NOT REPORTABLE

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

Case No. 634/2017

In the matter between:

V[…] D[…] obo M[…] D[…] **Plaintiff**

and

MEMBER OF EXECUTIVE COUNCIL,
DEPARTMENT OF HEALTH,
EASTERN CAPE **Defendant**

JUDGMENT IN RESPECT OF INTERLOCUTORY APPLICATION FOR INTERIM PAYMENT

HARTLE J

[1] The plaintiff seeks an order for an interim payment in terms of Rule 34A in the sum of R8 000 000.00 together with a punitive costs order.[1]

[2] The application is incidental to the main action in which the plaintiff claims damages in the sum of nearly R30 000 000.00 in both her personal capacity and as the legal representative of her brain damaged son.[2] The portion of her claim for future medical expenses is "estimated" to be in the sum of R20 650 000.00.[3]

[3] The child is presently twelve years old.

[4] The damages claim arises from the negligence of the defendant's medical staff during his birth in 2009 at the Indwe Hospital.

[5] On 20 October 2020 the defendant conceded liability. An order was issued by Smith J giving effect to her concession and acceptance that she is liable to compensate the plaintiff "in whatever form or manner allowed in law (for) 100% of all agreed and/or proven damages that (she), in her personal and representative capacity for and on behalf of her minor child (M[…] D[…]), has suffered as a result of the negligence of the Defendant's staff resulting in the cerebral palsy of the said minor child, whether in cash or kind."

[6] It is immediately evident from the manner in which the merits order has been framed that the defendant intends to keep her options open to have the plaintiff compensated in due course "in kind", if not in cash, foreshadowing possible reliance ultimately on the so-called "public healthcare defence" which the Constitutional Court in MEC for Health & Social Development, Gauteng v D

[1] The plaintiff never justified the necessity for such a costs order. As will appear from the judgment, the prayer seems to have been perfunctorily included as if the plaintiff was entitled to it as of right.
[2] This information is gleaned from the answering affidavit.
[3] The action file was not placed before the court. The assertion concerning the estimated claim appears from the founding affidavit of Mr. Klaas, the plaintiff's authorised attorney and deponent on her behalf.

Z obo W Z[4] endorsed as opening the door to develop the common law by permitting the State to pursue compensation for damages in kind in actions such as the plaintiff's.

[7] In her answering affidavit the deponent asserts, in response to Mr. Klaas' allegation that the nature and sequelae of the child's injuries are set out in certain medico-legal reports filed in the action,[5] that the medical services which the plaintiff is alleging will be or have been incurred and the medical supplies required for the child's benefit are available from the public healthcare sector at no cost, or at a lesser cost at a standard at least equivalent to that provided in the private healthcare sector, alternatively at a better standard, rendering it unnecessary to finance the proposed provisioning of such care in the private healthcare sector. Indeed, the respondent tenders the provisioning of such medical services and medical supplies to the applicant and/or the child in the interim under the auspices of the public healthcare system.

[8] Mr. Mlambo, a senior manager of the Department in legal services, who deposed to the answering affidavit on the defendant's behalf, asserts that the Department has been providing such services to the child at a reasonable and acceptable standard and that the defendant is confident that there are institutions under the department's control, and others under the control of other government departments, where the required care can be provided to patients suffering from cerebral palsy.

[9] This assurance is given in particular to counter the plaintiff's request for the lump sum interim payment.

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[4] 2018 (1) SA 335 (CC).

[5] As I indicated above the action file was not placed at the court's disposal.

[10] As an aside Mr. Mlambo laments the damaging and crippling effect that lump sum payments will have on other patients who rely on public healthcare institutions. He points out in this respect that it is "widely accepted" that medico-legal claims against the MEC's of Health in South Africa presently stand at an alarming amount of R100 000 000 000. He attributes this largely to claims such as the plaintiff's which are "pleaded at private health care rates" and in many other instances supposedly even above reasonable private healthcare rates.

