IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

REPORTABLE

CASE NO: 17436/09

In the matter between:

THE CITY OF CAPE TOWN	First Applicant/Defendant
TIMOTHY VICTOR PAUL FERUS	Second Applicant/Defendant
MARIO BRIAN BATIST	Third Applicant/Defendant

and

JACQUELINE KOTZÉ	Respondent/Plaintiff

Heard: 19 May 2016

JUDGMENT DELIVERED ON 1 JUNE 2016

SHER, AJ:

[1] This is an interlocutory application in terms of Rule 36 for an Order that the respondent be directed to submit herself to a further medical examination

before a psychiatrist, which examination is to take place in three sessions of two hours each. The applicants also seek an Order that the psychiatrist be permitted to canvass the circumstances of the events that transpired on the date *of "the incident"* with the respondent, during the course of such examination.

[2] The reference to *"the incident"* is a reference to the events which occurred on the afternoon of 29 December 2006, almost 10 years ago. At that time, the respondent was a Captain in the SA Police Services in Somerset West, where she was employed as an accountant.

[3] Whilst she was in a motor vehicle at a red traffic light in Gordon's Bay on that day, she became involved in an altercation with members of the first applicant's Metro Police Services, including second and third applicants. She was arrested in front of her two young daughters, who were 3 and 1 years old at the time and who were in the vehicle with her, and taken forcefully to the police station. She claimed that in the process she was abused and humiliated and was physically manhandled, and sustained certain bodily injuries, including bruising to her wrists and contusions to her upper back. According to a psychiatrist Dr C George (who assessed the respondent at the instance of the applicants), the arrest was severely traumatic for the respondent, the more so because she had her two young children with her at the time and was concerned not only for her own safety, but also for theirs, as she became separated from them. The respondent was also pregnant at the time and pursuant to this incident she miscarried. Dr George found that at the

time respondent experienced severe anxiety, panic, and 'fearfulness', and subsequent thereto she had 'flash-backs' and nightmares, manifested phobic symptoms, became hyper-vigilant and lost all interest in her personal life.

[4] In March 2007, some 3 months after the incident, she was formally diagnosed as suffering from a post-traumatic stress disorder as well as a major depressive disorder, by psychiatrist Dr P Strong. This diagnosis followed on several sessions which respondent had with Ms E Morkel, a clinical and counselling psychologist, and treatment and medication she received at the hands of another psychiatrist, Dr Verster. Later in 2007 she also consulted another counselling psychologist Mr A Pieterse, as well as psychiatrist Dr F Mohideen-Botes, and during 2008 she was also treated by psychiatrist Dr White. She was unable to return to work as a police officer due to the persistence of these conditions and was medically boarded at the end of 2008.

[5] During September 2009 respondent instituted an action against the applicants in which she claimed damages in an aggregate amount of R1 150 000.00. Included in the heads of damages were claims for estimated past and future medical expenses, loss of earnings (both past and future) and general damages. In December 2012 respondent filed amended particulars of claim in which she sought increased damages for loss of earnings in an amount of R10.7 million, and increased amounts in respect of all the other heads of damages. A trial date has not yet been allocated to the matter, and it is still subject to the provisions of Rule 37(8), in terms of which the pre-trial process

is being managed by a judge. The Registrar will consequently only allocate a date once all the directions of the court have been complied with in regard to any outstanding procedural requirements and the matter has been certified trial-ready.

The various assessments and the events leading up to the application:

[6] With a view to becoming trial-ready and in accordance with common practice followed in matters such as these, respondent has been examined and assessed by a number of medical practitioners and other professionals, both at the instance of the defendants (the applicants herein), as well as at the instance of her own legal representatives.

[7] Apart from Dr C George who assessed her and filed a report dated 18 June 2013, respondent was also assessed at the applicants' instance by a clinical psychologist Mr L Loebenstein, who prepared a report dated 28 September 2013. In February 2014, clinical psychologist Mr L Awerbuck assessed her at the request of her own attorneys and filed a report, and in July 2014 he filed a supplementary report. Subsequent thereto Mr Loebenstein conducted a follow-up assessment of the respondent at the instance of the applicants, and prepared a supplementary report dated 14 September 2014.

[8] Curiously, respondent did not get asked to return to Dr C George for a follow-up assessment, which is the standard practice that is adopted in these matters. Instead, a notice in terms of Rule 36(2) was served on her attorneys calling upon her to submit to a medical examination before another

psychiatrist, Dr K Czech, on 21 September 2014. According to a note filed by Dr Czech, he performed a *"full"* psychiatric assessment of the respondent over a 2-hour period on that day. However, Dr Czech did not file a report in the matter and withdrew therefrom. This followed after a letter was addressed to the applicants' attorneys by the respondent's attorneys, in which they expressed strong disapproval of what allegedly occurred during the interview which Dr Czech had with respondent. In this regard it was alleged that Dr Czech became irritated with the respondent (when she was unable to name all the doctors and psychologists she had seen over the years, and in what order, and all the medication she had been prescribed), and when she was unable to remember certain details of the incident which had occurred some 7 years earlier. It was further alleged that Dr Czech 'cross-examined' respondent in regard to her husband's circumstances, was discourteous to her and otherwise acted in a manner which was not objective and impartial. Respondent's attorneys said that respondent experienced the interview as a traumatic and stressful experience and by the end thereof she was severely distressed, to the point that she fled from the venue in a hysterical state and would not communicate. They indicated that, as a result, they had instructions to lay a complaint of professional misconduct against Dr Czech. Not surprisingly, pursuant to this letter applicants' attorney recommended to Dr Czech that it would be in the best interests of all the parties concerned if he withdrew from the matter, which he duly did.

