

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2016/07509

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

DATE: 24/11/2025

SIGNATURE

In the matter between:

M [M...] [J...] obo M [M...]

Applicant

and

THE MEMBER OF THE EXECUTIVE
COUNCIL FOR HEALTH, GAUTENG

Respondent

JUDGMENT

MZUZU, AJ

Introduction

[1] This is an application for interim payment by the applicant to the respondent in the amount of R1 500 00.00 in terms of Rule 34A pending the finalization of the main action. The main action is set down to the 17 August 2027 for trial.

[2] Merits have been settled as per court order marked as annexure "NR1".

Background

- [3] The main action is a medical negligence matter in which the applicant's minor daughter (hereinafter referred to as the "minor" and /or the 'child' interchangeably), who was born on the 7 March 2011 through normal vertex delivery, and at the Ntalspruit Hospital, had suffered from a brachial plexus injury to her right arm due to shoulder dystocia.
- [4] It was alleged that the respondent employees at the Ntalspruit hospital had negligently caused the minor's injury. It is common cause that liability for damages had been established and the respondent is liable for 100% of the applicant's proven and/or agreed damages.¹ The trial on quantum is now set down for the 17 August 2027. In terms of Rule 34A, the applicant seeks an interim payment of R1.5 million.

Facts

The applicant's version in summary

- [5] The claim on the pleadings, which have been amended to accord with the joint minutes of the experts for both parties are as follows:

Special damages:

6.1. Future Medical Expenses:	R2 437 726.00
6.2 Future Loss of Earnings:	<u>R3 208 130.90</u>
	R5 645 856.90

Further Damages claimed

6.3 General Damages	R1 500 000.00
6.4 Costs of managing the award	<u>R300 000.00</u>
	R1 800 000.00

Total Damages Claimed	R7 445 856.90
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¹ Court order of Manyathi (AJ) dated August 2022.

- [6] In assessing a claim for interim payment, Rule 34A (4) enjoins a court to make an award that does not exceed a reasonable proportion of the claim, so as to avoid the instance where a payment may have to be returned.
- [7] In this instance, the court is asked upon to consider an amount that is reasonable against the special damages i.e. what is a reasonable proportion of the special damages which are claimed in the sum of R5 645 856.00.
- [8] The applicant has claimed an amount of R1 500 000.00 as a reasonable proportion of the R5 645 856.90 (i.e roughly 27% of the special damages, and roughly 20% of the entire claim) it is respectfully submitted that this would constitute a reasonable award.
- [9] The applicant also state that the figures claimed for special damages are actuarially calculated on the joint minutes between the experts for both parties. Therefore, the claims for special damages are not "estimates". The only differences on the joint minutes is between the psychiatrists, on one issue and between the occupational therapists on recommendations for items of daily use, but in that regard the respondent's experts make higher recommendations than the applicant's occupational experts. The applicant does not rely on the respondent's higher amounts, but rather on the amount expressed by its own expert occupational therapist.
- [10] In pre-pandemic practice, it was frequently the case that when liability was resolved, the resolution of the *quantum* would follow in a period of approximately 18 months and there would be no need for an interim payment. However, the land scape has changed for a variety of reasons, and despite that fact that liability was resolved in August 2022 and the parties have appointed experts and joint minutes have been drawn up and thus the matter has been trial-ready since January 2024, the date allocated for the trial on *quantum* is set-down for 17 August 2027, a period or more than 3 and a half years after the matter became ripe for trial.

- [11] The applicant seeks for the respondent to pay the applicant, in her representative capacity as mother and natural guardian to minor, an interim payment of R1 500 000.00 pending the finalization of the main action

Respondent's version in summary

- [12] Whilst there is no dispute between the parties to the extent of the minor's permanent and debilitating disability, the respondent accepts the parties' orthopaedic surgeons' option that there are no prospects of recovery for the minor and that any future medical orthopaedic treatment would merely be for cosmetic purposes.

- [13] Other than for occupational treatment, there are no immediate and/or medium-term medical treatments needed by the minor. It is for these reasons that the respondent opposes this application for interim payment because:

- a. It is in the best interest of the child, given the circumstances of this matter, that curator ad litem first be appointed and/or a Trust be established for the benefit of the child before any interim payments are made.
- b. The respondent intends to amend her plea to incorporate the public health care defence.
- c. The applicant's claim for interim payment is unreasonable, with reference to the child's existing and current medical needs.

- [14] The respondent contends that the objective of the applicant's Rule 34A application for interim payment is to meet the minor's past and immediate medical and loss of income needs, until the anticipated trial date, that will ultimately address her quantum award. This interim payment is thus intended to mitigate against any medical and loss of income trial prejudice, given the duration it will take until the trial on quantum will be heard by the court.

[15] Even though the applicant sought the interim payment for the minor's "near and medium-term needs", the applicant contradictorily contends that Rule 34A application for interim payment is not for any immediate medical or loss of income needs. The applicant is of the view that in terms of Rule 34(A),² an interim payment application is for the payment of any amount, which the court deems fit, as an amount which shall not exceed a reasonable proportion of the damages, which in opinion of the court, are likely to be recovered by the plaintiff.

[16] The applicant's interpretation of Rule 34A is contrary to the judgment in the recent matter of *Ngcobo v Oelofse*³ (*Ngcobo case*) wherein this Court held that:

"[112] The enquiry that a court adopts in order to determine whether an applicant has made out a proper case for seeking an interim payment, is varied and depends largely on the facts of each case. An applicant approaching a court for an interim payment must, as a bare minimum, set out the following:

[112.1] Proper grounds on which the application is premised, and do so with sufficient details to enable the court to ascertain with certainty the basis for the relief sought.

[112.2] All documentary proof or certified copies which the applicant relies, for purposes of quantification, must accompany the affidavit.