[11] I cannot imagine that this is an argument that will prevail over a plaintiff's need for an interim payment if the jurisdictional requirements are established and the court exercises its discretion in favour of granting the relief sought on the basis that it is just. The defendant's claim that interim payments will cripple the Department financially does not bring her within the ambit of the exclusion provided for in subrule (5) where a defendant does not have the means at his/her disposal to make an interim payment. In my view the means of the defendant is not an issue. Perhaps the answer is to ask that instead of a lump sum being ordered that the defendant instead pay in instalments. Alternatively, there may be a basis to contend that the provisions of subrule (6) also envisage a payment in kind as opposed to a lump sum payment.

[12] Mr. Mlambo says that, in his professional view, the amount claimed by the plaintiff in the action stands to be significantly reduced upon trial to a figure as low as between R2 000 000.00 to R2 800 000.00 for general damages and loss of earnings only, alternatively discounted in full if the public healthcare defence is accepted.

[13] Apart from the reservation expressed by the defendant that the plaintiff can obtain the services she needs for her child in the interim from public healthcare facilities, the chief argument advanced against the relief sought is that there is an

absence of sufficient detail or quantification of the child's medical costs in the short term (until the anticipated trial date in the third term) to warrant the interim payment of R8 000 000.00.

[14] Whilst acknowledging that the child has medical needs, the defendant repeats that these can reasonably be met in the public health care sector. For present purposes, however, she concedes the physiotherapy treatment said to be needed by the child in the private healthcare sector "over a limited period of up to one year".[6]

[15] The defendant further points out the reasonable anticipation that the trial on quantum will be finalized in "roughly" four months without any expected delays.

[16] Rule 34A provides a unique procedural remedy to a claimant (whether acting in a personal or representative capacity) 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.[7] 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

[6] The suggestion that these be costed as provided for in "paragraph 34 above" makes no sense but I assume the reference was intended to be to the per annum costing of Ms. Rungqu, the physiotherapist, who has indicated that the child requires such services at an estimated cost of R80 992.86 per annum.
[7] See sub-rules (1)– (5); Karpakis v Mutual & Federal Insurance Co Ltd [19913 All SA 430 (O) at page 436.

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.[8]

[17] The rule, which was inserted in the Uniform Rules in 1987,[9] provides 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 applicant relies shall accompany the affidavit.
> (3) Notwithstanding the grant or refusal of an application for an interim payment, further such applications may be brought on good cause shown.
> (4) If at the hearing of such an application, the Court is satisfied that -
> *(a)* the defendant against whom the order is sought has in writing admitted liability for the plaintiff's damages; or
> *(b)* the plaintiff has obtained judgment against the respondent for damages to be determined, the Court may, if it thinks fit but subject to the provisions of subrule (5), order the respondent to make an interim payment of such amount as it thinks just which amount shall not exceed a reasonable proportion of the damages which in the opinion of the Court are likely to be recovered by the plaintiff taking into account any contributory negligence, set off 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.

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[8] Karpakis, *Supra*, at page 436.
[9] The novel procedural remedy was introduced by Rule 25 of GN R2164 of 2 October 1987 and Rule 25 of GN 2642 of 27 November 1987.

(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."

[18] The provisions of sub-rule (2) are of particular relevance to the defendant's opposition to the present claim.

[19] 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

[10] 1997 (2) SA 544 (O), at 546 G- 547 F.

as it will be when the action goes on trial. The degree 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.

[20] One of the considerations which will be weighty is the extent of facts in dispute as well as the nature of these facts.[11] 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.

[21] I turn now to the question to whether the plaintiff has substantially met the objectives of sub-rule (2) in the present application.

[22] Mr. Klaas, the authorized legal representative of the plaintiff, referred to several medico-legal reports already filed in the action by a multidisciplinary team of experts. Those were not attached, neither was the action file placed at the disposal of the court.

