



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 17524/2021

In the matter between:

PETER JOHN SMIT

Applicant

And

THE ROAD ACCIDENT FUND

Respondent

Coram: Parker, AJ

Matter heard on 27th August and 17th September 2024

Judgment delivered on **23rd September 2024**, electronically by circulation to the parties' representatives via email.

JUDGMENT

PARKER, AJ

Introduction

[1] This is an application in terms of Uniform Rule 34A(1) whereby the applicant seeks an Order directing the respondent to make an interim payment in respect of the applicant's past loss of earnings, past hospital and medical expenses, and future hospital, medical and related expenses arising from the injuries sustained in the motor vehicle accident that took place on the 23rd of October 2019 in Goodwood, Western Cape.

[2] The plaintiff sustained the following bodily injuries as a consequence of the collision:

- 2.1 Flexion-extension injury to the cervical spine;
- 2.2 Flexion-extension injury to his lower lumbar spine;
- 2.3 Compression of the left-sided nerve as a consequence of herniation of the L3/4 disc

[3] As a consequence of Plaintiff's bodily injuries and sequelae, applicant claimed the following damages:

3.1	Past Hospital and Medical Expenses	R 150,000.00
3.2	Future Hospital Medical and Related Expenses	R 250,000.00
3.3	Past and Future Loss of Earnings	R 560 847.00
3.4	General Damages	R 700,000.00
	Total	R1 660 847.00

The Notice of Motion

[4] In the application in terms of Rule 34A(1), applicant is seeking, *inter alia*, payment for:

- 4.1 Past hospital and medical expenses in the in the sum of R53 312.98 (The applicant provided a schedule and supporting vouchers for the expenditure).
- 4.2 Past Loss of Income in the sum of R11 596.00 (Actuarially quantified).
- 4.3 Directing the respondent to issue an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996 as amended (the 'Act'), to compensate the applicant for 100% of the cost of his future accommodation in a hospital or nursing home, or provision of treatment or rendering of a service or supply of goods to her/him arising out of the bodily injuries which applicant sustained.
- 4.4 Directing that the further action be expedited in accordance with Rule 34A(7) and that the matter be certified trial ready in respect of the quantum for the purposes of adjudicating general damages and future loss of income.

[5] The matter was set down for argument on the opposed roll for 27th August 2024. However, respondent had not filed any opposing affidavit neither Heads of Argument and instead raised the issue from the bar regarding the outstanding Workmen's Compensation Commission (WCC) award. The applicant moved for the application, however, I was not prepared to hear the matter. I was of the view that it was unacceptable for respondent to oppose argument in the manner it did was unacceptable. I needed an explanation from the respondent and accordingly it was postponed to the 17th September 2024. The Order *inter alia*:

1. *The Respondent shall serve and file its opposing papers on or before Wednesday 04 September 2024, in which the affidavit shall set forth reasons why the Respondent is opposing the application in terms of Rule 34A.*

2. *The Respondent shall set forth its reasons for serving and filing the opposing affidavit so late, given that Respondent served and filed its notice of intention to oppose on 19 June 2023.*
3. *The affidavit shall set forth its comprehensive reasons why wasted costs occasioned by the postponement should not be granted against Respondent.*
4. *The Applicant shall serve and file its replying affidavit on or before Monday 09 September 2024.*
5. *Heads of argument to be filed on or before Monday 12th September 2024.*
6. *Costs to stand over for later determination.”*

The Hearing 17 September 2024

[6] At the date of the hearing respondent did not consent to applicant filing its replying affidavit to its answering affidavit on the basis that it was late. The applicant abandoned to hand up the replying affidavit from the bar. At the conclusion of the hearing, I afforded both parties to file supplementary Heads of Argument should they wish to do so.

Merits of the Application

[7] To give the application context the timeline leading to the application is summarised:

DATE

PROCESS

13 October 2021	Summons issued
14 February 2022	Plea filed
27 February 2023	Judicial case management parties to consider settlement
5 June 2023	Notice of Motion issued in terms of Uniform Rule 34A(1).
19 June 2023	Notice to Oppose filed
4 March 2024	Placed on the opposed roll.
29 August 2024	No answering papers, Parker AJ issues order.
4 September 2024	Respondent's answering affidavit and Heads of Argument filed.
17 September 2024	Hearing

The Plea

[8] The respondent has settled the merits wherein it admitted liability to the applicant under Section 17(1)(a) of the Road Accident Fund Act¹. At Paragraph 3 of the Plea (Ad paragraphs 4 and 5), respondent conceded liability of the negligence of its insured driver filed in about February 2021. It not only admitted liability, it also settled the merits of the applicants claim on a 100% basis.

