REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, PORT ELIZABETH

Case no: 2416/2005
Date heard: 31.5.2012
Order granted: 31.5.2012

In the matter between:

FABIAN BRANDON THOMAS POTGIETER **Plaintiff**

vs

ROAD ACCIDENT FUND **Defendant**

REASONS FOR JUDGMENT

SUMMARY : Practice – Rule 36(2) and (3) of the Rules of the Superior Court Practice.

In the main action, plaintiff sues defendant in terms of section 17 of the Road Accident Fund Act (the Act) for compensation for injuries he sustained in a motor collision in Port Elizabeth. When the case was ripe for trial, defendant filed a notice in terms of Rule 36(2) requiring plaintiff to submit himself to a further examination by a clinical psychologist of defendant's choice. Plaintiff objected to defendant's notice. The matter was subsequently and procedurally brought before me for adjudication in terms of Rule 36(3)(d))(ii).

Court rejected plaintiff's grounds of objection as having no merit and ordered the examination to be conducted and awarded costs of the application against plaintiff. Principles enunciated in decided cases like ***Durban City Council v Mndovu*** 1996(2) SA 319 (D) and ***Mgudlwa v AA Mutual Insurance Association Ltd*** 1967(4) SA 721 (E) restated and, where necessary, in line with the Constitution.

TSHIKI J:

A) INTRODUCTION

[1] In the main action plaintiff herein is suing defendant in terms of section 17 of the Road Accident Fund Act[1] (the Act) for compensation for injuries which he sustained in a motor collision in Port Elizabeth on or about 31 August 2002.

[2] The case is now ripe for trial, however, defendant has since filed a notice in terms of Rule 36(2) of the Rules of this Court requiring plaintiff to submit himself to a further examination by Larry Loebenstein a clinical psychologist. Plaintiff has objected to the defendant's notice aforesaid and has, in terms of Rule 36(3), notified the defendant of the nature and grounds of his objection.

[3] In response to the objection by plaintiff defendant has filed an application in Court in terms of Rule 36(3)(d)(ii) requiring the Judge to determine the issue on the grounds that the plaintiff's objection is unfounded.

[4] On 31 May 2012, I was called upon to adjudicate the issues in this application and this resulted in my order issued on the following terms:

[1] Act 56 of 1996

"[4.1] That Fabian Brandon Thomas Potgieter (respondent) submit himself to a medical examination by Mr Larry Loebenstein, a clinical psychologist, at no 75 Second Avenue, Newton Park, Port Elizabeth, on a date and time to be arranged and agreed to by the parties in these proceedings.

[4.2] That respondent may have his own medical adviser present at such medical examination.

[4.3] That the respondent pay costs of this application.

[4.4] Reasons for judgment to follow at a later stage."

[5] In view of the fact that the last reported case to deal with the merits of Rule 36(2) and (3) in the country and which fortunately was decided in this division in 1967, I saw it necessary to prepare full reasons for my decision.

[6] At the time of the argument Mr van der Linde SC appeared for the applicant and Mr Niekerk represented the respondent.

B) NATURE OF THE OBJECTIONS

[7] It is common cause that the proposed examination of the plaintiff, which is the subject of these proceedings, is the second of such examination of the plaintiff by a clinical psychologist, the first one having been conducted in East London by Mr Pat Hill on 3 and 4 February 2009 at the instance of the defendant. Plaintiff objects to the proposed examination on the following grounds:

[7.1] That the plaintiff has, at defendant's instance, been examined in the past by a clinical psychologist Mr Pat Hill who subsequently prepared a medico-legal neuro-psychological report.

[7.2] That the plaintiff has been examined by a clinical psychologist of his choice Mr Ian Meyer, on two occasions.

[7.3] Defendant has, in addition, caused the plaintiff to be examined by further experts of its choice, a neuro surgeon Dr JA Azher and Dr P Whitehead an industrial psychologist.

[7.4] That the proposed examination is pertinent to the plaintiff's cognitive, executive, socio-emotional and behavioral functioning, and will be an invasion on his constitutional rights; and

[7.5] That an examination by a second psychologist without good reason will be unreasonable.

[8] Before dealing with the nature of the objections it would be apposite for me to state the relevant provisions of Rule 36 which read:

> "**36 INSPECTIONS, EXAMINATIONS AND EXPERT TESTIMONY**
>
> **(1)** Subject to the provisions of this rule any party to proceedings in which damages or compensation in respect of alleged bodily injury is claimed shall have the right to require any party claiming such damage or compensation, whose state of health is relevant for the determination thereof to submit to medical examination.

