

SOUTH AFRICA / JUDGMENT

Pienaar v Jordaan (23324/05)

[2006] ZAGPHC 173 (21 April 2006)

[2006] ZAGPHC 173**COURT**

High Courts - Gauteng

BEFORE

Murphy

CASE / FILE NUMBER

23324/05

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(TRANSVAAL****PROVINCIAL DIVISION)****NOT****REPORTABLE CASE NO: 23324/05****DATE:**

21/4/2006

In

the matter between:

MARIUS

JACOBUS PIENAAR Applicant

and

SUSAN

JORDAAN Respondent

JUDGEMENT

Murphy J

1. The applicant makes application for an order compelling the respondent, a clinical psychologist, to divulge certain notes and information forming part of a patient file. The respondent has indicated her willingness to abide by the decision of the court, but opposes the costs order sought against her.

2. The applicant previously had a relationship with Ms Natasja Faught, out of which relationship twin minor children were born. In 2004 the applicant launched an application to this court to obtain access rights to the two children. As far as I am aware this application has yet to be finalised.
3. During May 2005 Ms Faught consulted the respondent, in the latter's capacity as a registered and practising clinical psychologist, for the purpose of evaluating and assessing her competence as a mother. For reasons that will appear, Ms Faught has chosen to oppose the applicant's application for access to the children.
4. During the course of evaluating Ms Faught, the respondent took her history, performed psychometric evaluations, clinically evaluated Ms Faught's interaction with her children, and procured collateral information from various sources. Thereafter she prepared a report which was then filed as part of the record in the applicant's application for access to the minor children. In the introductory portion of the report the respondent states:

"Mev. Faught het my kom sien vir 'n evaluasie t.o.v. haar bevoegdheid as moeder.

Sy was baie bekommerd aangesien haar gewese vriend, Mnr Marius Pienaar, toegangsregte tot haar twee minderjarige kinders wil hê.

Volgens haar is hy nie bevoeg om toegangsregte tot die kinders te hê nie. Ek het geen evaluasie op Mnr Pienaar gedoen nie en kan dus niks oor hom sê nie behalwe agtergrond-inligting wat vanaf ander bronne verkry is.

Mev Faught wou graag 'n evaluasie ondergaan t.o.v. haar eie bevoegdheid as moeder."

5. The report then goes on to set out the background and the methodology of evaluation, beginning with various tests and an assessment of the interaction between the children and the mother. Much of the report in relation to the mother is favourable. In paragraph 4 of the report the respondent sets out that she sought and obtained collateral information from seven other people with whom she had had discussions regarding Ms Faught, the applicant and the two minor children. The information contained in this paragraph is of a negative nature insofar as the applicant is concerned. It reads as follows:

"4) INLIGTING VERKRY VANAF ANDER BRONNE

Ek het met ongeveer sewe ander persone gesels en die volgende aspekte is deur hulle genoem:

4.1) Almal is dit eens dat Natasja 'n goeie moeder is vir haar kinders en dat sy hulle pragtig versorg.

4.2) Almal was baie negatief t.o.v. Mnr Marius Pienaar, en die volgende is ten opsigte van hom gesê:

4.2.a) "Hy is 'n tronkvoël - was 6 jaar in gevangenis - het baie sake teen hom."

4.2.b) “Hy het ‘n naak-video van Natasja vir ander gewys waarna daar ‘n crimen injuria-saak geopen is. Hy het Natasja aangerand terwyl sy swanger was.”

4.2.c) Hy is ‘n gevaar vir die samelewing.”

4.2.d) Hy kan nie vir Natasja of die kinders sorg nie - het vir haar 2-minute noodles gemaak toe sy swanger was.”

4.2.e) “Hy maak aanmekaar beloftes wat hy nie nakom nie. Het gesê dat hy ‘n prokureur is. Hy sê altyd: Jy kan my niks vertel nie - ek ken die wet.”

