



NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)**

CASE NO. EL 1423/2018

In the matter between:

MINISTER OF POLICE

Applicant

and

SINDISWA NDAMASE

First Respondent

MAGQABI SETH ZITA ATTORNEYS

Second Respondent

THE SHERIFF HENNIE JORDAAN (ZWELITSHA)

Third Respondent

**REASONS RE URGENT RELIEF GRANTED TO STAY SALE IN
EXECUTION (PART A)**

HARTLE J

[1] On 7 May 2025 I issued an order in favour of the applicant in an urgent application (“*the stay application*”) in the following terms:

“1. The forms and service provided for in the Uniform Rules of Court are dispensed with and the applicant is permitted to be heard on an urgent basis in terms of Rule 6 (12)(a).

2. Pending the determination of the applicant’s application for rescission of the order granted pursuant to the first respondent’s application in terms of Rule 34A under Part B:

2.1 Further execution of the writ of execution dated 10 December 2024 and the public auction/sale in execution set for 8 May 2025, 10h00 at Sheriff’s Warehouse, Flemming Close, Schoornville, King William’s Town (“*Qonce*”) in respect of the following motor vehicles:

2.1.1 Nissan Hardbody NP 300 D/C, registration no. B[...];

2.1.2 Volkswagen Polo Vivo, registration no. K[...];

2.1.3 Ford Ranger XLT D/C 3.2 registration no. H[...]; and

2.1.4 Ford Focus, registration no. J[...]

is hereby stayed.

3. The costs of the application under Part A are to stand over for determination of the relief sought under Part B.

4. The applicant is directed in accordance with his tender, within three days, to tender security to the respondents for the payment of the third respondent’s costs of storage at the latter’s warehouse facility of the motor vehicles under attachment, reckoned from 10 December 2024 to the date of their anticipated release, whether in terms of the Uniform Rules or Order of this court.

5. Reasons for the court’s ruling in respect of the application under Part A may be requested in writing within ten days.”

[2] Reasons for my ruling were requested by the first and second respondents.

[3] These are them.

[4] The first respondent is the plaintiff in an action instituted by her against the applicant (defendant in the action) pursuant to a claim for damages arising from her unlawful arrest and detention, and claimed assault, at the hands of the Police (“*the action*”) on 16 December 2017.

[5] The second respondent is the first respondent’s attorneys of record in the action and in the application for a stay of execution concerned.

[6] The vehicles referred to above in the stay order are the property of the State under the control of the applicant.

[7] As at the date of the launch of the present application, the vehicles were in the custody of the third respondent. They were attached on 10 December 2024 by authority of a writ issued by this court on the same date and were about to be sold at a sale in execution the day after I granted the stay application order, namely 8 May 2025, at 10h00.

[8] The writ giving rise to the sale was in execution of an order delivered by this court on 3 September 2024 pursuant to an unopposed application by the first respondent in terms of rule 34A for an interim payment (“*the Rule 34A order*”).

[9] The latter order provided that the applicant was to make an interim payment to the first respondent of R 500 000,00 within 10 days. It is common cause that the applicant resisted that payment for various reasons which in my view and with hindsight it had been proper for him to do.

[10] The applicant applied on the same papers in the matter before me (under Part B) for an order rescinding the rule 34 A order. The applicant relied in

respect of its claimed entitlement to such relief on the provisions of rule 42 (1) (a) as well as the common law, but also variably referred to his entitlement to insist on a reconsideration of the Rule 34A order.

[11] Under Part A, which was heard before me, the applicant sought to stay the sale in execution in respect of the attached motor vehicles described above pending the determination of the rescission application.

[12] It was the imminent sale in execution that convinced me ultimately of the urgency of the situation and the fact that the applicant was staring down the barrel of a forced sale of State property under his control in circumstances where he appeared to have reasonable prospects of succeeding in the anticipated rescission application, if not a reconsideration of the Rule 34A order.

[13] In respect of his perceived entitlement to impugn the Rule 34A order the applicant in my view had made out a compelling case that could not be gainsaid by the first and second respondents based on what Mr. Petersen (who appeared for the applicant) – not without justification, referred to as “*a scheme of misleading the court*”. Indeed Mr. Leendertz, who appeared on their behalf, conceded during argument that if this court found that there had been a duty on the first respondent to disclose that she had been previously assaulted in 2015 and had suffered certain *sequelae* from that incident, that it followed that the applicant would then be entitled to a rescission of the Rule 34A order. Also not challenged was Mr. Petersen’s assumption that the interim damages which the court allowed on the papers was based on the fact that the first respondent told the court that she was assaulted by the police in 2017 and that it was *that* assault that was the cause of all the injuries and *sequelae* referenced in the selective expert reports that she placed before it.