(2) Any party requiring another party to submit to such examination shall deliver a notice specifying the nature of the examination required, the person or persons by whom, the place where and the date (being not less than fifteen days from the date of such notice) and time when it is desired that such examination shall take place, and requiring such other party to submit himself for examination then and there. Such notice shall state that such other party may have his own medical advisor present at such examination, and shall be accompanied by a remittance in respect of the reasonable expense to be incurred by such other party in attending such examination …

(3) The person receiving such notice shall within five days after the service thereof notify the person delivering it in writing of the nature and grounds of any objection which he may have in relation to –

(a) the nature of the proposed examination;

(b) the person or persons by whom the examination is to be conducted;

(c) the place, date or time of the examination;

(d) the amount of the expenses tendered to him …

(i) …

(ii) ...

Should the person giving the notice regard the objection raised by the person receiving it as unfounded in whole or in part he may on notice make application to a Judge to determine the conditions upon which the examination, if any, is to be conducted.

(4) …

(5) If it appears from any medical examination carried out either by agreement between the parties or pursuant to any notice given in terms of this rule, or by order of a judge ***that any further medical examination by any***

> ***other person is necessary or desirable for the purpose of giving full information on matters relevant to the assessment of such damages,*** **any party may require a second and final examination in accordance with the provisions of this rule.** " (My emphasis)

[9] Relative to the issues herein, section 19 of the Road Accident Fund Act[2] provides:

> "19 Liability excluded in certain case
>
> The Fund or an agent shall not be obliged to compensate any person in terms of section 17 for any loss or damage –
> (a) …
> (b) …
> (c) …
> (d) …
> (e) suffered as a result of bodily injury to any person who -
> (i) unreasonably refuses or fails to subject himself or herself, at the request and cost of the Fund or such agent, to any medical examination or examinations by medical practitioners designed by the Fund or agent."

[10] Some of the plaintiff's objections to the proposed examinations do not appear to be in accordance with Rule 36(3) and cannot assist the plaintiff in his objection. For instance, the fact that defendant has instructed attorneys in Cape Town, as it has been raised by plaintiff as an objection, is not relevant to the issues under discussion. Such is a matter which can be dealt with when the Court considers the question of costs on the merits of the case or when the taxing master deals with taxation of the bill of costs of

[2] the Act (for citation see fn 1)

the defendant should that be the case. I say so because the costs of the application in terms of Rule 36(3) should be dealt with at the stage when it deals with such application and therefore such costs cannot include the costs of the merits of the case and are provided for in terms of provisions of Rule 36(2) which provides that "such notice shall be accompanied by a remittance in respect of the reasonable expense to be incurred by such other party in attending such examination." [My emphasis]

[11] It seems to me that plaintiff herein sustained multiple injuries which resulted in him having to be compensated in respect of various heads which include, *inter alia*, loss of earnings, loss of earning capacity, general damages including disfigurement, significant short term memory problems, severe neuropsychological impairment and others. For the above reasons plaintiff would have to be examined by numerous and different experts in order to be able to calculate, with the required exactitude, the actual damages he has sustained. In respect of each head of damages a plaintiff is entitled to be examined by an expert in that particular field. In respect of each field of examination plaintiff is entitled to be examined at the instance of the defendant not more than two occasions, the second being the final examination in terms of Rule 36(5). It appears from the evidence before me that plaintiff was only examined once at the instance of the defendant in this particular field of expertise and the proposed examination would be the second and final examination by the clinical psychologist. In calculating the number of occasions of examination at the defendant's instance, plaintiff cannot include those instances where the examination was at plaintiff's own instance. In my view, this could not have been the intention of the Rules board in the circumstances. Therefore, for the

purposes of this application and in terms of Rule 36(2), plaintiff has been examined once at the defendant's instance. He cannot, therefore, refuse to be further examined at defendant's instance.