4.2.f) “Hy wil net probleme skep vir Natasja.”

4.2.g) “Hy sal die kinders molesteer - hy het kinderpornografie in sy besit gehad.”

4.2.h) “Hy maak pornografiese video’s.”

4.2.i) “Hy is die hoof-verkragter by die du Plessis-dogters.”

4.2.j) “Op die stadium wat Natasja swanger geraak het, het hy ook twee ander verhoudings gehad waar die meisies hom seksueel moes beloon vir verblyf wat hy aan hulle verskaf het.”

Ek het ook ‘n verklaring in my besit wat deur die Klerk van die Hof beëdig is waarin verklaar dat Mnr Pienaar geen berou getoon het oor die video van Natasja wat hy aan ander gewys het nie. Daar word in die verklaring gemeld dat hy gedreig het om die familie groot moeilikheid te gee indien hy onder korrekiewe toesig geplaas sou word en dat hy hulle elke dag sal pla. Daar word ook genoem dat hy ‘n gevaar vir die samelewing is.”

6. She then sums the information up in the next paragraph in the following terms:

“Vanuit verskeie agtergrond-bronne het daar baie negatiewe inligting t.o.v. Mnr Pienaar na vore gekom. Aangesien ek hom nie persoonlik geëvalueer het nie, kan ek nie ‘n mening oor hom uitspreek nie. Vanweë die erns van die aard van al die aantygings sal ek egter ‘n ernstige versoek rig dat al die aspekte ondersoek moet word. Die aantygings van kinderpornografie en dat hy betrokke is by die maak van pornografiese video’s is baie ernstige aantygings wat ‘n wesenlike gevaar vir die tweeling kan inhou.”

7. On that basis, the respondent concluded that she was unable to recommend that the applicant be given access rights to the children.

8. The filing of the report led the applicant to file an application to have the collateral information struck from the report. It appears that no such order was granted, but on 26 May 2005, Van der Merwe J issued an order dealing with the further progress of the custody application and granted an order restricting the applicant’s contact with various parties, including the respondent and any of the sources who had provided the respondent with collateral information. This order was considered necessary following a confrontation between the applicant and the respondent within the hearing of her patients during which the applicant had demanded that the respondent disclose the names of the collateral sources referred to in her report and had threatened litigation in that regard.

9. It is common cause that the applicant was in the past found guilty of crimen injura and thus has a criminal record flowing from that. The offence arose out of the applicant distributing a video of Ms Faught in which she appeared unclothed. The Department of Correctional Services has filed an affidavit in these proceedings in which it has stated that in the light of his conviction it considers the applicant a danger to the community particularly because he has openly indicated to them his intention to cause difficulty for Ms Faught's family.
10. It is the respondent's position that she was ethically and professionally obliged to report upon the collateral information disclosed to her for the purposes of the report and the determination of the issue of access.
11. The relief sought by the applicant is set out in paragraph 1 of the notice of motion in the following terms:

“Dat SUSAN JORDAAN die volledige aantekeninge en aanhalings ten opsigte van aantygings en bewerings teenoor die APPLIKANT soos verkry vanaf ongespesifiseerde “bronne”, spesifiek soos vervat in haar sielkundige verslag soos opgestel deur SUSAN JORDAAN vir Natasja Faught, aan die Applikant skriftelik bekend sal maak en beskikbaar maak.”

12. In his founding affidavit the applicant sets out the reasons for needing to obtain the information. He states:

“Die aantygings het my emosioneel hewig ontstel, en is dit so dat die aantygings in SUSAN JOORDAAN se verslag my verneder het, en my waardigheid en selfbeeld is erg gekrenk. Dit is dan ook vir my emosionele onthalwe, uiters belangrik om die waarheid uit te vind.”

