IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No.: **23037/2016**

In the matter between:

ROAD ACCIDENT FUND Applicant

and

MARIA DORETHEA CHIN Respondent

JUDGMENT: 9 NOVEMBER 2017

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1. On 18 March 2014, Maria Dorethea Chin **("Chin")** was a passenger in a taxi driven at the time by Unathi Kopman **("Kopman")**. As a result of Kopman's alleged negligence the taxi overturned on Hospital Bend, N2, Observatory, Cape Town.

2. Chin sustained various injuries in the accident, as a result whereof she alleges that she suffered damages.

3. Consequently, on or about 25 November 2016, Chin instituted action proceedings against the applicant, the Road Accident Fund **("RAF")** wherein

she claimed damages in the amount of R1 416 113.33, which is constituted by the following heads of damages:

3.1 past medical expenses in the amount of R1180.00;

3.2 estimated future medical expenses in the amount of R421 093.33;

3.3 future transport and carer costs in the amount of R68 840.00;

3.4 past loss of earnings in the amount of R65 000.00;

3.5 future loss of earnings in the amount of R410 000.00; and

3.6 general damages in the amount of R450 000.00.

4. The RAF duly entered an appearance to defend the matter and on 16 March 2017 it filed a notice in terms of Uniform Rule 36(2), requesting Chin to submit to a medical examination by Dr. R K Marks on 24 May 2017 at 10h00 at his rooms in Claremont. The Uniform Rule 36(2) notice also informed Chin that she could have her own medical advisor present during the medical examination.

5. On 17 March 2017, Chin filed a notice of objection in terms of Uniform Rule 36(3). The notice read as follows:

*"**BE PLEASEED TO TAKE NOTICE** that the Plaintiff hereby objects to Dr. R Marks as the person by whom the examination is to be conducted in respect of Defendant 's notice in terms of Rule 36(2) dated 14 March 2017 on the grounds set out below:-*

1. He is biased against Plaintiff's;

2. He fails to listen to complaints by Plaintiff's;

3. *He makes uncalled comments in respect of lawyers and the amount being claimed by Plaintiff's;*
4. *His attitude is one of patronizing Plaintiff's;*
5. *He lacks empathy and care when examining Plaintiff's'*
6. *He has already pre-judged a Plaintiff's conditions prior to examination of such Plaintiff."* (sic)

6. It is apparent from her notice of objection that while Chin was prepared to subject herself to a medical examination, she was not prepared to submit to a medical examination conducted by Dr. Marks.[1]

7. In this interlocutory application, the RAF seeks an order directing Chin to submit to a medical examination by Dr. Marks.

8. At this juncture, I set out the relevant provisions of Uniform Rule 36 which reads as follows:

"36.1 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.

36.2 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 where and the date

[1] The applicant questioned whether the objection was raised by Chin or whether it was raised by her legal representatives.

(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. Such expense shall be tendered on the scale as if such person were a witness in a civil suit before the court: Provided, however, that-

(a) if such party is immobile, the amount to be paid to him shall include the cost of his travelling by motor vehicle and, where required, the reasonable cost of a person attending upon him;

(b) where such other party will actually lose his salary, wage or other remuneration during the period of his absence from work, he shall in addition to the aforementioned expenses be entitled to receive an amount not exceeding R75,00 per day in respect of the salary, wage or other remuneration which he will actually lose;

(c) any amounts paid by a party as aforesaid shall be costs in the cause unless the court otherwise directs.

(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 and shall further-

(i) in the case of his objection being to the place, date or time of the examination, furnish an alternative date, time or place as the case may be; and

(ii) in the case of the objection being in the amount of the expenses tendered, furnish particulars of such increased amount as may be required.

Should the person receiving the notice not deliver such objection within the said period of five days, he shall be deemed to have agreed to the examination upon the terms set forth by the person giving the notice. 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[2].

(4) …

[2] Rule 1 defines a judge as "*a judge sitting otherwise than in open court.*"

(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 medical examination in accordance with the provisions of this rule.

(5A) …

(6) ….

(7) …

(8) Any party causing an examination to be made in terms of subrules (1) and (6) shall-

(a) cause the person making the examination to give a full report in writing of the results of his examination and the opinions that he formed as a result thereof on any relevant matter;

(b) after receipt of such report and upon request furnish any other party with a complete copy thereof; and

(c) bear the expense of the carrying out of any such examination: Provided that such expense shall form part of such party's costs.