[12] Furthermore, plaintiff's averment in his affidavit in support of his objection to the proposed amendment that his own medico-legal neuropsychological expert has already examined him and prepared a medico-legal neuropsychological report does not bar defendant from invoking the provisions of Rule 36(2). As has been alluded to above, in calculating the number of instances of examination the Rule does not include instances where the examination was done at plaintiff's instance. Rule 36(2) and (3) are clear in this regard. Defendant is entitled to have plaintiff examined by its own expert in that particular field notwithstanding the fact that plaintiff's expert has done so at the plaintiff's instance. This is so for many reasons, which, *inter alia*, include the fact that experts may differ in their conclusions and opinions. My experience also taught me that it would be advisable for each party to the proceedings to have a report of an expert of the party's choice especially when the other party does not agree with the opponent's expert opinion as detailed in his or her report.

[13] Plaintiff's averment in paragraph 15.2 of his answering affidavit on page 63 of the record that plaintiff has to be examined again for the convenience of Messrs Hindly or Hill does not make sense. In fact that conclusion is not supported by proved facts and therefore cannot be used to support the allegation that the proposed examination is unreasonable.

[14] In my view, there are no convincing grounds upon which plaintiff can rely in his objection to the proposed examination. The notice in terms of Rule 36(2) indicates clearly that the proposed examination would be conducted in Port Elizabeth and not in Cape Town as plaintiff has suggested. Therefore, there would have been no inconvenience to the plaintiff if the examination is conducted in Port Elizabeth.

[15] Mr Van der Linde has pertinently submitted that the last report made on behalf of the plaintiff was compiled in 2009 by one Pat Hill. The condition of the plaintiff is likely to have changed and improved since then. I agree with Mr Van der Linde in this regard. It is not the defendant's fault that the case has not proceeded till to date. I say so, because, in every case the plaintiff is *dominis litis* and should determine and take a leading role in the speedy finalisation of his or her case. In circumstances where there are delays in the speedy finalisation of the case by the time of the trial there is likely to be new developments and or changes in the condition of the plaintiff regarding his or her recovery from the injuries sustained during the accident. For that reason a defendant in the shoes of the Road Accident Fund in this case would be perfectly correct in seeking a further examination of the condition of the plaintiff since the last examination which was done about three years ago. The purpose of the assessment is to assist the legal advisers of the parties and or the Court to be able to assess the damages for the purpose of adequate compensation. It therefore follows that the rule under discussion "is mainly designed to avoid a litigant being taken by surprise in relation to matters with respect to which he would in the normal course of events be

unable, before the trial, to prepare his case effectively so as to meet that of his opponent[3]. Moreover, it is not the intention of Rule 36 to give the party sought to be examined a leeway to choose the medical expert who should examine him or her. In terms of rule 36(3)(b) he or she may object to the person by whom the examination is to be conducted, but he or she is not required to nominate someone else[4].

[16] The final contention by plaintiff is that the proposed examination is pertinent to the plaintiff's cognitive, executive, socio-economic and behavioral functioning, and will be an invasion of his constitutional rights. It is quite correct that the obligation of a plaintiff to submit to medical examination is a drastic invasion of his or her rights to privacy which includes bodily integrity. Our constitution[5] defines the right to privacy as follows:

> "Everyone has the right to privacy, which includes the right not to have –
>
> (a) their person or home searched;
> (b) their property searched;
> (c) their possessions seized; or
> (d) the privacy of their communications infringed."

[17] It should also be noted that the protection of this right can be limited by the manner in which the individual interacts with other people to which he or she communicates about his own private life matters. In ***Bernstein and Others v Bester NO and Others***[6] Ackerman J characterised the right to privacy as lying along a

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[3] Durban City Council v Mndovu 1966 (2) SA 319 (D) at 324 D-E

[4]Durban City Council v Mndovu fn 3 *supra* at 325 H

[5]Section 14 of the Constitution of the Republic of South Africa, 1996 (the constitution)

[6]1996(4) BCLR 449 (CC)

continuum where the more a person interrelates with the world, the more the amplitude of the right is reduced. At page 489 para 77 the learned Judge has this to say about the limitation of this right:

> "A very high level of protection is given to the individual's intimate personal sphere of life and the maintenance of its basic preconditions and there is a final untouchable sphere of human freedom that is beyond interference from any public authority. So much so that, in regard to this most intimate core of privacy, no justifiable limitation thereof can take place. But this most intimate core is narrowly construed. This inviolable core is left behind once an individual enters into relationships with persons outside this closest intimate sphere; the individual's activities then acquire a social dimension and the right of privacy in this context becomes subject to limitation."

