

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 1071/2003
1072/2003

In the matter between:

H W STEENBERGEN

First Plaintiff

Z J CILLIERS

Second Plaintiff

J J A HILLS

Third Plaintiff

G J DE BEER

Fourth Plaintiff

N F VAN ZIJL

Fifth Plaintiff

J M MEYER

Sixth Plaintiff

M A MYBURGH

Seventh Plaintiff

and

THE MINISTER OF SAFETY AND SECURITY

Defendant

JUDGMENT BY:

MOLEMELA, J

DELIVERED ON:

26 FEBRUARY 2010

[1] This matter came before me in chambers in terms of Rule 36(3) of the Uniform Rules of Court. The plaintiffs instituted action against the Minister of Safety and Security for damages arising out of an unlawful arrest. The merits and quantum were

separated and a hearing in respect of quantum has been set down for the 8th of March 2010.

- [2] The defendant served a notice in terms of Rule 36 on the plaintiffs on the 18th January 2010. In terms of the afore-said notice, the defendant required the plaintiffs “to submit themselves to the following medical examination and/or assessment: emotional and psychological conditions as alleged to have been caused by the defendant’s conduct”. As soon as subsequent correspondence exchanged between the parties made it clear that the envisaged medical examination also entailed being admitted at a clinic for seven days for purposes of observation, the plaintiffs filed a notice of objection to the defendant’s notice as contemplated in Rule 36(3). The plaintiffs’ averred that Rule 36 does not envisage an observation or assessment as contemplated by the Defendant. The plaintiffs further averred that “in the alternative, and on the proviso that the court or a judge sitting in chambers finds that the rule indeed contemplates observation, then and in that instance the Plaintiffs contend that the period directed or set forth by the Defendant in the notice is unreasonable, improper and unjust for the following reasons:

- 2.1 It cannot be expected from the plaintiffs to submit themselves for an observation, day and night, for a period of 6 consecutive days.
- 2.2 The plaintiffs have already made arrangements to have their own medical adviser present at the examination, and in this regard they have engaged the services of prof D A Louw.
- 2.3 By requiring from the Plaintiffs to be under observation at the clinic day and night, for 6 consecutive days, this means that prof D A Louw would also have to spend the observation time with them at the clinic, day and night. This is unreasonable.
- 2.4 In this regard the plaintiffs suggest to the defendant that the defendant should request the persons mentioned in its notice who would conduct the medical examination to contact telephonically Prof D A Louw at telephone number (051) 401 2444 in order to arrange convenient hours, within the days of 10 February 2010 and 16 February 2010 for the envisaged medical examinations.”

[3] Pursuant to the plaintiffs’ objection, the defendant then filed an application for consideration in chambers, asking for conditions to be set pertaining to how the medical examination, if any, should be conducted. Both parties filed affidavits to substantiate their respective stances on the matter. Their counsel also made submissions in chambers.

[4] After hearing counsels' submissions I was of the view that I would be unable to decide the matter on the basis of the opinion of just one psychiatrist, being the defendant's expert, viz Dr Kuekue. The plaintiffs had chosen to rely on the opinion of a clinical psychologist whose report did not suggest alternatives, save to mention, *inter alia*, that:

"Diagnosis of, for example, mood disorders, anxiety disorders and post traumatic stress disorder could be made in such shorter periods and via equally, if not more effective methods ... which will also be much more cost effective and cause less trouble for the plaintiffs.....I took the liberty to discuss the merits of the case with two psychiatrist and one clinical psychologist who all three have extensive experience in the field of making diagnosis via observation. They all agree that a seven day observation period to confirm or reject a diagnosis of for example a mood disorder, anxiety disorder and posttraumatic stress is unnecessary and "overkill" (sic). "I want to emphasize that I fully agree with Dr Kuekue that in cases such as this where there is secondary gain, the possibility of malingering should always be investigated. However, I repeat that it is the nature and extent of the present procedure that I find to be unnecessary."

[5] In the absence of alternatives, I deemed it appropriate to obtain an opinion from an independent psychiatrist. Both counsel agreed that in order to curb the costs of obtaining such an opinion, I could request same from a psychiatrist in the employ of the Department of Health. Prof P J Pretorius, being the Head of the Department of Psychiatry at the University of the Free State and also attached to the Department of Health, agreed to be of assistance. I provided him with copies of the respective experts' reports. In his letter dated the 25th February 2010, Prof Pretorius supported Dr Kuekue's views with regards to the need for an admission for purposes of an assessment. He also stated that he was of the view that the seven-day admission period suggested by dr Kuekue was reasonable. He essentially aligned himself with the following views set out in Dr Kuekue's letter:

- "1. The clinical presentation of a psychiatric disorder established and of which clinical management has been commenced, is scientifically subject to change, i.e. the patient shall have probably shown clinical signs of a favourable response, have the illness process going into remission or presents with persistent treatment-resistant signs of illness.

