

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION (BHISHO)**

Case No: 446/2014

In the matter between:

MAVIS NONTEMBISO MANQINA

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

NQUMSE AJ:

[1] The application concerns an interim payment in terms of the provisions of Rule 34A of the Uniform Rules of court pending the final determination of the main action which has been instituted by the Applicant (plaintiff in the main action) against the Respondent (defendant in the main action).

[2] The prayers that are sought in the Notice of Motion are the following:

2.1 Directing the respondent to pay the account of Nine Hundred and Fifty Thousand Rand (R950 000 00) to the bank account of the Applicant's Attorneys;

2.1 In the event of the respondent failing to pay the amount of Nine Hundred and Fifty Thousand Rand within (30) thirty days from the date of granting of this order, the applicant is granted leave to approach this court on the papers filed of record, supplemented against the respondent in the total sum prayed for;

- 2.3 An order directing the respondent to pay costs of this application including costs for engagement of counsel; and
- 2.4 Such further and/or alternative relief.

[3] The applicant is the mother and natural guardian of “SM” a minor child of 13 years old who was a victim and injured in a motor vehicle accident that occurred on 4 October 2011, as a consequence of which she sustained traumatic brain injury and a fractured left clavicle.

[4] According to the founding affidavit the merits in the main action have been settled between the parties. On 15 September 2016 the court ordered that all agreed or proven damages resulting from the accident in which the minor child was injured must be borne by the respondent. The applicant submits that the amount she seeks represents future medical treatment that is required for the minor child as well as costs to pay the fees for a special school as recommended by the Educational Psychologist who compiled a report filed in the main action. She further stated that owing to her precarious financial position, the funding of her litigation has been borne by her attorney who is no longer in a position to do so. It is further her submission that according to the expert reports which were prepared for the trial most significantly the report by Dr Mkhize, according to which he found that the child will get post traumatic seizures which require treatment of about R15 000 00 per annum as well as medication of +-R200 per month for headaches since the accident. She stated that it will be prejudicial to the child if interim payment is not made available. The same goes with the recommendation of Dr Rudenberg an Educational Psychologist who opined that the child needs an intensive remedial intervention which is not available at a mainstream high School. He estimated the cost attended to psychotherapy treatment to be R37 882. 00 per anum.

[5] It is further her contention that, had the respondent rejected the RAF4 on time and had not waited until the matter was set down for trial, the Health Professional Council of South Africa (HPCSA) would probably have made the necessary decision by now. Her hardship is worsened by the failure and refusal of the respondent to make

any offer. She further submits that according to the calculations by her actuaries, the final award this court is likely to award her would exceed by far the R950 000.00 she is currently claiming as interim payment. The delay owing to the laxity of the respondent in its handling of the matter has brought to bear an excruciating despondency almost causing her to settle the matter in whatever amount the respondent was offering but for the advice she received from her attorneys.

[6] In its opposing affidavit of Noxolo Ntame-Memela the respondent stated that according to the report compiled by their neurosurgeon, Dr Muballe, a copy of which is annexed to the answering affidavit, the minor child sustained a mild traumatic brain injury and her recovery therefrom is near complete; with her class performance slightly above average and that she should be able to perform her functions without limitations. It is on the basis of this report that caused the respondent to reject the RAF4 assessment by Dr Naidoo.

[7] She further stated that in terms of section 17(4)(a) and 17(6) of the Road Accident Fund¹ the applicant is precluded from claiming interim payment for future medical expenses by way of application. Instead applicant is entitled to make an application for an interim payment in respect of past medical expenses, past loss of income and past loss of support. Respondent further contends that since the serious injury assessment was rejected, the remaining head of damages cannot be decided separately. She further contended that the applicant claims interim payment of future medical expenses in the sum of R950 000.00, whilst in her summons under the head of general damages, she claims R200 000.00. It is the respondent's further contention that what should be inferred from the statement of applicant is testimony, that her attorneys can no longer continue funding her litigation, is that the true purpose of this application is to foot the bill for the legal costs of her attorney and not for future medical expenses. She further submits that if the applicant has incurred medical expenses she is at liberty to amend her particular of claim to include for a claim for past medical expenses and will be entitled to make an application for an interim payment in respect

