Fishing Expedition

"Possibly not, My Lord, but far better informed."

- F.E. Smith (To a judge who complained that he was none the wiser at the end than when he started hearing one of Smith's arguments).

Mrs van Wyk brought an application under the provisions of the **Promotion of Access to Information Act** against Unitas, a private hospital in Centurion. Her husband died on 3 July 2002 in the intensive care unit at Unitas. She believed that she had an action for the damaghes she suffered as a result of the hospital negligently causing her husband's death. She required access to a general report on existing practices of nursing care at the hospital, allegedly to make a decision on instituting that action.

The late Mr van Wyk suffered from Chrone's disease, was admitted to Unitas on 6 May 2002 and underwent an operation on 13 May. Instructions were given that he was not to be fed solids, being prone to attacks of vomiting. According to Mrs van Wyk, these instructions were not followed and the nursing staff did not properly supervise him. On 1 June while in the high care unit, he choked in his own vomit. This caused the oxygen supply in his lungs to be interrupted long enough to induce brain damage. He died nearly a month later.

Dr Naudé is a specialist physician who also treated the deceased. As chairman of the body representing medical specialists practicing at Unitas, he prepared the relevant report on nursing conditions in the intensive care and the high care units at the hospital. The Naudé report was finalised on 28 June 2002. It contained a survey of these two units over a period of six days from 18 to 24 June, while the deceased lay critically ill. The name of the deceased was not mentioned in the report.

Seven medical specialists, including Dr Naudé, assisted Mrs van Wyk in her investigation. She had been provided with a complete set of hospital records, including the notes made by the nurses caring for her husband recording their observations and the treatment he received. She also had access to the clinical notes and medical reports of the responsible doctors, but not to the report.

In an adversarial system of litigation such as ours, issues must be defined in pleadings. Access to documents, such as the report, must ordinarily be limited to discovery after the pleadings have closed. The Act makes provision for pre-trial discovery of particular documents "required for the exercise or protection of any rights" in certain circumstances. The Supreme Court of Appeal held that this must remain the exception rather than the rule.

It declined to delve into an abstract determination of the meaning of "required" within the context of the Act, as it felt that access rights to the Naudé report depended on the facts of the matter. In overturning a High Court ruling, the court said that information could not be "required" merely because it would be useful to Mrs van Wyk. She had to substantiate that the report would be of assistance to her in formulating her case against Unitas. The report contained nothing about the deceased's treatment or the cause of his death, and would not have been necessary to take a pre-trial decision. She therefore did not require the report for the exercise or protection of her right to damages.

In a dissenting judgment, Judge Edwin Cameron noted that Mrs van Wyk claimed her husband died because the hospital as an institution failed to function in ways that gave rise to individual acts of negligence. If a systemic and not individual failure cause her loss, the report would enable her to particularise her claim and assess its ambit and viability. He stated: "*Institution of proceedings is an immense step. It involves a massive investment in costs, time, personnel and effort. And it is fraught with risks. Where access to a document can assist in avoiding the initiation of litigation, or curtailing opposition to it, the objects of the statute suggest that access should be granted.*" Unfortunately for Mrs van Wyk, his view was a minority one.

Unitas Hospital v. Maria Magdalena van Wyk and others
(SCA) Case No 231/ 2005 decided on 27 March 2006