36 Inspections, Examinations and Expert Testimony

(1) A 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 a medical examination.

(2)*(a)* A party requiring another party to submit to a medical examination shall deliver a notice to such other party that—

(i) specifies the nature of the examination required;

(ii) specifies the person or persons who shall conduct the examination;

(iii) specifies the place where and the date (being not less than 15 days from the date of such notice) and time when it is desired that the examination shall take place; and

(iv) requires the other party to submit himself or herself for the medical examination at the specified place, date and time.

(b) The notice contemplated in paragraph *(a)* shall—

(i) state that the party being examined may have his or her own medical adviser present at the examination; and

(ii) be accompanied by a remittance in respect of the reasonable expenses to be incurred by the other party in attending the examination.

(c) The expenses referred to in paragraph *(b)*(ii) shall be tendered on the scale as if such person were a witness in a civil suit before the court: Provided that—

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

(ii) where the party being examined will actually lose salary, wage or other remuneration during the period of absence from work, such party shall, in addition to the aforementioned expenses, be entitled to receive an amount not exceeding the amount determined by the Minister, in terms of the relevant legislation, for witnesses in civil proceedings, per day in respect of the salary, wage or other remuneration which such person will actually lose;

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

(3) The person receiving the notice referred to in subrule (2) shall, within five days after the service of the notice, notify the person delivering it, in writing, of the nature and grounds of any objection which such person may have in relation to—

(a) the nature of the proposed examination;

(b) the person or persons who shall conduct the examination;

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

(d) the amount of the expenses tendered;

and shall further—

(i) in the case of the 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 to the amount of the expenses tendered, furnish particulars of such increased amount as may be required.

Should the person receiving the notice not deliver an objection within the said period of five days, such person 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 the person giving the notice may on notice make application to a judge to determine the conditions upon which the examination, if any, is to be conducted.

(4) Any party to such an action may at any time by notice in writing require any person claiming such damages to make available in so far as such person is able to do so to the other party within 10 days, any medical reports, hospital records, medical imaging, or other documentary information of a like nature relevant to the assessment of such damages, and to provide copies or records thereof upon request.

[Subrule (4) substituted by GN R3397 of 12 May 2023.]

(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) If any party claims damages resulting from the death of another person, such party shall undergo a medical examination as prescribed in this rule if this is requested and it is alleged that such party's own state of health is relevant in determining the damages.

(6) If it appears that the state or condition of any property of any nature whatsoever whether movable or immovable, may be relevant with regard to the decision of any matter at issue in any action, any party may at any stage give notice requiring the party relying upon the existence of such state or condition of such property or having such property in that party's possession or under that party's control to make it available for inspection or examination in terms of this subrule, and may in such notice require that such property or a fair sample thereof remain available for inspection or examination for a period of not more than 10 days from the date of receipt of the notice.

(7) The party called upon to submit such property for examination may require the party requesting it to specify the nature of the examination to which it is to be submitted, and shall not be bound to submit such property thereto if this will materially prejudice such party by reason of the effect thereof upon such property. In the event of any dispute whether the property should be submitted for examination, such dispute shall be referred to a judge on notice delivered by either party stating that the examination is required and that objection is taken in terms of this subrule. In considering any such dispute the judge may make such order as deemed fit.

(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, within two months of the date of the examination or within such other period as may be directed by a judge in terms of rule 37(8) or in terms of rule 37A, of the results of the examination and the opinions that such person formed as a result thereof on any relevant matter;

(b) within five days after receipt of such report, inform all other parties in writing of the existence of the report, and upon request immediately 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)*(a)* No person shall, save with the leave of the court or the consent of all parties to the suit, be entitled to call as a witness any person to give evidence as an expert upon any matter upon which the evidence of expert witnesses may be received unless —

(i) where the plaintiff intends to call an expert, the plaintiff shall not more than 30 days after the close of pleadings, or where the defendant intends to call the expert, the defendant shall not more than 60 days after the close of pleadings, have delivered notice of intention to call such expert; and

(ii) in the case of the plaintiff not more than 90 days after the close of pleadings and in the case of the defendant not more than 120 days after the close of pleadings, such plaintiff or defendant shall have delivered a summary of the expert's opinion and the reasons therefor:

Provided that the notice and summary shall in any event be delivered before a first case management conference held in terms of rules 37A(6) and (7) or as directed by a case management judge.

(b) The summary of the expert's opinion and reasons therefor referred to in subparagraph *(a)*(ii) shall be compiled by the expert himself or herself and shall contain a statement by the expert confirming that the report is —

(i) in such expert's own words;

(ii) for the assistance of the court; and

(iii) a statement of truth.

[Subrule (9) substituted by GN R3397 of 12 May 2023.]

(9A) The parties shall —

(a) endeavour, as far as possible, to appoint a single joint expert on any one or more or all issues in the case; and

(b) file a joint minute of experts relating to the same area of expertise within 20 days of the date of the last filing of such expert reports.

(10)*(a)* No person shall, save with the leave of the court or the consent of all the parties, be entitled to tender in evidence any plan, diagram, model or photograph unless such person shall not more than 60 days after the close of pleadings have delivered a notice stating an intention to do so, offering inspection of such plan, diagram, model or photograph and requiring the party receiving notice to admit the same within 10 days after receipt of the notice.

(b) If the party receiving the notice fails within the said period so to admit, the said plan, diagram, model or photograph shall be received in evidence upon its mere production and without further proof thereof. If such party does not admit them, the said plan, diagram, model or photograph may be proved at the hearing and the party receiving the notice may be ordered to pay the cost of their proof.

[Rule 36 substituted by GN R842 of 31 May 2019.]

Commentary

General. Rule 36 is designed to avoid a litigant being taken by surprise in relation to matters in respect of which he would in the normal course of events be unable, before trial, to prepare his case effectively so as to meet that of his opponent. [1]

The rule makes provision for the following distinct procedures:

(a) medical examinations and inspection of medical reports, hospital records, medical imaging and the like (subrules (1)–(5A) and (8));

(b) inspection and examination of movable or immovable property (subrules (6)–(8));

(c) expert summaries and evidence (subrule (9));

(d) discovery of plans, diagrams, models and photographs (subrule (10)).

Subrule (1): 'Any party claiming such damage.' This subrule as framed refers only to the medical examination of 'any party' claiming damage or compensation. It is submitted, however, that the rule also covers the case of, for example, a father claiming damage or compensation on behalf of his minor child. Subrule (5A) makes special provision for the medical examination of a person who claims damages resulting from the death of another person and it is alleged that such party's own state of health is relevant in determining the damages.

'To submit to a medical examination.' This subrule places an obligation on a claimant which constitutes a drastic invasion of his rights [2] and personal liberty. [3] The rule must, accordingly, be strictly construed. [4]

Subrule (2)*(a)*: 'Deliver a notice.' The rules do not contain any provision as to when a notice requiring a claimant to submit to a medical examination may be delivered. Such an examination can be required immediately after the institution of action in order to enable the defendant to estimate the amount he may wish to offer by way of an offer to settle. [5] The examination is often required after the close of pleadings when preparation for trial is made.

Subrule (2)*(a)*(iii): 'Specifies the place where and the date . . . and time.' In this regard two conflicting interests must be balanced: on the one hand, the party requiring the examination should not be hampered in preparing for trial or estimating the amount he may wish to offer by way of settlement. On the other hand, the person required to be examined should be subjected to the least possible inconvenience. [6] As a general rule a qualified practitioner in the near vicinity of the person to be examined should be employed, and the plaintiff's medical adviser (who in terms of subrule (2)*(b)*(i) has the right to attend the examination) should, if possible, be spared the inconvenience of travelling a long distance. [7]

Subrule (2)*(b)*(i): 'May have his or her own medical adviser present.' The party required to undergo a medical examination who desires his own medical adviser to be present at such examination, cannot claim that expenses incurred in this regard be tendered under the subrule. In giving judgment at the end of the case the court may, in the exercise of its discretion, award the costs of the claimant's medical representation at the examination. [8]

It has been held that the plaintiff party required to undergo a medical examination is entitled to be legally represented at a medical examination held in terms of the subrule. [9] It is for the court or the taxing master to decide whether, on the facts and circumstances of the individual case, the costs in connection with a party's legal representation at a medical examination were reasonably incurred. [10]

Subrule (2)*(b)*(ii): 'A remittance in respect of the reasonable expenses.' This refers to payment and not to a mere tender to pay. See further the notes to subrule (2)*(b)*(i) s v 'May have his or her own medical adviser present' above.