¹ Act 56 of 1996

of those costs. She also stated that the minor child was treated at state hospitals after the accident and there was no claim made that the medical treatment she was provided was not sufficient to meet the needs of the minor child. Respondent further contends that according to Dr Mkhize the child has no neurological deficits. Respondent is therefore refuting the claim that the behavioural difficulties suffered by the child who is now 13 years old are as a result of concussions of 7 years ago, especially if regard is had to the neurosurgeons who have opined that the minor has nearly made a full recovery and suffer no neurological deficits. Instead they impute her behavioural problems and poor performance at school as being caused by her entry into the adolescence stage and being bullied at school.

[8] The respondent further contends that since the applicant has described herself as an indigent person, the respondent will in all likelihood be unable to recover any overpayment made to her should the decision of the Appeal Tribunal be against her. Instead it is the respondent's view that if the HPCSA delays in making its decision timeously, the applicant has available to her a remedy in terms of the Promotion of Administrative Justice Act. She further contends that the defendant is an organ of state that has a constitutional duty to safeguard public funds. In light thereof so she contends, the applicant is not entitled to the relief sought and the application ought to be dismissed with costs.

[9] In reply the applicant stated that the R200 000-00 figure which was indicated in the particulars of claim for future medical expenses is a nominal figure. She further contends that Dr Muballe on whose report the respondent place reliance to reject the RAF 4 form is not a competent expert to deal with the other heads of damages. She further stated that she is not in a position to place the child in a special school and claim such expenses in future. She contends that the rejection of damages that was made at the 11th hour should cause this court to exercise its discretion in favour of the applicant and order the interim payment sought.

WHAT IS THE ISSUE FOR DETERMINATION

[10] The issues I am called upon to decide is

- (a) Whether the plaintiff is entitled to interim payment as envisaged in Rule 34 A of the Uniform Rules of this Honourable Court.
- (b) Whether the applicant is in terms of Section 17(4) (a) and 17(b) of the Road Accident Fund Act precluded from launching a claim for an interim payment for future medical expenses.

THE LAW

Rule 34 A of the Uniform Rules provides:

- “(1) In an action for damages for personal injuries or 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 or medical costs and loss of income arising from his physical disability or the death of a person.
- (2) Subject to the provisions of rule 6 the affidavit in support of the application shall contain the amount of damages claimed and the grounds for the application, and all documentary proof or certified copies thereof on which the applicant relies shall accompany the affidavit.
- (3) Notwithstanding the grant or refusal of an application for an interim payment, further such applications may be brought on good cause shown.
- (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 respondent for damages to be determined, the court may, if it thinks fit but subject

to the provisions of subrule (5), order the respondent to make an interim payment of such amount as it thinks just, which 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 counterclaim.

- (5) No order shall be made under subrule (4) unless it appears to the court that the defendant is insured in respect of the plaintiff's claim or that he has the means at his disposal to enable him to make such a payment.
- (6) amount of any interim payment ordered shall be paid in full to the plaintiff unless the court otherwise orders.
- (7) Where an application has been made under subrule (1), the court may prescribe the procedure for the further conduct of the action and in particular may order the early trial thereof.
- (8) The fact that an order has been made under subrule (4) shall not be pleaded and no disclosure of that fact shall be made to the court at the trial or at the hearing of questions or issues as to the quantum of damages until such questions or issues have been determined.
- (9) In action where an interim payment or an order for an interim payment has been made, the action shall not be discontinued or the claim withdrawn without consent of the court.
- (10) If an order for an interim payment has been made or such payment has been made, the court may, in making a final order, or when granting the plaintiff leave to discontinue his action or withdraw the claim under subrule (9) or at any stage of the proceedings on the application of any party,

make an order with respect to the interim payment which the court may consider just and the court may in particular order that:

- (a) the plaintiff repay all or part of the interim payment;
- (b) the payment be varied or discharged; or
- (c) a payment be made by any other defendant in respect of any part of the interim payment which the defendant, who made it, is entitled to recover by way of contribution or indemnity or in respect of any remedy or relief relating to the plaintiff's claim.

