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NOT REPORTABLE

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

Case No. 629/2019

In the matter between:

N[…] M[…] obo
A[…] M[…] Plaintiff/Applicant

and

THE MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, EASTERN CAPE PROVINCE Defendant/Respondent

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JUDGMENT IN RESPECT OF INTERLOCUTORY APPLICATION FOR INTERIM PAYMENT

HARTLE J

[1] The applicant, who is the plaintiff in the main action for damages, issued out an interlocutory application on an urgent basis for an order directing the

respondent (the defendant in the main action) to make an interim payment pursuant to the provisions of Uniform Rule 34A. The relief requested is framed as follows:

> "1. That this application be heard as a matter of urgency and that the forms and services be attenuated accordingly.
>
> 2. That to the extent necessary, the applicant be permitted to utilise facsimile copies of affidavits, subject to the originals being filed in due course.
>
> 3. That the respondent be ordered to pay to the applicant the sum of R5 000 000.00 as and for an interim award of damages, to be paid within 30 days of the service of this order on the defendant (and the department) in accordance with applicable prescripts.
>
> 4. That the respondent be ordered to pay the opposed costs of this application, on a scale as between attorney and client, in the event that the respondent opposes the application, and if the application is unopposed, that the costs be on an unopposed scale as between party and party."

[2] 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, froma 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.[1] 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.[2]

[3] The rule, which was inserted in the Uniform Rules in 1987,[3] provides as

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[1] See sub-rules (1)– (5); Karpakis v Mutual & Federal Insurance Co Ltd [19913 All SA 430 (O) at page 436.
[2] Karpakis, *Supra*, at page 436.
[3] 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.

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.

(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."

[4] The main action involves a damages claim instituted by the applicant in her personal and representative capacity, as mother and guardian of a severely brain-damaged child, A[…]. The child is presently 6 years old and suffers from a mixed cerebral palsy involving both spastic and dystonic cerebral palsy. The damages claim arises from the negligence of the respondent's medical staff during his birth and at the time of the plaintiff's confinement at the Stutterheim and Cecilia Makiwane hospitals which resulted in him suffering permanent and irreversible brain damage and consequently cerebral palsy.

[5] On 23 November 2020 the merits of the action in respect of both the applicant's personal claim and the child's claim pursued by her in her representative capacity was finalized in her favour. This culminated in an order issued by Mbenenge JP pursuant to which the respondent was held liable for the applicant's damages in both her personal and representative capacities.

[6] The applicant alleges that the trial could not be finalised in total when it was set down for hearing on 23 November 2020 because the respondent had, at

that stage, not taken steps to progress the matter on the issue of quantum. She had filed no expert reports which resulted in the trial in respect of this aspect being postponed *sine die*. The order incidentally does not state that the matter is postponed, but it follows by necessary implication that this aspect of the applicant's claim is extant and falls still to be dealt with. Since the issue of this application, notice has been given by the Registrar that the matter has been allocated for trial in the 4th term on 18 October 2021 when the remaining aspect of quantum will be determined.

[7] The applicant complains that she had hoped for a settlement or conclusion upon the earlier enrolment of the trial in respect of both merits and quantum "so that funds in the form of damages could be released expeditiously in order to enable (the child) to obtain much needed urgent optimal palliative and ameliorative care, rehabilitation and treatment." She asserts that this treatment "is long overdue and is essential to provide for the day-to-day comfort, the avoidance of unnecessary pain and suffering, and the avoidance of conditions which could or will have an effect on the mortality and life expectancy of the child."

[8] Dr. Campbell, a specialist rehabilitation practitioner and medical doctor, states in support of the application that it is in the best interests of the child that optimum and structured medical care commence as soon as possible in accordance with the guidance and opinion of the relevant expert practitioners. He further opines that: -

> "All children with cerebral palsy have a pressing need for specialist and mult i-disciplinary management to ensure that they are able to develop any possible abilit ies in spite of their severe neurological and developmental impairment, the complicat ions are prevented and that the quality of life and burden of care is optimised.
>
> …..
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> There is, however, an urgent need that he have access to any compensation that may flow out of this claim that he can have access to the necessary treatment in the near future.
>
> Any attempt to delay resolution of the claim would, therefore, impact negatively on

his health, well-being and function."

