

Judgment confirms importance of disclosure of records in litigation

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In a recent case where a claimant for damages sought to prevent the disclosure of her medical records, the rules of court were found to override other legislation relating to confidentiality of personal information.



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A recent judgment, involving the assessment of damages for injury, has highlighted that the full disclosure of documents is necessary for the purposes of litigation, and other legislation is clearly not intended to conflict with the rules relating to discovery.

The judgment in the case of *Divine Trading 205 (Pty) Limited & Another vs Gordon & Others* deals with an application for the disclosure of medical records and the interplay between discovery of documents, the Uniform Rules of Court, and the circumstances under which a litigant can rely on lack of consent under the National Health Act, 2008, The Health Professions Act, 1974, and the Protection of Personal Information Act, 2013 for refusal to disclose medical records in a pending action.

Briefly, the facts are:

- Ms Gordon sued the applicants, Divine Inspiration Trading 205 (Pty) Limited and the Alphen Farm Estate (Pty) Limited, for injuries she sustained in an accident when she visited their premises in October 2015.

- The merits of the claim were settled during September 2017. The settlement agreement provided that the applicants pay 70% of Gordon's agreed or proven damages.
- As usually happens in such cases, following settlement of the merits, Gordon amended her claim to increase the quantum from R500,000 to R7m. The bulk of the claim related to her loss of earning capacity.
- In assessing the quantum, the applicants requested Gordon's medical records, including those from the second and third respondents, who were the general practitioner and psychiatrist who had treated Gordon for certain medical conditions.
- The second and third respondents refused to disclose the medical records on the basis that they were precluded from doing so under the National Health Act, 2008. This Act prohibits the disclosure of a patient's medical information without their consent (Gordon had refused to provide the consent) unless "the court or any law requires that disclosure". The second and third respondents also relied on the Health Professions Act and their ethical duties which similarly limit the circumstances under which a healthcare practitioner may disclose a patient's medical information.
- The applicants had sought to obtain the documents from the medical practitioners, through a subpoena and a Rule 35(3) and (6) against Gordon, on the basis that she had not disclosed all documents relevant to her claim.

The Court found that the reference to "any law" in the National Health Act includes the rules of court. That means that health practitioners whose patients refused to consent to the disclosure of their medical records, cannot rely on this particular section of the National Health Act when they are served with a subpoena subject to questions of privilege. Ethical rules are also subject to those principles.

Arguing that the medical records are not relevant to her claim for loss of earning capacity and are not necessary to pursue the applicants' defence in the main action, Gordon also sought to rely on the Protection of Personal Information Act (POPIA) in refusing to disclose her medical records. She did so on the basis that disclosing the medical records would unjustifiably trample upon her rights under POPIA, which provides that personal information (of which medical records is one) may only be processed if:

- processing complies with an obligation imposed by the law on the responsible party (a person who processes the personal information of others);
- processing is necessary for pursuing the legitimate interests of the responsible party or of a third party to whom the information is supplied.

The Court found that Gordon's treating medical practitioners were responsible parties as defined under POPIA and it was on them that obligations were "imposed by law" by virtue of the subpoenas served on them. Furthermore, POPIA provides that a data subject, in this case, Gordon, may object to the processing of personal information unless legislation provides for such processing and once personal information has been collected, POPIA makes provision for the further processing for purposes of proceedings of any Court or tribunal proceedings.

On the facts, it was found that Gordon had a history of anxiety, drug and alcohol use which may have had an impact on her career, without the injury. The Court agreed with the applicants that her pre-morbid medical conditions could and probably would impact on her earning capacity and was therefore relevant to the assessment of her quantum.

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