendant is in search of the requested documents and a permission for an extension of time to provide same was requested. It is further contended that on 18 February 2022, the defendant complied with the plaintiff's Rule 35 (3) notice in that, the plaintiff's attorneys were notified and invited to inspect the requested documents at the offices of the defendant's attorneys. A copy of such notification was not annexed in the defendant's opposing affidavit despite an averment by the defendant's attorney that such notice was served on the plaintiff's attorney and that same forms part of the annexures to the opposing affidavit. No explanation was given on behalf of the defendant for such crucial and fundamental omission. The defendant's attorneys were alerted to this omission, but they failed to rectify it. Without such annexure, this Court is disabled to comment and evaluate the accuracy of such allegation.
- [8] As one of the grounds of opposition of the present application, the defendant submitted that, the plaintiff should have taken the statutory route ordained in the Promotion of Access to Information Act 2 of 2000 to seek access to the required medical records. This is an unfortunate state of attitude adopted by the defendant's

attorneys. Such an attitude is misguided and is in complete disregard of the provisions of section 7(1) of PAIA.

[9] Section 7(1) of PAIA reads:

- “(1) This Act does not apply to a record of a public body or a private body if –
- (a) that record is requested for the purpose of criminal or civil proceedings;
 - (b) so requested after the commencement of such criminal or civil proceedings, as the case maybe, and
 - (c) the promotion of or access to that record for the purposes referred to in paragraph (a) is provided for in any other law.”

[10] Clearly from the provisions of section 7(1) of PAIA referred to in the preceding paragraph the defence and attitude adopted on behalf of the defendant has no merit in law. The defendant as an organ of State is expected to litigate in a transparent manner and not be obstructive as evident herein, especially in matters involving children. The misguided and technical approach evinced by the defendant herein is regrettable. However, and at great credit to *Mr Maduma*, defendant’s counsel, this defence was not persistent with during argument.

[11] In the replying affidavit, the plaintiff alleged that an inspection of the documents was conducted at the defendant’s attorneys’ offices but the documents requested were still not made available.

[12] The defendant, for the first time in the heads of argument and during oral argument made submissions that she is not in possession and/or control of the documents requested in the plaintiff’s Rule 35(3) notice. The defendant was required in terms of Rule 35(3) to file an affidavit and state that she was not in possession and /or control of such documents, if same were unavailable. As indicated in paragraph 7 above, a contention was made on behalf of the defendant that the plaintiff’s attorney was invited to inspect the documents. In response to such allegation the plaintiff argued that the inspection conducted at the defendant’s attorney’s office yielded no results. There is no allegation made in the opposing affidavit that the documents are not available.

[13] From the objective evaluation of the averments set out in the opposing affidavit, the defendant had no defence not to reply to the plaintiff's Rule 35(3) notice. However, I have not ignored the defendant's submission raised during argument that such documents are not in her possession and / or control. That submission was taken into account in framing paragraph 2 of the order that I had issued.

[14] On the issue of costs, although the plaintiff's counsel argued for punitive costs against the defendant, however in the exercise of my discretion I was not persuaded that there was any justification for costs on a punitive scale. It was based on these reasons that the order dated 15 June 2022 was issued.

N GQAMANA
JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Applicant	:	<i>Mr Mlalandle</i>
Instructed by	:	Booi & Sons Attorneys East London
Counsel for the Defendant	:	<i>Mr Maduma</i>
Instructed by	:	The State Attorney East London
Date heard	:	15 June 2022
Order issued	:	15 June 2022
Reasons given	:	20 July 2022