[9] On 6 March 2015 applicants' attorney addressed a further correspondence to the respondent's attorney in which he indicated that in the light of Dr Czech's

withdrawal, he had made arrangements that one Dr P Cilliers, a psychiatrist in practice in Cape Town, should examine the respondent instead. Although it appears that respondent was amenable to attending upon Dr Cilliers for such further examination, various appointments which were made with her had to be re-scheduled on a number of occasions.

[10] On 23 March 2015 applicants' attorney received a letter from the respondent's attorney in which he was advised that respondent was no longer prepared to subject herself to any further medico-legal examinations, given that she had already been examined by two psychiatrists and a clinical psychologist at the instance of the defendant.

[11] Notwithstanding respondent's objections to the further proposed examination before Dr Cilliers, applicants' attorney caused yet another notice to be issued in terms of the provisions of Rule 36(2) formally calling upon her to submit to such an examination on 20 May 2015. In response thereto respondent's attorneys reiterated that respondent refused to attend on any further *"medico-legal reports"* (sic) with a psychologist or a psychiatrist, and they pointed out that it seemed as if the applicants were on a *"wild goose chase"* to obtain a report from a specialist who would 'assist' them in their defence, rather than a report which would assist the court. Consequently, respondent's attorneys indicated that any application seeking to compel respondent to undergo any further examination would be opposed. Such an application was duly launched by the applicants in June 2015.

[12] A few days before the application was due to be heard the parties were summonsed by the Judge-President and were urged to resolve the impasse. Although respondent was very reluctant to accede thereto she was persuaded by her counsel to attend upon the further psychiatric examination with Dr Cilliers, on the understanding that this would be the last such examination at the instance of the applicants, in order that the matter could be finalised. Given what had allegedly transpired during the interview with Dr Czech, respondent's attorney assured the respondent that he would be present at the consultation with Dr Cilliers, and that he would personally ensure that Dr Cilliers was briefed with a full set of papers including copies of the reports of all the other experts, so that it would not be necessary for Dr Cilliers to go into the detail of the events pertaining to the incident which occurred in December 2006. Pursuant to this undertaking respondent's attorney addressed a letter directly to Dr Cilliers whereby he enclosed a copy of all the relevant medico-legal reports, as well as the papers in the application to compel. In his letter, respondent's attorney remarked as follows: *"U sal aflei dat die hele aangeleentheid baie traumaties was en nog steeds is vir ons kliënt en is dit ons kliënt se versoek (indien moontlik) om haar nie weer deur die hele traumatiese voorval te vat nie"*.

[13] In the light of the reassurances she received respondent duly consented to an Order which was granted by agreement between the parties on 26 October, directing her to submit to a medical examination before Dr Cilliers.

[14] It is apparent from an ordinary reading of the terms of the Order that it was envisaged that respondent would be assessed on one further occasion by applicants' psychiatrist.

[15] On 1 December 2015 respondent duly attended on Dr Cilliers's rooms in the company of her attorney. Dr Cilliers informed them that he would not allow respondent's attorney to sit in on the consultation. As a result respondent did not want to proceed therewith, but after her attorney contacted her counsel they managed to prevail upon her to allow the examination to proceed in his absence. It is also apparent that Dr Cilliers did not read any of the medico-legal reports which had been sent to him by respondent's attorney, before the consultation, and it seems as if he treated this as an instance where he was to provide a general opinion which was not confined to any specific issue.

[16] Some 45 minutes into the consultation Dr Cilliers began examining respondent in relation to the incident, and whilst she was recounting the circumstances thereof she 'broke down', and he was unable to console her. He thought it was in her best interests to stop the assessment and to resume on another date. Later that day his practice manager sent an e-mail to applicants' attorney in which it was indicated that Dr Cilliers needed to see the respondent for a further three sessions of two hours each, which should take place in the same week. Applicants' attorney forwarded this correspondence to the respondent's attorney and requested that provisional arrangements be made for such further sessions. Respondent was not amenable to agreeing thereto.

[17] It is these events which prompted the launching of the instant application. Against this background, I turn to consider the provisions of the Rule that are of application in this matter.

The origins and mechanism of the relevant provisions:

[18] Prior to the enactment of the Uniform Rules in 1965, defendants in actions for damages for compensation resulting from bodily injuries had practical difficulties in obtaining information pertaining to the assessment of the plaintiff's injuries and damages claimed, from independent sources. Aside from certain statutory exceptions, defendants had no means whereby they could demand that a plaintiff should submit herself to a medical examination, and in practical terms the only way of obtaining some of the necessary information was limited to a request for further particulars or discovery.[1] Rule 36 was consequently enacted to deal with these difficulties. In *Durban City Council v Mndovu*[2] it was held that the purpose of the sub-rules pertaining to examinations was to avoid a litigant being taken by surprise (in relation to matters in respect of which he would ordinarily be unable to prepare his case effectively before trial), so that he could meet the case put up his opponent.

[19] Rule 36(1) provides that 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 so claiming (and whose state of health may be relevant for the determination of such damages or compensation), to submit

---

[1] *Durban City Council v Mndovu* 1966 (2) SA 319 (D) 324A.