[23] He submitted on an overall conspectus of "these" the necessity for "such" assistance to be provided to the child who is claimed to be in "dire need" thereof in order to "alleviate daily suffering and to assist *her* to enjoy life". (Emphasis added.)[12]

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[11] It is in this respect that the public healthcare defence will probably receive traction in applications of this nature.

[12] The child who is the subject of the application is a boy.

[24] He also sought to impress upon the court that the sum of R8 000 000.00 against the sum of R20 650 000.00 claimed in respect of future medical and related expenses, represents a "reasonable" proportion of damages that the child will ultimately be awarded.

[25] He attached an affidavit of Ms. Rungqu, a qualified physiotherapist in support of the application, which, with reference to her attached opinion, lists a per annum cost of R80 992.86 for physiotherapy procedures the child will undergo.[13] Her affidavit termed a "founding affidavit in application for an interim payment" does not even correctly categorize the gender of the child as male, leaving the unfortunate impression that the affidavit was hurriedly and perfunctorily prepared.

[26] A report of a professional nurse, Ms. Susan Anderson, was also attached in support of the application together with a notice in terms of rule 6 (9)(a) and (b) but only on 14 April 2021, after the defendant had delivered her answering affidavit. In a supplementary affidavit deposed to by Mr. Klaas to explain the context of her report he alleges, again obviously perfunctorily, that the plaintiff and "Ongeziwe" (not even the name of the child) were assessed by her in relation to the report and concludes with the allegation that she "makes recommendation which Ongeziwe needs in order to help with her life which is apparent from the attached report". (Again, name and gender incorrect.)

[27] Later, on 20 April 2021, after a challenge by the defendant that her opinions were inadmissible for want of a supporting affidavit, Mr. Klaas put up an affidavit by her in support of his contentions as to what services the child requires in the

[13] This was not filed together with the founding affidavit, but at least it preceded the filing of the defendant's answering affidavit. It is dated in August 2019.

future. In it, Ms. Anderson alleges that the child urgently requires systematic and structured medical and related treatment, which must commence without delay. She adds that should the necessary financial means be made available that the child needs the indicated treatment "at the relevant cost (as stated in her attached report) over the next months". She avers further that the treatment would need to be scheduled "as a matter of urgency" in consultation with a case manager and in consultation with other relevant treatment practitioners". Nothing helpful is said about the public healthcare defence or the defendant's assertion that *certain services and medical equipment ought to be available to the plaintiff in the public healthcare system*.[14] (Emphasis added)

[28] In any event, one has to make sense oneself of what in the schedule alluded to by Ms. Anderson is alleged to be vitally necessary in the next few months and what the estimated cost of each service will be. The plaintiff could not even be bothered to extract from the table what is relevant for present quantification purposes.

[29] Mr. Toni, who appeared on her behalf, when pressed to be more specific about what was necessary now and in the foreseeable future and at what cost, could also not provide a figure.

[30] Be that as it may the costs that one can imagine might be incurred from the list in the interim pending the quantum trial do not near equate to R8 000 000.00.

[14] In this respect Mr. Klaas says "I vehemently disagree with the Respondent's contention that medical services and medical supplies required by the minor child are available from the public healthcare sector at no cost or at a standard at least equivalent to that provided in the private healthcare sector. The respondent is misleading this Honourable Court in that he knows for a fact that the health system in the province is on the brink of collapse for more than a decade. The crumbling infrastructure, unavailability of medication, clinical problems and shortage of medical staff continues to be a major issue in the Eastern Cape." Whilst all of these concerns may be valid, it is difficult to test Mr. Klaas' complaints without a study of what services and expenses are supposedly in contention and if these services can in fact be provided in kind. My present concern is with the lack of information concerning what is necessary now and at what cost exactly. Contrariwise the defendant, who has seen these reports suggests that these are services or supplies that the plaintiff and her child can access in the public healthcare sector.

