

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

OF INTEREST

Case no: 3429/2013

In the matter between:

MINISTER OF SAFETY AND SECURITY

Applicant/Defendant

and

AK

Respondent/Plaintiff

JUDGMENT

Govindjee J

[1] Is a plaintiff entitled to have her own legal representative present during psychological and psychiatric assessments required by the defendant in terms of Uniform Rule 36?

[2] The plaintiff was abducted by an unknown assailant in Gqeberha during December 2010, held captive, raped and abandoned. She instituted action against the defendant (the Minister) for psychological trauma and psychiatric injury suffered due to the way the police searched for her and investigated the incident. A majority of the Constitutional Court upheld the decision of the trial court to hold the defendant liable for 40% of the damages to be proved.¹

¹ *AK v Minister of Police* [2022] ZACC 14.

[3] As part of the proceedings to establish the quantum of the claim, the Minister served Rule 36(2) notices on the plaintiff requiring her to undergo psychological and psychiatric assessments respectively with his medico-legal experts, Dr Olivier and Dr Colin.² Rule 36(1) provides as follows:

‘A party to proceedings, in which damages or compensation in respect of alleged bodily harm 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 a medical examination.’

[4] The Minister does not dispute that a plaintiff is entitled to have her legal representative present at medical assessments for physical injury. That concession is well-made in the light of the decision in *Goldberg v Union and SWA Insurance Co Ltd*³ (*Goldberg*). The dispute turns on whether the same entitlement prevails at psychological and psychiatric assessments, which the Minister refutes.

[5] In *Goldberg*, Howie J held that a claimant was entitled to be legally represented at a medical examination held in terms of Rule 36. In coming to that conclusion, the learned judge emphasised the plaintiff’s right to ‘bodily privacy’ coupled with the right to decline to divulge their evidence to anyone but their legal advisers and the court hearing the action.⁴ Unfair questioning on aspects of the history, injuries and symptoms of the ailment may result in prejudice to the plaintiff, who would be unable to avoid the questions and whose answers could be used against them at trial. The problem was framed in this way:⁵

‘...medical practitioners can generally be relied on to perform an examination under this Rule objectively...However, there can obviously be unfortunate

² Rule 36(2)(b)(i) provides that the notice contemplated shall state that the party being examined may have his or her own medical adviser present at the examination. No mention is made of an entitlement to the presence of a legal representative.

³ *Goldberg v Union and SWA Insurance Co Ltd* 1980 (1) SA 160 (E) (*Goldberg*).

⁴ As noted in *Goldberg*, in most cases wherein the quantum of damages is disputed, the claimant is required to testify so that the Rule, in effect resulted not only in physical examination, ‘... but also to questioning about one or more of the very medical issues which will, by way of testimony including his own, be canvassed at trial.’ *Goldberg* above n 3 at 164E–G.

⁵ *Goldberg* above n 3 at 164H–165A. On the general expectation in respect of medical examinations, see *Mgudlwa v AA Mutual Insurance Association Ltd* 1967 (4) SA 721 (E) at 723D–E.

deviations from that general standard whether through ignorance, inexperience or otherwise. In addition it is distinctly possible for honest and objective questioning unintentionally to develop from examination into cross-examination whilst in zealous pursuit of an appealing point. Finally, unless controlled within the appropriate spheres of enquiry, the questioning may stray on to the circumstances of the accident itself or economic considerations not germane to the medical issues. Should the questioning be otherwise than objective or transgress the limits of what is proper or relevant it is not difficult to imagine an unrepresented claimant who is, for example, an ignorant peasant or a brain-injury case 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.’