[14] Before I explain why the circumstances under which the latter order was granted compelled me in the direction of concluding that the applicant ought to be allowed an opportunity to challenge it, it is necessary to set out some background information to appreciate how it arose that the Rule 34A order came to be granted on an unopposed basis.

[15] The applicant had firstly conceded the merits in the action, with the issue of quantum to be determined later. This was an essential premise for the first respondent to have approached this court for an interim payment in respect of her special damages.¹

[16] An order of this court dated 28 April 2021 gives expression to that concession. (*“the liability order”*) In his plea, dated after the latter order, the applicant repeats that he conceded merits *“...and therefore shall be liable for proven damages.”*

[17] Despite the foregoing the applicant qualified in his plea (filed after the liability order) the narrow remit of his acceptance of liability in respect of the assault that in effect went to the nerve of the urgent application and the applicant’s motivation that he should be allowed to go back and challenge the rule 34A order. For the record I set it out here that the applicant yet denies that the plaintiff was brutally assaulted on the occasion of her arrest on 16 December 2017 or that she sustained *“seriously badly injuries”*. The plea goes on to deny that the 1st respondent *“sustained visible injuries as alleged.”* Elsewhere in the plea the applicant denies that the injuries sustained by the first respondent *“were as a result of the assault by the police.”*² (What would ultimately emerge as one

¹ Rule 34A (4) (b) of the Uniform Rules of Court.

² In the parties’ minute of their pretrial conference dated 31 October 2022, it is recorded in response to the question whether the applicant is prepared to admit the *“manner of the assault inflicted upon the (first respondent) as described in para 4.4 of her amended particulars of claim, as well as the injuries sustained...”* that he is not prepared to admit that she was *“assaulted by its members as alleged herein”*. One gets the distinct impression from all of this that the issues still to be determined by this court in the quantum hearing possibly go further than the mere question of causality.

of the significant factors for the present application is that the first respondent had apparently been severely injured in a prior incident in December 2015 when she was assaulted by her neighbours with a piece of wood on the face, head and body and that these injuries were being passed off as those caused to her at the hands of the Police on 16 December 2017 when they had arrested her.)

[18] Although the applicant's plea had to be read and understood in its peculiar context, the merits order carved the way for the contentious Rule 34A order to be prayed for.

[19] A further detail of significance is that subsequent to the liability order the first respondent, by way of an amendment to her particulars of claim, increased her claim for both general and special damages quite substantially.³ The basis laid in the rule 34A application is that because of the serious injuries sustained by her she would require medical treatment in the future and had and would suffer a loss of income. Thus in the rule 34A application she asked for an interim payment of R2 000 000,00 which roughly translates to about a 42% of her special damages.

[20] I daresay that the amendment introduced factual underpinnings relating to the assault and the extent of the first respondent's injuries that were not on the horizon when the merits concession was made. This may have accounted for the matter of fact presentation by the first respondent of her supposed future medical expenses, estimated in the sum of R137 787,00 (on the assumption that she had suffered all the injuries and *sequelae* mentioned in her amended pleadings arising from the one and only assault referenced in her particulars of claim in respect of which the applicant had before acknowledged liability) and her estimated past and future loss of income in the sum of R4 643 778,00,

³ There were two amendments. The first amended the quantum by only R200 000,00 but the effect of the last one was quite dramatic. Unfortunately it was difficult to follow the evolution of the pleadings in the action file because the file was not complete with the original editions of either the particulars of claim or the first plea.

which she also claimed in the Rule 34A application flowed as a natural consequence of the “*delict meted out to (her)*”. In her founding affidavit she pleaded, again matter-of-factly, no doubt because of the applicant’s liability concession that had gone before, that her complete inability to participate in economic activity in future, arose squarely from both significant cognitive defects sustained by her (stemming from injuries in the assault that the applicant had accepted liability for) as well as the psychological impact the assault had had on her.