Respondent's defence

First ground – Interim Payment

[9] The thrust of respondent's argument is that plaintiff has not met the requirements for an interim payment in terms of Rule 34A since the respondent has not admitted liability to the applicant for the injury sustained in the motor vehicle accident. The respondent argues that the concession on the insured driver's negligence is not an

¹ Paragraphs 2 and 3 of defendant's plea.

admission of liability and that any written offer or tender by the respondent specifically states that such offer is made "*without prejudice or admission of liability*". The respondent maintains that the causal nexus between the injuries sustained, and the accident must still be proven. It relied on several case law including the *Qelesile*² judgment, on the basis that the application be dismissed where there is no formal concession of liability.

Second ground- Medical Payments

[10] Respondent submits that the applicant is not entitled to claim past hospital and medical expenses as the Medical Schemes Act 13(1) of 1998 as amended provides that a medical aid scheme is compelled to pay certain expenses incurred by its members and is consequently unable to contract out of such an obligation. This argument is founded on the principle of subrogation.

[11] The respondent states that it is not opposed to reimbursing the applicant for expenses paid directly by the applicant that does not fall within the ambit of emergency care or prescribed minimum benefits as envisaged under the Medical Schemes Act. Additionally, the respondent asserts that the medical aid scheme is prohibited from contracting out of its statutory obligations under the same Act.

Third Ground – WCC

[12] Lastly, in order to avoid a claimant from claiming from both the respondent and the Workmen's Compensation Commission (WCC) an award is required to assess applicant's claim for past medical expenses and loss of earnings to avoid a claimant from claiming from both the respondent and the WCC. That is accepted as a general principle. Whilst the respondent's view is, the WCC award is unclear as to the specific head of damages it awarded and whether it was finalised, as there appears to be two

² *Qelesile and Another v RAF* (14719/20) and *Banda v RAF* (5196/2021).

WCC claim references. Consequently, the respondent's view is that it is preferable for applicant to prove the past hospital and medical expenses, as well as future medical hospital medical and related expenses, at a later stage, to be ventilated at trial.

Evaluation

[13] The court enjoys a discretion to grant an order for **interim payment** which discretion is to be exercised judicially after having considered all the relevant facts and having considered the criteria set out in Rule 34A, sub rules (4) and (5). In the context of an interim payment, specifically *Qelesile*,³ our courts have rendered numerous decisions regarding the circumstances under which an award for compensation in accordance with Sections 17(1) and 17(6) is considered competent. The plea in this application is compelling enough that the respondent cannot escape its admission of liability. It is understood that whilst liability is admitted the actual quantum claimed is to be proven. The respondent is conflating the meaning of the admission in the context and its interpretation is still in the process of being formed.

[14] The applicant challenged respondent's basis for the opposition, raised now, 15 months later, forging ahead with its internal directive issued on 12th August 2022 to avoid payment of the past **medical and hospital** expenses which were covered by a medical aid.

[15] This directive became highly contested and addressed the same arguments raised in *Van Tonder*. The respondent was attempting to circumvent the well-established legal position,⁴ without providing any evidence or authority.

[16] I agree with the applicant's assertion that the medical aid scheme is compelled to cover certain expenses incurred by its members and consequently the respondent is

³ *Qelesile v The Road Accident Fund* [2023] JDR 0745 (GJ).

⁴ *Van Tonder v Road Accident Fund* (1736/2020; 9773/2021) [2023] ZAWCHC 305 para [14], the RAF could not indicate a single authority in its favour.

unable to contract out of such obligation. This argument has been repeatedly ventilated, without success, and respondent is once again clutching at straws in this application.⁵ This court is bound by the plethora of decisions including the decisions in this division⁶. The internal directive was declared unlawful in *Discovery*⁷, followed by the respondent's leave to appeal to the Constitutional Court which was denied.⁸ Additionally, the SCA denied a leave to appeal in the case of *RAF v Tonder*⁹ and *Another* on 30 August 2024.