Subrule (2)*(c)*: 'The expenses . . . shall be tendered.' This, obviously, refers to the amount of the actual remittance. See further the notes to subrule (2)*(b)*(i) s v 'May have his or her own medical adviser present' above.

'On the scale as if such person were a witness in a civil suit.' See, in this regard, Appendix D4 below.

Subrule (2)*(c)*(ii): 'Will actually lose salary, wage or other remuneration.' This subrule makes it clear that a person is entitled to be compensated for loss of salary or wages only if he is actually earning salary, wages or other remuneration at the time of the examination. If he is in hospital or otherwise incapacitated from work, it would seem that no remittance in respect of salary, wages or other remuneration need be made.

'The amount . . . for witnesses in civil proceedings.' See, in this regard, Appendix D4 below.

Subrule (3): 'The nature and grounds of any objection.' It is submitted that in this subrule the 'nature' of the claimant's objection means that he must specify in his notice whether his objection falls under paragraph *(a)*, *(b)*, *(c)* or *(d)* of this subrule; and the 'grounds' of his objection means that the reasons must be set out on which the objection is based.

Subrule (3)*(a)*: 'The nature of the proposed examination.' If a person claims damages for injury to both mental and physical health, and a defendant seeks an examination by an expert qualified in one of these fields only, an objection that a claimant should not submit to an examination because the expert would wholly or partly ignore the other disability is invalid. [11]

Subrule (3)*(b)*: 'The person . . . who shall conduct the examination.' The rule does not entitle the party sought to be examined to any say in the choice of the medical expert; he may object to the medical expert suggested on such grounds as that the practitioner is not medically qualified, or is a person with whom he has had an unpleasant association in the past, [12] or was not going to be independent in conducting the examination. [13] While there is no closed list of objections that 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. [14] This must be determined with regard to the facts or averments on which the objections are based. [15] If necessary, consideration should be given as to whether the objections would be addressed by the imposition of certain conditions during the medical examination. [16]

Subrule (3)*(c)*: 'The place, date or time of the examination.' If the objection is to the place, date or time of the examination, an alternative date, time or place must, in terms of paragraph (i) of this subrule, be suggested in the notice of objection.

Subrule (3)*(d)*: 'The amount of the expenses tendered.' If the objection is to the amount of the expenses tendered, the claimant must, in terms of paragraph (ii) of this subrule, in his notice of objection furnish particulars of such increased amount as he may require.

Though the party sought to be examined may, at the end of the case, be awarded the costs of his own medical representation at the examination, [17] such costs need not, under subrule (2)*(b)*, be tendered to him prior to the examination and he cannot object under this subrule that such costs have not been tendered to him.

'Make application to a judge.' In terms of the definition of 'judge' in rule 1 this means a judge sitting otherwise than in open court, i e a judge in chambers. [18]

The costs of an application under this subrule are not part of the expense of carrying out the examination referred to in subrule (8)*(c)* and do not, therefore, automatically form part of the party and party costs of the applicant. [19] It is submitted that once the application has been finally decided, the court should make an appropriate order as to the costs of the application, [20] and only in exceptional circumstances order the costs of the application to be costs in the cause. [21]

'If any.' These words (and especially the phrase 'indien wel' in the Afrikaans text) suggest that, in appropriate circumstances, the court may order that no medical examination be held.

Subrule (4): 'At any time.' The medical reports, hospital records, medical imaging and other documentary information of a like nature may be demanded as soon as action has been instituted. A defendant is, for example, entitled to demand the documentary information under this subrule prior to filing his plea and preparatory to doing so.

Subrule (5): 'Second and final medical examination.' The rule clearly envisages only two medical examinations although further examinations may, no doubt, be held by consent of the parties.

In *Cape Town City v Kotzé* [22] it was held that in the exercise of its discretion to make the order, a court had to weigh, amongst other things, the importance of the information sought from the examination, against the examination's likely effect on the examinee. If it were likely to be 'materially prejudicial' to the examinee, the order ought to be refused. In this regard Sher AJ stated: [23]

'[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 s 173 of the Constitution), 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 specialised nature, and whether or not it is already established in, or has been obtained by way of, other reports, or is otherwise common cause.

(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 (e g to obtain material from which to cross-examine a party or to use as "ammunition" against such party)?

(c) Is the examination which is proposed sought on the basis of a medically justifiable rationale or reason relevant to the issues in dispute (e g 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 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, 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.'

Subrule (5A): 'Own state of health is relevant.' The *quantum* of a person's claim for loss of support resulting from the death of his breadwinner depends, amongst other things, on the claimant's ability to work and his life expectation, both factors in respect of which the claimant's own state of health is relevant.

Subrule (6): 'Whether movable or immovable.' In *Da Mata v Menfred Properties (Pty) Ltd* [24] the respondent was ordered to make available to the applicant for examination or inspection certain tape recordings of conversations, and the applicant was permitted to record the conversations from such tapes by making use of a machine whereby the record of such conversations might be made audible.

'To make it available for inspection or examination.' This subrule contemplates that *(a)* the person who is required to make an article available has to do no more than to place it at the disposal of or make it accessible to the litigant requiring its inspection or examination; [25] and *(b)* during and after the inspection or examination the thing will remain in the possession and under the control of the party who originally had such possession and control, i e that the words 'to make it available for inspection or examination' cannot be read to include the concept 'hand over for analysis and destruction'. [26] The party merely has to keep the article available for inspection. If a party alleges that an object has been lost and cannot be made available under this rule, the onus is on him to establish this. [27]

The inspection or examination under this subrule is not confined to ocular inspection; [28] hence the provisions of subrule (7) that a party may be requested to specify the nature of the inspection or examination for which the article is to be made available.

Subrule (7): 'Materially prejudice such party by reason of the effect thereof.' Material prejudice may arise if the nature of the proposed inspection or examination will lead to the destruction of the article, or leave it in a different condition or cause it to diminish in value. [29] Where a party seeks an examination which entails dismantling of or other experimentation with the article, he must show that the examination will not cause the destruction of, or cause damage to or reduce the value of the article.

'Referred to a judge.' In terms of the definition of 'judge' in rule 1 this means a judge sitting otherwise than in open court, i e a judge in chambers.

'Make such an order as deemed fit.' The judge has a discretion which is exercised in the interests of justice in the particular circumstances of each case. [30] If the objection is to the nature of the proposed inspection or examination, it is submitted that the court will, amongst other things, take the following into consideration: (i) whether the examination will lead to the destruction of, cause damage to or reduce the value of the article; (ii) the qualifications and experience of the person who is to undertake the examination; (iii) whether the party

seeking examination has offered to provide security against any possible damage which may result from the examination and the effectiveness of such security. [31]

Subrules (8)*(a)* and *(b)*: 'Full report . . . complete copy.' A 'full report' must be obtained from the person making the examination and a 'complete copy' thereof must be furnished to the other party. The practice of obtaining an additional 'confidential report' from the person making the examination which is not furnished to the other side is not warranted by the subrule.

Subrule (8)*(a)*: 'Within two months.' For the computation of this time period, see the notes to rule 1 s v 'Court day' above.

'Such other period as may be directed by a judge in terms of rule 37(8) or in terms of rule 37A.' The provisions of rule 30A apply to a direction made in a judicial case management process referred to in rule 37A. They do not, however, apply to a direction made in terms of rule 37(8). See further, in this regard, the notes to rule 30A(1) s v 'An order or direction made . . . in a judicial case management process referred to in rule 37A' above.