[6] The court concluded that the drafter of the rule must have been alive to the protection enjoyed by the claimant in court proceedings, including legal representation during questioning. Those rights should apply, as far as possible, during extra-curial questioning. Bearing in mind that a legal representative would already have been engaged by the time the notice was issued, it would have been expected of the drafter to have expressly excluded legal representation during medical assessments if that had been the intention.⁶ In fact, the intention was to provide for the possible attendance of the claimant’s own medical adviser as an ‘extra safeguard’ for their interests, not as a substitute for legal representation ‘to control the questioning or to advise the claimant on [their] legal rights’.⁷

[7] Why does the Minister object to the presence of the plaintiff’s legal representative at the interviews and evaluations to be conducted by his experts? The answer lies in the views of the Minister’s experts themselves. Dr Colin, a registered psychiatrist, considered the presence of any third party to be unnecessary, undesirable, and risky due to the possible impact on the validity of the outcome of the examination. Dr Colin noted that the presence of a third-party could influence an expert’s observations by creating an artificial sense of safety. He relied on the

⁶ *Goldberg* above n 3 at 165C–E

⁷ *Goldberg* above n 3 at 165E–G.

published views of Prof Robert Simon that caution against the presence of third parties during examination:

‘The presence of a third party can have a profound influence on the outcome of the examination as it might have a psychological influence on the patient, influencing the observations made by the expert witness, and ultimately not be of assistance to the Court.

[8] To the extent that a third party is permitted to attend, Dr Colin maintained that they should do so without any interference whatsoever, so as not to influence the outcome of the examination. Dr Olivier, a registered clinical-; counselling-; and neuropsychologist, was of a similar opinion, and drew a distinction between the presence of a legal representative at a forensic medical examination for physical injuries, on the one hand, and a forensic psychological and psychiatric evaluation, on the other. Dr Olivier concluded as follows:

‘It is clear ... that neither the Professional Board of Psychology of the Health Professions Council of South Africa nor the American Psychological Association, is in favour of third-party observers in psychological testing and assessment as it contaminates and skews the assessment, does not protect the integrity and security of psychometric tests and procedures and will not be of assistance to the Court.’

[9] By time of argument, the Minister’s stance was to concede that Ms Kawa was, in general, entitled to have her legal representative present during psychological and psychiatric assessments. On the Minister’s approach, however, this right was to be ‘balanced’ against the state’s constitutional entitlements. The only real remaining concern was the sanctity of the outcome of the required assessments, for the consequent reports and evidence of the experts to be of assistance to the court.

[10] Ms *Lewis*, who presented the argument on behalf of the plaintiff, offered a compelling series of arguments each culminating in the conclusion that the application ought to be dismissed. This included reliance on the plaintiff’s

constitutional rights to equality, human dignity, and psychological integrity⁸ as well as the common-law right to informed consent. While it is tempting to venture into these dimensions of the dispute immediately, particularly given that *Goldberg* was decided pre-Constitution, a more straightforward approach is merited.

[11] The outcome turns on the proper approach to be given to Uniform Rule 36(1). At the time of argument, the substantive relief sought by the Minister was for the plaintiff to attend the interviews with Drs Olivier and Colin in private, without the presence of a legal representative. In the alternative, the Minister offered only to record the interview by way of 'live audio and video'. To succeed with the application, it was for the Minister to convince the court that the proper interpretation of Uniform Rule 36(1) excludes the presence of the plaintiff's legal representative during the necessary forensic interviews and evaluations, with or without the recording of the interview. The difficulty with that interpretation is that it runs headfirst into the decision in *Goldberg*.

[12] The issue to be determined in that matter was, in essence, the same as in the present circumstances. The defendant issued a s 36(2) notice requiring the plaintiff to subject herself to a medical examination by a medical specialist of its choice. *Goldberg* was prepared to be examined provided that her attorney could be present at the examination. The defendant launched a similar application, which was opposed, to resolve the impasse. Following a careful analysis, the court concluded that 'a claimant is entitled to be legally represented at a medical examination held in terms of Rule 36'.⁹ That decision remains the leading authority on point.

[13] The result is that this court bound by the decision in *Goldberg*, unless of the view that it is clearly wrong. In my view the interpretation of the rule and its consequence, as articulated in *Goldberg*, was, with respect, correct. To seek to distinguish *Goldberg* on the facts is artificial given its *ratio*. The judgment was premised on problematic dimensions of questioning during medical examinations absent the presence of a legal representative.¹⁰

⁸ Sections 9(3), 10 and 12(2) of the Constitution of the Republic of South Africa, 1996.