[31] Regarding the other required services (apparently vouched for in medico-legal reports already filed of record), the file in the action was not even placed before the court, not that it is the duty of the court to wade through the papers and glean this information for itself.

[32] It is therefore unclear what other services are necessary or at what cost. For this reason, the court cannot even gain an impression or perform its own rough assessment of which of these services can be provided "in kind" in the short term alternatively ought to be brought into the reckoning for a lump sum payment.

[33] Applications of this nature fulfil a specific purpose and interim awards are not for the mere asking simply because liability has been conceded. In this instance Mr. Mlambo, in deposing to his affidavit that was delivered before the report of Ms. Anderson had come to hand, explained the difficulty that he was faced with. As a senior manager he is required to assess and evaluate medico-legal claims and to make recommendations to the defendant in respect of both liability and the quantum of such claims. Leaving aside his technical objections to the absence of confirmatory affidavits and inadmissible hearsay evidence,[15] he could only really comment on what Ms. Rungqu suggested was reasonable and necessary in her dated report.

[34] Regarding the other expert reports (the contents of which, except for Ms. Anderson's report, this court has not even been privy to) he was of the view that these services could be provided through the public healthcare system. This was not gainsaid by the plaintiff except for the sweeping generalization by Mr Klaas

[15] As indicated in Van Wyk (Supra) extreme formalism regarding the manner in which this evidence is presented should be avoided to keep unnecessary costs to a minimum.

of his concern that the defendant is ill equipped to provide adequately for such services in kind.

[35] 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 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.

[36] When the matter was called before me Mr. Rili who appeared for the defendant had his own professional view, based on what Ms. Rungqu and Ms. Anderson at least have indicated is reasonably required for present purposes, concerning what amount in their opinion, ought to be awarded as an interim payment, but he advised that the defendant's instructions regarding his proposal could not be obtained.[16] Although counsel should come to the court's assistance as much as possible, both being proficient in the exercise of assessing the quantum of damages (even in respect of a part payment thereof), I agree with Mr.

[16] This is also an unfortunate state of affairs. A state party against whom a hefty claim of R8 000 000.00 has been claimed and who is litigating with the public purse should certainly make herself available to instruct her counsel or ensure that a firm mandate is given one way or the other. I allowed Mr. Rili an opportunity to stand down so that he could obtain the defendant's instructions, but this attempt came to naught. These applications, especially since they involve the invocation of a procedural remedy in an existing action where the end result can be projected with some certainty, ought to be settled as best they can. I can rarely imagine a scenario in which there would be an absolute defence to an interim payment request. Counsel employed by parties in applications like these are usually extremely well versed in making projections on what amounts are reasonable when it comes to assessing quantum. They ought to be able to assist the court as much as they can without being stunted by a lack of instructions.

Rili that the plaintiff has in this instance woefully failed to meet the requirement stated in sub-rule (2) and the application ought for this reason not to succeed.

[37] I should add that I also cannot read into the situation any anticipated trial prejudice that would conduce to the claimed exigency of so substantial an interim payment[17] given the parties' acceptance that the trial will in all likelihood be finalized in the third term.

[38] This notwithstanding, the defendant has conceded the need of the child to receive treatment in the interim (in the public healthcare sector) in kind, and by way of a lump sum payment for the physiotherapy treatment indicated by the report of Ms. Rungqu. As indicated above it is not for the court to extrapolate from Ms. Anderson's report which of the services she lists should be added to the mix.

[39] I intend to order that such an advance be made (on the basis of the defendant's concession made in the answering affidavit), but the plaintiff will have to forfeit her costs of making this application. I repeat that she has failed to make out a proper case as the rule requires and to award her costs on the basis of the limited payment that I intend to authorize would be tantamount to my condoning the slipshod papers presented to me in this matter. I would rarely be inclined to dismiss an application of this nature but this is certainly one of those instances where the plaintiff has not gone far enough to make out a proper case.