[9] The medical treatment required by the child are set out in the expert reports filed by the applicant in the action, in particular those of Dr Campbell, Grace Hughes (physiotherapist) and Sue Anderson (specialist professional nurse) to which the applicant adverted in the application emphasizing both the need for each facet of care or treatment required in the meantime and the costs of obtaining same privately.

[10] As an aside the amount claimed by the applicant in the main action exceeds R15 million, in addition to the further costs relating to the protection of the damages award in a trust or in the hands of a curator. The far greater bulk of these damages certainly appear to be in respect of medical, hospital and related expenditure.

[11] The applicant, in the person of her attorney representing her, asserts that it is well-known to all who deal with cerebral palsy damages claims, which reality ought to be known to the respondent and her legal representatives, that children in the position of the child urgently require sustained optimal medical treatment of an intensive nature and on an extensive basis such as has been described in the medico-legal reports on which reliance has been placed.[4] This treatment, so the deponent avers, is required for the mitigation of the day-to-day *sequelae* of the injury and is necessary for the prevention and alleviation of pain and suffering, and for the urgently required improvement in the quality of life of the child.

[12] The applicant's attorney, who deposed to the founding affidavit, explains further that the applicant is impecunious, unemployed and without the financial wherewithal to provide for the reasonable and necessary treatment of the child herself as a result of which such care has in certain respects been non-existent and in other respects, where she has been able to access public health care facilities,

[4] The applicant's attorney relies on the extent and general orders of damages made by our courts in matters with facts the same as or similar to the present matter. It is so that there have been numerous settlements and judgments involving the respondent in comparable cases.

suboptimal for an extended period of time. The delays in implementing necessary and reasonable treatment are plainly not in the interests of the child so the argument goes.

[13] I indicated above that the application served before me both as an interlocutory application (such as the rule provides) and on the basis of urgency. In the certificate of urgency counsel sought to persuade me as follows:

> "The matter involves a minor child suffering from cerebral palsy and who urgently needs both medical care and treatment. The medical experts Dr Campbell, Grace Hughes and Sue Anderson confirm the dire condition of the child."

[14] The application was provisionally enrolled after I gave a directive in terms of rule 12 (1) (d) of the Joint Rules of Practice.[5] My directive, issued at 15h13 on 29 March 2021,[6] provided as follows:

> "Having read the proposed papers and certificate of urgency I issue the follow ing directive:
>
> 1. The interlocutory application in terms of Rule 34A may be enrolled on the basis of urgency and on notice to the defendant.
> 2. The notice of application can be adjusted to reflect that the matter will be heard at 12h00 in Bhisho tomorrow (after motion court).
> 3. The defendant must be advised that if he/she wishes to oppose the application that notice to this effect must be filed before 12h00 tomorrow.
> 4. In that event, the parties are to make suggestions to me in court tomorrow regarding

[5] Sub paragraph 12 (d) provides as follows in respect of this category of urgent matters sought to be enrolled on a day other t han on the ordinary motion court roll:
"(*d*) In all urgent applications in which it is sought to enrol the matter other than on a day normally reserved for the hearing of motion court matters:

(i) The practitioner who appears for the applicant must sign a certificate of urgency which is to be filed of record before the application papers are placed before the Judge and in which the reasons for urgency are fully set out. In this regard, sufficient particularity is to be set out in the certificate for the question of urgency to be determined solely therefrom and without perusing the application papers.

(ii) The certificate of urgency will be placed before the Judge who will make a determination solely from that certificate as to whether or not the matter is sufficiently urgent to be heard at any time other than the normal motion court hours.

(iii) Should he/she determine that it is sufficiently urgent, he/she will then give directions as to the time and place, when and where the application is to be heard."