[2] *Id* at 324D-F.

to medical examination. The machinery for giving effect to such submission is set out in sub-rules (2), (3) and (5).[3] In broad terms, these sub-rules provide that any party desirous of requiring another party to submit to a medical examination is required to deliver a notice specifying the nature of such examination, the person or persons by or before whom, and the place and date at which, such examination shall take place.[4] The party being examined is expressly allowed, in terms of the Rule, to have his/her own medical advisor present during the examination, and the reasonable costs to be incurred in attending such examination (including travelling costs and loss of salary, wages or other remuneration), must be tendered by the requesting party.[5]

[20] Rule 36(5) provides that if it appears from any medical examination which was carried out, that any *"further"* medical examination by *"any **other** person is necessary or desirable"* (my emphasis), for the purpose of obtaining "*full"* information on matters relevant to the assessment of the damages claimed, "*any*" party may require *"a second and final"* medical examination to be carried out. Sub-rule (8) in turn provides that any party so causing any examination to be made shall cause the person *"making"* the examination to provide a full report, in writing, of the results thereof and the opinions that

---

[3] Rule 36(5)(A) provides that where any party claims damages as a result of the death of another person, he or she shall also undergo a medical examination as prescribed in the Rule if so requested and his/her own state of health is relevant in determining the damages or compensation.

[4] This shall be not less than 15 days from the date of the notice in terms of Rule 36(2).

[5] Rule 36(2)(a)-(d).

he/she formed as a result thereof[6] and is obliged to furnish any other party with a complete copy of such report, upon request.[7]

[21] Rule 36(9) provides that no party shall[8] be entitled to call as a witness any person to give evidence as an expert unless he shall have delivered notice of intention to do so within the prescribed period,[9] and has delivered a summary of such expert's opinion and his reasons therefor, no less than 10 days before the trial.[10] In the light of this sub-rule it has become standard practice for the full report which is obtained from any medical expert commissioned by a party, to be annexed as is, to any notice which is given in terms of Rule 36(9)(b), instead of just a summary. Because of the peremptory terms in which the Rule is phrased ie that the evidence of *any* expert which a party wishes to call shall not be allowed unless a summary thereof is provided, in practice the provisions of sub-rule (5) are ignored, and parties commonly call upon claimants to undergo repeated follow-up assessments, even by experts who are not medical practitioners and even where the assessments involve examinations which are not 'medical'.

[22] There are a number of anomalies evident in the Rule. In the first place, although the Rule is titled "*Inspections, Examinations and Expert Testimony*" as far as the examination of persons is concerned it only deals with "*medical*"

---

[6] Rule 36(8)(a).

[7] Rule 36(8)(b).

[8] Save with the leave of the Court or the consent of all parties.

[9] Fifteen days before the hearing.

[10] Rule 36(9)(b).

examinations, and it is only in respect of such examinations that a party may be required to submit. Unlike the wording of the equivalent Rule in the Magistrate's Court,[11] such an examination need not be carried out by a registered medical practitioner, and it is the nature of the examination that determines whether it falls within the ambit of the Rule. On the face of it the Rule would not apply in regard to examinations to be carried out by a whole host of experts who are frequently commissioned to draw up 'medico-legal' reports in claims for damages arising from bodily injuries, such as occupational therapists, remunerations experts, mobility experts, industrial psychologists, accountants and actuaries. However, as I have pointed out because the provisions of sub-rule 36(9) provide that no party shall be entitled to call as a witness any person to give evidence as an expert unless it has delivered notice of its intention to do so, and has filed a summary of such expert's opinions and his reasons therefor, reports from these and other professionals are regularly obtained and filed, even though on the wording of the Rule as it stands, there is no duty on the part of the party who is subject to examination before such professionals, to submit thereto. There is however no question that the examination and interrogation to which a party can be subjected by such other 'non-medical' experts would in many instances constitute the self-same sort of examination or interrogation (if not a more rigorous one at times), than that to which the party may be subjected to in a 'medical' examination in terms of the Rule.

[11] Rule 24(1).

[23] In the second place, whilst provision is made expressly for a judge to determine the conditions upon which any initial proposed examination is contested, there is no similar provision allowing for intervention by a court in regard to any subsequent examination that may take place. In this regard, sub-rule (5) simply provides that a "*second and final*" medical examination may be carried out at the instance of a party, provided the requirements of the Rule are met. Given the inexorably slow process of litigation from issue of summons to the hearing of a matter before a court, in numerous instances involving many years, it is common practice for parties to obtain so-called follow-up or supplementary reports from their experts on more than one occasion. Were a party that is to be examined to elect to refuse to submit to any such examinations beyond the second one however, it appears that on the strict wording of sub-Rule (5) he or she would be entitled to adopt such a stance.

The provisions and the parties' rights:

[24] It was recognised as early as 1967 that the provisions of the Rule under discussion constitute a *"drastic invasion"* of a party's rights.[12] In *Goldberg v Union and South West Africa Insurance Co Ltd*,[13] Howie J (as he then was) held that it was not only a party's right to bodily privacy which was intruded upon, but also his/her right as a party to pending litigation, to decline to divulge evidence to anyone but his legal representatives and the Court which

---

[12] *Mgudlwa v AA Mutual Insurance Association Limited* 1967 (4) SA 721 (ECD) 722I-723A.

[13] 1980 (1) SA 160 (E).

was trying his action. What the Rule in effect obliged a party to do was to subject himself, in advance, not only to a physical examination, but also to questioning about medical issues which would be canvassed at the trial. Howie J pointed out that whereas the doctor conducting the examination would have to question the examinee in order to apprise himself of the relevant issues including the patient's medical history, the injuries sustained and the symptoms of which the claimant suffered, unless the questioning was fair an unrepresented claimant could well be prejudiced and there was little, if anything, that he could do to avoid such questioning and his answers could be freely used against him should his testimony at the trial be at variance with what he had said during the examination. Consequently, he held that a claimant should enjoy the same protection which he would enjoy in a court by having the right to have his legal representative present during the examination, in order to ensure that the extra-curial questioning to which he was subjected was fair and just.[14] He remarked further that although medical practitioners could generally be relied on to perform an examination objectively there could be unfortunate instances of deviations from that standard and in addition, it was *"distinctly possible for honest and objective questioning unintentionally to develop from examination into cross-examination whilst in zealous pursuit of an appealing point"*. In addition, unless controlled within the appropriate spheres of enquiry, the questioning could also *"stray onto the circumstances of the accident itself or economic considerations not germane to the medical issues"*. Should such questioning