(11) The provisions of this rule shall apply *mutatis mutandis* to any claim in reconvention.”

[11] The provisions set out in sub-rule 4(a) and (b) are jurisdictional requirements which are a pre-requisite for the court to exercise its discretion to order an interim payment. In this matter merits have been settled in favour of the plaintiff. Consequently the court ordered that all agreed or proven damages suffered by the minor child must be borne by the defendant. It therefore follows that the plaintiff has met the jurisdictional requirement to launch this application for interim payment. However this matter does not end there. Section 17(6) of the RAF provides as follows:

“The fund, or an agent with the approval of the Fund, may make an interim payment to the third party out of the amount to be awarded in terms of subsection (1) to the third party in respect of medical costs, in accordance with the tariff contemplated in subsection (4B), loss of income and loss of support: Provided that the Fund or agent shall, notwithstanding anything to the contrary in any law contained, only be liable to make an interim payment in so far as such costs have already been incurred and any such losses have already been suffered”.

[12] Mr Malunga for the plaintiff argued that notwithstanding the provision that the defendant will only be liable to make interim payment in so far as such costs have already been incurred and where such losses have already been suffered, it could not

have been the intention of the legislature to close the door for a plaintiff who has suffered loss albeit not incurred due to financial constraints, not to be able to claim interim payment. He relied on the remarks which were made by Petse JA in *Pithey vs RAF*² where the learned judge of Appeal reiterated what was said in *Multilateral motor vehicle Accidents Fund vs Radebe*³ that the primary purpose and objectives of the Act represents social legislation aimed at the widest possible protection and compensation against loss and damages for the negligence driving of a motor vehicle.

He further invited the court to have regard of the best interest of the child as envisaged in the Constitution⁴.

[13] Mr Clark for the defendant reiterated the provisions of s17(6) that the plaintiff is only entitled to make an application for interim payment in respect of past medical expenses, past loss of support and not for losses that may be incurred in future.

[14] I find it necessary to sketch the common cause timelines of this matter from its inception up to the stage of this present application.

[15] RELEVANT TIME LINES

- 15.1 The accident as a result of which the child sustained injuries occurred on 04 October 2011, when she was six years old.
- 15.2 Summons were issued in August 2014
- 15.3 All medico-legal reports were served and filed with the last one filed on 18 July 2016.
- 15.4 On November 2016 parties agreed that in light of the issue of liability having been settled and disposed of, the only issue that is outstanding for determination is quantum.
- 15.5 The matter having been set down for 18 April 2018, it was postponed to 28 August 2018 for settlement of quantum.

² 2014(4) SA 112

³ 1996 (2) SA 145(A)

⁴ See section 28 Constitution of the Republic of South Africa (No. 108 of 1996)

- 15.6 On the 28 August 2018 the matter was postponed to 22 November 2018 with the order of court directing that the matter is postponed for the determination of quantum. For reasons not apparent, on 22 November 2018 the matter was removed from the roll at the instance of the plaintiff.
- 15.7 On the 28 August 2018 when the matter was postponed to 22 November 2018 for determination of quantum, at 09:39 of the same date, the defendant served the offices of the attorneys of plaintiff with a notice in terms Rule 36(a)(b) in which he advises the plaintiff of the report of the neurosurgeon Dr Muballe who will testify at the trial on the findings that were contained in his medico-legal report.

[16] Notwithstanding this development the respondent chose not to be candid with the court, and inform the court that it is premature or at best an exercise in futility for the matter to be postponed for determination of quantum whereas knowing fully well that as a result of that report of Dr Muballe the horses have bolted and the matter will await the outcome of the HPCSA.

[17] If regard is had to the timelines above, it is indeed so that after seven years the injured child is yet to be compensated for her suffering. As already indicated that despite the availability of all the applicant's expert reports to the respondent up to the middle of 2016, it is only in 2018 that the defendant finds it necessary to engage an expert upon whose report the RAF 4 form is rejected.

