



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

Not reportable

CASE NO. 3889/2015

In the matter between:

RICHARD ALEXANDER YEOMANS

Applicant

and

**MEC FOR ROADS AND PUBLIC WORKS
OF THE EASTERN CAPE PROVINCE**

Respondent

JUDGMENT

LAING J

[1] This is an interlocutory application for an interim payment of R 7,500,000 in terms of rule 34A(1) of the Uniform Rules of Court ('URC'), pending the outcome of the action proceedings. The applicant also seeks an order prescribing the procedure for the further conduct thereof.

Background

[2] The applicant's attorney, Mr Jonathan Cohen, stated in a founding affidavit that the underlying claim was for damages suffered by the applicant because of personal injuries sustained in a motor vehicle accident that occurred on 6 August 2012 between Gariep Dam and Venterstad. The three-axle truck driven by the applicant overturned when he attempted to negotiate a sharp bend in the R701 provincial road.

[3] The matter went to trial but only for the determination of liability. On 14 July 2020, Smith J (as he was then) held the respondent liable for such damages as the applicant was able to prove; the learned judge made no finding in relation to contributory negligence. The respondent's appeal was unsuccessful. The quantification of damages remains to be determined.

[4] In his particulars of claim, the applicant described the extensive personal injuries that he suffered, including a cervical spine fracture that has caused total paralysis from his chest downwards. He relied on several expert reports to substantiate his claim.

[5] Furthermore, the provisions of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 ('the COID Act') apply, entitling the applicant to payment of compensation which must be deducted from any award of damages to be made by the court in due course.¹ To that effect, Mr Cohen averred that the applicant received compensation to the sum of R 556,367 until 22 June 2023, after which it was assumed for purposes of the application that the Compensation Commissioner would continue to pay him a monthly pension of R 6,100 until the date upon which the court awards him damages.

[6] Mr Cohen tabulated the damages as follows:

Item	Sub-total (R)	Total (R)

¹ The applicant referred to sections 22(1) and 36(2) of the COID Act, read with Chapters V and VI thereof.

(a) Past hospital, medical and related expenses ²	1,736,643	1,736,643
(b) Estimated future expenses, including medical and related expenses, as well as further expenses regarding attendant care, assistive devices, therapy, and alterations to applicant's home ³	10,184,324	10,184,324
(c) Past and future loss of earnings or earning capacity: ⁴		2,453,707
(i) past loss (after deduction of a 5% contingency amount)	2,310,181	
(ii) future loss (after deduction of a 10% contingency amount)	748,696	
(iii) less COID Act payments received to date of actuarial calculation	(605,170)	
(d) General damages for permanent impairment, disablement and handicap; past shock; past and future pain, suffering and discomfort; permanent disfigurement; reduced life expectancy; and permanent	4,000,000	4,000,000

² Details of the expenses were listed in a separate schedule. The applicant has used a revised amount, based on corrections made after having detected errors in the compilation of the amount reflected in his particulars of claim.

³ The applicant based his calculation on expert reports, including that of Ivan Kramer CC Consulting Actuaries. The details thereof were listed separately.

⁴ Similarly, the applicant relied on expert reports, including the above actuaries and an industrial psychologist, Dr Peter Whitehead.

loss of enjoyment of amenities of life		
Total damages claimed (R)		18,374,674

[7] The applicant is unemployed and does not earn an income. Mr Cohen alleged that the applicant has extensive medical needs and daily assistance requirements, without which his health would be imperilled. He went on to describe the applicant's financial situation, referring to his indebtedness to Standard Bank Ltd and how this had resulted in proceedings for the recovery of a bank loan and for an order to have his primary residence declared executable. A primary purpose of the present application was to allow the applicant to obtain an interim payment to cover such indebtedness. This would minimise the risk of possible homelessness or associated hardships.

[8] Furthermore, Mr Cohen indicated that the applicant required approximately R 60,000 per month to meet his expenses. It was, accordingly, essential for him to obtain the interim payment in question.