Subrule (8)*(b)*: 'Inform all other parties . . . of the existence of the report.' In terms of this subrule all other parties to the proceedings must in writing be informed of the existence of the full report of the examination.

Subrule (9): General. The main purpose of this subrule is to require the party intending to call a witness to give expert evidence to give the other party such information about his evidence as will remove the element of surprise from the trial. Furthermore, proper compliance with the subrule may enable experts to exchange views before giving evidence and thus to reach agreement on at least some of the issues, thereby saving costs and the time of the court. [32] On the other hand, the subrule makes inroads upon a fundamental right of a party, viz to call a witness, and places the party at the disadvantage of having to intimate in advance what his expert is going to say. Accordingly, the subrule should be strictly construed. [33]

The attendance of an expert witness at court when other witnesses are giving evidence in regard to issues which remain unresolved after an exchange of experts' reports as contemplated by this subrule, should be allowed on taxation. [34] With regard to fees and expenses of expert witnesses in general, see Parts D4 and D5 below.

Most of the divisions of the High Court have their own local rules of practice relating to expert witnesses. See, in this regard, Volume 3, Parts F–N.

In *Ndlovu v Road Accident Fund* [35] it was remarked [36] that 'a time may come when a court will consider that an expert's lack of care, skill and diligence will have adverse costs consequences upon the successful litigant, or will direct that the expert is limited in what may be recovered from the instructing party (particularly where there is a contingency-fee arrangement and this may constitute an additional disbursement reducing the ultimate award received)'.

In *Ntombela v Road Accident Fund* [37] Sutherland J [38] disallowed all costs for joint minutes (save in respect of the neurosurgeons) following non-compliance with the provisions of the Gauteng, Johannesburg, *Practice Manual* relating thereto and issued a stern warning that such failure ought in future to be met with a refusal to hear the matter concerned at all.

In *Bee v Road Accident Fund* [39] the majority of the Supreme Court of Appeal held [40] that effective case management required parties to stick to the facts agreed in a joint minute. If a litigant wished to depart from it, it had to give due warning to the other side, and the same went for the experts themselves. Therefore, if the Fund's expert had wished to testify inconsistently with the agreement in the joint minute, it should have notified the other side before the start of the trial. The Fund's conduct amounted to impermissible trial by ambush. The trial court was entitled, if not bound, to accept the matters agreed by the experts, and its decision not to ask them to lead further evidence was therefore entirely justified.

In *HAL obo MML v MEC for Health, Free State* [41] the position in regard to agreements between experts and joint minutes was summarized as follows by the majority (footnotes omitted):

> '[229] In summary, the position in regard to agreements between experts, is as follows. In accordance with *Bee*, if they agree on issues of fact and the appropriate approach to technical analysis, the litigants are bound by those agreements, unless they have been withdrawn in circumstances where no prejudice results, or any prejudice can be cured by an adjournment or other means. If the experts have reached agreement on a common opinion on a matter within their joint expertise, that is merely part of the total body of evidence. The court must still determine whether to accept the joint opinion. The existence of that agreement between the experts will not ordinarily preclude evidence that qualifies or contradicts their opinion, unless the case has been conducted on the basis of the agreement and the admission of that evidence will prejudice the other party in a manner that cannot be cured. If the parties choose to place an agreed minute before the court reflecting both shared opinions and areas of disagreement and do not call the parties to the minute to deal with the areas of disagreement, the minute will do no more that reflect that there is disagreement on the point. While it is for the parties to determine which witnesses they call, if they fail to call the authors of a joint minute they cannot object when other witnesses express views that qualify or dissent from the views in the minute.
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> [230] The existence of joint minutes may not be used to prevent witnesses from explaining the reasons for the conclusions expressed in the minute. For example it would have been most helpful for one or both of Prof Andronikou and Dr Kamolane to have explained how they arrived at the view that the injury occurred in the peri-natal period. That is the sort of question that a court would ask in order to understand the degree of certainty about this opinion. They could also have been asked to comment on Dr Mogashoa's view that the nature of MML's disability was more consistent with injury occurring to the preterm brain and inconsistent with hypoxia. The passage from *AM* cited in para [212] identifies the second purpose of expert evidence as being

"to provide the court with abstract or general knowledge concerning their discipline that is necessary to enable the

court to understand the issues arising in the litigation". The existence of a joint minute of experts cannot be used to prevent that function from being fulfilled, whether by the experts who were party to the minute or by another expert. The decision in *Bee* does not relate to the admissibility of expert opinions, but to the fairness of the trial. Expert opinion evidence should only be excluded when it impacts adversely on the latter.

[231] My final point is that the joint minute does not render the whole of the expert's report admissible in evidence. Unless the expert gives evidence, or it is agreed that the report will be admissible, it remains inadmissible. The deficiencies in a joint minute cannot be resolved by reference to the report of the expert. As the trial judge remarked in Huntley a joint minute is a useful document, but by its nature it is never more than a summary.'

Subrule (9)*(a)*: 'Save with the leave of the court or the consent of all parties.' It has been held that it is wrong to preclude a party from calling expert evidence when his failure to comply strictly with the subrule was not due to default on his part but was in fact caused by the conduct of the other party, however bona fide the latter's conduct may have been. [42]

Though the leave of the court or the consent of the parties may be tacit, a party is not entitled to lead expert evidence without prior compliance with the subrule and to contend thereafter that by not objecting, the court and the parties have given their tacit consent to the evidence being led. [43]

'Be entitled to call as a witness.' This subrule contains its own sanction in that the party who fails to comply with the provisions thereof is precluded from calling an expert witness. This does not mean, however, that it is the only remedy available to the other party: in appropriate circumstances such a party would be entitled to a postponement of the trial by reason of his opponent's non-compliance with the provisions of the subrule. [44]

'Give evidence as an expert.' This subrule applies to expert witnesses who are asked to express an opinion on a particular subject. There are, therefore, two requirements for the rule to operate: first, the evidence must be in the nature of an opinion and, secondly, it must be given by a person who is an expert. [45]

In essence the function of an expert is to assist *the court* to reach a conclusion on matters on which the court itself does not have the necessary knowledge to decide. [46] It is not the mere

opinion of the witness which is decisive but his ability to satisfy the court that, because of his special skill, training or experience, the reasons for the opinions he expresses are acceptable. [47] Courts must guard against adopting the scientific level of proof, viz the ascertainment

of scientific certainty, frequently applied by experts in assessing whether a particular thesis had been proved or disproved. Courts must assess where the balance of probabilities lies on a review of the evidence as a whole. [48]

The notice pursuant to this subrule has no evidential value. Accordingly, the failure of the witness to give evidence about his qualifications and expert knowledge in court is fatal, as his evidence in relation to the matter before court remains mere opinion evidence that is irrelevant. [49]

Expert evidence within the context of the subrule does not mean any evidence given by an expert but only admissible opinion evidence by such a witness. [50]

In *KPMG Chartered Accountants (SA) v Securefin* [51] the Supreme Court of Appeal expressed strong disapproval of the fact that the High Court had made no attempt to curtail the growing and undesirable practice of allowing expert witnesses to testify as to the meaning of a contract and stated the following:

'. . . but the chaff is still heaping up, the undesirable practice keeps growing and courts make no effort to curtail it. An expert may be asked relevant questions based on assumptions or hypotheses put by counsel as to the meaning of a document. The witness may not be asked what the document means to him or her. The witness (expert or otherwise) may also not be cross-examined on the meaning of the document or the validity of the hypothesis about its meaning. Dealing with an argument that a particular construction of a document did not conform to the evidence, Aldous LJ quite rightly responded with, "So what?" (*Scanvaegt International A/S v Pelcombe Ltd* 1998 EWCA Civ 436.) All this was sadly and at some cost ignored by all.'