(9) ….

(10) …"

9. As seen from the provisions of Uniform Rule 36(3), if the applicant was of the view that the objections raised were unfounded either in whole or in part, it should have made application to a judge in chambers to determine the conditions upon which the examination, if any, was to be conducted. Instead the applicant opted to bring an application to compel Chin to submit to an examination by Dr. Marks. No satisfactory explanation was given for the failure to comply with the provisions of Uniform Rule 36(3).

10. Be that as it may, I turn now to address the merits of this application.

11. Advocate Wynne for the RAF argued that there were only two grounds on which Chin could object to submitting to a medical examination conducted by Dr. Marks. These were that (i) he was not suitably qualified and (ii) Chin had had a prior unpleasant experience with him. Advocate Wynne cited the case of *Durban City Council v Mndovu*[3] in support of this argument.

12. The objection raised in this matter was not done on either of those two grounds. Instead, the objection was that Dr. Marks was not going to be independent in conducting the examination.

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[3] 1966 (2) SA 319(D).

13. Consequently, Advocate Wynne sought to convince me to dismiss the objection and to direct that Chin submits to a medical examination to be conducted by Dr. Marks.

14. Advocate Roux, who represented Chin, argued that the legislator could not have intended to limit the grounds on which an objection could be raised against a doctor nominated to conduct the medical examination. He too relied upon the case of *Durban City Council v Mndovu* in support of his argument.

15. The relevant passage from *Durban City Council v Mndovu* reads as follows:

"Rule 36 does not entitle the party sought to be examined to a say in the choice of the medical expert. In term of Rule 36 (3) (b) he may object to the person by whom the examination is to be conducted, but he is not required to nominate someone else. ***I find it unnecessary to define the grounds upon which such objection may be based.*** *A person might as well validly object to an examination by a man not medically qualified, or to examination by a doctor with whom the person had unpleasant association in the past."*[4] (my emphasis)

16. Thus, it is clear from *Durban City Council v Mndovu* that there are not only two grounds on which objection may be raised against the doctor nominated to carry out the medical examination.

[4] 1966 (2) SA 319 (D) at 325 H

17. Given the inherent invasive nature of the provisions of Uniform Rule 36(2) and the impact it could have upon a number of fundamental rights such as the right to privacy, the right to bodily and psychological integrity[5], I am in agreement that the legislator could not have intended to limit the grounds on which an objection could be raised against a doctor nominated to carry out the medical examination.

18. While there is no closed list of objections which could possibly be raised against submitting to an examination by a medical practitioner nominated by the defendant, the objection raised will have to be reasonable, material and substantial.

19. This follows from the fact that Uniform Rule 36 strives to give effect to the right to a fair trial which is inimical to the rule of law.[6]

20. In *Starr v National Coal Board*[7] the court examined the reasonableness of the plaintiff's refusal to submit to a medical examination by the defendant's chosen practitioner. As in this case, the plaintiff was prepared to submit to a medical examination but was not prepared to submit to a medical examination conducted by the defendant's nominated practitioner. The court found that the plaintiff's refusal would be unreasonable if such refusal would prevent a just determination of the cause.

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[5] Cape Town City and Other v Kotzé 2017 (1) SA 593 (WCC) at paras 24 to 28
[6] MEC for Health, Gauteng v Lushaba 2017 (1) SA 106 (CC) at para 20
[7] [1977] 1 All ER 243

21. The objection to the doctor nominated was based on an apprehension that the doctor would produce a misleading report as he had acted unprofessionally when examining and reporting on other plaintiffs in the past. It was also suggested that the doctor was a hostile examiner of plaintiffs.

22. The court in *Starr* held that only the interests of justice could require one or other of the parties to accept an infringement of a fundamental right. The plaintiff could only be compelled to an infringement of his/her personal liberty if justice required it. Similarly, the defendant could only be compelled to forgo the expert witness of his/her choice if justice requires it.[8]

23. Lord Justice Lane reasoned that if the nominated doctor produced an unfavourable report, it could be dealt with at the hearing during cross-examination and comment. This could result in discrediting the doctor, rendering his report useless to the defendant.[9] The objection in the *Starr* case was held to be unreasonable and was not upheld.