[18] Although the right to privacy is distinguishable from the right to dignity there is close connection between the two rights the former (privacy) consisting essentially in the right to live one's life with minimum of interference unless the individual extends his or her intimate sphere of individual activities by acquiring a social dimension with other people. In that case there will be a justification for the Courts, where applicable, to limit the claim of the right in accordance with the interests of both the holder of the right to privacy and those with which the holder interacts. In such circumstances there will be a justification for the resultant invasion of the right to privacy.

[19] In my view, this invasion of the claimant's rights aforesaid is exactly what is contemplated by the wording of Rule 36 which is plain and unambiguous and should be given its literal interpretation. The provisions of the Rule cannot be avoided for the reason that they have the effect of invading the claimant's constitutional rights. In my view, it is also imperative that the examination be conducted regardless of its

consequences if to do so would be in the interest of justice. If to do so would be in compliance with the correct interpretation of Rule 36(2) the logical consequences thereof are unfortunate as the provisions of the Rule 36(2) should be given its effect. The effect of the invasion has also been ameliorated by the fact that defendant who seeks to traverse the plaintiff's rights should be responsible for the costs of the examination. It is also in the interests of the plaintiff to conduct the examination in order to be as accurate as possible in the calculation of the damages due to the plaintiff more so when the amount to be paid in compensating plaintiffs in such claims is paid from the public coffers. Our law, though, requires a strict construction to be placed upon the provision in question not only in interpreting the relevant provisions but also in ascertaining the intent thereof. In ***Mgudlwa v AA Mutual Insurance Association Ltd***[7] Kotze J writing judgment for the full bench of this division stated:

> "In such a case our law requires a strict construction to be placed upon the provision in question not only in interpreting the provision but also in ascertaining the intent thereof (***Dadoo Ltd v Krugersdorp Municipality Council*** 1920 AD 530 at p 552). Having regard to this principle it seems to me that the Rule of Court should be fairly applied so as to adjust between two conflicting interests. On the one hand, the party requiring the examination should not be hampered in preparing for trial or estimating the amount of any sum which he might wish to offer by way of settlement. On the other hand, the person required to be examined should be subjected to the least possible degree of inconvenience, regard being had to the relevant circumstances. I consider that as a general rule it would be wise to apply Rule of Court 36 in such a way as not to require a plaintiff to travel a long distance in order to be examined on behalf of the defendant if this can be reasonably obviated …"

[7] 1967(4) SA 721 (E) at 723 A

[20] In my order I have left it to the parties to arrange a venue which will be convenient to both parties obviously after having regard to the interests of the plaintiff who has already suffered disfigurement as a consequence of the injuries he sustained during the accident under discussion.

D) COSTS

[21] The costs of this application are not part of the expense of carrying out the examination referred to in Rule 36(8)(c) and do not therefore automatically form part of the party and party costs of the applicant herein[8]. The Court is therefore entitled to consider the costs of this application in the normal method of dealing with any costs of the litigation before it[9]. A party who defends a case brought to Court does so at his or her peril and would consequently take the risk of losing his or her opposition of the case in which case, unless there are justifications for any deviation from the norm, the costs will follow the event. Having had regard to all the circumstances of the case, I am of the view that the plaintiff's objection to the examination together with his grounds thereof were unreasonable. For that reason plaintiff could not escape payment of the costs as an obvious consequence of his failure to successfully object to the proposed examination which is to be conducted to him. In the present circumstances, defendant could also have elected not to proceed with the application in terms of section 36(3) but invoke the provisions of section 19 of the Road Accident Fund Act[10] which provides that

[8]See Erasmus on Superior Court Practice [Service 37, 2011] – B1 262-267. See also Durban City Council v Mndovu fn 3 *supra*

[9]Mgudlwa v AA Mutual Insurance Association Ltd fn 5 *supra*

[10] Act 56 of 1996

the fund or agent shall not be obliged to compensate any person in terms of section 17 of the Act[11], for any loss or damage suffered as a result of bodily injury to any person who unreasonably refuses or fails to subject himself or herself at the request and cost of the fund or agent, to any medical practitioners designed by the fund or agent.

[22] I came to the conclusion that plaintiff's objection to the proposed examination did not have merit and should be rejected in its entirety. It is for the above reasons that I granted the order on 31 May 2012 and the above reasons constitute my reasons for that order.

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P.W. TSHIKI
JUDGE OF THE HIGH COURT

Counsel for the applicant	:	Adv H Van der Linde SC
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Counsel for the respondent	:	Adv D Niekerk
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[11]See fn 10 *supra*