In *Windrush Intercontinental SA v UACC Bergshav Tankers AS: The Asphalt Venture* [52] the Supreme Court of Appeal stated the position relating to an expert on foreign law as follows:

'Where a court is dealing with the evidence of experts on foreign law it is entitled to consider it in the same way in which it considers the evidence of any other expert. As this court has consistently said, foreign law is a question of fact and must be proved. This is achieved by reference to the evidence of experts, i e lawyers practising in the courts of the country whose law our courts want to ascertain. But the court is not bound to accept the view of the experts and it may, for cogent reasons, accept the testimony of one as against that of another where they are at odds. And, if in their evidence the experts have referred to passages in the code of the country whose law is sought to be ascertained, the court is at liberty to look at those passages and consider their proper meaning.'

Subrule (9)*(a)*(i): 'Not more than 30 days . . . not more than 60 days.' Prior to the substitution of rule 36 [53] this subrule imposed the same time limit on both parties, viz 15 days before the hearing for a notice of intention to call a witness to give evidence as an expert. By imposing different time limits and providing for the calculation of the time periods with reference to

the close of pleadings, the subrule in its amended form is of a more efficient and practical nature, amongst other things, by allowing a defendant, on receipt of a plaintiff's notice of intention to call an expert witness, to consider its position and, if necessary, to find an expert to give evidence at the hearing.

'The close of pleadings.' In terms of rule 29(1), pleadings are considered closed if —

(a) either party has joined issue without alleging any new matter, and without adding any further pleading;

(b) the last day allowed for filing a replication or subsequent pleading has elapsed and it has not been filed;

(c) the parties agree in writing that the pleadings are closed and such agreement is filed with the registrar; or

(d) the parties are unable to agree as to the close of pleadings, and the court upon the application of a party declares them closed.

Subrule (9)*(a)*(ii): 'Not more than 90 days . . . not more than 120 days.' Prior to the substitution of rule 36 [54] subrule (9) imposed the same time limit on both parties, viz ten days before the trial for a summary of the expert's opinions and reasons

therefor. That gave rise to questions such as if a party delivered his summary on the eleventh day before trial, was the other party entitled to lead evidence in rebuttal of the summary without complying with the rule, for in such circumstances it was impossible to file a summary of rebutting evidence in time to comply with the rule? It had been held that the rule 'was not intended to cover evidence strictly in answer to an opposing party's summary'. [55] In other words, such evidence could

be led as of right and was not hit by the subrule. On the other hand, it could be argued that such evidence was hit by the subrule and was evidence which might be allowed without a summary by the leave of the court. In either event there appeared to be a *lacuna* in the subrule. This has been addressed by the subrule in its amended form: first, by introducing different time periods within which the plaintiff and the defendant must deliver their expert summaries; and, secondly, by providing that the time periods are to be calculated from the date of close of pleadings.

'The close of pleadings.' In terms of rule 29(1), pleadings are considered closed if —

(a) either party has joined issue without alleging any new matter, and without adding any further pleading;

(b) the last day allowed for filing a replication or subsequent pleading has elapsed and it has not been filed;

(c) the parties agree in writing that the pleadings are closed and such agreement is filed with the registrar; or

(d) the parties are unable to agree as to the close of pleadings, and the court upon the application of a party declares them closed.

Proviso: 'Be delivered before a first case management conference . . . or as directed by a case management judge.' In all matters falling under rule 37A, and despite the time periods laid down in this subrule, both the notice of intention to call a person to give evidence as an expert and the summary of such person's opinion and the reasons therefor must be delivered before the first case management meeting or otherwise as directed by the case management judge. See further rule 37A and the notes thereto below.

Subrule (9)*(b)*: 'The summary of the expert's opinion and reasons therefor.' The purpose and function of an expert summary that must be delivered under this subrule differ from the purpose and function of a medical report under subrule (8). In particular, this subrule does not require 'a full report' as required by subrule (8)*(a)*. [56]

The meanings of the words 'summary' and 'opinion', and of the phrase 'reasons therefor' were considered by the Appellate Division in *Coopers (SA) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbH*. [57] In regard to 'summary' and 'opinion' the court adopted as appropriate the meanings given by the *Concise Oxford Dictionary*: 'summary' as a noun means a 'brief account, abridgement, epitome'; 'opinion' means a 'judgment or belief based on grounds short of proof' or a 'formal statement by expert when consulted on what he holds to be the fact'. In regard to the phrase 'his reasons therefor', the court held that it means, or at least includes, the facts or data on which the opinion is based. However, the 'summary' also governs 'his reasons therefor'; hence the testimony that the expert witness intends to give need not be fully set out in the summary. The summary must at least state the sum and substance of the facts and data which lead to the reasoned conclusion (i e the opinion). In this regard Wessels JA stated: [58]

> 'As I see it, an expert's opinion represents his reasoned conclusion based on certain facts on [*sic*] data, which are either common cause, or established by his own evidence or that of some other competent witness.'

If the process of reasoning is not a matter of ordinary logic, but involves, for example, the application of scientific principles, it will ordinarily also be necessary to set out the reasoning process in summarized form. [59]

In deciding whether there has been due compliance with the subrule, it is relevant to have regard to the main purpose thereof, viz to remove the element of surprise. When summarizing the facts or data on which the expert witness premises his opinions, the draftsman should ensure that no information is omitted, where omission thereof might lead to the other side being taken by surprise. [60]

In claims in which the occurrence of a psychiatric injury is in dispute, the psychiatric evidence adduced to support the proposition must be clear and cogently reasoned, and it should be preceded by summaries that properly fulfil the requirements of this subrule. [61]

'Be compiled by the expert himself or herself and shall contain a statement.' In *AM v MEC for Health, Western Cape* [62] the rules relating to expert witnesses were disregarded in various respects, to the dissatisfaction of the Supreme Court of Appeal, which held (*per* Wallis JA):

> '[22] In my view these requirements were disregarded in this case. The experts instructed on behalf of the Ms were in certain respects not instructed on the basis of facts that could be, or were, proved at the trial in regard to the mechanics of J's injury. There was no endeavour to clarify the facts known to Dr Horn, or the facts about her diagnosis and treatment of J. She was criticised in relation to matters that were known to be irrelevant, such as her failure to perform an otoscopy. Her notes and other documents were subjected to forensic scrutiny and criticism of a type one encounters with the most pedantic lawyers. Conclusions contrary to her diagnosis were expressed on the basis that her notes were not as complete as Dr Goosen and Dr Edeling thought desirable. The medical literature was used selectively to bolster arguments and not for the purpose of informing the court of the current approach to the clinical assessment of head injuries in children and the range of accepted medical views. Instead, it was directed at justifying exceptions to the established consensus. Initial theories, advanced to justify claims that a skull X-ray or CT scan should have been performed, were shown under cross-examination to be untenable and abandoned.
>
> [23] In the result, the eventual argument that Dr Horn negligently diagnosed J with a minor injury proceeded on a basis that was not pleaded; was not reflected in the expert's summaries; was not debated at the pre-trial meetings between the experts; was referred to in passing during counsel's opening address; and first emerged, fully formed, in Dr Edeling's evidence on the fourth day of the trial. All the other arguments directed at suggesting that Dr Horn was negligent in arriving at her diagnosis have been abandoned. This is an unsatisfactory state of affairs and resulted in a lengthy trial, much of which was devoted to ploughing through the minutiae of academic articles.
>
> [24] A proper use of the provisions of rules 37 and 37A of the Uniform Rules would have avoided many of these problems and enabled the trial to proceed and finish in the estimated 3–4 days instead of taking 10 days spread over three months. The 10 pre-trial

> meeting minutes, or progress certificates in relation to such meetings, show that the 'meetings' were conducted telephonically or by way of correspondence, without any engagement on the nature of the disputes between the parties or any real endeavour to clarify and limit the issues. The impression is overwhelming that these were seen as nothing more than a necessary formality in order to secure a trial date. What should have happened in an endeavour to narrow the issues was that witness statements should have been delivered from both Mr M and Dr Horn. Broadly speaking that is what rule 37A(10)*(e)* contemplates. It is what is customary in many jurisdictions.
>
> [25] Turning to the experts, the instructions given to them on the facts should have been disclosed. Where necessary,

clarification should have been sought to enable proper instructions to be given. Instead, opinions were expressed on the basis of conjecture and, in one instance, on a misreading of Dr Horn's notes. An agreed bundle of academic articles should have been prepared together with an executive summary of their contents. That would have largely obviated the need to trawl through them, reading sections into the record disguised as questions. The issues at the trial should have been clearly defined in terms of rule 37A(11)*(c)*. Instead of refusing the particulars for trial requested in relation to the expert summaries of Drs Goosen and Edeling they should have been furnished.