[14] 165B-C.

transgress the limits of what was proper or relevant, it was *"not difficult to imagine an unrepresented claimant….making unwarranted and ostensibly damaging concessions which, had they been made in the course of the trial, could have been satisfactorily explained away or at least cast in proper perspective"*.[15]

[25] Given the invasive effect which the provisions of the Rules thus have on a party's rights it has been held that they must be interpreted strictly,[16] and in giving effect to such a strict interpretation it must be presumed that the legislature intended there to be *"as little interference"* with a claimant's rights as possible.[17]

[26] I have, in the time at my disposal, not been able to locate a single reported judgment in which the ambit of the Rule and how it affects a party's rights in the post-constitutional era has been considered. The provisions in question clearly impact upon a number of fundamental rights in the Bill of Rights, including the right to freedom and security of the person (in terms of s 12) and subsumed therein, the right to bodily and psychological integrity,[18] which includes the right to security and control over one's body.[19] So too, the right to privacy,[20] which includes the right not to have one's person *"searched"* [21]

---

[15] 164H-165A.

[16] *Mgudlwa* n 11 at 723A, relying on *Dadoo Ltd v Krugersdorp Municipal Council* 1920 (AD) 530-552.

[17] *Goldberg* n 12 at 165C-D.

[18] S 12(2).

[19] S 12(2)(b).

[20] In terms of s 14.

[21] S 14(1)(a).

and the right not to have the privacy of one's confidential communications infringed,[22] are also implicated, as is the right to dignity. Human dignity is listed as a primary foundational value in the Constitution,[23] and the Bill of Rights provides that everyone has the right to have their dignity respected and protected.[24] These rights all inter-link with one another. As Bishop and Woolman point out[25] the right to bodily and psychological integrity often overlaps with rights to dignity and privacy, and an invasion of a person's privacy has often been regarded *per se* as an impairment of a person's dignity.[26] The scope of the right to privacy is also closely linked to the concept of personal identity.[27] At common law it is well established that a person's right to bodily integrity and autonomy entitles him to refuse medical treatment or assessment,[28] and subjecting a person to unauthorised medical procedures to which he or she has not consented has been held to constitute an invasion of privacy.[29]

---

[22] S 14(1)(d).

[23] S 1.

[24] S 10.

[25] 'Freedom and Security of the Person' in *Constitutional Law of South Africa* (2nd ed) at 40-78.

[26] McQuoid-Mason 'Privacy' in *Constitutional Law of SA* (2nd ed), 38-6; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) at para [30].

[27] *Bernstein and Ors v Bester and Ors NNO* 1996 (2) SA 751 (CC).

[28] *Castell v De Greeff* 1994 (4) SA 408 (C).

[29] In a number of cases it was held that the performance of blood tests without authorisation or consent was wrongful *vide Seetal v Pravitha and Ano NO* 1983 (3) SA 827 (D) 861C; *M v R* 1989 (1) SA 416 (O) 426J; *Nell v Nell* 1990 (3) SA 889 (T) 895H; *C v Minister of Correctional Services* 1996 (4) SA 292 (T) 300F-301B.

[27] In *D v K*[30] it was held that the constitutional right to privacy precluded a court from invoking its inherent jurisdiction to order a person to undergo a blood test, against his will, in a paternity dispute.

[28] It is also well-established in common law that the unauthorised disclosure of private information about a person contrary to a confidential relationship (eg the relationship between doctor and patient) would ordinarily also constitute a breach of privacy.[31] All of these rights are effected by the provisions of Rule 36(1) and (5).

[29] The personal rights referred to must be juxtaposed against s 34 of the Constitution which provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair hearing before a court. In *DF Scott (EP) (Pty) Ltd v Golden Valley Supermarket*,[32] the Supreme Court of Appeal held that the Rules of court are designed to ensure a fair hearing, and as such they should be interpreted in such a way as to advance, and not reduce, the scope of the right to a fair trial in terms of s 34. In *De Beer NO v North-Central Local Council and South-Central Local Council and Ors*,[33] the Constitutional Court remarked that:

> *"The right to a fair hearing before a court lies at the heart of the rule of law … Courts in our country are obliged to ensure that the proceedings*

---

[30] 1997 (2) BCLR 209 (N) *contra S v Huma* 1996 (1) SA 232 (W) 236H-237B where it was held that taking a person's fingerprints constituted a trivial infringement rights to bodily integrity. See further Bishop and Woolman n 24 at 40-87.

[31] *Financial Mail (Pty) Ltd and Ors v Sage Holdings Ltd and Ano* 1993 (2) 451 (A) 462F.

[32] 2002 (6) SA 297 (SCA) 301G-H.

[33] 2002 (1) SA 429 (CC) 439.

