



IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE:	YES ☒ NO
(2) OF INTEREST TO OTHER JUDGES:	YES ☒ NO
(3) REVISED.	
2010.02.24	
DATE	<i>[Signature]</i>

24/02/2010
CASE NO: 63149/09

In the matter between:

HARMSE F.A

Applicant

and

ROAD ACCIDENT FUND

Respondent

J U D G M E N T

MAKGOKA, J:

[1] The applicant approaches this court on an urgent basis, for interim payment in terms of rule 34A of the Uniform Rules of Court. The application is opposed by the respondent.

[2] The applicant suffered certain bodily injuries on 24 November 2008 as a result of a motor vehicle collision. He was a driver of one of the two motor vehicles involved in the collision. It is alleged that the sole cause of the collision was the negligent driving of the insured driver.

[3] As a result of the said collision, summons was served on the respondent for the recovery of the applicant's damages. The action, which is pending before this court, is defended by the respondent.

[4] Initially this application was brought as a normal motion, and was set down for 24 November 2009. On the said occasion, the matter was postponed *sine die*, and the respondent was ordered to pay the wasted costs.

[5] Subsequent thereto, on 17 December 2009, the applicant launched the present urgent application, wherein the applicant claims interim payment from the respondent in an amount of R25 000. 00, as well as a monthly payment of R2 500. 00 from 1 January 2010 until the determination of the main action.

[6] Rule 34A of the Uniform Rules provides:

“(1) In an action for damages for personal injuries or the death of a person, the plaintiff may, at any time after the expiry of the period for the delivery of the notice of intention to defend, apply to the court for an order requiring the defendant to make an interim payment in respect of his claim for medical costs and loss of income arising from his physical disability or the death of a person.

(2)...

(3)...

(4) If at the hearing of such an application, the court is satisfied that-

(a) the defendant against whom the order is sought has in writing admitted liability for the plaintiff's damages; or

(b) the plaintiff has obtained judgment against the defendant for damages to be determined,

the court may if it thinks fit but subject to the provisions of sub-rule

(5), order the defendant to make an interim payment of such

amount shall not exceed a reasonable proportion of the damages which in the opinion of the court are likely to be recovered by the plaintiff taking into account any contributory negligence, set off or counterclaim."

[7] From the above, it is clear that a jurisdictional requirement for an interim payment, is an admission of liability in writing by the respondent.

Is there written admission of liability in the present case?

[8] It is submitted on behalf of the applicant that there is. In support of this submission, the applicant relies on a series of settlement negotiations, which culminated in the respondent making a written offer of settlement on a 50% merits apportionment. The high water mark of the applicant's case in this regard, is an e-mail transmitted on 4 September 2009 by the respondent's claims handler, Mr. Kenneth Mkhawane which reads:

"The offer for 50% merits apportionment and pre-settlement undertaking has been approved. Upon receipt of your merits acceptance, we will sent the undertaking limited to 50% via post to yourselves."

[9] On 7 September 2009, the application's attorney responded to the 50% apportionment offer as follows:

“As per the meeting I confirm that I am not happy with the 50% merits offer apportionment. I have pointed out numerous aspects indicating that the insured driver's version is not probable.”

[10] The same date, 7 September 2009, Marlize Joubert, apparently a senior claims handler of the respondent, replied to the above e-mail as follows: “I(f) you say that the insured driver's version is improbable , the same argument can be applied to your client's version. I will immediately proceed to consider the appointment of a reconstruction expert and assessor to investigate further, which is the procedure to follow when one is faced with contradictory versions.”

[11] On 3 December 2009, at the request of the respondent's attorney, the applicant's settlement proposals were reduced to writing and transmitted to respondent's attorney.