[40] The plaintiff is of course entitled to approach the court for a further interim payment pursuant to the provisions of sub-rule (3) on good cause shown. The other alternative is to utilize the case management machinery at the parties'

[17] See sub-rule (7) which implies a consideration of factors impacting on the conduct of the trial or standing in the way of the issue of quantum being determined as early as reasonably possible.

disposal to ensure the earliest enrolment of the action upon trial in respect of quantum.

[41] In all the circumstances the amount referred to below is the only cash advance that I consider just to authorize for now.

[42] The plaintiff's attorneys would do well to bear in mind in future that a court in exercising its discretion is required in sub-rule (4) to apply its mind against an overall conspectus of what a plaintiff *is likely to recover upon trial* considering any contributory negligence, set off or counterclaim. To this must be added the more recent public healthcare defence that the defendant is raising in actions such as these.

[43] In reckoning with the probabilities that this "defence" may succeed at trial the plaintiff should be careful in setting out what expenses will be particularly justified and necessary and which of these in her opinion cannot be provided in kind and why she so contends. The defendant ought in response to indicate where (in the plaintiff's locality) such services can be accessed at a public healthcare facility that meets the special needs of a child with cerebral palsy. This ought not to entail a full-on engagement with the public health care defence but is a rough and ready assessment of what amount should be advanced in cash pending finalization of the quantum trial.

[44] The public healthcare defence will likely only impact to the extent that a court will have to dwell on the question of what is likely to be awarded as quantum ultimately and which of the services and costs can be made available to the plaintiff "in kind" so to speak. The objective of a rule 34A application is to meet the child's needs (that in the long term will be represented in the quantum award) in the here and now so as to mitigate against any trial prejudice especially

if it is going to be a while before the issue of what amount falls to be paid in cash or in kind can be finally determined.

[45] In the result I issue the following order:

1. The defendant/ Eastern Cape Department of Health is ordered to pay to the applicant the sum of R81 000.00 (eighty-one thousand rands) as an interim payment.

2. Such amount is to be paid within fifteen court days of this order.

3. The aforesaid amount shall be paid to the plaintiff's attorney Trust Account whose account details are as follows:

Account holder	**: M T Klaas Incorporated**
Bank	**: (to be confirmed)**
Account no	**: 623 937 91332**
Branch code	**: 211021**
Branch name	**: Vincent**

4. Until an *inter vivos* trust is established for the benefit of the child to administer the quantum award that this court will ultimately make, the interim payment is to be invested in an interest-bearing account in terms of section 86 (4) of the Legal Practice Act, No. 28 of 2014, and used for the payment of any reasonable expenses or disbursements for the benefit of the child as a trustee would be able to do pursuant to the objects of the anticipated Trust.
5. The plaintiff's attorneys are directed, in due course, to account fully to the trustee appointed, of all costs, fees, expenditure and/or

disbursements paid from the interim payment once the Trust has been registered and the balance of the award is paid over.

6. In the meantime, the defendant is requested to hold to her undertaking to provide such medical services and medical supplies to the applicant and/or the child under the auspices of the public healthcare system such as are available and accessible to them pending the finalization of the trial in respect of quantum.

7. The plaintiff shall be liable for the costs of this application, which shall not be offset by either her attorneys (in respect of attorney and client fees for which she is liable to them) or the defendant (in respect of its party and party costs of this application) against the interim payment.

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B HARTLE
JUDGE OF THE HIGH COURT

DATE OF HEARING: 5 August 2021
DATE OF JUDGMENT: 13 August 2021*

*Judgement delivered electronically to the parties by email.

APPEARANCES:

For the applicants: Mr. P Toni instructed by M T Klaas, East London (ref. Mr. Klaas).
For the first respondent: Mr. M Rili instructed by Norton Rose Fulbright Inc. care of Smith Tabata Attorneys, East London (ref. 33N937015).