[112.3] Where the interim payment is sought in respect of medical costs, the applicant disclose sufficient detail or qualification of the medical costs in the short term (until the anticipated trial date) to warrant the interim payment.

[112.4] Where the interim payment is sought in respect of loss of earnings, the applicant must set out sufficient detail or quantification of the loss, and what he/she requires in the short term (until the anticipated trial date) to warrant the interim payment. Full disclosure is preferred." (Emphasis added)

² (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 judgement against the respondent for damages to be determined,

³ *Ngcobo v Oelofse and Others* 2024 (1) SA 233 (GJ) at [112] – [112.4].

- [17] It is undisputed that only the parties' occupational therapist had agreed to the minor's immediate need for forty (40) individual sessions of occupational therapy. The combined cost of these forty (40) sessions amounts to R 41 400.00. The respondent concedes to this amount for occupational therapy services but had further pleaded that such services are already available to the minor in the public health care sector. There was thus no need for the applicant to have launched this application for interim payment. The availability of this medical service within the public health care sector was not disputed by the applicant.
- [18] The parties' occupational therapist had further agreed that the minor needs assistive devices, however, they could also not agree to the reasonable amount due for such devices and / or agree to the type of devices. The respondent had pleaded that these devices are also available to the minor in the public health care sector. This too was not denied by the applicant.
- [19] In the best interest of the child, the circumstances of this matter mandate the appointment of a curator *ad litem* and the establishment of a trust for the minor's estate before any interim payments are made.
- [20] The respondent intends to amend her plea to incorporate the public health care defence.
- [21] The applicant's claim for interim payment is unreasonable, with reference to the minor's existing and current needs.

Issue for determination

- [22] Whether the applicant is entitled to an interim payment of a sum of R1 500 000.00.

Analysis and legal frame work

- [23] The parties have since appointed experts and certain agreements have been made on joint minutes prepared by experts for the parties. A date for hearing of the quantum component of the matter has been secured and it is on the 17 August 2027. The amount constituting special damages which reflects what has

essential been agreed upon by the expert for both parties is R 5 441 431.90. The amount prayed for as interim payment is about 30% of this amount.

- [24] Despite the agreement that have been reached by experts, settlement prior to the trial date in 2027 is unlikely.
- [25] The applicant is applying for interim payment based on Rule 34A, and supported her application by the founding affidavit by Ms. Radebe and the applicant signed the confirmatory affidavit.
- [26] The documents relied upon by the applicant are largely based on the joint experts' agreement by expert of both parties with attachment of those reports. This joint experts' agreement will be used in the determination of quantum on the trial date which is 17 August 2027.
- [27] The respondent opposes the application on the basis that there is no need of the interim payment and it is unreasonable.
- [28] The applicant is not fit to handle finances as she does not know English, therefore require that curator ad litem to be appointed. This submission is really not fair to the applicant that she is judged by her not knowing English and not whether she will be capable to manage or handle the finances of her child. Therefore, I would not consider it at all. The curator *ad litem* is not required.
- [29] The respondent intends to amend her plea. This submission as well is not fair to the current application. Respondent speaks of her intentions to amend in a matter that has been running for a long time.
- [30] It is common cause that the applicant's claim is for damages in relation to personal injury that was sustained due to medical negligence. The applicant is the mother of a minor child hereinafter referred to as a minor, who suffered a branchial plexus injury during birth on 7 March 2011, due to medical negligence of the employees of the Old Natalspruit Hospital as a result the right arm a minor has been functionally useless.

- [31] The applicant has already obtained judgment against the respondent for such damages as are to be determined. Rule 34A stipulates that the contributions in respect of which an interim payment can be made, briefly are:
- a. The liability of the respondent must be established (Rule 34A (4)). This criterion is fulfilled by the applicant. The respondent was found liable for the applicant's damages, in her representative capacity by Order of Manyathi AJ, on 29 August 2022.
 - b. The respondent must have the ability to pay an interim payment Rule 34A (5)). The respondent has not raised any issue in regard to its ability to pay. Debts payable by the state are governed by the State Liability Act,⁴ as amended.
 - c. The interim payment can only be made against special damages i.e. past and future loss of earnings, past and future medical expenses. (Rule 34A (1)). The claims in this matter made by the applicant are fully cognizant of this criterion.
- [32] The applicant made submissions to the requirements of rule 34(A). Objections of the respondent are out of Rule 34(A) requirements, as indicated in the answering affidavit and the respondent heads of arguments. The respondent did not address the court in respect of the past medical expenses.
- [33] The applicant cannot be said she is/will be unable to handle the affairs of her child because she does not know English. The interim payment will be employed for the benefit of a minor and once final judgment or settlement is made the award is placed in trust, the trustee will be entitled to a full account of disbursement used in the employment of the interim payment.

⁴ Act 20 of 1957.

[34] In the case which was also quoted by the parties of *Ngcobo*,⁵ the court 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;
- d. Sufficient detail or quantification of loss of earnings and what he or she will require in the short term to warrant such payment.

Order

[35] Considering all the submissions made by the applicant and the respondent as well as the relevant legal authorities. The following order is made:

- i. Interim payment of a sum of R1 000 000.00 is granted, and such interim payment should be paid to the applicant's Attorney of record who has to hold same in the trust account, in an interest-bearing account in terms of Section 86 (4) of the Legal Practice Act 28 of 2014 (LPA) pending the appointment of a trustee to the estate of the child;
- ii. No order as to costs.



N MZUZU
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

⁵ See n3 above at [112.1] – [112.4].

Date of Hearing: 25 August 2025
Date of Judgment: 24 November 2025

Appearances:

For the Plaintiff: Adv Vanessa Fine
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For the Defendant: Adv Luzelle Adams
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