[21] Although the merits concession in relation to the assault was not revoked or pertinently qualified, the difference of opinion regarding what the applicant latterly accepted responsibility for received attention in his consequential plea, in the pretrial minute, and was made known though various expert reports that had already been filed on his behalf in anticipation of the quantum hearing. In a nut shell, the applicant’s case distilled from all of these is the first respondent had received a significant head injury from the prior assault upon her in December 2015, before the arrest and assault incident for which the applicant had acknowledged liability, which in his view had more likely conducted to her lack of employability etc.

[22] Be that as it may, the first respondent self-evidently failed to disclose this prior injury or its likely impact when making a play for an interim payment. The only medical records attached in support of her application were a J88 report of a health practitioner, Dr James Kyangulani, following an examination undertaken two days after the arrest and assault incident in 2017 that (inconsistently) reflected moderate injuries; a report by a clinical psychologist, Samuel Mphuthi, who examined the first respondent a month or two after the incident (ostensibly without sight of any prior medical records concerning an attack on her in 2015 but pursuant to a quantitative electroencephalograph) in

which it is concluded that she *inter alia* suffered neurocognitive deficits; a report of a physiotherapist, Ms. Lundstrom, dated 5 August 2021, which notes a need for physiotherapy treatment arising from headaches, jaw, shoulder and knee pain sustained by the first respondent according to the latter's peculiar account; a report from an occupational therapist, Ms. Vanessa Ruiters, dated 27 July 2021, which is short of the pages that were supposed to contain the conclusion of the report; and finally a report of an industrial psychologist, Ms. Hillary Tomu, dated 4 August 2021 that underpins the first respondent's supposed entitlement to compensation to ameliorate her loss of potential future earnings on account of a supposed vicious assault on her by the Police in December 2017, with far reaching consequences.

[23] Additionally the first respondent attached a certificate of value by a consulting actuary, Dr Robert J Koch, which reflects his reliance in turn on Ms. Tomu's report.

[24] Significantly Ms. Ruiters relied on collateral in the form of records from Cecilia Makiwane Hospital which do not appear anywhere at all in the founding papers or in the court file concerning the action, but which the applicant would say in the present application relate rather to the 2015 incident but had, deliberately in his view, been imputed to the assault incident of 2017.

[25] Ms. Tomu states in her report that she relied on "*hospital notes*" (unspecified) and the reports of Mr. Mputhi and Vanessa Ruiters in reaching her conclusions. (All of this confirms an insular plaintiff-centered version of the essential facts and *sequelae* etc.)

[26] What was quite obviously lacking in the Rule 34A application was any reference at all to the applicant's expert reports that by obvious implication predate the launch of that application.

[27] The motivation supplied for the launch of the Rule 34A application, apart from the first respondent's need for assistance in the form of an interim payment, was the applicant's supposed refusal to respond meaningfully to attempts by her attorneys to secure a final settlement of the matter since the merits concession made, extensive delays therewith, his failure to have filed "all" of his expert reports, and the fact that a date for the trial on quantum had not yet been allocated.⁴

[28] So much for the foundation of the first respondent's application for the interim payment.

[29] Her attorneys served the notice of application in terms of rule 34A on the State Attorney on 29 July 2024. It heralded that she would seek an interim payment in the sum of R2 000 000,00 or any amount which the court would find just and equitable, payable in ten days from the grant of the requested order. It was ostensibly launched as an interlocutory application that would supposedly automatically be heard on 3 September 2024 if the applicant chose not to oppose it. The applicant was liberally granted 15 court days to deliver a notice to oppose. (However the Notice of application also confusingly stated that the applicant intended to seek the indicated relief "*on a date to be arranged with the Registrar*".)⁵

⁴ One of the essential bases for the invocation of the interim payment procedure is trial prejudice. The first respondent conceded in her answering affidavit that the quantum trial had in fact been enrolled for hearing shortly after the rule 34A order was granted. She claimed that she had made an error in stating that there was no trial date on the horizon.

⁵ See *King Sabata Dalindyebo Local Municipality v Zwelitsha* (CA78/2022) [2023] ZAECHC 29 (13 June 2023) in which the court highlights the difficulty when the notice of motion does not state a date for appearance. In this instance a date was stated but was rendered equivocal by the intimation that a date would (still) be arranged by the Registrar.

[30] The reference cited therein on behalf of the State Attorney who is the official attorney of the applicant is Mr. Ngcama. It was common cause that he left the employ of the State Attorney in July 2021.