24. In determining whether the grounds of objection raised in this matter are reasonable, material and substantial, regard must be had to the facts or averments on which the objections are based.

25. Advocate Roux sought to introduce affidavits deposed to by Jonathan James Firth **("Firth")** and Odette Adams **("Adams").** Both Firth and Adams had

[8] Starr v National Coal Board [1977] 1 All ER 243 at pg 250 at b-c
[9] ibid, at 254 j to 255 i

previously instituted claims against the RAF and had been examined by Dr. Marks pursuant to a notice issued in terms of Uniform Rule 36(2).

26. Advocate Roux argued that as the affidavits constituted similar fact evidence, it was admissible. Furthermore, he argued that if the evidence is relevant then it should be admitted.

27. This is an overly simplistic and incorrect statement regarding the admissibility of similar fact evidence.

28. Similar fact evidence is only admitted in exceptional circumstances and will only be received as evidence if it is sufficiently relevant to warrant its reception. Furthermore, the relevance of similar fact evidence should pertain to relevance other than that based solely on character.[10]

29. Before the affidavits of Firth and Adams can be admitted as similar fact evidence, it has to be shown that the same conditions would be present during the examination of Chin as that which existed during the examination of Firth and Adams. Furthermore, it has to be shown that the similarity of conditions will likely to produce the same result. This follows from the rationale for admitting similar fact evidence- the same conditions are likely to produce the same results.

[10] The South African Law of Evidence, 2nd Edition by D T Zeffert + A P Paizes, page 271 onwards.

30. Advocate Roux argued that the similarity of conditions were found in that Chin was to be examined by Dr. Marks after she instituted a claim against the RAF, and that both Firth and Adams were examined by Dr. Marks as the medical practitioner appointed by the RAF after they instituted claims against it. I am not convinced. It does not appear from the record whether Firth or Adams had their own medical practitioner present during their examination by Dr. Marks. Therefore, the past experiences of Firth and Adams could provide no reasonable indication of the results that may follow should Chin elect to have her own medical practitioner present during her examination, as she was invited to.

31. If the similarity of conditions is not established then the similar fact evidence cannot be admissible.[11]

32. Furthermore, when determining whether similar fact evidence should be admitted, consideration should be given as to whether the value of admitting it as proof warrants its reception in the interests of justice and whether the admission thereof will not operate unfairly against the other party.[12]

33. Although the affidavits contain very serious allegations against Dr. Marks (in fact it could even be said to be defamatory) it is unknown whether Dr. Marks was given an opportunity to respond or answer to the allegations made against him. To admit the affidavits in circumstances where Dr. Marks was

[11] Laubscher v National Foods Ltd 1986 (1) SA 553 (ZS)
[12] Mood Music Publishing Co Ltd v De Wolfe Ltd [1976] 1 All ER 763 (CA)

not afforded an opportunity to reply thereto would be highly prejudicial to him. As stated in the *Starr* judgment:

"If, on the other hand, the objection is to the doctor's skill or his probity or his anticipated behavior at the examination, then a finding adverse to him might constitute in effect a bar to his examining any other person for the purpose of litigation. That sort of possibility would act as a serious disincentive to any doctor minded to undertake this sort of work, and would militate against the candour and forthrightness in reporting which are so valuable to any judge who has the difficult task of evaluating medical evidence at the hearing. Such allegations should be approached with great care."[13]

34. To admit the affidavits and to uphold the objections on the averments set out therein would have a serious detrimental effect on Dr. Marks. As held by the Constitutional Court, it is a fundamental principle of our law that no one should be condemned without a hearing. This is part of the rule of law which is foundational to our constitutional order.[14]

35. Advocate Roux also argued for the admission of the affidavits on the basis that past facts are the best indicator of future facts. Therefore, he argued, it follows that prior prejudicial experiences would suffice as a vital ground of objection. If this was indeed the case and if Dr. Marks had the propensity to be biased against plaintiffs and to pre-judge their conditions, I would have expected more numerous and more recent complaints than two affidavits deposed to in 2012.

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[13] Starr v The National Coal Board [1977] 1 All ER 243 at 254 f-g

[14] MEC for Health, Gauteng v Lushaba 2017 (1) SA 106 (CC) at para 18

36. In the circumstances, I find that the affidavits deposed to by Firth and Adams have not been shown to be sufficient relevant for it to be admitted as similar fact evidence nor that it would be in the interests of justice to do so.