(iv)

a timeframe for the exchange of papers and earliest hearing of the matter.

5. The defendant should further be advised that in the absence of any notice to oppose being filed or appearance in court tomorrow as suggested for case management purposes, that the relief sought together with costs on the scale of party and party will be entertained on a default basis."

[15] The parties appeared before me on 30 March 2021 by which time the respondent had indicated her intention her intention to oppose the application. I consequently issued an order postponing the matter for hearing to 7 April 2021(co-incidentally a motion court day) and further directives regarding the exchange of opposing papers, *inter alia* directing the respondent to file her answering affidavit by 1 April (within two court days) and heads of argument by the 7th. Incidentally, it bears mentioning that this application and a second one for similar relief also issued by the applicant's attorney reached me for consideration on the basis envisaged in paragraph 12 (1) (d) of the Joint Rules of Practice as duty judge during the Easter recess.[7] The certificates read in identical terms save for the headers and distinct file references. The other application was not opposed by the respondent[8] yet this one was, and it was heard via *Zoom* conference on 7 April 2021. I had originally intended that it be heard at the East London Circuit court after motion court at 14h00, but I was requested by the applicant's attorneys to hear it remotely.

[16] I had no hesitation in allowing the matter to be heard on the basis of urgency given the premise that it involved the interests of a minor child said to be in a dire condition and in urgent need of physical care and treatment, but I point out that the recess period was particularly busy with four other opposed applications set down for hearing at the same time over and above this matter, all of which were vying for my attention beside the several matters enrolled for

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[6] The application is dated 15 March 2021 but could only have been issued after my directive.
[7] See A Tsipa obo (minor child) v MEC for Health, Eastern Cape Province (Bhisho case no 22/18).

[8] Counsel in that matter settled on an order in a Rule nisi format calling upon the respondent to show cause on the selected return date why her department should not be ordered to make the interim payment requested in that matter. I am not aware what happened on the return date but the device of this form of order employed would certainly have given the respondent more time to reply if she had wanted to

hearing on the unopposed motion court roll in East London. The significance of this will shortly become apparent.

[17] The respondent opposed the application on the basis that it was not urgent but appeared to conflate the issue of urgency as contemplated in rule 6 (12) with the grounds advanced on behalf of the applicant to establish the applicant's "need" for the interim payment. She also challenged the applicant's attorney's authority to make the application without her ostensible endorsement thereof by the filing of a confirmatory affidavit. However, on the merits she provided no facts, evidence, or information to contradict the case made out for the applicant for an interim payment or why this court should not exercise its discretion in favour of granting the relief sought save to contend that there was no haste in promoting the earliest commencement of the specialised treatment regime and that urgency had not been made out on the papers. Rather disappointingly, apart from raising the technical objections aforesaid, the respondent seemed to misconceive of the nature of the remedy and offered little assistance to the court especially regarding what might constitute a reasonable proportion of the damages to be paid as an interim procedural remedy or what amount she believed was likely to be recovered by the applicant ultimately at the conclusion of the trial. Neither was any help forthcoming concerning any safeguards to be put in place by the fact that I might grant the relief and order her to advance a payment that on its own is quite substantial.

[18] I am inclined to agree with Mr. McKelvey, who appeared on behalf of the applicant, that the respondent's attack on the authority of her attorney to launch this application is without merit and opportunistic. The defence was also raised rather perfunctorily in my view.

[19] It is so that sub-rule (1) requires the plaintiff to apply, but sub-rule (2) refers generically to *the* affidavit that is required to support the application and which is to contain the essential information on which an applicant relies for the remedy

sought. I agree that it is perhaps a salutary practice for an applicant to align herself (by way of putting up a confirmatory affidavit) with all the bits and pieces of information necessary to be asserted and collated to meet the requirements for grant of the procedural remedy and of course to confirm her personal input that might otherwise amount to hearsay evidence, but it is to my mind not fatal to her application that her attorney, who would naturally be better placed to advance the necessary detail which is required, deposed to the founding affidavit on her behalf instead, pursuant to a mandate given to his firm at the outset to prosecute the action.