[26] Following that course, as is required in many jurisdictions, especially when dealing with expert witnesses, would have brought greater clarity to the proceedings. While rule 36(9) was innovative when introduced in 1963, times have moved on and the preparation of expert summaries by lawyers, who often have only a tenuous grasp of the real issues in a case, frequently gives rise to problems of this type. It would be desirable for the Rules Board to reconsider the rule. A useful change would be to require the experts to prepare and deliver their reports in their own words and to include both a statement recognising that the report is furnished for the assistance of the court and a statement of truth. Having said that, I turn to consider the three issues described earlier.'

Subrule (9)*(b)* was introduced in its amended form as a result of what the Supreme Court of Appeal had suggested in paragraph [26] of its judgment referred to above. The subrule makes it compulsory that the expert's opinion and reasons therefor be compiled by the expert, and not the plaintiff's or defendant's legal representative, and that the summary contain a statement by the expert confirming that the expert's report is —

(i) in such expert's own words;

(ii) for the assistance of the court; and

(iii) a statement of truth.

The purpose of this requirement is to ensure that the expert evidence presented to the court is, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation. [63]

The subrule gives rise to at least the following questions:

(a) what is the meaning of the word 'report' in the subrule?

(b) is the subrule retrospectively applicable to expert reports which were made and summaries of such reports which were delivered in pending actions prior to the date of its coming into operation?

As to *(a)* it is submitted that the word 'report' (in the Afrikaans text of the subrule the word 'verslag' is used) has its ordinary meaning, viz a report in writing following the expert's observation of the facts and, on the basis of the expert's knowledge in the relevant field, the

inferences and opinions and the grounds for drawing those inferences and expressing those conclusions. In other words, the report is distinguishable from the summary drawn from it.

As to *(b)* it is submitted that the subrule does not have retrospective effect for the following reasons, amongst others:

(a) there is no clear indication in the subrule that it applies retrospectively; [64]

(b) to apply the subrule retrospectively would negatively impact upon a party's right to call an expert where there was proper compliance with the subrule prior to its amendment; [65]

(c) it could never have been the intention of the drafters of the subrule that in pending cases where there was proper compliance with the subrule prior to its amendment the summary of the expert's opinion and the reasons therefore had to be discarded and the process under the amended subrule had to start afresh. An interpretation of the amended subrule to that effect would not promote the spirit, purport and objects of the Bill of Rights as provided by s 39(2) of the Constitution. [66]

Subrule (9A)*(a)* and *(b)*: 'Shall endeavour . . . to appoint a single joint expert . . . file a joint minute.' Proper compliance with the subrule will enable experts to exchange views and to reach agreement on the issues, or at least some of them, thereby facilitating the appointment of a single joint expert, on the one hand, and the preparation of a joint minute, on the other hand, thus saving costs and the time of the court. [67]

Subrule (10)*(a)*: 'No person shall . . . be entitled to tender in evidence.' The purpose of discovery under this subrule is the same as that of discovery in terms of rule 35, namely to make all parties aware of the evidence of the objects mentioned in the subrule so that the issues may be narrowed and incontrovertible points of debate eliminated. [68]

'Any plan, diagram, model or photograph.' These words apply only to representations of physical features of the relevant place or object which can be determined objectively. They do not include marks on such a plan, diagram, model or photograph which amount to an expression of opinion by the person who produced it or by any other person. [69] The statement by a policeman in the plan of the scene of an accident that the collision had taken place at a certain point is no more than an opinion or a conclusion—the statement on the plan does not constitute proof that the impact took place at the point shown on the plan. [70]

Subrule (10)*(b)*: 'Received in evidence . . . without further proof.' When a plan, diagram, model or photograph is admitted or received in evidence without proof in terms of this subrule, an admission is created only (i) as to the authenticity of the plan, etc, i e the need to call the author of the plan, etc or to provide other proof of its authorship is dispensed with; and (ii) as to the physical features actually found by the author. [71] Such receiving in evidence without proof of the plan, etc does not constitute proof of statements on such plan, etc which amount to an expression of opinion. [72] Statements on such plan etc may be admissible under the Civil Proceedings Evidence Act 25 of 1965 provided the conditions set out in s 34(1) of the Act are proved. [73] In the case of photographic material the admission under this subrule is an admission of what is depicted in the photograph. [74]

1 See *Durban City Council v Mndovu* 1966 (2) SA 319 (D) at 324D; *Coopers (SA) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbH* 1976 (3) SA 352 (A) at 371D.

2 *Durban City Council v Mndovu* 1966 (2) SA 319 (D) at 324G. See in this regard *Starr v National Coal Board* [1977] 1 All ER 243 (CA).

3 *Goldberg v Union and SWA Insurance Co Ltd* 1980 (1) SA 160 (E) at 164D; *Lane v Willis* [1972] 1 All ER 430 (CA) at 435.

4 *Mgudlwa v AA Mutual Insurance Association Ltd* 1967 (4) SA 721 (E) at 723A.

5 In *Goldberg v Union and SWA Insurance Co Ltd* 1980 (1) SA 160 (E) the defendant, before filing its plea and preparatory to doing so, called for a medical examination of the plaintiff.

6 *Mgudlwa v AA Mutual Insurance Association Ltd* 1967 (4) SA 721 (E) at 723B.