[9] Mr Cohen contended that, having regard to the value of the applicant's claim, less general damages, the sum of R 7,500,000 would be appropriate. He also pointed out that the accident occurred on 6 August 2012; the action had been delayed by various interlocutory applications, the separation of issues, the appeal process in relation to the determination of liability, and the COVID-19 pandemic. Accordingly, this was an appropriate matter for the court to order an early trial and to issue such directions as to ensure that it was ready to proceed on the allocated date.

[10] The present application was initially set down for hearing on 12 March 2024. An order was granted by agreement in terms of which the respondent was ordered to make an interim payment of R 2,775,076 and that the matter be postponed until 1 August 2024 for the delivery of outstanding answering and replying papers.

[11] In a supplementary affidavit, Mr Cohen indicated that he had contacted Standard Bank Ltd after receipt of the interim payment to ascertain how much was required to repay the outstanding loan and to settle the proceedings. Pending a response, he estimated that this amounted to approximately R 880,000. He went on to allege that the applicant owed R 1,399,837 to his medical aid scheme for past medical and related expenses; the applicant also owed R 315,393 to sundry creditors, including Absa Bank Ltd, Woolworths, the City of Cape Town, and the supplier of a new wheelchair. Finally, the applicant owed Mr Cohen's legal practice at least R 3,645,306 for services provided as attorneys or record.⁵ Consequently, the applicant owed more than R 6,240,536 to various parties. He persisted in his claim for the balance of the payment originally claimed, i.e. R 4,744,924.⁶

[12] In addition, because of the respondent's delay regarding the interim payment, the applicant incurred further damages pertaining to the legal fees incurred for execution proceedings, as well as interest lost on the late interim payment; this totalled R 57,018. The respondent has since undertaken to pay the amount in question.

[13] The state attorney, Mr Laubscher Potgieter, deposed to the respondent's answering affidavit, pointing out that the interim payment of R 2,755,076 was for the applicant's past and future medical expenses. It excluded provision for loss of income because this was disputed. The applicant had commenced work for his last employer, RTS,⁷ only three weeks before the date of the collision; furthermore, he had produced no payslips, and he had informed the industrial psychologist, Dr Peter Whitehead,⁸ that RTS would close its business. Consequently, the respondent intended to obtain its own expert opinion regarding loss of income.

⁵ The amount represented the sum claimed in terms of five separate bills of cost pertaining to orders previously granted in the applicant's favour. The bills have become opposed, however, and have yet to be taxed.

⁶ The amount is the difference between the original claim and the interim payment already received, as ordered, i.e. R 7,500,000 – R 2,755, 076 = R 4,744,924.

⁷ The reference to 'RTS' is unclear; Dr Whitehead's report indicates that the applicant was employed at 'Frans Lubbe', which is described as a refrigerated transport service. The applicant did not deal with the discrepancy in reply.

⁸ See n 4, above.

[14] Mr Potgieter proceeded to identify and deal with the four grounds upon which he alleged the application was based. He contended, firstly, that the repayment of the loan from Standard Bank Ltd did not fall within the ambit of rule 34A(1). He contended, secondly, that the respondent's interim payment of R 2,755,076 included provision for the applicant's past and future medical expenses; this was sufficient to cover his indebtedness to the medical aid scheme. He contended, thirdly, that the settlement of amounts owed to sundry creditors was also something that did not fall within the ambit of rule 34A(1); the applicant had, moreover, failed to comply with rule 34A(2) by neglecting to provide documentary proof of the amounts in question. He contended, fourthly (and finally), that the payment of legal fees did not form a proper basis upon which to claim an interim payment.

[15] The applicant, in reply, dealt with Mr Potgieter's assertions regarding his source of income after the accident. He averred that he had undertaken contract work for about five years as a tetraplegic at the Fish Hoek fire station, in terms of the expanded public works ('EPW') programme. He had earned R 150 per day, which later increased to R 180 per day; however, he had no documentary proof thereof. He had later left such employment, for various reasons, and had subsequently been unemployed. At present, the applicant's sole source of income was a pension from the Compensation Commissioner, which had increased to R 6,558 per month.