[31] Mr. Isaacs who deposed to the founding affidavit in the stay application would later explain that due to severe resource constraints after Mr. Ngcama left, the staff had responsibly diarised to file a notice to oppose on the last day it could, but that this target had unfortunately not been met. There had been no deliberation election by the State Attorney, so to speak, to maintain an absence from the proceedings of 3 September 2024.⁶

[32] In any event, what become apparent to me when I looked at the papers in the Rule 34A application is that the application had been automatically enrolled on 3 September 2024 without compliance with the provisions of rule 6 (5) (c), or our Joint Rule of Practice 23 (m), which provides as follows:

“In all cases in which judgment by default is sought against the State (which will include applications where the State has failed to timeously file either a notice of opposition or its opposing papers) a notice of set down is to be served on the State attorney at least five days prior to the hearing.”

⁶ In *Zuma v Secretary of Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* 2021 (11) BCLR 1263 (CC), the Constitutional Court drew a distinction between two litigants: In the first place, there is a litigant who was physically absent because he or she was not present in court on the day the judgment was granted. In the second place there is a litigant whose absence she or he chose or elected. Accepting this approach, the court held that on the facts, Mr. Zuma was given notice of the case against him and also, sufficient opportunity to participate in the matter by opposing same if he wanted to. He deliberately chose not to participate. The court therefore found that a litigant who elects not to participate in despite knowledge of legal proceedings against him or her is not absent within the meaning of Rule 42 (1) (a) In other words, the court emphasized that the word “*absence*” in the rule, “...*exists to protect litigants whose presence was precluded, not those whose absence was elected.*” In summarising this requirement, the constitutional court put the position as follows:

“*Our jurisprudence is clear: where a litigant, given sufficient opportunities to participate, elects to be absent, this absence does not fall within the scope of the requirement of rule 42 (1) (a). And it certainly cannot have the effect of having an order granted in absentia, into one erroneously granted.*”

See *Matseke v Maine* (M198/2020) [2023] ZANWHC 239 (12 October 2023) at [46] – [47] where the distinction was discussed and applied.

In this instance the applicant could not have been accused of being deliberately absent.

[33] Such notice is necessary even if the State elects (or neglects as was the case here) not to file a notice to oppose. The practice rule adds a layer of professional courtesy extended to the State to avoid a proliferation of default orders granted against such entities.⁷

[34] That on its own satisfied me that the order had erroneously been granted in the absence of the applicant.

[35] That was however not the only basis upon which I was inclined to permit the applicant to revisit the grant of the Rule 34A Order.

[36] It is necessary to briefly consider the provisions of the rule, which are to the following effect:

“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 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 -

⁷ See the discussion in *Spannenberg v Member of the Executive Council, Department of Health, Eastern Cape Province and Another - Application for Rescission* (803/2020) [2023] ZAECBHC 34 (25 May 2023), at paragraphs [68] – [76]. See also *King Sabata Dalindyebo Local Municipality v Zwelitsha, Supra*, at [25] as to the purpose of the practice rule.

(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) 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) The amount of an 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 an 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 the 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 considers 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.”

[37] Rule 34A provides a unique procedural remedy to a claimant who has suffered damages in the form of medical costs and loss of income arising from physical disability or the death of a person, from a certain juncture after the issue of the summons claiming such damages, to apply for an interim payment “*on account*” of what the plaintiff (i.e. the claimant or applicant for the interim payment) *must still prove in the action* in order to obtain judgment in his/her favour upon the trial of the action, provided the prescribed jurisdictional facts and the necessary requirements therefor are met.⁸

[38] The enforcement of this right is entirely in the discretion of the court, but subject to the defendant being safeguarded as provided for in the rule in respect of such advance payment (representing a reasonable proportion of the medical costs or loss of income that *will likely be recovered as damages* arising from the physical disability), pending final judgment or the order that the court will make at some as yet uncertain future time upon the conclusion of the trial.⁹

[39] The provisions of sub-rule (2) are of particular relevance in the context of the applicant’s defence raised in the action.

[40] In *Van Wyk v Santam Bpk*,¹⁰ the court held that the standard of proof referred to in the jurisdictional requirements outlined in sub-rule (2) is not as high as it will be when the action goes on trial. The degree of evidence required by the court 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*

⁸ See sub-rules (1)– (5); *Karpakis v Mutual & Federal Insurance Co Ltd* [19913 All SA 430 (O) at page 436.

⁹ *Karpakis, Supra*, at page 436.

¹⁰ 1997 (2) SA 544 (O) at 546G – 547F.