[20] Indeed, it is not uncommon for affidavits filed in support of interlocutory applications which concern issues of procedure to be sworn by attorneys representing the respective litigants involved as opposed to being made by the litigants themselves. There is further nothing to suggest that the respondent has at any stage before in the conduct of the action questioned the attorney's authority to prosecute the applicant's claim on her behalf or that his authority to settle the issue of liability, a significant event in the course of the litigation, falls now to be impugned for any reason. If the respondent had any qualms in this respect, it was certainly open to her to have utilised the machinery of uniform rule 7(1) to have challenged or investigated the authority of the applicant's attorney. She has admittedly not done so. Neither was any reason advanced in her answering affidavit to now call into question the deponent's entitlement to act other than to remark therein upon the absence of a confirmatory affidavit, confirming in my view that the point taken was simply for nuisance value.

[21] In Ganes and Another v Telecom Namibia Ltd[9] the Supreme Court of Appeal stated the following:

> "There is no merit in the contention that Oosthuizen AJ erred in finding that the proceedings were duly authorised. In the founding affidavit filed on behalf of the

[9] [2004] 2 All SA 609 (SCA).

> respondent Hanke said that he was duly authorised to depose to the affidavit. In his answering affidavit the first appellant stated that he had no knowledge as to whether Hanke was duly authorised to depose to the founding affidavit on behalf of the respondent, that he did not admit that Hanke was so authorised and that he put the respondent to the proof thereof. *In my view it is irrelevant whether Hanke had been authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised.* In the present case the proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the respondent. In an affidavit filed together with the notice of motion a Mr Kurz stated that he was a director in the firm of attorneys acting on behalf of the respondent and that such firm of attorneys was duly appointed to represent the respondent. That statement has not been challenged by the appellants. It must, therefore, be accepted that the institution of the proceedings were duly authorised. In any event, rule 7 provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant. The appellants did not avail themselves of the procedure so provided. (See *Eskom v Soweto City Council* 1992 (2) SA 703 (W) at 705C-J.)"[10](Emphasis added)

[22] Mr. Dukada, who appeared on behalf of the respondent, submitted that it is possible to challenge a party's authority other than by way of rule 7 (1), for example by raising an objection or point *in limine* such as the respondent did. While this may well be the case, it is clear from the objective of rule 7 (1) however that a party complaining of a lack of authority to act must promptly raise his objection "within 10 days after it has come to the notice of a party *that such person is so acting*" if he or she has a problem with it. It certainly cannot be suggested as Mr. Dukada submitted that the ten-day period referred to in the rule had not yet expired whereas the respondent must have known from the date of the commencement of the action that the deponent was representing the applicant in respect of its prosecution and by necessary implication any applications incidental thereto. Otherwise, the party complaining must with the leave of the court on good cause shown dispute it at the relevant juncture when he chooses to

[10] *Supra*, at [19].

raise his or her concern.

[23] Here no reason was put up at all why the authority of the deponent to act should be called into question. The mere fact that no confirmatory affidavit appears from the applicant's interlocutory application for a procedural remedy in an action where no objection to the deponent's acting has been raised before during the conduct of the action does not by any stretch of the imagination automatically bring the respondent's "objection" within the ambit of rule 7 (1). Neither was there any obligation on the part of the applicant's attorney, as was suggested by Mr. Dukada, to put up proof of a special power of attorney to have launched the present application.

[24] Given that the court in an application for an interim payment would certainly be concerned from a safeguard point of view that the advance sought to be paid is going to be paid to a legitimate legal representative of such a claimant one would have expected the respondent to have provided reasons along these lines why the payment should not be made to the applicant's attorneys in circumstances where as suggested on behalf of the respondent she might be entirely unaware that the request has been made on her behalf. In this respect however there was no demur from the respondent whatsoever, leading me to conclude that the objection was raised for no valid reason at all.