[16] Furthermore, the applicant reiterated that he and his wife continued to suffer financial hardship. The respondent's interim payment had alleviated his situation to some extent, but R 3,485,460 was still required to settle his indebtedness.⁹ He also estimated that he would require approximately R 50,000 per month to meet his expenses once he had settled his indebtedness to Standard Bank Ltd, using the interim payment already received. His wife was employed at Absa Bank Ltd and earned a gross income of R 22,000 per month.

⁹ The amount is calculated by reducing the applicant's total indebtedness to various parties by the sum of the interim payment that he recently received, i.e. R 6,240,536 – R 2,755,076 = R 3,485,460.

Issues to be decided

[17] The issues to be decided are as follows: (a) whether the applicant has met the requirements of rules 34A(1) and (2); (b) if so, then, subject to the provisions of rule 34A(4), what would constitute a just award; and (c) what procedure for the further conduct of the matter should be prescribed, as envisaged under rule 34A(7).¹⁰

A brief analysis of the applicable principles is set out below.

Legal framework

[18] The relevant provisions of rule 34A provide as follows:

'34A Interim payments

(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) 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 application relies shall accompany the affidavit.

(3) ...

¹⁰ The subrule stipulates that the court may prescribe the procedure for the further conduct of the action and in particular may order the early trial thereof.

(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 or counterclaim.

(5) ...'

[19] Van Loggerenberg observes that the introduction of the rule has alleviated, to some extent, the hardship that a plaintiff may suffer because of having to lay out or borrow funds, pending the determination of a claim.¹¹ In *Nel v Federated Versekeringsmaatskappy Bpk*,¹² Schabert J emphasised that the court has at its disposal a discretion that must be exercised judicially from case to case, dependent on the merits of each particular matter.¹³

[20] Regarding the interpretation to be given to rule 34A, it was held, in *Karpakis v Mutual & Federal Insurance Co Ltd*,¹⁴ that the only restrictions to which an interim payment was subject are those contained in the rule itself. To that effect, Lichtenberg J found that the rule did not prohibit an interim payment in relation to future medical

¹¹ DE van Loggerenberg, *Erasmus: Superior Court Practice* (Juta, vol 2, 2ed, service 16, 2021), at D1-452.

¹² 1991 (2) SA 422 (T).

¹³ At 427J- 428A.

¹⁴ 1991 (3) SA 489.

expenses and future loss or earnings.¹⁵ In the more recent case of *Ngcobo v Oelofse*,¹⁶ Ford AJ stated that an applicant must, as a bare minimum, set out the following: (a) proper grounds for the application; (b) documentary proof or certified copies thereof, which must accompany his or her affidavit; (c) sufficient detail or quantification of medical costs in the short term to warrant an interim payment; and (d) sufficient detail or quantification of loss of earnings and what he or she will require in the short term to warrant such payment.¹⁷ The learned judge held, further, that legal costs, household expenses, and the need to repay loans from family or friends do not constitute valid bases for interim payments.¹⁸

[21] The above cases were referred to by the parties in argument and provide a basic framework for the relevant legal principles. These are applied to the facts of the matter in the discussion below.

Discussion

[22] It is common cause that the applicant's claim is for damages in relation to personal injuries that he sustained in an accident. Furthermore, he has already obtained judgment against the respondent for such damages as are to be determined. The appeal was unsuccessful. In the present matter, his claim is expressly based on past and future medical expenses as well as past and future loss of earnings or earning capacity that arise from his physical disability; he has excluded general damages. Consequently, the applicant has satisfied, on the face of it, the essential requirements of rule 34A. The respondent's arguments must nevertheless be considered in greater detail.

[23] Counsel for the respondent initially focused his opposition to the application on the contention that the applicant's claim fell outside the ambit of rule 34A(1). Referring

¹⁵ At 501B-E.