*considerations which will be weighty is the extent of facts in dispute as well as the nature of these facts.*¹¹

[41] In *Van Wyk* where the deponent of the originating affidavit referred to the medico legal reports already filed of record in support of the request for an interim payment, criticism levelled against him for failing to file confirmatory affidavits by the experts themselves came to naught, the court even going so far as to suggest that the formalism of obtaining such affidavits would amount to an unnecessary running up of costs in a scenario where the focus is on gaining an impression only, or conducting a rough and ready assessment, of what is necessary at this stage to be advanced as an interim payment.

[42] Formalism aside, what is abundantly plain from the provisions of sub-rule 4 (b) is that the exercise of the court's discretion in determining an appropriate interim payment is focused on the amount of the payment being 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.*

[43] A court in a Rule 34A application is thus required to project its imagination into the quantum trial and to contend somewhat with the plaintiff's prospects of success regarding the final damages to be awarded. The section does not pertinently implore a court to consider the defendant's plea but it follows by implication that any defence raised that will impact the plaintiff's entitlement to damages or the extent thereof will be weighty considerations in the exercise of the court's discretion, especially in my view against advancing

¹¹ I have highlighted above the applicant's qualified plea or "defence".

the full extent of the sum's claimed where preexisting injuries are in the mix.¹² Seen from the opposite perspective of what a court is expected to look out for, this in my view places a clear duty on a plaintiff requesting an interim payment to explicitly level up and make a full disclosure of all factors relevant to the court's determination and exercise of its discretion. In this instance the first respondent failed to disclose the applicant's reservations that something had happened to her in 2015 that would perforce have an impact on the extent of damages she might be entitled to.

[44] In my view the failure of the first respondent to have highlighted the factors that would have impacted the court's discretion would certainly warrant a rehearing or reconsideration of the interim award, indeed even if the applicant had been found not to have been absent from the hearing. The need for the reconsideration arises upon the premise that not all the facts relevant to the exercise of that court's discretion were properly brought to its attention.

[45] But it did not end there. In *V.D obo M.D v Member of Executive Council, Department of Health, Eastern Cape*¹³ the court also remarked upon the fact that applications of this nature fulfil a specific purpose and that interim awards are not for the mere asking simply because liability has been conceded.¹⁴

[46] The court in that instance observed that:

“Even though the standard of proof is not as high when it comes to assessing an interim need, the requirement stated in rule 34A (2) can hardly be met by just cobbling together random reports, or by referring to reports in general. I would

¹² See for example *V.D obo M.D v Member of Executive Council, Department of Health, Eastern Cape* (634/2017) [2021] ZAECBHC 10 (13 August 2021) in which the court had to keep in mind the import and significance of the public healthcare defence when reckoning with a request for an interim payment.

¹³ *Supra*.

¹⁴ *Supra*, at [33].

imagine that even if the plaintiff's attorney has presented a proper opinion of what was reasonably anticipated to be necessary in the next few months, that this would have assisted the exercise and might have sufficed. Neither is it about simply asserting a percentage of the overall claim to be a reasonable proportion of what should be advanced on account of what the plaintiff may ultimately be awarded. The public healthcare defence renders the base figure on which that calculation is premised somewhat less exacting so the detail of what is required pending the trial ought to be engaged with a bit more extensively than the plaintiff has.”¹⁵

[47] The sentiments apply equally to the scenario that this court had to apply its mind to in the stay application, especially having regard to the fact that the first respondent merely “*cobbled together*” only those reports favourable to her and without drawing attention to the applicant’s case raised on the pleadings or his concerns repeated in the pre-trial conference. In the rule 34A application the first respondent had simply averred that two million against an advance of damages estimated in excess of four million would not be “*excessive*”. Further, although the first respondent perfunctorily alleged that it was “*just and equitable*” to make the order, the important stuff was left entirely unsaid.

[48] Moreover the first respondent had also made herself guilty of being careless generally in putting her case forward.¹⁶ So for example she stated that she was a male person; asserted wrongly (it was later conceded on her behalf) that a date for the quantum trial had not been allocated; created the misimpression that the applicant had not filed his expert reports whereas these were clearly filed of record in the action on dates preceding the launch of the rule 34A application; and failed to address apparent anomalies in medical reports put forward by her.

¹⁵ *Supra*, at [35].

¹⁶ In *V.D obo M.D*, *Supra*, at [36] – [39], the court had to contend with papers that were woefully inadequate to invoke the procedural remedy except to the extent of the defendant’s tender of an interim payment.