2. The presence of clinical proof of ill-health may temporarily cause impairment in the patient's ability to function and does not necessarily imply that such a patient is permanently incapacitated.
3. Currently, I find it desirable to ascertain through standardized and scientific clinical methods of evaluation, the to be evaluatee's cognitive and conative functioning.(sic)
4. Generally, in clinical cases where there exist possibilities of a secondary gain, a high index of suspicion on **Malingering** is justifiable."

[6] In **MGUDLWA v AA MUTUAL INSURANCE ASSOCIATION**

LTD 1967 (4) SA 721 (E) it was held that Rule 36 should be applied fairly so as to adjust between two conflicting interests.

On p. 723 the court stated that:

"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." (My underlining for emphasis).

- [7] In **DURBAN CITY COUNCIL V MNDOVU 1966(2)SA319** at **324B-D**, the court remarked as follows: “[In the past], a defendant could not insist upon the opportunity of gaining information relating to a plaintiff’s injuries or the effects thereof on his mental or physical health, save by way of asking for further particulars in the course of the pleadings or for the purpose of trial, or, possibly by way of discovery application. ... As I interpret the Rule, not only in relation to a medical examination required in terms of sub-rule (1) but as a whole it 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 trial, to prepare his case effectively so as to meet that of its opponent.”
- [8] Having considered (i) the purpose of rule 36 as elucidated in *Durban City Council v Mndovu (supra)*, (ii) the mental affliction allegedly suffered by the plaintiffs as set out in their medical experts’ reports and (iii) the opinion of an independent psychiatrist as alluded to, above, I find that the medical examination contemplated in the rule does envisage mental assessment as desired by the defendant. I am of the view that even though an admission to an institution for purposes of a medical examination encroaches on an individual’s right to

liberty, such admission is not beyond the purview of Rule 36. Its necessity and duration will be dictated by the extent of the plaintiff's alleged injury to physical or mental health.

[9] *In casu*, all the seven plaintiffs claim to have various mental disorders emanating from their unlawful arrest. The two psychiatrists are *ad idem* that malingering needs to be excluded and that same can only be excluded by continuous observation or assessment. I do not have a different view from any other psychiatrist. I therefore find that the defendant has made out a proper case for the granting of an order obliging the plaintiffs to submit to a medical examination that is inclusive of continuous observation. Indeed, the plaintiffs should be exposed to the least possible degree of inconvenience and thus their admission to an institution should be for the shortest possible period. I accept that the 7-day admission period recommended by both Dr Kuekue and Prof Pretorius is reasonable under the circumstances.

[10] I have taken the reasons for the plaintiffs' objection into account. These should be considered vis-à-vis the assurances

given by the defendant in this regard. I am of the view that any fears that the plaintiffs had ought to be allayed by the reassurance given by dr Kuekue with regards to the professional manner in which the assessment will be conducted. The defendant also correctly pointed out that the persons who will conduct the examination and the place where the examination will be conducted are accountable to professional bodies and any improper conduct on their part can therefore be reported to those bodies.

[11] With regards to the costs of this application, I am of the view that equity demands that I depart from the general rule that the costs should follow the event. After all, the plaintiffs' objection is not one that can be described as frivolous. Having considered all the circumstances of this matter, I find that the appropriate order is the following:

[12] ORDER

1. That the plaintiffs do submit themselves to a medical examination that will include being admitted at Care Cure

Clinic, 46 Victoria Road, Willows, BLOEMFONTEIN for a medical examination of the nature set out in the defendant's notice dated 18 January 2010 by the doctors indicated in the same notice for a duration of 7 consecutive days commencing on a date and time to be agreed between the parties or, failing agreement within ten days, to be fixed by the Registrar of this court.

2. That Prof D A Louw, the plaintiffs' medical adviser, may be present at any time during such medical examination and may have access to the hospital records in respect of the plaintiffs.
3. The defendant shall pay all the costs in respect of the medical examination and admission to the clinic.
4. The costs of this application shall be costs in the cause.

M.B. MOLEMELA, J

On behalf of plaintiffs:
Adv. Notshe
Instructed by:
The State Attorney
BLOEMFONTEIN
/sp

On behalf of the defendant
Adv Grobler
Instructed by:
Lovius Block Attorneys
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