¹⁶ 2024 (1) SA 233.

¹⁷ At paragraph [112].

¹⁸ At paragraphs [123] to [125].

to *Ngcobo*, counsel asserted that the applicant could not claim an interim payment for purposes of repaying the loan to Standard Bank Ltd, settling amounts owed to sundry creditors, or paying his legal fees. The provisions of rule 34A(1) only permit claims for medical costs and loss of income. Counsel also contended that the applicant had failed to supply sufficient documentary proof of the claims in question.

[24] In *Karpakis*, the court dealt with the question of whether an interim payment should be refused where there was a likelihood, if not a certainty, that the payment would be used for the defrayment of legal fees. Lichtenberg J held as follows:

‘The plaintiff would still be able to apply for an interim payment and, if granted and thereafter paid to him, he could quite properly pay it over to his attorney as a deposit for the fees in the action. *A fortiori* must this be the case with the amount which the Court orders the defendant to pay to the plaintiff for his loss of income. The Court will not order such sum if the plaintiff has not suffered such loss already. Surely, if he obtains it by way of interim payment because he has already suffered it, he must be able to use it in whatever reasonable manner he chooses, including, obviously, paying it to his attorney as a deposit.’¹⁹

[25] As counsel for the respondent acknowledged, it is open to an applicant to use an interim payment as he or she sees fit. Similarly, Cilliers (*et al*) remarks:

‘What a plaintiff does with her compensation is no concern of either the defendant or the court: the improbability that an award will be used to make good the plaintiff’s loss is no reason to deny damages, and a court cannot refuse the plaintiff compensation purely because she is more likely to spend the money at the casino than at the chemist. For the issue is not how the award will be used,

¹⁹ *Karpakis*, at 506I- 507B.

but whether the plaintiff has suffered a loss for which she is entitled to be compensated.’²⁰

[26] The distinction to be drawn is between the subject of the applicant’s claim and the purpose to which he or she applies any award made in that regard. Where the applicant has instituted an action for damages in relation to personal injuries, as is the case here, the subject of any claim brought under rule 34A(1) must be limited to medical expenses and loss of income that have occurred because of such injuries. Provided that either the respondent has admitted liability for the damages, or the applicant has already obtained judgment in that regard, the court may, in the exercise of its discretion, order the respondent to make interim payment of an amount that is fair, and which does not exceed a reasonable percentage of the damages that the applicant is likely to recover at trial. How the applicant intends to use such interim payment or the purpose to which he or she applies such award is irrelevant.

[27] In the present matter, the applicant has referred to his various debts merely to demonstrate the parlous state of his finances and the severe economic hardship that he and his wife are experiencing. This was done, clearly, to persuade the court in the exercise of its discretion regarding what would constitute a just interim payment and to support the applicant’s seeking an early trial. The amounts in question do not form the basis for his claim. He has tabulated his claim as one based on past and future medical costs and past and future loss of earnings or earning capacity. The distinction is clear enough.

[28] During argument, counsel for the respondent adjusted his approach to a certain extent and argued that the applicant had failed to meet the requirements of rule 34A(2). There was insufficient documentary proof or certified copies to support his claim. The provisions of rule 34A(2) constitute an important safeguard to protect a respondent against an applicant’s over-zealous reliance on the remedy available under rule 34A(1).

²⁰ AC Cilliers *et al*, *Herbstein and Van Winsen: Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* (Jutastat e-publications, 5ed, 2009) ch42- p 1424.

[29] The court held, in *Karpakis*, that an applicant's attachment of an expert report to his or her affidavit, in support of a rule 34A application, constitutes substantial compliance with the provisions in question.²¹ Furthermore, in *Nel*, the court indicated that where it was apparent from the papers that the relevant documentation had already been furnished to the respondent, prior to the application, it was unnecessary for the applicant to attach such documentation to his or her founding affidavit.²²

[30] In the present matter, Mr Cohen averred as follows in his founding affidavit:

‘As alleged in paragraph 16 of the particulars of claim, the applicant relies on the following medico-legal reports filed on his behalf in terms of Uniform Rule 36(9)(b) which I pray be regarded as if included and incorporated herein; and which provide particulars of the nature and extent of the bodily injuries which the applicant sustained in the accident, as well as the nature, effects and duration of the permanent impairment, disablement and handicap which he has suffered and which give rise to the damages which he claims from the respondent, as well as the treatment and care which he will require in the future, and the costs thereof...’