7 *Mgudlwa v AA Mutual Insurance Association Ltd* 1967 (4) SA 721 (E) at 723D.
8 *Feros v Rondalia Assurance Corporation of SA Ltd* 1970 (4) SA 393 (E).
9 *Goldberg v Union and SWA Insurance Co Ltd* 1980 (1) SA 160 (E) at 164; and see *Feros v Rondalia Assurance Corporation* 1970 (4) SA 393 (E).
10 *Goldberg v Union and SWA Insurance Co Ltd* 1980 (1) SA 160 (E) at 166A–D; and see *Selamolela v President Versekeringsmaatskappy Bpk* 1981 (3) SA 1099 (T).
11 *Durban City Council v Mndovu* 1966 (2) SA 319 (D).
12 *Durban City Council v Mndovu* 1966 (2) SA 319 (D) at 325D–H. In *Starr v National Coal Board* [1977] 1 All ER 243 (CA) at 249 it is pointed out that there are in the balance two fundamental rights. On the one hand, there is the plaintiff's right to personal liberty. On the other, there is the defendant's right to defend himself in litigation as he and his advisers think fit; and this is a right which includes the freedom to choose the expert witnesses that he will call.
13 *Road Accident Fund v Chin* 2018 (3) SA 547 (WCC) at 551F. The court held (at 555B–C) that in this regard a strong case (i e a higher standard than a reasonable apprehension of bias) had to be made out.
14 *Road Accident Fund v Chin* 2018 (3) SA 547 (WCC) at 552C–D.
15 *Road Accident Fund v Chin* 2018 (3) SA 547 (WCC) at 553A.
16 *Road Accident Fund v Chin* 2018 (3) SA 547 (WCC) at 556E, 556H–C and 558C.
17 *Feros v Rondalia Assurance Corporation of SA Ltd* 1970 (4) SA 393 (E).
18 Cf *Road Accident Fund v Chin* 2018 (3) SA 547 (WCC) at 551C.
19 *Durban City Council v Mndovu* 1966 (2) SA 319 (D) at 326B.
20 This was done in, for example, *Durban City Council v Mndovu* 1966 (2) SA 319 (D) at 326; *Goldberg v Union and SWA Insurance Co Ltd* 1980 (1) SA 160 (E) at 167.
21 This was done in *Mgudlwa v AA Mutual Insurance Association Ltd* 1967 (4) SA 721 (E).
22 2017 (1) SA 593 (WCC).
23 At 606F–608B (footnotes omitted).
24 1969 (3) SA 332 (W).
25 *Zandry v Randle Yachts CC* 2006 (5) SA 301 (C) at 305B–306C.
26 *The Wellcome Foundation Ltd v Caps Industries (SA) (Pty) Ltd* 1976 BP 505 at 509E–G. In this case the judge, sitting as commissioner of patents, pleaded for a rule with a wider ambit in patent cases (at 510A).
27 *SA Neon Advertising (Pty) Ltd v Claude Neon Lights (SA) Ltd* 1968 (3) SA 381 (W).
28 *Caltex Oil Rhodesia (Pvt) Ltd v Perfecto Dry Cleaners (Pvt) Ltd* 1970 (2) SA 44 (R).
29 See *Caltex Oil Rhodesia (Pvt) Ltd v Perfecto Dry Cleaners (Pvt) Ltd* 1970 (2) SA 44 (R); *American Cyanamid Co v National Fermentation Pharmaceutical* 1967 BP 392. The decision in *Eimco (South Africa) (Pty) Ltd v Magistrate, Wynberg* 1967 (3) SA 715 (C) is also instructive for, although the case was not decided under this rule, the considerations leading to the refusal of an examination would also apply to an examination sought under this rule.
30 See *Caltex Oil Rhodesia (Pvt) Ltd v Perfecto Dry Cleaners (Pvt) Ltd* 1970 (2) SA 44 (R) at 48E.
31 These propositions are derived from *Eimco (South Africa) (Pty) Ltd v Magistrate, Wynberg* 1967 (3) SA 715 (C) and *Caltex Oil Rhodesia (Pvt) Ltd v Perfecto Dry Cleaners (Pvt) Ltd* 1970 (2) SA 44 (R). See also *The Wellcome Foundation Ltd v Caps Industries (SA) (Pty) Ltd* 1976 BP 505.
32 *Klue v Provincial Administration, Cape* 1966 (2) SA 561 (E); *Coopers (SA) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbH* 1976 (3) SA 352 (A) at 371F; *Doyle v Sentraboer (Co-operative) Ltd* 1993 (3) SA 176 (SE) at 181A–C; *Hall v Multilateral Motor Vehicle Accidents Fund* 1998 (4) SA 195 (C) at 200A.
33 *Boland Construction Co (Pty) Ltd v Lewin* 1977 (2) SA 506 (C) at 508H; *Doyle v Sentraboer (Co-operative) Ltd* 1993 (3) SA 176 (SE) at 180G–J; *TN obo BN v MEC for Health, Eastern Cape* 2023 (3) SA 270 (ECB) at paragraphs [41]–[42].
34 *Tulbagh Municipality v Waveren Boukontrakteurs (Edms) Bpk* 1968 (3) SA 246 (C).
35 2014 (1) SA 415 (GSJ).
36 At 440I–441J.
37 2018 (4) SA 486 (GJ).
38 At 496A–497E and 498B–C.
39 2018 (4) SA 366 (SCA), reaffirmed in *MEC for Health and Social Development, Gauteng v MM on behalf of OM* (unreported, SCA case no 697/2020 dated 30 September 2021) at paragraph [16] and *NSS obo AS v MEC for Health, Eastern Cape Province* 2023 (6) SA 408 (SCA) at paragraph [25] footnote [20]. See also the minority judgment in *Passenger Rail Agency of South Africa v Bischoff N.O. obo Reyners* [2022] 3 All SA 255 (WCC) at paragraphs [110]–[111].
40 At 386A–388A.
41 2022 (3) SA 571 (SCA), reaffirmed in *NSS obo AS v MEC for Health, Eastern Cape Province* 2023 (6) SA 408 (SCA) at paragraph [25].
42 *Klue v Provincial Administration, Cape* 1966 (2) SA 561 (E); *Coopers (SA) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbH* 1976 (3) SA 352 (A) at 373D–H.
43 *Colt Motors (Edms) Bpk v Kenny* 1987 (4) SA 378 (T) at 387F.
44 *Smit v Shongwe* 1982 (4) SA 699 (T) in which Nicholas J (with respect, rightly) rejected the approach adopted in *Venter v Du Plessis* 1980 (3) SA 151 (T) at 152G–H. Both these cases deal with former magistrates' courts rules 24(9) and 31(1), the wording of which is almost identical to that of rules 24(9) and 31(1) of the present magistrates' courts rules.
45 *Uni-Erections v Continental Engineering Co Ltd* 1981 (1) SA 240 (W) at 250A; *M J Snyman v Alert-O-Drive (Pty) Ltd* 1981 BP 213. The court will not allow the provisions of the subrule to be evaded by setting itself up as an expert nor admit the evidence of an expert by allowing him to be styled non-expert (*Stewarts Lloyds of SA Ltd v Croydon Engineering & Mining Supplies (Pty) Ltd* 1979 (1) SA 1018 (W)). In *IM v Road Accident Fund* 2023 (1) SA 573 (FB) the Road Accident Fund's counsel indicated to the court that she had received instructions to admit the plaintiff's expert reports by mere submission thereof to the court. The subsequent argument presented on behalf of the plaintiff was based on the facts, opinions, postulations and calculations of the experts. The arguments on behalf of the Road Accident Fund, which were tantamount to opinion, were that of the Fund's counsel and not that of an expert. The latter argument was frustrated by the fact that no expert evidence, or any evidence at all, was submitted on the issues that were raised by her. On her word from the bar, it remained pure and mere speculation. The court would therefore not take cognizance thereof for its mere vagueness, generalness and unsubstantiated nature. The court emphasized that the common theme in the approach of courts adopted towards expert evidence was that courts had to jealously protect their role and powers (at paragraphs [14]–[15]).
46 In *NSS obo AS v MEC for Health, Eastern Cape Province* 2023 (6) SA 408 (SCA) the Supreme Court of Appeal stated (footnotes indicated between [ ]):
'[24] What is more, a party cannot bind the court to the opinion of her opponent's expert witness by merely conceding that that opinion is correct. Indeed, this illustrates why an expert's opinion is not a fact, within the meaning of s 15 of the Act. [*Author's note:* Civil Proceedings Evidence Act 25 of 1965.] Put simply, the decision on the opinion is for the court, not the witness. For this reason, it is open to the judge to make findings contrary to the opinions of experts, even where their reports are agreed. [T Hodgkinson *Expert Evidence: Law and Practice* (1990) at 352.] In *S v M* [*S v M* 1991 (2) SACR 91 (T).] Kriegler J aptly described the position thus:
"A court's approach to expert evidence has been dealt with on many occasions. The court is not bound by expert evidence. It is the presiding officer's function ultimately to make up his own mind. *He* has to evaluate the expertise of the witness. *He* has to weigh the cogency of the witness's evidence in the contextual matrix of the case with which he is seized. *He* has to gauge the quality of the expert qua witness. However, the wise judicial officer does not lightly reject expert evidence on matters falling within the purview of the expert witness's field."'
(Emphasis added by the court.)
In *AM v MEC for Health, Western Cape* 2021 (3) SA 337 (SCA) at paragraph [17] (footnotes omitted) the following was said about the role of an expert and expert evidence:
'Something needs to be said about the role of expert witnesses and the expert evidence in this case. The functions of an expert witness are threefold. First, where they have themselves observed relevant facts that evidence will be evidence of fact and admissible as such. Second, they provide the court with abstract or general knowledge concerning their discipline that is necessary to enable the court to understand the issues arising in the litigation. This includes evidence of the current state of knowledge and generally accepted practice in the field in question. Although such evidence can only be given by an expert qualified in the relevant field, it remains, at the end of the day, essentially evidence of fact on which the court will have to make factual findings. It is necessary to enable the court to assess the validity of opinions that they express. Third, they give evidence concerning their own inferences and opinions on the issues in the case and the grounds for drawing those inferences and expressing those conclusions.'
See also the majority decision in *HAL obo MML v MEC for Health, Free State* 2022 (3) SA 571 (SCA) at paragraph [212]; *NSS obo AS v MEC*