[17] In respect of ground 3 it must be noted that the respondent had only requested a copy of the final WCC award on 2 September 2024 despite it opposing the present application as far back as 19 June 2023. The WCC has awarded a sum of R162 064.90, however, the method by which it was calculated has not been determined nor is it known precisely when the said disbursement will be paid. Respondent's argument was that the payment cannot be made until the precise details are known in order for it to deduct like from like, from the respective head of damages.

[18] To support Plaintiffs' claim an interim payment can be made in terms of the provisions of Rule 34(10). Pronouncement on judgment and accordingly the trial Court, in making a final order or at any stage of the proceedings, on the application of any party, may make an order with respect to the interim payment which the court may deem just. This order may include an order that the applicant pay all, or a portion of the interim payment or the interim payment, or it may be varied or a discharged.¹⁰

[19] The applicant has complied with the requirements of Section 34A in that the applicant has instituted an action against the respondent. The applicant's damages have been adequately set out in the applicant's founding affidavit, and the respondent cannot escape the fact that it has admitted its **statutory liability** to the applicant in

⁵ *Bezuidenhout v Road Accident Fund* 2024 JDR 3274 (B) at para [14].

⁶ *Rayi N.O v Road Accident Fund* (343/2000) [2010] ZAWCHC30 where the defendant is primarily liable to the plaintiff for the payment of past medical expenses. See also *Van Tonder, supra*.

⁷ *Discovery Health (Pty) Limited v The Road Accident Fund and Another* 2023 JDR to 424 GP para [42]

⁸ *Road Accident Fund v Discovery Health (Pty) Ltd and Another* CCT 106/2023.

⁹ SCA 296/2024.

¹⁰ *Karpakis v Mutual and Federal Insurance Company Ltd* 1991(3) SA 489(O) at 496A-E.

terms of section 17 of the Act.

[20] Regardless of whether I evaluate the respondent's weak argument that a concession on the insured driver's negligence is not an admission of liability and that any written offer specifically states that such offer is made without prejudice or admission of liability, it is evident that this argument is unfounded. The respondent expressly admitted its statutory liability, in paragraphs 2 as well as 3 of its plea, stating that the cause of the collision was due to the sole negligence of its insured driver. Therefore, respondent has no grounds to circumvent the contents of its plea.

[21] Accordingly, the ill-conceived attempt to rely on the internal directive, as its justification to avoid the payment, has been declared *ultra vires* in *Discovery Health*¹¹. The application was dismissed with costs¹² as well as the leave to appeal to the Constitutional Court¹³.

[22] This implies that the respondent is flagrantly disregarding court decisions. It is not entitled to act as it pleases. It is a juristic person established by an Act of Parliament and as a schedule 3A of the Public Finance Management Act 1 of 1999 ("PFMA") and as a national public entity it does not have share capital. It is owned by the South African public. It is accountable to the public, its Board, the legislative (Portfolio Committee and the Standing Committee on Public Accounts) and the executive authority (The Honourable Minister of Transport)¹⁴.

[23] How far, how long and at whose expense is the respondent going to shirk its mandate to compensate persons injured? Its conduct dishonours its very mandate in Section 3 of the Act, to pay compensation. The respondent is acting contrary to the tenets of the constitution of the Republic of South Africa and it needs to be held

¹¹ *Discovery Health (Pty) Limited v The Road Accident Fund and Another* 2022 JDR 3179 at para [14].

¹² *Discovery Health (Pty) Limited v The Road Accident Fund and Another* 2023 JDR to 424 GP.

¹³ *Road Accident Fund v Discovery Health (Pty) Ltd and Another* CCT 106/2023.

¹⁴ See Road Accident fund. Available at <https://www.raf.co.za/Pages/Default.aspx> Accessed on 15 September 2024.

accountable for its decisions and actions.

[24] It cannot escape its mandate and to provide compensation to victims of motor vehicle accidents in respect of Past medical and hospital expenses, as this is a collateral benefit that is to be disregarded and coincides with the *res inter alios acta* principle¹⁵. The respondent's refusal to pay such claims, despite legal precedent, is disrespectful towards the judicial authority vested in the judicial system.

[25] In applying my discretion I am satisfied that the applicant's claim as set out meets the requirements of Rule 34A and the provisions of sub rules (1),(2),(4)(a) and (5) , it is not unreasonable to grant the relief sought in paragraphs 1.1 , 1.2 , 4 and 5 of the Notice of Motion.