[31] Mr Cohen then listed the various medico-legal experts involved, describing the reports in question. These were all previously delivered to the respondent in terms of rule 36(9)(b) and form part of the record. Similarly, Mr Cohen referred to the report of the industrial psychologist, Dr Whitehead, as well as the reports of Ivan Kramer CC Consulting Actuaries, all of which having been filed already. There was no need to have attached the reports in question to the application. The respondent was in possession thereof prior to the institution of the present proceedings. The applicant has complied substantially with the requirements of rule 34A(2).

²¹ *Karpakis*, at 503C- D.

²² *Nel*, at 427G- I.

[32] Counsel for the respondent went on to point out, with specific reference to Dr Whitehead's report, that it lacked supporting documentation such as copies of employment contracts, tax invoices, bank statements, tax returns, and similar proof to substantiate the applicant's claim for past and future loss of earnings or earning capacity. It was, counsel contended, chiefly anecdotal in nature.

[33] The report had already been placed squarely in dispute by Mr Potgieter in his answering affidavit. He explained that the respondent's previous payment of R 2,755,076 was only for the applicant's past and future medical expenses. He stated further that:

'No allowance has been made for the applicant's loss of income. This is so as the applicant had commenced working at RTS only approximately three weeks prior to the collision. No payslips are available from the applicant. Further, the applicant informed his industrial psychologist, Mr Whitehead, that after a period of some time, RTS was going to close its business. It is for these reasons that the applicant's claim for the component of loss of income is reasonably disputed and the respondent intends to appoint its own industrial psychologist in this regard. Mr Whitehead's report has been filed of record and will be referred to in argument to the extent necessary.'

[34] That was the extent, no more, of the respondent's challenge. In reply, the applicant simply confirmed that the contents of the various medico-legal reports, including that of Dr Whitehead, were true and correct insofar as they related to him.

[35] In *Van Wyk v Santam Bpk*,²³ Hancke J found that:

'In an application in terms of Rule 34A of the Uniform Rules for the interim payment of damages in an action under the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 it should be borne in mind, in determining which documents

²³ 1997 (2) SA 544 (O).

should in terms of Rule 34A(2) be annexed to the application, that a Court at this stage only has to make an interim assessment which can even be amended at a later stage and that the standard of proof is not as high as it will be when the action goes on trial. The quantum of evidence required by the Court at this stage in order to be able to direct an interim payment will vary from case to case and according to the circumstances of each case. One of the considerations which will be weighty is the extent of facts in dispute as well as the nature of these facts.’²⁴

[36] The difficulty with the respondent’s position is that the facts that Mr Potgieter relied upon to dispute the applicant’s claim for loss of income are far from clear. He placed no evidence before the court to demonstrate that Dr Whitehead’s report was factually incorrect. He merely referred to extracts therefrom to draw certain adverse conclusions, without the benefit of cross-examination to test the factual basis therefor. The same approach was adopted in argument. Mr Potgieter also failed to address Dr Whitehead’s methodology and findings. A vague reference was made to the respondent’s intention to appoint her own industrial psychologist but that was all. The possibility cannot be excluded that the ensuing report might well correspond with Dr Whitehead’s.