13. During May 2005, after the applicant threatened the respondent with civil and criminal action, the respondent yielded and provided him with the names and telephone numbers of the sources of the collateral information. Subsequently the applicant contacted the sources telephonically, but was not satisfied with the information provided to him by them. For that reason, he now seeks access to the complete clinical record in respect of Ms Faught.
14. The only explanation as to why he believes himself to be entitled to the complete clinical record held by the respondent is set out in paragraph 4.9 of his replying affidavit, which reads as follows:

“I do not dispute the Respondent's claim that disconcerting information was conveyed by the patient to the Respondent, but therein exactly lies my effort as to deduce whether the “collateral sources” originally provided the Respondent's patient with lies and untruth that led to the patient's decision to deny me access to my twins, or whether the “collateral sources” were provided with these lies and untruths by the Respondent's patient herself in order to further her own position. It would be in the interest of fairness and justice to determine the true position, hence did I apply to this Honourable Court for the relief sought in prayer 1 of the Notice of Motion.”

15. Although the applicant does not explain for what specific purpose he requires the information, he does state in his replying affidavit that he has lodged a criminal complaint against the respondent as well as a complaint of unethical conduct with the Health Professions Council of South Africa.
16. In short, the applicant believes he is entitled to the information because it would be in the interest of fairness and justice to give it to him for the determination of the true position in various proceedings contemplated by him.
17. The respondent has put up a number of arguments as to why the applicant is not entitled to the information he seeks. In view of the conclusion I have reached on the merits, I do not consider it necessary to deal with all of them. The applicant has not had the benefit of legal representation and thus his claim is not formulated with precision. Nevertheless, it is clear that he seeks the information in terms of his constitutional right to access to information.
18. Section 32 of the Constitution provides:
(1) Everyone has the right to access to
 - a. any information held by the state;
 - b. any information that is held by another person and that is required for the exercise or protection of any rights.
- (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the State.”
19. Thus, as I understand the applicant’s case, he believes he has the right to information held by another person that is required for the exercise or protection of his rights. The legislation referred to in section 32(2) of the Constitution has now been enacted in the Promotion of Access to Information Act of 2000. This Act then is the principal legal instrument defining and delineating the scope of the content of the right of access to information, establishing the mechanisms and procedures for its enforcement and limiting the right appropriately.
20. Both the Constitution and the Act grant access to information in private hands on a “need to know” basis, in the sense that the person requesting the information is only entitled to such information if the request can be justified by providing reasons for why the information is required. The applicant is thus required to show that the information is required for the exercise or protection of one of his rights. Here one should be mindful that the legislation was not intended to allow a full scale intrusion upon private rights by requiring a level of transparency in private bodies of the same order as that which is required of public bodies, which through the system of democracy are understandably expected to be more transparent and accountable. When dealing with private information the constitutional right, and the legislative enactment of it, oblige an applicant to show a significant risk of prejudice or harm should there be no disclosure of the information.

21. As I have indicated, the applicant has not clearly expressed the nature and content of the antecedent right he proposes to exercise or protect and in respect of which the information is required for that purpose. From the papers before me, the best I can assume is that the applicant requires the information in order to exercise his rights to proceed with the criminal proceedings against the respondent, the professional proceedings before the Health Professions Council of South Africa or perhaps defamation proceedings against the sources of the collateral information.
22. The question therefore is whether the applicant requires the information for the exercise or protection of his rights to prosecute or litigate. This would be so, in terms of section 32 of the Constitution, as well as section 50(1) of the Promotion of Access to Information Act of 2000. The section provides:
- “(1) a requestor must be given access to any record of a private body if -*
- (a) that record is required for the exercise or protection of any rights;
 - (b) that person complies with the procedural requirements in this Act relating to a request for access to that record;
 - (c) access to that record is not refused in terms of any ground for refusal contemplated in chapter 4 of this part.”
23. There has been some suggestion that the applicant is not entitled to the information by virtue of not having followed correct procedure. However, because I am of the view that the matter will be best disposed of on a substantive basis, I do not propose to deal with the procedural aspect. In *Clutchco (Pty) Ltd v Davis* 2005 (3) SA 486 (SCA) Comrie AJA held that in terms of section 50(1)(d) of the Promotion of Access to Information Act the request for access to the records of any private body has to assert that the information is required for the exercise or protection of a right and that this should be interpreted to mean that the information was reasonably required for the exercise or protection of the right. Thus, it is not sufficient for the applicant to assert a belief that the information is required for the protection of his rights. The test is an objective one and involves a weighing and balancing of competing rights in order to assess whether the need for the information is reasonable in the circumstances.
24. On the assumption that the right which the applicant seeks to protect is his right under the Constitution to have disputes resolved before a court or other forum, or alternatively simply a right at common law, or in terms of statute, to pursue the actions he wishes to pursue against the respondent or the collateral sources, the question is therefore whether he reasonably requires the entire content of Ms Faught’s personal file for the exercise or protection of that right. Just as access to information and access to courts is protected under the Constitution so too is the right to privacy, which is protected in