⁹ *Goldberg* above n 3 at 164C.

¹⁰ *Goldberg* above n 3 at 164F–165A.

[14] That aside, the appropriateness of the approach adopted has been emphasised by the constitutional dispensation, with various rights referenced in *Goldberg* now finding expression in sections of the Constitution. It is apposite to quote from the minority judgment of Khampepe J in *AB and another v Minister of Social Development* as one illustration in support of this conclusion:¹¹

‘[67] The drafting history of section 12(2) supports this view ... The change in language illustrates a shift in emphasis away from a sanctuary approach that protects a person’s corpus, towards one which acknowledges the multifaceted lives people may choose to live by providing for a more expansive range of bodily and psychological protections. This adjustment in focus coheres with the lessons of our past. The defilements of integrity that characterised our pre-constitutional era extended beyond violations of personal security. The legal structure that marked and marred the apartheid era was one of disregard and disrespect. The Constitution thus enjoins us to develop a new understanding of “freedom and security of the person” that demonstrates respect and attentiveness to the decisions of others. The inclusion of section 12(2) is one facet of this new approach.

[68] That historically-grounded shift builds on the recognition in our common law – chiefly in the law of delict – that a person’s psychological integrity, independent of their body, can be harmed in numerous ways by the actions of others ...’

[15] On the approach adopted, the conflicting opinion evidence presented by both parties adds little to the resolution of the dispute. For the sake of completeness, it may be added that much of the opinion evidence submitted was premised on hypothetical scenarios as to what might occur should a legal representative be permitted to attend the examinations. I am unpersuaded that the standards and ethical rules are properly interpreted to exclude the presence of a legal representative during forensic psychological and psychiatric testing. To the extent

¹¹ *AB and another v Minister of Social Development* [2016] ZACC 43 paras 67–68.

that the intention behind these documents is to do so, that objective must be subordinated to protect the established legal entitlement of the person undergoing assessment.

[16] That is not to suggest that over-zealous interference on the part of a legal representative might not, in exceptional circumstances, result in the process being compromised. Bearing in mind that the legal representative would lack the specialist knowledge of either the psychologist or psychiatrist, one would expect that a prudent legal practitioner would limit any interruptions to the process to instances where it is clearly necessary to do so. A fair approach would balance the protection of the rights of the claimant while noting the concern that excessive intervention might adversely affect the extent of assistance that an expert might eventually be able to offer the court.

[17] To that end, the Minister applied to amend his Notice of Motion to include further alternative relief, in the form of adequate safeguards for both the plaintiff and the examining evaluators including video and audio recording. This occurred after oral argument and the court has benefited from additional written submissions from both sets of counsel on the point. Of assistance is the plaintiff's agreement to the further alternative relief sought, subject to various details pertaining to protection of her privacy, which I intend to incorporate in the order.

[18] Penultimately, it is perhaps useful to address the suggestion that the plaintiff's rights must be balanced with that of the state. This notion has been determined by the apex court in the context of 'everyone's' right to just administrative action. That right was held to be one enjoyed only by private persons, with the state being the bearer of the corresponding obligations under the section.¹² Leaving aside issues of horizontal application of the Bill of Rights, a similar approach must be adopted in respect of the rights implicated in the present instance. It is for the state to respect, protect, promote and fulfil such rights.¹³

¹² *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* [2017] ZACC 40 para 29.

¹³ S 7(2) of the Constitution.