[18] Upon these facts it is my view that the applicant is not crying foul when she contends that the respondent has purposed to delay the finalization of this matter. It is well and good for the defendant to say that the plaintiff has the right to launch a court application under the Promotion of Administrative Justice Act 3 of 2003 (PAJA) to drag the Appeal Tribunal to court to force it to expedite its pending decision regarding the serious injury assessment but chose not to do so. What the respondent fails to appreciate and deliberately so in my view, is the apparent lack of means of the plaintiff to litigate at will. This is more so that many [a] claimants against the fund are poor

citizens who struggle to make ends meet. And what the defendant overlooks and regrettably so, is that it is an organ of state that is enjoined by the constitution to perform its obligations diligently and without delay⁵. Whilst the contention is correctly made, that the applicant has a remedy available under PAJA as was stated in *Road Accident Fund v Duma*⁶. And whilst subscribing fully to *Duma*. I do not find that the judgment of *Duma* was a carte blanche for respondent to act in an inept manner such as the one displayed in this case, where the respondent has waited for two years after having been placed in possession of the expert reports to later reject the RAF 4 form at the 11th hour when the matter is set down for trial.

[19] To amplify my view above I find the remarks of Plasket J⁷, very instructive when he said:

“It is expected of organs of State that they behave honourably that they treat the members of the public with whom they deal with dignity, honestly, openly and fairly. This is particularly so in the case of the defendant. It is inundated to compensate with public funds those who have suffered violations of their fundamental rights to dignity, freedom and security of the person, and bodily integrity as a result of road accidents. The very mission of the defendant is to rectify those violations, to the extent that monetary compensation and compensation in kind is able to. That places the defendant in a position of great responsibility:

Its control of the purse strings places it in a position of immense power in relation to the victim of road accidents many of whom it is well-known, are poor and lacking in protective and assertive armour”.

[20] It is in light of the checkery history of this matter, the best interest of the child which this court is enjoined to uphold as upper guardian of all minor children, that causes me to find the attitude of the respondent not consonant and in sync with it's

⁵ 237 Constitution of the RSA Act 108 of 1996.

⁶ *RAF v Duma, RAF v Kubeka; RAF v Meyer; RAF v Mokoena* [2013] 1 ALL SA 543 (SCA) 2013 (6) SA9 (SAC) (27 NOVEMBER 2012)

⁷ *Mlatsheni v Road Accident Fund* 2009(2) SA 401 (E) at 406 Para 17 (F-G).

mandate towards victims of motor vehicle accidents who as I alluded to earlier are people in the main who are in the poor strata of society. To expect from them to litigate until they are dried out is a renunciation of the fund's mandate which is to compensate those who have suffered violations of their bodily integrity as a result of road accidents.

[21] Mr Clark for the defendant referred me to the matter of *NJ v MEC (Health) Western Cape Provincial Government*⁸. In that matter Henney J was invited to give a disjuncture interpretation to Rule 34A of the Uniform Rules to grant the plaintiff the relief sought of interim payment without having regard to the onerous provisions and requirements as set out in sub-rule (4). The net effect was to make it possible for plaintiff to bring an application in a substantive manner in terms of sub-rule (1) and (2) without either having to satisfy the court that the defendant has in writing admitted liability for the plaintiff's damages or that the plaintiff has obtained judgment against a defendant for damages to be determined. The court in that matter, correctly so, rejected the contention and refused the relief sought on the basis that there was no indication that the defendant is liable neither was there an admission of liability by the defendant.

[22] The situation in this matter is in all fours similar to the matter of Karpakis. It is common cause that the applicant has obtained judgment against the respondent this is a distinguishable feature from the matter that was before Henney J.⁹

Whilst accepting that the opinion of Dr Muballe has a bearing on the general damages, I do not find a convincing reason why the other expert opinions to the effect that the minor child needs immediate remedial attention must yield to the opinion of Dr Muballe who is not an expert or competent to deal with the other heads of damages. It is inconceivable that the respondent can bravely reject that the child requires special schooling on the basis of Dr Muballe's report and eschew the overwhelming opinions of the clinical psychologist, educational psychologist, occupational therapist and industrial

⁸ Case No 15364/16 (Reportable)

⁹ 1991 (3) SA489 (o) at 497 D-F

psychologist who all are in agreement on this aspect. Consequently I do not see any reason why the issue of general damages cannot be separated from the other heads of damages.