terms of section 14, and it is trite that medical practitioners are ethically and legally required to keep the confidence of their

patients and that such confidentiality may only be breached in limited circumstances, for example where the practitioner is required to make disclosure in terms of an Act of Parliament, if there is a moral or legal obligation on the practitioner to do so, if the patient consents to the disclosure or a court of law orders disclosure. In the present matter special caution must also be observed in the light of the applicant's criminal conviction for previously having infringed the privacy rights of Ms Fraught.

25. Moreover, and in any event, the information is neither required nor necessary for the applicant to engage in the processes he envisages. He has not demonstrated why he is unable to protect his rights sufficiently through the use of the normal discovery procedures. Should he proceed by civil action, he will have the right to invoke discovery, to subpoena witnesses and to cross-examine them in the trial. Should the State be willing to pursue a criminal prosecution against the respondent, it too would have similar rights to gain access to the information for the purposes of a trial in terms of the Criminal Procedure Act. Likewise, should the Health Professions Council of South Africa act to discipline the respondent in any way, one imagines, it too has means at its disposal to acquire the information when and if it so requires it. Furthermore, the applicant is now in possession of the

names of the persons who provided the collateral information and should he so wish he can seek to obtain further information from them during the course of any action he may institute against them. The applicant has had access to the report, and is thus fully aware of the adverse information contained therein as well as the identity of the sources of that information. Accordingly, it cannot be said that the information is required in order for the applicant to make a decision and obtain advice as to whether he should launch proceedings based on the untruthfulness of the information.

26. The constitutional guarantee of freedom to information should not be used as an additional aid in obtaining discovery in civil litigation. I align myself with the view expressed by Davis J in *Inkatha Freedom Party v Truth & Reconciliation Commission* 2000 (3) SA 119 (C) at 135J-37C, that in civil disputes open and democratic societies do not encourage the kind of fishing expeditions which could well arise with a generalised pre-action right of discovery. Like Davis J, I have serious doubts as to whether section 32 of the Constitution should be used to justify a principle of discovery before the time provided in rule 35(1) of the High Court Rules. Moreover, the present case is not one in which there is a real or well founded apprehension that any evidence may be hidden or destroyed or in some manner be spirited away by the time the case comes to trial, or at any rate to the stage of discovery

- see *Universal City Studios Inc and Others v Network Video (Pty) Ltd* [1986] ZASCA 3; 1986

(2) SA 734 (A) 755 A - C.

27. In the premises, I am not persuaded that the applicant reasonably requires the information for the protection or exercise of any of his rights.
28. Although the application is misguided I do not consider the applicant's conduct to be sufficiently wayward to justify a punitive costs award.
29. In the premises, the application is dismissed with costs on a party and party basis.

J MURPHY

JUDGE OF THE HIGH COURT

Applicant appeared in person and advocate for the respondent is JP van den Berg, Pretoria

Attorney for applicant, Snyman De Jager Pretoria and attorney for respondent, Macrobert Inc, Pretoria.

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