[25] The next question concerns urgency. The urgency contemplated by the provisions of rule 6 (12), read together with par 12 of the Joint Rules of Practice, is to be distinguished from the motivation required to justify the basis for an interim payment as contemplated in rule 34A itself, although these reasons may well overlap.

[26] It cannot be gainsaid in my view that the need for and entitlement of the applicant to approach this court for an interim payment has been amply demonstrated. Despite the respondent's roundabout way of challenging the

necessity for the interim payment under the mantle of the technical objection of lack of urgency, Mr. Dukada conceded during the hearing that the applicant indeed meets the requirements for an interim payment but for the technical objections raised to the application.

[27] In this respect the application was launched after the notice of intention to defend was filed.[11] A judgement on liability was granted to the applicant on 23 November 2020 by the order of Mbenenge JP. The applicant resorts within the category of plaintiffs who are entitled to approach the court for an interim payment for the medical costs of the child arising from his physical disability which form the greater bulk of the quantum claimed in the main action. She has furnished details (in the form of medico legal opinions supported in the application on affidavit) of what is required for now, in the interim, until the trial can be concluded, and at which point final judgment will be pronounced and which sum it is contended on her behalf constitutes a "fair, reasonable, equitable, and conservative portion of the child's damages and sum of interim damages."[12] She has also explained the exigency and objective for approaching the court at this juncture for the remedy at her disposal. Albeit hearsay evidence, it appears to be common cause that she does not have the financial means at her disposal to make provision for these expenses herself. Although some state interventions are in place to provide certain incidents of the treatment required, the complaint is that these are not adequate, optimal, or commensurate with what the child needs. The respondent has not pertinently pleaded that the treatment could now or in the future be provided via public health care facilities. Her only contention in this respect is that since he has not "ceased receiving this medical treatment … this does not render the matter urgent as it is likely to be finalized during

[11] The respondent mistakenly suggested that the applicant was obliged from this date already to have brought the application, rendering it seriously overdue by the time she got around to it, but this argument misses the point that the judgment on liability obtained in November 2020 was a necessary jurisdictional requirement before she could do so.

[12] See Van Wyk v Santam Bpk 1997 (2) SA 544 (O), at 546 G- 547 F, in which the court held that the standard of proof is not as high as it will be when the action goes on trial. The *quantum* of evidence required by the Court at this stage in order to be able to direct an interim payment will vary from case to case and according to the circumstances of each case. One of the considerations which will be weighty is the extent of facts in dispute as well as the nature of these facts . In that matter where a reader of the originating affidavit was referred to the medico legal reports already filed of record, criticism levelled against the applicant 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.

the current year." Further, it has not been suggested that the respondent, or the Department of Health rather, does not have the means at its disposal to enable it to make the interim payment. (Indeed, it is a sad reality that millions of rands are being paid out by the Department as damages for medical malpractice claims of a similar nature.)

[28] The delay in the finalisation of the action in total at its last enrolment upon trial is also a very relevant factor in justifying the applicant's entitlement to an interim payment. Even though the respondent denies that conduct on her part was causal to the applicant's predicament of the child needing treatment now and not being able to finance it herself whereas the payment of these damages will happen as a certainty albeit at some uncertain stage when the matter serves before court again for the quantum hearing, the fact of the delay itself and this court's inability to hasten this moment in any practical manner (see sub-rule (7)) justify the grant of the remedy in favour of the applicant. The stumbling block it appears is the fact that at this late stage in the day, the respondent by her own admission has not yet filed expert reports. Mr. Dukada suggested during argument, when I asked him if there was any reason why I should not overlook the technical objection in respect of the claimed lack of urgency and deal with the merits of the application itself, that the respondent will be prejudiced because, in the absence of any assessment by her own experts, she could not weigh in on the reasonableness of the estimated costs of the child's treatment being claimed even in the interim. This prejudice, apart from not being a basis to oppose a rule 34A application, is however in my view of her own doing and was certainly not pleaded in opposition to the present application.[13]