[19] Moreover, and absent a law of general application, seeking to limit the plaintiff's rights with reference to the kinds of considerations listed in section 36(1) of the Constitution is a non-starter.¹⁴ Instead, the preferred approach is to broaden the content of the constitutional rights implicated, notably the rights to bodily and psychological integrity and dignity. This is achieved by conceptualising these inter-related rights to include legal representation during Uniform Rule 36 examinations, as part of the content of the rights themselves. Doing so is likely to enhance the nature of the participation of a person being examined, courtesy of the presence of their chosen legal practitioner, and provide fortification from undue stress or shock.¹⁵

[20] All that remains is to determine whether the plaintiff is justified in seeking a punitive costs order. This requires consideration of what would be just and equitable in the circumstances of the matter.¹⁶ The application was launched on an urgent basis. Ultimately it was unfounded and the common-sense approach which has prevailed ought to have been adopted at an earlier stage to obviate the proceedings. The Minister's approach, although backed by the views of his experts, was unjustifiably contrary to the sentiments expressed in *Goldberg* and unappreciative of basic constitutional considerations. It has resulted in the plaintiff incurring unnecessary costs, also for purposes of responding to the medical evidence presented by the state.

[21] That being the case, the argument to be considered is whether it would be unfair to expect the plaintiff to bear any of the costs occasioned by the litigation.¹⁷ The application was not launched fraudulently, dishonestly or in bad faith. Nor can it be said to amount to an abuse of the process of court.¹⁸ I am also mindful of the likely negative effects of courts granting punitive cost orders too readily. This would ultimately deter parties, including the state, from seeking to ventilate their disputes in court.

¹⁴ S 36(1) of the Constitution.

¹⁵ See M Bishop and S Woolman above n 15 at 40–77. 'Psychological integrity as a self-standing right necessarily goes beyond the protection afforded by 'bodily integrity' and 'provides fortification from undue stress or shock': M Bishop and S Woolman at 40–78.

¹⁶ *De Lacy v SA Post Office* 2011 (9) BCLR 905 (CC); [2011] ZACC 17 paras 116–117 and 123.

¹⁷ *President of the Republic of South Africa and Others v Quagliani and Two Similar Cases* 2009 (2) SA 466 (CC); 2009 (4) BCLR 345; [2009] ZACC 1 para 11.

¹⁸ *Public Protector v SARB* 2019 (6) SA 253 para 223.

[22] A punitive costs order should also not result merely because a party erred in its approach to the law. While hindsight has clarified the correct position, the case provided the state with the opportunity to test the *Goldberg* rationale in a different context, which it was entitled to do. The outcome also provides useful pointers towards the kinds of safeguards that would be appropriate to protect the plaintiff and the assessing specialists, as well as to ensure the veracity of the interview process and its results. While the state may be held to an exacting standard in respect of its duty to respect, protect, promote, and fulfil constitutional rights, its conduct in defending a legal action must be assessed fairly, even in cases where its position was erroneous.

[23] A just and fair outcome in the circumstances of this matter is to order the state to pay the plaintiff's costs, including the costs of two counsel, where employed, on a party and party scale. This order is to include the costs of the medical experts engaged by the plaintiff to support the opposition to the application, and the costs of the further written submissions requested by the court.

Order

[24] The following order is issued.

1. The applicant's failure to comply with the Rules of Court as regards forms and service is condoned.
2. The application to amend the notice of motion is granted.
3. It is declared that the legal representative of the respondent is entitled to be present and seated behind her during the interviews with Drs Olivier and Colin.
4. The interviews may be simultaneously video- and audio recorded, subject to the following:

- 3.1 The applicant is to pay the costs of the video- and audio recording;
 - 3.2 The respondent must be granted unrestricted access to the entire video- and audio recording;
 - 3.3 The recording and any information contained therein must be kept strictly confidential and may not be distributed in any form to any person other than the parties' legal representatives, or used for any purpose other than the present litigation;
 - 3.4 The respondent's legal representative is to be advised of all copies made of the recording as well as the identity of any person to whom the recording is made available;
 - 3.5 The audio and video recording and any copies thereof must be destroyed immediately after the conclusion of the present litigation. This is to be confirmed by the legal representative of the applicant in writing.
- 5. The applicant is to pay the respondent's costs, including the costs of two counsel, where so employed, on Scale C.
 - 6. The costs to be taxed are to include the costs of the medical experts engaged by the respondent in opposing the application as well as the costs occasioned by the subsequent written submissions prepared at the request of the court.

A GOVINDJEE
JUDGE OF THE HIGH COURT

Heard: 07 August 2024

Delivered: 13 August 2024

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