[26] The interim relief sought pales in comparison to what the applicant's total claim stands at. Applicant has addressed the scenario that a set off /repayment can occur in due course in terms Rule 34 (10), hence in my view the final WCC award in the amount of R162 064.90 has overall very little impact on the total claim and for the interim relief sought, which is conservative and will not make a significant dent in the eventual settlement or judgment.

[27] In view of applicant's compliance with Rule 34A and in applying my judicial discretion, the amounts sought in paragraphs 1.1 and 1.2 are reasonable. I see no reason why it should not be granted.

Costs

[28] Despite my order dated 29th August 2024, the respondent did not offer any explanation as to why it's opposing papers were filed so late save to ask for condonation. Condonation is not for the mere asking. I would have expected a

¹⁵ *Bezuidenhout v Road Accident Fund* 2024 JDR 3274 (FB) at 9 – 11.

substantial application for condonation, instead it is a one liner. The respondent did not take the Court into its confidence why it failed to file its answering affidavit timeously. Neither did respondent address the wasted costs occasioned for the postponement. I expected substance to the foregoing and this reflects poorly on the legal representatives had the respondent taken the matter and my order seriously.

[29] The conduct of the respondent to advance the stale arguments as it did in the *Discovery* matter, the Constitutional Court, and this Division meets with my displeasure. This cannot continue in this manner. Respondent have been mulcted with costs at the expense of the public purse in the running up fruitless and wasteful expenditure and fails to meet its mandate. It cannot continue to oppose matters, for the sake of it, file a plea then renege on it, all while sitting back and doing nothing to advance the matter.

[30] I echo the argument of applicant's counsel that legal representatives of the respondent cannot continue to avoid the matter, knowing the precedent in our courts in matters of a similar nature has raised in opposition by the respondent. It remains to be seen how far the legal representatives will go if they continue to take instructions from their client, which is in conflict of their ethical duty as officers of the court, precedent established in the case law, the profession, the Constitution, the court as well as the public. For the respondent to persist as it did in *Bezuidenhout*¹⁶ where the legal representatives were instructed to appear and advanced such arguments, cannot however go without sanction.

[31] In the circumstances, respondent's conduct ought to be met with displeasure and a punitive cost order including the cost of the postponement on 27th August 2024 on an attorney and client scale. I agree with the findings in *Bezuidenhout*¹⁷, the respondent's conduct is deprecated with attorney client costs on Scale B.

[32] Accordingly, it is ordered:

¹⁶ Ibid para [14].

¹⁷ Ibid

- a) Payment in the sum of R53 312.98 in respect of applicants' past hospital and medical expenses.
- b) Payment in the sum of R 11 596.00 in the respect of past loss of income.
- c) The WCC is ordered to furnish both applicant and respondent with the full calculation as to how the final award is calculated and arrived at to enable the respondent to apply the award made by the WCC, on a like for like basis, from the computation in due course, and or in accordance with Rule 34A, sub rules (10) (a),(b) and (c).
- d) Payment of the taxed or agreed of costs on the scale as between attorney and client including the costs of counsel, paid directly to the applicant's attorneys trust account subject to the following conditions:
 - i) if the costs are not agreed, the applicants are to serve the notice of taxation on the respondent;
 - ii) the respondent shall pay the costs as taxed or agreed within 180 calendar days from the date of taxation or agreement on costs;
 - iii) the applicant shall not proceed with a warrant of execution prior to expiry of the 180 day period.
- e) The matter be placed on Judicial Case Management in terms of Rule 37A (7), for an expedited date to consider whether it is trial ready.
- f) The respondent shall pay the capital amounts referred in paragraphs a) and b) directly into the attorneys trust account within 180 calendar days from the date of the order.

- g) The respondent is liable for interest on the capital amount at the applicable interest rate as from 14 court days from the date of the order to the date of final payment.
- h) The applicant shall not proceed with a warrant of execution prior to the expiry of the 180 day period.

R K PARKER
ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for Applicant	: Adv. KL Kloppe
Instructing Attorney	: Jonathan Cohen & Associates – Ms S Harvey
Counsel for Respondent	: Ms M Mothilal (27 August 2024) Ms Y Ramjee (17 September 2024)
Instructing Attorney	: Road Accident Fund - State Attorneys