[49] The J88 medical report provided (the only one focused on the primary injuries noticed to have been sustained by the first respondent in December 2017) was clearly inconsistent with any notion of cognitive defects she had supposedly suffered. The critical pages of the report of Ms. Ruiters (pages 27-29) were omitted. The court's attention was not directed to the significance of the records of the Cecilia Makiwane Hospital and there were essential differences in the underlying information supplied to Mesdames Ruiters and Tomu respectively that were not drawn attention to or explained. Examples relate to details of the first respondent's siblings and notably their standards of education. (Only two of the siblings on Ms. Riter's list are included in Ms. Tomu's list and she adds a degreed brother not mentioned by Ms. Ruiters at all). There appears to be conflicting information about studies pursued by the first respondent after she matriculated and conflicting dates of prior employment. This is confusing especially since Ms. Tomu referenced Ms. Ruiter's report.

[50] Whilst rule 34A applications do not require exceptional formalism, and whereas the focus is on "*gaining an impression only, or conducting a rough and ready assessment, of what is necessary at this stage to be advanced as an interim payment*", there is an imperative on such a plaintiff to be careful in his or her presentation of her case so as to meet all the jurisdictional requirements postulated by the rule.

[51] It is no surprise, given the novel procedural remedy afforded by rule 34A and the impact of its invocation that subrule 10 provides for its own unique mechanisms to ensure that the remedy is not abused and that interim payments are ultimately properly brought into account at the end of the day in a manner that protects the party advancing the damages. For one it is noted that a party may apply to vary or discharge an interim order if the court is satisfied that it would be "*just*" to do so.

[52] Even though I found that the applicant would likely have succeeded with a rescission application, the kind of anomaly that presented itself with hindsight cried out for the court's intervention. Leave aside the fact that it appeared to me just to call some introspection to the rule 34A order, it also occurred to me that the state attorney had a statutory obligation to revisit the situation.

[53] That being said, there was some merit in the submission by Mr. Leendertz that the state attorney had delayed considerably in getting to the point of formally acting to vindicate the situation by the stay application, in reality leaving the matter to the very last moment. I accepted though that that Mr. Isaacs had only come to learn of the sale in execution on 11 April 2024. I concluded that the applicant would not have received substantial redress later (with regard to the loss of the Police's property by the forced sale) had I not halted the sale. I also accepted the applicant's averment that Mr. Isaacs had tried in a number of alternative ways to pursue his concern that the rule 34A order should never have been granted but for the lack of disclosure that I have referenced above. It was clearly less about the amount of the interim payment than it was about the perceived misrepresentation. As a riposte to that harsh statement the first respondent had merely contented herself with the refrain that the applicant was bound to take his victim as he found her. This comeback was hardly sufficient to persuade me that I should not have exercised my discretion to stay the sale.

[54] It came to attention during argument that the vehicles the subject of the execution had been under storage for a while. That did not matter though because the impelling feature to my mind if the sale proceeded was that the property would be lost to the Police irrevocably. That was the grist to the mill for me.

[55] I asked the parties whether the applicant had requested the stay. I was informed that he had, but that costs had not been tendered.

[56] On the opposite side of the State Attorney's tardiness in bringing the application any earlier since Mr. Issacs had known of the rule 34A order existence since the day after it was granted was the glaring indication that the first respondent, if she had made a full disclosure of the facts concerned, would not have gained the advantage she had by the granting of the order. The application was fully resisted on its merits as opposed to just the costs.

[57] However I deferred deciding the issue of costs, leaving that to the court that would hear the rescission application which I understood at the time had already been launched.

[58] Paragraph 4 of my order was granted on the basis of the applicant's tender. The difficulty that still remained to him, even with the stay of execution granted by me, was that the vehicles had been in storage for a considerable while and would not have been released to the Police without putting up the costs of storage.

[59] In the result I issued the order which I did.

B HARTLE
JUDGE OF THE HIGH COURT

DATE OF HEARING : 6 May 2025
DATE OF REQUEST
FOR REASONS : 14 May 2025
DATE OF REASONS : 17 March 2026

Appearances:

For the applicants: Mr. F Petersen instructed by the State Attorney, East London (Ref: 788/18-P16 Mr Isaacs).

For the first and second respondents: Mr. R Leendertz instructed by Magqabi Seth Zita Inc., East London (Ref: Ms. Bulube/ab/C-1700/20).

For the third respondent: Nil