> *before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution courts must interpret legislation and Rules of Court, where it is reasonably possible to do so, in a way that would render the proceedings fair"*.[34]

[30] Insofar as the relationship between the Rules of Court and any limitations on fundamental rights which are contained therein is concerned, the Constitutional Court has remarked that:

> *"For courts to function fairly, they must have Rules that regulate their proceedings … Of course, all these Rules must be compliant with the Constitution. To the extent that they do constitute a limitation on a right of access to court, that limitation must be justifiable in terms of s 36 of the Constitution. If the limitation claimed is justifiable, then as long as the Rules are properly applied there can be no cause for constitutional complaint. The Rules may well contemplate that at times the right of access to a court will be limited. A challenge to the legitimacy of that effect however, would require a challenge to the Rule itself. In the absence of such a challenge the litigant's only complaint can be that the Rule was not properly applied by the court. Very often the interpretation and application of the Rule will require consideration of the provisions of the Constitution, as s 39(2) of the Constitution instructs. A court that fails to adequately consider the relevant constitutional provisions will not have properly applied the Rules at all"*.[35]

[31] I am enjoined when interpreting the provisions of the Rule in question, in the context of the fundamental rights referred to, to do so in a way that promotes the values that underlie a society based on human dignity,[36] and in a way which promotes the spirit, purport and objects of the Bill of Rights.[37]

[32] Neither of the parties contended that the provisions of the Rule under discussion were *per se* unconstitutional, but they were agreed that they

---

[34] 439G-440A.

[35] *Giddey NO v JC Barnard and Partners* 2007 (2) BCLR 125 (CC) at para [16].

[36] S 39(1)(a) of the Constitution.

[37] S 39(2).

constituted material limitations of the fundamental rights I have referred to. Ms *Witten*, who appeared for the applicants, drew my attention to the unreported decision of Tshiki J in the matter of *Fabian Potgieter v The Road Accident Fund (ECD Case No 2416/05)*, in which, in a similar application to this, it was contended that a notice which called upon the plaintiff to undergo an examination before a second psychologist commissioned by the defendant was *"pertinent to the plaintiff's cognitive, executive, socio-economic and behavioural functioning"*[38] and constituted an invasion of his constitutional rights, in particular, his right to privacy. With reference to the decision in *Bernstein and Ors v Bester NO and Ors*,[39] Tshiki J pointed out that the right to privacy lay along a continuum and the more a person inter-related socially with those around him, the more the amplitude of this right was reduced. As such, a court was justified in applicable circumstances to limit a claim to such right in accordance with the interests of both the holder thereof and those with whom the holder of such right interacted. Tshiki J was of the view that such an invasion of the right to privacy *"is exactly what is contemplated by the wording of Rule 36"* [40] and he held that the provisions of the Rule could thus not be 'avoided' on the basis that they had the effect of 'invading' a claimant's constitutional rights. Consequently, he was of the view that it was imperative

[38] At para [7.4].

[39] Note 26 .

[40] At para [19].

that an examination be conducted *"regardless of its consequences,"*[41] if to do so would be in the interests of justice.

[33] In my view, the provisions of the Rule under discussion (at least those pertaining to the compulsion of a party to submit to medical examination), are essential and necessary for the achievement of important public policy objectives, in the interests of the administration of justice. In this regard, both the public at large and litigants in a particular suit have an interest in the resolution of disputes before courts in a fair, expedient and cost-efficient manner. Experience has shown that generally (provided they are not abused), the sub-rules allow for independent experts with the necessary skill, experience and expertise to report on the medical status of a party and thereby inform not only the opposing party but the court as well, of the nature, ambit and extent of any bodily or mental injury which a party may have suffered, to provide a diagnosis of any medical condition or ailment which may be found, and to venture an opinion in regard to the prognosis of future recovery, if any, and the effects of the injury, overall, on the body and psyche of the party examined. The findings and opinions set out in these reports impact directly on the quantification of the various heads of damages claimed and are of immeasurable value in setting out, objectively, those factors which may be relevant in regard to an assessment of the general damages which are to be awarded for pain, suffering, disability and such loss of the amenities of life as may have been suffered. In addition, without the expert opinions of the relevant medical professionals in relation to issues of functional

---

[41] *Id.*

impairment and permanent disability, it would not be possible for other experts such as industrial psychologists and actuaries to compute the value of any claim for past and future loss of earnings. In order to obtain these opinions in the form of written reports it is obviously necessary for the party in question to be examined by the practitioner or medical health professional concerned, and without the necessary machinery to compel a party to undergo such examination and assessment, the underlying substratum of the Rule would fall away, and the provisions of sub-rule 36(9)(a) and (b) would be rendered nugatory. Experience has taught that the more extensive and thorough the reports are, the less likely it is that a court will be required to make its own determination in respect of medically related issues, including issues such as what future medical treatment and medication may be appropriate, and the costs thereof, which are aspects in respect of which a court does not have the necessary knowledge and expertise. Without such examinations and reports subsequent thereto, the necessary commonality between the parties in respect of such issues would not be able to be defined, and opposing experts would not be able to apply their minds to whittling down the issues in dispute and arriving at an agreement in respect of the impact of an incident which has caused injury or damage to a party's body and/or psyche, thereby limiting the length and breadth of any trial which may eventutate, and the parties would not be in a position to evaluate the strengths and weaknesses of their respective cases and, based on these, to negotiate a fair settlement.

[34] In the circumstances, in my view such limitations of a party's rights to bodily integrity, privacy and dignity as are occasioned by the application and enforcement of these Rules are thus clearly reasonable and justifiable limitations in an open and democratic society based on freedom and equality, provided that a court is alive to, and effectively regulates any abuses of the Rule.

[35] In this regard, as the court did in *Potgieter*, I too have had recourse to the decision in *Bernstein,*[42] albeit for different purposes. In that matter, the Constitutional Court was faced with a challenge to the provisions of ss 417 and 418 of the (then) Companies Act[43] which allowed for any director or officer of a company that has been wound up to be summonsed to appear at an enquiry before the Master, or a Commissioner appointed for this purpose by the court, to be interrogated and to provide information concerning the trade, dealings, affairs or property of the company. It is trite that the purpose of these provisions is to allow the liquidators to determine what the circumstances were which led to a company's demise, whether any mismanagement or depredations on the company occurred, and what the assets and liabilities of the company are, in order that such assets may be recovered and the liabilities discharged in the best interests of the creditors. A challenge to these provisions on the basis that they violated a cluster of constitutional rights including the right to freedom and security of the person, and the right to privacy, was unsuccessful. Ackerman J pointed out that both

---

[42] Note 26.