for Health, Eastern Cape Province 2023 (6) SA 408 (SCA) at paragraph [25].
In *Schneider NO v AA* 2010 (5) SA 203 (WCC) at 211E–214B the role of an expert was explained as follows:
'In this connection it is necessary to deal with the role of an expert. In Zeffertt, Paizes & Skeen *The South African Law of Evidence* at 330, the learned authors, citing the English judgment of *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The "Ikarian Reefer")* [1993] 2 Lloyd's Rep 68 at 81, set out the duties of an expert witness thus:
"1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
2. An expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise. . . . An expert witness should never assume the role of an advocate.
3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.
4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
5. If an expert opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report."
In short, an expert comes to court to give the court the benefit of his or her expertise. Agreed, an expert is called by a particular party, presumably because the conclusion of the expert, using his or her expertise, is in favour of the line of argument of the particular party. But that does not absolve the expert from providing the court with as objective and unbiased an opinion, based on his or her expertise, as possible. An expert is not a hired gun who dispenses his or her expertise for the purposes of a particular case. An expert does not assume the role of an advocate, nor gives evidence which goes beyond the logic which is dictated by the scientific knowledge which that expert claims to possess.'
See also *IM v Road Accident Fund* 2023 (1) SA 573 (FB) at paragraphs [18] and [19].
Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist. As long as there is some admissible evidence on which the expert's testimony is based it cannot be ignored; but it follows that the more an expert relies on facts not in evidence, the weight given to his opinion will diminish. An opinion based on facts not in evidence has no value for the court (*AM v MEC for Health, Western Cape* 2021 (3) SA 337 (SCA) at paragraphs [20]–[21] and the cases there referred to; *HAL obo MML v MEC for Health, Free State* 2022 (3) SA 571 (SCA) at paragraphs [206]–[215]). Expert evidence is only as sound as the factual evidence on which it is based. The less fixed (or more variable) the assumption and the fewer hard facts available to the expert, the greater the scope for alternative conclusions (*Harrington NO v Transnet Ltd t/a Metrorail* 2010 (2) SA 479 (SCA) at 494B–C; and see *JA obo DA v MEC for Health, Eastern Cape* 2022 (3) SA 475 (ECB) (a decision of the full court) at paragraphs [11]–[13]). Where there are eye witnesses or direct evidence of an occurrence, that may render the reconstructions of experts less relevant or even irrelevant in determining the cause of the occurrence (*Representative of Lloyds v Classic Sailing Adventures (Pty) Ltd* 2010 (5) SA 90 (SCA) at 107F–G; and see *JA obo DA v MEC for Health, Eastern Cape* 2022 (3) SA 475 (ECB) (a decision of the full court) at paragraph [11]).
See also *Twine v Naidoo* [2018] 1 All SA 297 (GJ) at paragraphs [18] and [19]; *Dias v Petropulos* 2018 (6) SA 149 (WCC) at 173B–F; *British American Tobacco v Minister of Co-operative Governance and Traditional Affairs* 2021 (7) BCLR 735 (WCC) (a decision of the full court) at paragraph [128]; *JA obo DA v MEC for Health, Eastern Cape* 2022 (3) SA 475 (ECB) (a decision of the full court) at paragraphs [11]–[17]; L Knoetze-le Roux 'Ways to curb expert bias' 2017 (September) *De Rebus* at 37–9.
Expert evidence must be weighed as a whole, and it is the exclusive duty of the court to make the final decision on the evaluation of expert opinion. Isolated statements made by experts should not too readily be accepted, 'especially when dealing with a field where medical certainty is virtually impossible' (*Frantzen v Road Accident Fund* [2022] 3 All SA 657 (SCA) at paragraph [35]).
The evidence of an expert, tendered because of his special knowledge, skill or experience, must be regarded with a measure of caution (*Altech Radio Holdings (Pty) Ltd v Tshwane City* 2021 (3) SA 25 (SCA) at paragraph [70]).
In *MF v Road Accident Fund* 2023 (1) SA 52 (SCA) the Supreme Court of Appeal reaffirmed the correct approach in evaluating expert evidence laid down in *Michael v Linksfield Park Clinic (Pty) Ltd* 2001 (3) SA 1188 (SCA):
'[32] The correct approach in evaluating expert evidence was laid down in *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another (Linksfield*), where this court held:
"(W)hat is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning. That is the thrust of the decision in the medical negligence case of *Bolitho v City and Hackney Health Authority* [1998] AC 232 (HLE). With the relevant dicta in the speech of Lord Browne-Wilkinson we respectfully agree. Summarised, they are to the following effect.
The court is not bound to absolve a defendant from liability for allegedly negligent medical treatment or diagnosis just because evidence of expert opinion, albeit genuinely held, is that the treatment or diagnosis in issue accorded with sound medical practice. The court must be satisfied that such opinion has a logical basis, in other words that the expert has considered comparative risks and benefits and has reached a defensible conclusion (at 241G–242B)."
[33] The fact that a body of professional opinion is almost universally held would not make the opinion reasonable, if it disregarded an obvious risk that could have been prevented. In this regard, this court further stated in *Linksfield*:
"A defendant can properly be held liable, despite the support of a body of professional opinion sanctioning the conduct in issue, if that body of opinion is not capable of withstanding logical analysis and is therefore not reasonable. However, it will seldom be right to conclude that views genuinely held by a competent expert are unreasonable. The assessment of medical risks and benefits is a matter of clinical judgment which the court would not normally be able to make without expert evidence and *it would be wrong to decide a case by simple preference where there are conflicting views on either side, both capable of logical support*. Only where expert opinion cannot be logically supported at all will it fail to provide the benchmark by reference to which the defendant's conduct falls to be assessed (at 243A — E)." [My emphasis.]'
See also *Road Accident Fund v Zulu* (unreported, SCA case no 50/11 dated 30 November 2011) at paragraph [14]; *IM v Road Accident Fund* 2023 (1) SA 573 (FB) at paragraph [20]; *Visagie v Health Professions Council of South Africa* 2023 (2) SA 626 (GP) at paragraphs [38]–[40].

47 *Menday v Protea Assurance Co Ltd* 1976 (1) SA 565 (E) at 569B. See also *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 616–17; *JA obo DA v MEC for Health, Eastern Cape* 2022 (3) SA 475 (ECB) (a decision of the full court) at paragraph [10]; and see, in general, 2008 (November) *De Rebus* 26.

48 *Michael v Linksfield Park Clinic (Pty) Ltd* 2001 (3) SA 1188 (SCA) at paragraph [40]; *Maqubela v S* 2017 (2) SACR 690 (SCA) paragraph [5]; *MEC for Health and Social Development, Gauteng v MM on behalf of OM* (unreported, SCA case no 697/2020 dated 30 September 2021) at paragraph [6] footnote 3; *Frantzen v Road Accident Fund* [2022] 3 All SA 657 (SCA) at paragraph [34]; *MF v Road Accident Fund* 2023 (1) SA 52 (SCA) at paragraph [34].

49 *Mkhize v Lourens* 2003 (3) SA 292 (T) at 299C–G.

50 *M J Snyman v Alert-O-Drive (Pty) Ltd* 1981 BP 213.

51 2009 (4) SA 399 (SCA) at 410F–G. See also *Masstores (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd* 2016 (2) SA 586 (SCA) at 593A–B and the cases there referred to.

52 2017 (3) SA 1 (SCA) at 16B–D, and see the cases referred to at 16E–17E.