[12] On 9 December 2009, the respondent's attorney transmitted an e-mail to the applicant's attorney, with the following content:

“I have managed to speak to Adv. Bezuidenhout... He informed that we cannot settle the merits for one part of the matter only. If the plaintiff cannot accept the merits in totality we unfortunately cannot assist you in this matter”

[13] From the exchange of the correspondence referred to above three important aspects emerge. First, that the parties were clearly engaged in genuine “without prejudice” negotiations. Therefore those communications are privileged. The rationale for the privilege is public policy: parties are encouraged to avoid litigation by resolving their differences amicably in full and frank discussions without fear that, should negotiations fail, any admissions made by them during such discussions will be used against them in ensuing litigation. See *Kapeller v Rondalia Versekeringskorporasie van SA Bpk* 1964 (4) SA 722 (T) at 728F; *Naidoo v Marine and Trade Insurance Co Ltd* 1978 (3) SA 666 (A) at 677B-D, as well as *Tshabalala v President Versekeringsmaatskappy Bpk* 1987 (4) SA 73 (T) at 75H-76A.

[14] The second aspect is that there is no consensus on the liability of the respondent for the applicant’s damages. This is confirmed by the respondent’s statement that it considered appointing an accident reconstruction expert to investigate the merits. To my mind, this is a clearest indication that the respondent had not accepted the liability for the applicant’s damages.

[15] Thirdly, even assuming that the respondent, by its offer of a 50% apportionment, had “admitted” liability for the applicant’s damages, the said “admission” was rejected by the applicant’s attorney in the e-mail of 7 September 2009, wherein it was expressly stated that the attorney was “*not happy with the 50% merits apportionment.*”

[16] In my view, the applicant seeks to sit on two chairs, by rejecting the respondent's "admission" of liability, while simultaneously seeking to base his rule 34A application on the very same rejected "admission." The applicant should make an election between the two positions.

[17] Mr. *du Pisanie*, for the applicant, contended that it was competent for the applicant, solely for the purpose of rule 34A interim payment, to rely on the "admitted" 50% apportionment, and claim interim payment thereon, while still at large to negotiate further on the liability and apportionment percentages, in the main action. I do not agree with this contention. The provisions of rule 34A (4) are clear, and couched in peremptory terms: only in instances where the respondent had admitted liability for the applicant's damages, may a court order interim payment. In my view, the rule envisages a clear, unequivocal and unconditional admission of liability for it to find application. It clearly does not envisage a situation where, the parties being in the process of settlement negotiations, one party latches onto an offer, and seek to enforce it in terms of the rule. An offer to settle is, and remains exactly that. It cannot be elevated to an unequivocal admission of liability.

[18] The argument of Mr *du Pisanie*, if sustained, would have far-reaching practical implications. Amongst those would be that, once an offer is made in settlement negotiations, in these types of claims, the applicant would be entitled to an interim payment. It is common knowledge that in practice, the respondent, on a daily basis, makes offers in an endeavour to settle claims. If the contents of such offers are to be used against the respondent for interim

payment, it would most certainly result in the respondent been discouraged to enter into any settlement proposals at all. That would defeat the whole purpose and spirit of “without prejudice” negotiations and offers, as provided in terms of rule 34A.

[19] Given the above considerations, the application falls to be dismissed. There remains the issue of costs. The applicant was given notice, contained in the answering affidavit of the respondent’s attorney, that a punitive costs order would be sought against the applicant. In argument, Mr. *Motsiri*, for the respondent, persisted quite forcefully with this prayer. After careful consideration, I am of the view that a punitive costs order is not warranted.

[20] As a result I make the following order:

1. The application is dismissed.
2. The applicant is ordered to pay the costs of the application.

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T.M. MAKGOKA

JUDGE OF THE HIGH COURT

DATE HEARD : 28 DECEMBER 2009

JUDGEMENT DELIVERED: 31 DECEMBER 2009

FOR THE APPLICANT : ADV P J DU PISANE

INSTRUCTED BY : MANONG BADENHORST BOTMA

ATTORNEYS, BOTHAVILLE, AND

ROOTH WESSELS MOTLA CONRADIE,

PRETORIA

FOR THE RESPONDENT : ADV SDK MOTSIRI

INSTRUCTED BY : ***MOTLHE JOOMA SABDIA INC,***
PRETORIA