37. In the absence of the affidavits deposed to by Firth and Adams, there is no factual basis to the objections raised to Dr. Marks examining Chin. In the circumstances the objections cannot be said to be reasonable.

38. However, can it still be said that the objections are either material or substantial? In determining this, I turn to the grounds of objections raised.

39. The first ground of objection raised against Dr. Marks was that he was biased against plaintiffs. It appears from the answering affidavit deposed to by Chin's attorney, Halliday, that he has a reasonable apprehension of bias and that he lacks confidence in Dr. Marks' ability to provide an objective and neutral assessment.

40. While there may be circumstances in which bias could result in the exclusion of a medical practitioner from examining the plaintiff in terms of Uniform Rule 36(2)[15], a strong enough case has not been made out in the present matter.

41. Given that the prerogative to elect your own expert is part of the right to a fair trial, a higher standard than a reasonable apprehension of bias should be

[15] Daggit v Campbell, 2016 ONSG (CanLII) http:// canlii.ca/t/gpqm3 retrieved on 2017 – 11 - 06

applied when objecting to a medical practitioner nominated to conduct the medical examination in terms of Uniform Rule 36(2). At a minimum, the apprehension of bias would have to be objectively established.

42. As Chin will also be aided with the expertise and assistance of her own expert which will enable her to fully interrogate the opinion and report of Dr. Marks, it has not been shown what prejudice she would suffer, should Dr. Marks be allowed to conduct the medical examination. Furthermore, bias is best tested through cross-examination.[16]

43. Should it transpire that the trial court, having had the benefit of observing Dr. Marks' demeanour when giving evidence as well as the benefit of cross examination find that he is biased and/or inaccurate then it may make an appropriate finding in this regard and can reject the evidence and opinion of Dr. Marks.

44. Should the opinion of Dr. Marks be rejected by the trial court then Chin will suffer no prejudice as a result hereof. On the contrary, it may even be to her benefit as this may result in the court accepting the evidence and opinion of her expert witness.

45. In light of the above, Chin has not demonstrated that her objection to Dr. Marks on the basis of a reasonable apprehension of bias is material and substantial.

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[16] Court of Appeals of Ohio, 10th District, Franklin County. Vetter et al., Appellants v Twesigye, Appellees, et al. No 04AP- 673 (decided on 20 January 2005)

46. The objection that Dr. Marks has pre-judged a plaintiff's condition prior to examining such plaintiff is a complaint of bias restated differently. Therefore, the same considerations set out above would be applicable.

47. The remainder of the grounds of objection raised against Dr. Marks pertain to his conduct during the medical examination.[17] During oral argument, Advocate Roux advised that there were no objections to the manner in which Dr. Marks testified. Rather, the objection was to the manner in which he carried out the medical examination. He intimated that this was as a result of the fact that the court room was a controlled environment whilst there was no such controlled environment when the medical examination was conducted, where Dr. Marks was solely in charge.

48. The relationship between Dr. Marks and Chin cannot be equated to the ordinary doctor-patient relationship. In an ordinary doctor-client relationship it is implicit that a long-term relationship is envisaged, where the patient pays for ongoing medical care and advice and the doctor is invested in the medical health of the patient. The relationship between Dr. Marks and Chin, as with any plaintiff examined in terms of Uniform Rule 36(2) and the medical practitioner nominated by the defendant to conduct the medical examination, cannot be equated with a normal doctor patient relationship as it is far more fleeting than that. In most circumstances, the doctor would only exam and thus interact with the plaintiff on a single occasion. Furthermore, this singular

[17] The grounds of objection are set out in paragraph 5 above.

interaction takes place within the adversarial context. Thus, plaintiffs examined by medical practitioners in terms if Uniform Rule 36(2) cannot expect the same bedside manner and empathy as they would in an ordinary doctor patient relationship. However, this does not mean that unprofessional conduct should be accepted or tolerated.

49. In determining whether or not the objections raised are material and substantial consideration should also be given to whether the grounds of objection would be addressed by the imposition of certain conditions during the medical examination.

50. In this matter Chin has been invited to have her own medical practitioner present during the medical examination. Furthermore, she may also have her legal representative present during the medical examination.[18]

51. Advocate Roux was doubtful that the presence of either an own medical practitioner or legal representative would act to create a controlled environment and thus prevent any misconduct on the part of Dr. Marks during the examination. He expressed the concern of who would entertain and rule on any objections made during the medical examination.