53 By GN R842 in *GG* 42497 of 31 May 2019 with effect from 1 July 2019.

54 By GN R842 in *GG* 42497 of 31 May 2019 with effect from 1 July 2019.

55 By Margo J, giving the unanimous decision of the full court of the Transvaal Provincial Division in an appeal against a decision of the court of the Commissioner of Patents. The decision of the full court went on appeal to the Appellate Division and is reported *sub nomine Coopers (SA) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbH* 1976 (3) SA 352 (A) at 371F (the decision of the full court is not reported but is referred to in a note by Brathwaite in (1976) 6 *Newsletter of the Institute of Patent Agents* at 4; the Appellate Division did not deal with this point as it decided the case on other grounds); *Doyle v Sentraboer (Co-operative) Ltd* 1993 (3) SA 176 (SE) at 181A–C. See further *Klue v Provincial Administration, Cape* 1966 (2) SA 561 (E) at 563A–B; *Doyle v Sentraboer (Co-operative) Ltd* 1993 (3) SA 176 (SE) at 183C–D. In *Mokhethi v MEC for Health, Gauteng* 2014 (1) SA 93 (GSJ) the court stated (at 98D–I):
'It is further trite law that the rules regarding expert notices are to be complied with, not necessarily in sequence. It is not for the defendant to wait and see if the plaintiff is going to call expert testimony before the defendant decides whether or not its case demands the calling of expert testimony to its own benefit.
The attitude disclosed in the present instance by the defendant's legal representatives amounted to just such an attitude, more akin to playing a waiting game. Unfortunately the game has redounded to its own disadvantage. It is well worth quoting from the judgment of Mullins J in *Doyle v Sentraboer (Co-operative) Ltd* 1993 (3) SA 176 (SE), where at 183B–C the following is said:
"The time limits provided for in Rule 36(9) were not designed to provide a litigant with a tactical advantage over the other party. Each party must prepare for trial individually."
As correctly pointed out by Mr Liebenberg, Rule 36(9) does not, as in the case of certain other rules, provide that the plaintiff must take a certain step within a prescribed period whereafter the defendant has a further period to respond thereto. As Addleson AJ said in *Klue and Another v Provincial Administration, Cape* 1966 (2) SA 561 (E) at 563A–B:
"I do not think that Rule 36(9)(*b*) was designed to encourage one party to wait until ten days before a trial in order to satisfy himself that his

opponent does not intend to call expert evidence, before himself deciding whether or not to call expert evidence on a material issue on the pleadings. Such an approach would in many cases result in a situation of stalemate and would in my view be contrary to the spirit of the Rule."
I respectfully agree with the aforesaid interpretation of the Uniform Rules of Court dealing with the requirements to enable a party to call expert witnesses.'
The court further stated (at 100H–I and 102I) that '[t]he conduct of the defendant's attorney in the present instance is also, astonishingly, reprehensible and cannot be countenanced by this court' and ordered that a copy of the judgment was to be transmitted by the registrar to the defendant and to the head of the Department of Health, Gauteng.

56 *Ndlovu v Road Accident Fund* 2014 (1) SA 415 (GSJ) at 437G–H. As to difficulties experienced with medico-legal reports, see the *Ndlovu* case at 437H–438H.

57 1976 (3) SA 352 (A) at 371B.

58 At 371F. See also *Schneider Electric SA (Pty) Ltd v Jim Fung Industrial Limited* (unreported, GJ case no A5058/2015 dated 8 December 2016) at paragraph [69]; *AM v MEC for Health, Western Cape* 2021 (3) SA 337 (SCA) at paragraphs [18]–[21]; *MEC for Health and Social Development, Gauteng v MM on behalf of OM* (unreported, SCA case no 697/2020 dated 30 September 2021) at paragraph [17]; and see *JA obo DA v MEC for Health, Eastern Cape* 2022 (3) SA 475 (ECB) (a decision of the full court) at paragraphs [11]–[13] and the notes to subrule (9) s v 'Give evidence as an expert' above.

59 *Coopers (SA) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbH* 1976 (3) SA 352 (A) at 371–2; *NSS obo AS v MEC for Health, Eastern Cape Province* 2023 (6) SA 408 (SCA) at paragraph [25]. In *Boland Construction Co (Pty) Ltd v Lewin* 1977 (2) SA 506 (C) Vos J suggested (at 508) that 'the concept "summary" may not have received sufficient weight in *Cooper's* case'. He expressed the opinion that the rule should be restrictively construed and that 'a summary should be no more than a summary'.

60 *Coopers (SA) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbH* 1976 (3) SA 352 (A) at 371E.

61 *Hing v Road Accident Fund* 2014 (3) SA 350 (WCC) at 363G–H.

62 2021 (3) SA 337 (SCA); and see the majority decision in *HAL obo MML v MEC for Health, Free State* 2022 (3) SA 571 (SCA) at paragraphs [206]–[215].

63 Cf *Schneider NO v AA* 2010 (5) SA 203 (WCC) at 211E–214B.

64 See *Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission* 1999 (4) SA 1 (SCA) at paragraphs [19]–[24]; *Raumix Aggregates (Pty) Ltd v Richter Sand CC, and Similar Matters* 2020 (1) SA 623 (GJ) (a decision of the full court) at paragraphs [11]–[14].

65 See *Raumix Aggregates (Pty) Ltd v Richter Sand CC, and Similar Matters* 2020 (1) SA 623 (GJ) (a decision of the full court) at paragraphs [15]–[17].

66 See *Raumix Aggregates (Pty) Ltd v Richter Sand CC, and Similar Matters* 2020 (1) SA 623 (GJ) (a decision of the full court) at paragraphs [19]–[27].

67 In *Ntombela v Road Accident Fund* 2018 (4) SA 486 (GJ) Sutherland J (at 496A–497E and 498B–C) disallowed all costs for joint minutes (save in respect of the neurosurgeons) following noncompliance with the provisions of the *Practice Manua*l of the High Court, Johannesburg, relating thereto and issued a stern warning that such failure ought in future to be met with a refusal to hear the matter concerned at all. In *Bee v Road Accident Fund* 2018 (4) SA 366 (SCA) the majority held (at 386A–388A) that effective case management required parties to stick to the facts agreed in a joint minute. If a litigant wished to depart from it, it had to give due warning to the other side, and the same went for the experts themselves. Therefore, if the Fund's expert had wished to testify inconsistently with the agreement in the joint minute, it should have notified the other side before the start of the trial. The Fund's conduct amounted to impermissible trial by ambush. The trial court was entitled, if not bound, to accept the matters agreed by the experts, and its decision not to ask them to lead further evidence was therefore entirely justified.

68 *Hall v Multilateral Motor Vehicle Accidents Fund* 1998 (4) SA 195 (C) at 199I.

69 *Mabalane v Rondalia Assurance Corporation of SA Ltd* 1969 (2) SA 254 (W), approved in *Shield Insurance Co Ltd v Hall* 1976 (4) SA 431 (A) at 438F.

70 *Mabalane v Rondalia Assurance Corporation of SA Ltd* 1969 (2) SA 254 (W); *Shield Insurance Co Ltd v Hall* 1976 (4) SA 431 (A).

71 *Shield Insurance Co Ltd v Hall* 1976 (4) SA 431 (A) at 438F; *Swart v Santam Versekerings-maatskappy Bpk* 1986 (2) SA 377 (T) at 380I–381A; *Hotz v University of Cape Town* 2017 (2) SA 485 (SCA) at 495H–496A and 496H–I.

72 *Mabalane v Rondalia Assurance Corporation of SA Ltd* 1969 (2) SA 254 (W); *Shield Insurance Co Ltd v Hall* 1976 (4) SA 431 (A).

73 *Shield Insurance Co Ltd v Hall* 1976 (4) SA 431 (A) at 438H.

74 *Hotz v University of Cape Town* 2017 (2) SA 485 (SCA) at 496H–I.