[29] Quantum and merits were not separated at the first enrolment of this matter upon trial, and it is further clear that in prior case management directives issued by this court the respondent was prevailed upon to get on with the filing of these. She has still not done so and believes it to be her prerogative to do so when she

[13] It would be absurd indeed if the respondent could ward off a rule 34A application by claiming that sh e cannot assess the reasonableness of the interim payment because she has not briefed her own experts , whereas it is exactly because of her tardiness in this respect that the payment has become necessary to do justice to the adverse situation.

feels it appropriate. The peremptory time limits provided for in amended rule 36 (9) however make it abundantly plain that she missed the boat on the earlier occasion of the set down of the trial (when both merits and quantum were to be determined) and probably caused the present delay resulting in the trial court doing the next best thing in line with the practical objectives of judicial case management by severing quantum from the mix and allowing for this aspect to be determined down the line once the respondent is better placed to consider this aspect. Self-evidently she is not yet there. Nothing more needs to be said about this unfortunate state of affairs save that I do not accept the purported taint against the applicant that she has dragged her heels or that she has not been *bona fide* or has manufactured a basis to approach this court for the present relief. Even after the applicant explained away an obvious misinterpretation that a further postponement of the quantum hearing was the premise for the application, Mr. Dukada continued to argue the respondent's case on the misunderstood basis.

[30] Returning to the aspect of urgency, there is merit in the submission made on behalf of the respondent that the applicant has not strictly complied with the provisions of rule 6 (12) (b) which require in respect of urgent applications that every affidavit filed under the subrule shall set forth explicitly the circumstances which render the matter urgent and to say why the applicant will not be afforded substantial redress at a hearing in due course. The applicant in justifying urgency appears to have missed the point that the inherent or relative urgency that justifies the need for the interim payment is different from the level of urgency that warrants the matter being heard earlier than it would in the ordinary course or attenuating the relevant time frames or dispensing with the usual forms or service. The subrule has in mind that this kind of application (i.e., a professed urgent one) is bound to prejudice the party at the receiving end of such abridgment etc. *In casu*, for example, the respondent was prevailed upon at very short notice to file an answering affidavit although no complaint was raised by her in this respect either in her answering affidavit or on her behalf by Mr. Dukada in argument. (There was however a random reliance on the applicant's failure to have strictly

complied with the provisions of rule 6 (12) by failing to address the aspect of insubstantial redress to her unless she could be heard on an urgent basis).

[31] The obvious effect of launching the application as one of urgency (with no express justification why the usual forms and time frames were to be dispensed with in all the circumstances) is that the applicant's needs were prioritised over other litigants waiting their turn in line for the hearing of their matters.[14] The applicant never stated why it was necessary at all for the matter to be heard in the midst of a very busy Easter recess. I agree that whereas applications of this nature (for interim payments in like actions where the child has suffered permanent and irreversible brain damage and consequently cerebral palsy as a result of the negligence of public health staff during the course of the child's birth and is in need of appropriate treatment pending the finalisation of a delayed trial) inherently carries with it an element of urgency, and that the interests of a child are always relatively urgent and obviously of paramount importance, that it was entirely unnecessary to have caused this matter to be heard under the mantle of urgency during the recess whereas it could have been entertained during term, as an ordinary interlocutory application, with the permitted expedition that accompanies such an application.[15]

[32] The question is whether this justifies the striking of the matter from the roll. Mr. Dukada suggested that I might order either that or permit the matter to be continued in the normal manner.

[33] An important consideration in this respect is that the present application was issued as an interlocutory one first and foremost. An applicant is entitled in

[14] See my opinion expressed in National Ship Chandlers (Natal) 1989 (Pty) Ltd v Wayne Ellis and Another, Case no. 542/18 PE, Reasons dated 6 April 2018, at [35] that:
"When an applicant insists on dealing with a matter on an urgent basis there is not only inconveni ence to the respondent, but to the court as well as litigants and practitioners making demands on its time and resources. Other litigants (and their representatives) waiting for their matters to receive attention are also compromised by the queue being jumped as it were by a litigant making their subjective emergency everyone else's concern."