52. Advocate Roux failed to appreciate that the very presence of a legal representative during the conduct of the medical examination could possibly act to prevent any uncalled comments and improper questioning by Dr.

[18] Feros and Another v Rondalia Assurance Corporation of SA Ltd 1970 (4) SA 393 (E).

Marks.[19] Furthermore, the presence of an own medical practitioner would also act to ensure that Dr. Marks correctly records any answers or complaints provided and that the examination is conducted in accordance with the standards and practice applicable to the medical profession. Should Dr. Marks fall short in this regard, not only will it provide the legal representatives with ammunition with which to attack the credibility of Dr. Marks during cross-examination but it may also form the basis of a formal complaint to the Health Professional Council of South Africa.

53. The objections could further be addressed by an audio recording of the examination which would ensure that there is an unbiased and objective recording of what was done and said.[20] An audio recording of the examination will also prevent anyone from taking any words or actions out of context.

54. Therefore, by providing for the presence of an own medical practitioner, legal representative and the possible audio recording of the examination, all the grounds of objections are addressed.

55. It was argued that the RAF is a public body and that any administrative action which it takes has to be reasonable and lawful in terms of the Promotion of Administrative Justice Act, Act 3 of 2000 **("PAJA")**.

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[19] Sharff v Superior Court (1955) 44 C2d 508, 510

[20] The Journal of the Virginia Trial Lawyers Association, vol 25 no 1, 2014

56. It was argued that it could not be reasonable or lawful for the RAF to appoint Dr. Marks as a result of the objections of bias raised against him. It was also argued that it could not be lawful or reasonable to appoint Dr. Marks who intentionally inaccurately records the symptoms reported to him.[21] The remedies provided for in PAJA would not be of assistance as it would not be able to remedy the examination itself, against which the complaint is directed. However, it is remains open to Chin to review the RAF's decision to appoint Dr. Marks to conduct the medical examination in terms of PAJA.

57 Argument was also presented on the vital role played by an expert and the assistance he or she can render to a court. It was argued that as Dr. Marks was biased, there would be no point to appoint him as an expert. It was also argued that Dr. Marks should not be appointed as an expert because his expertise together with his bias could result in him misleading the court instead of assisting it.

58. These concerns go to Dr. Marks' credibility. It is not for Chin to usurp the court's function and to determine whether or not Dr. Marks is credible and of assistance to the court. This is the court's function. As stated earlier, the court would be in a better position to make this determination as it would have had the benefit of observing Dr. Marks during the giving of his evidence and the benefit of cross examination.

[21] During the hearing of the matter it was argued that Dr. Marks intentionally inaccurately records the symptoms reported to him.

59. The objections to Dr. Marks were seemingly not raised by Chin herself but by her attorney. There is no indication that Chin herself objected to Dr. Marks carrying out the medical examination. The answering affidavit is deposed to by her attorney. Uniform Rule 36(3) makes provision for the person who is to be examined to raise the objection. This person is Chin and not her attorney or legal representative. The practice of attorneys raising objections of this nature on behalf of their clients should be discouraged. At the very least there should have been some indication that Chin was in agreement and supportive of the objections raised. This could easily have been done by way of a confirmatory affidavit. No adequate explanation was provided why this was not done.

59. In light of the above, I find that the objections raised against Dr. Marks carrying out the medical examination on Chin are not reasonable, material or substantial.

60. In the circumstances, I make the following order:

(1) the respondent, Ms Dorethea Chin is directed to submit to a medical examination by Dr. Marks at his rooms at Bowwood, Claremont on a date mutually agreed to between the parties but which has to be within one month of the date of this order.

(2) in addition to having her own medical practitioner and legal representative present, Ms Chin, may, should she so chose, audially record the examination.

(3) the costs of this application shall be costs in the main action.

H SLINGERS

ACTING JUDGE OF THE HIGH COURT

Counsel for Applicant: Adv. R D WYNNE

Instructed by: Rahman Inc. ref Mr A Mohamed.

Counsel for Respondent Adv.H J O ROUX.

Instructed by: A Batchelor & Associates ref: P R Halliday

Court resumed Thursday, 19 October 2017.

Date of Judgment: 09 November 2017.