[43] Act 61 of 1973.

in the United Kingdom and jurisdictions such as Australia, which share a common ancestry with South African companies' legislation, courts have exercised control over the machinery of the provisions in question by intervening in instances where an application for the examination of a person ought not to be granted if it would be oppressive, vexatious or unfair; or to prevent any oppressive or unfair conduct from taking place during the course of any inquiry which had been previously authorised.[44]

[36] Amongst the numerous authorities the court referred to was the matter of *Clover Bay Ltd (Joint Administrators) v Bank of Credit and Commerce International SA*,[45] where the Court of Appeal set out the criteria which applied to the exercise of the court's discretion to order an examination, and which are instructive for the purposes of considering the exercise of discretion in this matter:

> *"It is clear that in exercising the discretion the court has to balance the requirements of the liquidator against any possible oppression to the person to be examined. Such balancing depends on the relationship between the importance to the liquidator of obtaining information on the one hand and the degree of oppression to the person sought to be examined on the other. If the information required is fundamental to any assessment … and the degree of oppression is small … the balance will manifestly come down in favour of making the order. Conversely, if the liquidator is seeking merely to dot the i's and cross the t's of a fairly clear claim by examining a proposed defendant to discover his defence, the balance would come down against making the order. Of course, few cases will be so clear: it will be for the Judge in each case to reach his own conclusion"*.[46]

---

[44] Paras [17], [35] – [37].

[45] [1991] 1 All ER 894 (CA) at 900B-D.

[46] 900B-D.

[37] In my view, given this Court's inherent power to regulate its Rules and procedures (both in terms of common law and in terms of s173 of the Constitution),[47] it should adopt a similar approach in regard to applications for the submission of a party to undergo a medical examination. In considering whether to allow such an application, the court should strive to balance the aims and objectives of affording a party an opportunity to obtain such information (pertaining to the state of health of any party in regard to matters which may relate to the assessment of a claim for damages pursuant to an alleged bodily injury), as may be necessary in order to enable it to prepare for trial, on the one hand; with the nature of the examination which is sought to be performed and the effect it may have on the party to be examined, on the other. In carrying out such a balancing exercise, and without seeking in any way to be definitive or prescriptive, the following considerations would play a part:

(a) The importance of, and the need for obtaining the information sought: This, in turn, will depend on the nature of the information and what evidentiary value it may have in regard to the issues in the matter which is before the court, whether it is of a general or specialized nature, and whether or not it is already established in, or has been obtained by way of other reports, or is otherwise common cause;

---

[47] S173 provides that the High Court has the inherent power to protect and regulate its own process, and to develop the common law, having regard for the interests of justice.

(b) Is it about obtaining further medical information which can assist the parties and/or the court at arriving at a resolution of the dispute or is it about seeking to obtain a tactical, forensic advantage over a party which one would not ordinarily obtain (eg to obtain material from which to cross-examine a party or to use as 'ammunition' against such party);[48]

(c) Is the examination which is proposed sought on the basis of a medically justifiable rationale or reason relevant to the issues in dispute (eg if there is no suggestion of any psychological impact being suffered as a result of a bodily injury, a party would not ordinarily be expected to subject themselves to a psychological assessment);

(d) What will be the effect of the proposed examination on the party that is to be examined? Will it result in an unnecessary invasion of the party's personal privacy and bodily integrity in circumstances where this is not necessary and the information can be obtained in another manner? Will it cause the party to suffer undue hardship or inconvenience, or emotional or psychological distress or pain, and thereby add insult to injury?

(e) At what stage in the litigation is the examination being sought? Is the information being sought in the form of a supplementary report for the

[48] See *James v Magistrate, Wynberg and Ors* 1995 (1) SA 1 (C) 16C.

purposes of updating the results of previous examinations or is it a completely new inquiry which is to be launched on the eve of the trial?

(f) How many other examinations has the party been subjected to, either at the instance of the party seeking the further examination or at its own instance?

[38] Where a court is of the view that a medical examination is likely to result in an invasion of a party's personal privacy and bodily integrity in circumstances where this is not necessary and the information can be obtained in another manner, or it will cause the party to suffer undue hardship or inconvenience, or physical, emotional or psychological distress or pain, it should not allow the examination to go ahead, or should put conditions in place to safeguard the examinee's rights. I point out that when it comes to an examination of any property (either movable or immovable) in terms of the Rule,[49] a party is not bound to subject itself thereto if such examination will "*materially prejudice"* it, by reason of the effect the proposed examination will have on such property. I can see no reason why, if an examinee is likely to be materially prejudiced in the sense I have outlined in regard to any bodily or mental examination, he or she should not similarly be entitled to refuse to submit thereto.

The parties' submissions:

[39] Respondent adopts the attitude that the reference in the Rule to *"any further medical examination by any other person"* cannot be understood to afford the

---

[49] Rule 36(7).

applicants in this matter a right to have her examined in order to obtain a second opinion on an issue or aspect that has previously been examined by an expert commissioned at their instance. Respondent points out that usually, in matters such as these, follow-up or supplementary reports are obtained by a party from the experts it originally commissioned as they are familiar with the patient's circumstances and medical history and have already expressed an opinion in regard thereto. As such, this would usually be the most cost-effective and expedient way of dealing with the need to obtain further information. As I have previously pointed out applicants initially commissioned their own psychiatrist, Dr George, to examine and assess the respondent, but for some reason which has not been disclosed in the papers, elected not to request the respondent to submit herself to a follow-up examination before Dr George, and now seek to have her examined by another psychiatrist. Respondent's counsel conceded however that on an ordinary reading of the Rule there was no prohibition on a party, either expressly or impliedly, which disallowed it from obtaining a second opinion for any good reason eg if it had lost confidence in the expert it had originally employed, or no longer made use of his or her services because the working relationship between them had come to an end.