[37] In the absence of positive evidence to the contrary in the respondent’s papers or at least an indication that she would present such evidence at trial, no real dispute of fact arises. Dr Whitehead’s report is, *prima facie*, adequate documentary proof of the applicant’s claim for past and future loss of earnings or earning capacity. It satisfies the requirements of rule 34A(2) and establishes a provisional factual basis upon which the court can exercise its discretion in the making of an order that is just in the circumstances. The correctness of Dr Whitehead’s views will be properly examined at trial but, for the purposes of rule 34A, viz. to alleviate the financial difficulties experienced by an applicant in having to spend or borrow funds for the determination of

²⁴ Headnote, and at 547B- D. See, too, *Karpakis* at 496E- G.

damages when judgment has already been obtained against the respondent, his report is sufficient.

Relief and order

[38] At this stage, it is necessary to decide what would constitute a just order. The respondent, as Mr Potgieter averred, has already compensated the applicant for his past medical and related expenses. Counsel for the respondent confirmed, moreover, that the interim payment also served to provide at least a further R 1,000,000 for expenses to be incurred prior to the commencement of trial.²⁵ This ignores, however, the substantial nature of the claim for future medical and related expenses, many of which being for what appear to be immediate needs, e.g. a patient hoist, attendants, a lightweight wheelchair, a motorised assistance drive, an adapted vehicle, and a bed with rails and elevated headrest.²⁶ These, on their own, amount to R 1,245,650 and exclude smaller expenses that are listed in the medico-legal reports, which seem to be just as urgent. In addition, there appears to be an immediate need for alterations and additions to the home to accommodate the applicant's extensive personal injuries, amounting to R 2,686,045.²⁷ Similarly, it appears that there are immediate rehabilitation needs.

[39] The above assessment rests, of course, on untested factual assertions made in the underlying affidavits and various reports upon which the applicant relies. For purposes of deciding whether to order an interim payment, a court is not required to evaluate the evidence and determine whether the applicant has proved his or her claim on a balance of probabilities; that is something for trial. Any award based on such assessment carries, admittedly, an inherent risk that the applicant will be unable to prove the extent of his or her claim for medical costs and loss of income in due course. In *Karpakis*, Lichtenberg J held that the entire claim remains extant and must still be

²⁵ The amount is derived from the difference between the interim payment and past medical and related expenses, i.e. R 2,755,076 – R 1,736,643 = R 1,018,433.

²⁶ The information is contained in the expert reports of an occupational therapist, Ms Marion Fourie, and a physiotherapist, Dr Elsje Scheffler.

²⁷ This appears from the report of a quantity surveyor, Mr Mike Kleve.

proved, including those portions of it as might be covered by the interim payment.²⁸ The award itself is subject to possible repayment, in whole or part, in terms of a final order or judgment on the quantum, as apparent from rule 34A(10). That seems to be a risk, however, with which the applicant must be reconciled before electing to use the available remedy.²⁹ If the applicant has, in the end, demonstrated that his or her claim for interim payment does not fail the preliminary yardsticks and safeguards created under rule 34A,³⁰ then the court is merely required to determine: (a) the likelihood of the applicant's being able to recover his damages; (b) what would constitute a reasonable proportion thereof for purposes of setting an upper limit on any order for an interim payment; and (c) what amount would be just in the circumstances.

[40] The likelihood of recovery must be determined with reference to the nature of the facts and the extent to which they are in dispute.³¹ As already found, the applicant's claim for medical costs and loss of income is anchored upon the underlying reports, which are, *prima facie*, factually based and logical in relation to the findings made; the respondent has not presented any evidence to give rise to a real dispute of fact and has not, save for her criticism of Dr Whitehead's report, advanced any argument to challenge the findings in question. Consequently, there is, at the least, a moderate likelihood that the applicant will recover his damages. For purposes of determining what would constitute a reasonable proportion thereof, an inverse relationship exists between the relevant percentage and the degree to which the respondent has successfully challenged the likelihood of recovery, in other words, the greater the doubt, the smaller the percentage. In the present matter, for the reasons already discussed, the court is not persuaded that the respondent has raised enough doubt in relation to the applicant's

²⁸ *Karpakis*, at 496D- E.