[23] I find what was held in *Karparkis v Mutual & Federal Insurance Co. Ltd* very apposite, where the following was said:

“Under Rule 34(4)(a) and (b) the respondent’s (defendant’s) position is a strong one because an interim payment can only be ordered if, *inter alia*, the defendant has in writing admitted liability for the plaintiff’s damages, that is to say if the defendant has conceded the merits of the action (which is the case in the present action) or if the plaintiff has obtained judgment against the defendant for damages still to be determined, that is to say where the issues of the merits and of the quantum of damages were separated at the commencement of the trial in terms of Rule 33 (4).”

[24] Turning to section 17(6) of the RAF Act. Mr Mnqandi for the plaintiff referred me to the matter of *Allpay Consolidated v Chief Executive Officer, SASSA*¹⁰ where the Constitutional court stated:-

“Assessing the materiality of compliance with legal requirements in our administrative law is, fortunately, an exercise unencumbered by excessive formality. It was not always so. Formal distinctions were drawn between “mandatory” or “peremptory” provisions on the one hand and “directory” ones on the other, the former needing strict compliance on pain of non-validity, and the latter only substantial compliance or even non-compliance. That strict mechanical approach has been discarded. Although a number of factors need to be considered to the purpose of the provision. In this Court O’Regan J succinctly put the question in *ACDP v Electoral Commission* as being “whether what the

¹⁰ 2014 (1) SA 604 (CC) (29 November 2013)

applicant did constituted compliance with the statutory provisions viewed in the light of their purpose."

[25] In *Natal Joint Municipality Pension Fund v Endumeni Municipality*¹¹ the rules of interpretation where articulated by Wallis JA as follows:

"The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[26] Concomitant to the rules of interpretation laid down above the I have also been requested to heed the best interest of the child as envisaged in section 28 of the

¹¹ 2012 (4) SA 593 (SCA) para 18.

Constitution as well as the attended provisions of the children's Act¹² which underscore the best interest of the child.

[27] Given the purpose and objectives of the Road Accident Fund Act, which is to give the widest possible protection and compensation to third parties in respect of loss and damages for the negligent driving of a motor vehicle, it is my view that it would be absurd if section 17 (6) was intended to have those victims who seek interim payment but because such costs have not yet been incurred due to their financial constraints must be found unsuited to bring such an application. Each case must be amended in its own merits and the relevant circumstances for the court to make a value judgment thereon.

[29] In the circumstances I find that the plaintiff is entitled to interim payment as sought in the notice of Motion. However, during the argument of the matter, counsel for the applicant agreed that the court has a discretion to determine an appropriate amount notwithstanding the amount of the 950 000.00 which is claimed in the Notice of Motion. Based on the evidence before me and the immediate remedial needs of the minor child I have determined an amount R500 000.00 as a suitable amount for the interim payment.

[30] In the result I make the following order:

30.1 The respondent is directed to pay to the applicant an amount of Five Hundred Thousand (R500 000.00) paid in to the bank account of the applicant's attorneys as an interim payment in terms of Rule 34 A of the Uniform Rules of Court pending the final determination of the main action which has been instituted in this court in case no. 446/2014.

30.2 In the event of the respondent failing to pay the amount of Five Hundred Thousand Rand (R500 000.00) within thirty (30) days from the date of granting this order, the applicant is granted leave to approach this

12

Honourable Court on the papers filed of record, supplemented, if necessary, for judgment against the defendant in the total sum prayed for.

30.3 The defendant is directed to pay the costs of this application, including costs of counsel.

NQUMSE AJ

JUDGE OF THE HIGH COURT (ACTING)

Appearances:

Counsel for the Plaintiff: Adv SY Malunga

**Instructed by WT MNQANDI & ASSOCIATES
Plaintiffs' Attorneys
c/o DANDALA ATTORNEYS
18 Eagle Street
KING WILLIAMS TOWN**

Counsel for the Defendant: Adv I. C Clark

**Instructed by SMITH TABATA ATTORNEYS
Defendants' Attorneys
Sutton Square
Queens Road
KING WILLIAMS TOWN**

Matter heard on: 28 March 2019

Judgment delivered on: 09 May 2019