[40] Respondent contended further that the applicants could not show from the report of Dr George or any other practitioner who had examined her that it was "*necessary or desirable*" for her to be examined by another person, and a second opinion on the same issue was thus not theirs for the asking.

[41] Finally, respondent contended that in any event, if the applicant's request properly fell within the ambit of the requirements of sub-rule (5) then it had been complied with when she attended upon Dr Czech, at which time a second examination was conducted at the instance of the applicants, and the fact that Dr Czech disqualified himself from reporting on his assessment should not be laid at her door.

[42] On the other hand, applicants adopt the attitude that inasmuch as respondent consented to a further examination which was incorporated into an order of court and Dr Czech was unable to complete his examination and did not render a report, the examination which they now seek to be performed by Dr Cilliers (or rather to be completed by Dr Cilliers), constitutes the "*second"* and final medical examination which they are entitled to request the respondent to undergo.

[43] In *Potgieter*, Tshiki J interpreted the provisions of sub-rule (5) to mean that as a plaintiff in matters such as these would have to be examined by numerous experts in respect of various heads of damages, which included loss of earnings and general damages, he/she was entitled to be examined at his own instance by an expert in each particular 'field' pertaining to such head of damages and, in response, defendant was entitled to require the plaintiff to be examined at its instance in respect of each 'field' of examination, on no more than two occasions.[50]

---

[50] Para [11].

[44] I am, with respect, not convinced that the interpretation which was adopted in *Potgieter* was correct. In the first place, I do not believe that it would always be possible to categorise an expert's function or his report as pertaining to an assessment in a clearly defined 'field' which is linked to a particular head of damages. In my experience, experts frequently report on aspects which may serve to traverse more than a single 'field' and which often pertain to more than one head of damages. In this regard it is not unusual for a single medical practitioner to comment not only on an injury and the pain and suffering it may have caused, which would relate to the claim for general damages, as well as the costs of future medical treatment, but also in regard to its affect on functionality and whether it has resulted in physical impairment or disability, which would impact upon the loss of earnings component of the claim. However, in the view I take of the matter it is not necessary for me to pronounce on this issue because I will assume, in favour of the applicants, that inasmuch as Dr Czech did not provide a report, even though he carried out a 'full' assessment, there was no true 'second' examination within the meaning of the Rule as a whole, and applicants are thus entitled to have respondent re-assessed by Dr Cilliers, provided of course that they can show that they fall within the requirements of the Rule in regard to 'necessity' or 'desirability'.

[45] In his affidavit in support of the original application for an Order that the respondent submit to a medical examination by Dr Cilliers, applicants' attorney said that such proposed further medical examination was necessary or desirable if regard be had to the views expressed by Dr George and

Messrs Loebenstein and Awerbuck, and the allegations contained at paragraphs 9.4 and 9.5 of the respondent's amended particulars of claim. In these paragraphs it was simply averred that as a result of the incident, respondent would require further consultations in the future, with a psychologist and/or a psychiatrist, and medication. As far as this issue goes, both Dr George and Mr Loebenstein were *ad idem* that a course of cognitive behavioural therapy was indicated in respect of future treatment and Loebenstein pointed out that outcome studies with regard to the disorders of which the respondent suffered from generally supported the view that such therapy should be combined with psychopharmacological intervention. In the circumstances, the averment that the allegations contained in paragraphs 9.4 and 9.5 of the respondent's amended particulars of claim made it necessary and/or desirable to obtain the opinion of yet another psychiatrist at the instance of the applicants is not justified.

[46] In his report dated 13 February 2014 Awerbuck confirmed the diagnosis made by numerous other mental health professionals and concurred with them that the incident had a severely traumatic influence on the psychological make-up and quality of life of the respondent. He pointed out that his findings were in line with those of all the other clinical psychologists and psychiatrists who had treated or assessed the respondent, save for Loebenstein, who only differed slightly in regard to the severity of the diagnosis and who was more sanguine about the prospects of respondent being able to work in the future. He pointed out that all of the (six) other mental health professionals who had assessed the respondent had labelled her condition as *"intense"* or *"severe"*

and had used phrases such as *"severely emotionally incapacitated"*, *"unable to function in any areas of daily living"*, *"her impaired state is having a profoundly detrimental effect on her children and her husband"*, and *"she remains severely ill"*. His own assessment confirmed a poor prognosis for complete recovery due to the severity and recurring length of the conditions from which respondent was suffering, a finding which was similarly supported by all of the other mental health professionals (including Dr George), save for Loebenstein who was somewhat more optimistic that with cognitive behavioural therapy the respondent would benefit substantially. Dr George was of the view that cognitive behavioural therapy would only have a limited benefit and would not significantly improve respondent's employment prognosis.

[47] Given the overwhelming concurrence in the opinions of all the various mental health professionals that have assessed the respondent over some 8 years, one must but wonder what the purpose of yet another assessment some 10 years after the incident in question, would serve. In the report of the very latest assessment of the respondent which was carried out by Loebenstein in September 2014, it was noted that she presented in a more distressed manner than when she was first examined and that she appeared to have deteriorated in regard to her previous functioning. Her husband considered her to be very depressed and withdrawn and confirmed there was a deterioration in her condition. He attributed this to her having been exposed to repeated medical examinations, and said her symptoms had been exacerbated because of this. Given her husband's view that her condition

had worsened after being examined repeatedly Loebenstein recommended that the cognitive behavioural therapy she should undergo should be of a more generalised nature, and should not include the specific trauma-based therapy he had intinially proposed, and he also was of the opinion that the respondent should be treated *"robustly"* with anti-depressant medication. Notwithstanding the deterioration in respondent's functioning, he remained of the view that with the necessary treatment and medication, she would be able to make some recovery and re-integrate herself *"into some form of work"*.