²⁹ The possibility that an order for interim payment could prove to be hollow if the applicant has spent all the money that he or she received was discounted by Lichtenberg J, in *Karpakis*, who pointed out that such an event was highly unlikely if, *inter alia*, the court has exercised its discretion properly and has properly taken into account all the safeguards that rule 34A provides to ensure that the respondent is duly protected. At 498I- 499D.

³⁰ The terms were used in *Karpakis*; see 496F and 499A. See, too, *Fair v SA Eagle Insurance Co Ltd* 1995 (4) SA 96 (E), at 99D. An example thereof is the requirement, under rule 34A(1), that the claim for interim payment be limited to medical costs and loss of income; another example is the requirement, under rule 34A(2) that the claim be supported by documentary proof or certified copies thereof.

³¹ *Van Wyk*, see n 23 and 24 above.

claim to demonstrate that there is not, at the least, a moderate likelihood of recovery; the percentage must reflect this accordingly.

[41] In the present application, the respondent has not disputed the nature and extent of the applicant's injuries. The seriousness thereof ought not to be understated. The accident occurred more than 12 years ago, and the applicant has had to adjust to a lifestyle that accommodates his total paralysis from the chest downwards. A substantial portion of his indebtedness pertains to outstanding legal fees that were incurred in the pursuit of his claim. He has since obtained judgment, as well as several costs orders, but these remain contested. It would be fair to take the above factors into consideration when determining a just amount.

[42] Consequently, in a situation such as the present, where the applicant suffers severe physical disability, where no real dispute arises on the papers in relation to the nature and extent of his claim for medical costs and loss of income and where no serious doubt has been cast thereon, and where the applicant has been constrained to spend or borrow funds to pursue the action and where he will require further funds for the determination of quantum, it would seem entirely just to permit the applicant to invoke the remedy available under rule 34A. Fairness dictates that the court should also make an award that accommodates a significant percentage of the medical costs and loss of income claimed.

[43] The applicant's claim is for R 7,500,000; this represents approximately 52% of his total claim for damages. The respondent has already paid R 2,755,076. For the reasons set out in the preceding paragraphs, the court is of the opinion that the applicant is likely to recover the full amount of the claim for interim payment at trial and that it represents a reasonable proportion of his total claim for damages. It would, in the circumstances, be just to award to the applicant the remaining balance of R 4,744,924.

[44] Regarding the further relief sought by the applicant, it is common cause that the accident occurred on 6 August 2012; the action itself was instituted more than nine

years ago. For a litigant in the applicant's position, it would be unjust to have the determination of quantum delayed for any longer than was necessary.³² Consequently, it would be fair to require the parties to deliver all outstanding papers at the earliest opportunity and for the allocation of a trial date to be given priority.³³

[45] The only outstanding issue is that of costs. There is no reason why the general rule should not be applied; the applicant is entitled to the recovery thereof.

[46] The following order is made:

- (a) the respondent is ordered to make a further interim payment of R 4,744,924 to the applicant in terms of rule 34A(1) of the URC, pending trial;
- (b) the procedure for the further conduct of the action is hereby prescribed in terms of rule 34A(7), whereby:
 - (i) the parties are directed to file all outstanding papers, including expert reports and joint minutes, within 90 calendar days of the date of this order, unless directed otherwise;
 - (ii) the registrar is directed to allocate a date for the early trial of the matter; and
- (c) the respondent is ordered to pay the applicant's costs of the application.

JGA LAING

JUDGE OF THE HIGH COURT

³² See Langa CJ's comments in relation to rule 34A(7) in *Minister of Safety and Security v Luiters* 2007 (2) SA 106 (CC), at paragraph [41]. The matter involved a claim for damages arising from an incident that had rendered the plaintiff tetraplegic; an 11-year delay ensued before judgment on the merits was confirmed on appeal.

³³ During argument, counsel for the respective parties seemed to have been *ad idem* that all outstanding papers, including expert reports, were to be delivered by the end of the fourth term. The timeframe will require adjustment to accommodate the date of the judgment.

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Date of hearing: 01 August 2024

Date of delivery of judgment: 29 October 2024