[48] In July 2013 respondent was assessed at the instance of the applicants by an industrial psychologist Mr H Swart, who also prepared a report. A supplementary report was obtained from him in January 2014. It is important to mention that in neither report did Swart suggest that he was unable to opine on respondent's probable career path and earnings had the incident not happened and had she remained in the SAPS, or in regard to her future earning capacity, if any, subsequent thereto, because of any uncertainty or difference relating to her diagnosis, or her prognosis. For the sake of completeness I point out that a report from an industrial psychologist which respondent's attorneys commissioned, Mr P Crous, was filed as early as October 2012. He too had no difficulty in this regard. Swart allowed for the possibility that with the necessary psychotherapy and psychotropic intervention, respondent would possibly be able to return to work. He postulated that, provided she made the necessary recovery she could obtain employment as a junior bookkeeper in the non-corporate sector and he set out what he believed she could realistically hope to earn by way of

remuneration in this regard. In the circumstances there appears to be no reason why the applicants should not be able to compute, with the assistance of an actuary, the value of respondent's claim for past and future loss of earnings.

[49] To my mind it would appear that the real motivation behind the wish to submit respondent to yet another psychiatric examination at the instance of the applicants, is for them to obtain a better opinion than the one given by Dr George in regard to the respondent's future prognosis, which would be more in line with the views expressed by Mr Loebenstein. That this is indeed the motivation behind the application is apparent if one considers paragraphs 76 and 78 of the affidavit of the applicants' attorney in the original application which was launched. In my view, this does not constitute the necessary grounds for a further examination as required within the meaning of the Rule, in the sense that it is neither necessary nor desirable in order to obtain *"full information"* in respect of an assessment of the respondent's damages.

[50]. In contrast to the stated basis for the application as formulated originally, in his supporting affidavit in regard to the instant application applicants' attorney said that he was advised by Dr Cilliers that the further 6 hour examination proposed was necessary in order that Dr Cilliers could *"understand"* respondent's experience of the events to *"determine whether or not the* ***alleged*** *post-traumatic stress disorder and depression were caused by the circumstances of the event"* (my emphasis) and in the light thereof, what her prospects of recovery were.

[51] Given the consistency in the diagnosis made by each of the various psychologists and psychiatrists who assessed respondent since 2007, including the applicants' own experts, it is disconcerting, to say the least, that Dr Cilliers still needs to determine whether or not the respondent suffers from post-traumatic stress disorder and depression and if so, whether it was caused by the circumstances of the event to which she was subjected. In my view, given the concurrence by the applicants' own psychologist and original psychiatrist in the diagnosis made by all the previous health professionals who assessed the respondent it is neither necessary nor desirable for respondent to be subjected to any further examination or assessment in regard thereto, and given the opinion of the applicants' own psychologist, Loebenstein, in which its industrial psychologist, Swart, concurs, to the effect that respondent will, with the necessary cognitive behavioural therapy and pharmacological intervention be able to reintegrate herself into *"some form of work"* of a nature and kind that will afford her a calculable remuneration, it does not appear to me to be either necessary or desirable for first respondent to be subjected to yet another psychiatric assessment at the instance of the applicants. In the circumstances I am of the view that applicants have not made out a case, as required, within the meaning of the sub-rule in question.

[52] In addition, I do not believe that it would be in the interests of justice for me to order that respondent submit herself to yet another examination, and that to do so so would be unduly oppressive and unfair to her. I point out that when Dr George saw her in June 2013 he found that getting her to relive the events in question was painful and stressful for her and she became overly anxious

and emotional at times. When Loebenstein saw her in August 2014 he found her to be more distressed than on the previous examination a year earlier. She appeared agitated when having to describe her current functioning and as I have pointed out her husband reported that part of her decline was attributable to her exposure to repeated examinations, and having to rehash and relive the circumstances of the incident time and time again. Already on his initial assessment Loebenstein noted that when respondent was taken to address the incident she was brought to tears, before she even related any of the circumstances of the arrest and detention. In a supplementary report which Awerbuck filed on 7 July 2014 he pointed out that unnecessary delays in the legal process had been severely detrimental to the respondent's mental health, and in his view any further reassessment would only serve to traumatise respondent even more, which in his opinion would be unfair to her given the severity of her diagnosis. This is exactly what appears to have occurred when respondent was subjected to the further assessments of Dr Czech and Dr Cilliers.

Conclusion:

[53] In the circumstances I am of the view that the time has come to draw a line. I agree with respondent's counsel that the proper course for the matter to now follow is for the parties to call for their experts to meet with a view to formalising joint minutes. On the papers before me I can see no reason why this should not be possible given the position adopted by the applicants' own experts. I am not disposed to subjecting respondent to yet another psychiatric

examination which, to my mind, is neither necessary nor desirable and which would in all likelihood only serve to cause her futher psychological and emotional distress. In my view applicants have substantially all the necessary information they require in order to enable them to prepare for trial and to meet the case which will be put up by the respondent, in the event that the matter cannot be settled.

[54] In the result, the application is dismissed with costs.

_____

M SHER, AJ

Appearances:

For the Applicants (Defendants): Adv S Witten

Instructed by: Fairbridges, Cape Town

For the Respondent (Plaintiff): Adv TD Potgieter SC

Instructed by: Faure & Faure, Paarl