[15] I dealt with the unique nature of such applications in Farrington v Farrington Farming (Pty) Ltd and Others v Volcano Agrosciences (Pty) Ltd and Another; In re: Frikton CC v Chris Hani District Municipality (75/2008, 3245/2009 [2010] ZAECGHC 134 (18 March 2010) at [27] – [42].

an interlocutory application at own risk to impose time frames regarding the exchange of papers and the hearing of these matters and to bring such a date forward with due regard to the exigency of the relief sought in each peculiar instance. Indeed, the cumbersome procedure of an opposed application is discarded due regard being had to the particular exigency, it being up to the respondent to object to any perceived prejudice. The recent insertion of rule 37A to the Uniform Rules also permits a case management judge at a case management conference to give directions for the hearing of opposed interlocutory applications by a motion court on an expedited basis.[16]

[34] Rule 6(11), which is an exclusionary sub-rule, (distinguished from the rest of rule 6) provides a *sui generis* model and procedure for simple interlocutory and other applications incidental to pending proceedings. It states as follows:

> "Notwithstanding the aforegoing sub-rules, interlocutory and other applicatio ns incidental to pending proceedings may be brought on notice supported by such affidavits as the case may require *and set down at a time assigned by the Registrar or as directed by a Judge*." (Emphasis added)

[35] There is no prescribed form of notice of motion for interlocutory applications, but the somewhat cumbersome procedure laid down in rule 6(5) need not be followed where parties are already litigating.[17] Further, although the sub-rule is silent as to the procedure to be adopted when such an application becomes opposed with regard to delivery of notice of intention to oppose or the filing of answering affidavits, it appears that answering and replying affidavits, when these are necessary to be filed, should be filed within a reasonable time[18]The applicant can prescribe any reasonable period he deems fit between delivery of such an application and the hearing of it although he does so at his own risk as the respondent may argue that he has not had an inadequate

[16] See sub-rule (12) (e).
[17] See Herbstein and van Winsen, the Civil Practice of the High Courts of South Africa, 5 th Ed 2009, at 424, and the authorities referred to therein.
[18] See Gisman Mining and Engineering Company (Pty) Ltd (in liquidation) v LTA Earthworks (Pty) Ltd 19 77 (4) SA 25 (W) at 27 H – 28 A.

opportunity to opposethe application.[19]

[36] The parties are therefore left somewhat at large to make their own rules relating to the delivery of documents for purposes of an interlocutory application, but if a court is not satisfied that the application is ripe for hearing when it comes before it, either because the Respondent has not been afforded adequate time in which to deliver an answering affidavit, or because heads of argument are required to be filed, appropriate directions may be given as to the arrangements for the hearing of such applications. The risk envisaged may entail nothing more than that the application is removed from the roll or postponed, with the applicant to pay the costs.

[37] In practice interlocutory applications are routinely set down on the unopposed motion court roll and the future conduct of the matter determined with reference to time frames reached between the parties, alternatively directions being issued by the court as and when circumstances dictate such intervention. The new rule 37A (12) (e) confirms the desirability of such applications being expedited on the motion court roll in pursuit of effective case management.

[38] In this instance, since the respondent raised no objection to the short time frames set by me but after counsel provided me with their own suggestions, and although the application should ideally have been heard during term, in my view the application was otherwise in substantial compliance with the provisions of rule 6 (11) and was required to be heard with the necessary expedition that the matter calls for. I could have directed that the matter be heard other than on a date during recess, but I elected to hear it when I did, having regard to the obvious exigency which will remain incidentally should I strike the matter from the roll.

[39] Therefore, despite the respondent's objection taken to the applicant's less than perfect papers, again raised mechanically in my view, I am not inclined of the view that she or her attorneys have made themselves guilty of any abuse of process by having launched the application in the format it was, or by having had the benefit of the matter being argued during recess such as to warrant the striking

[19] See SA Metropolitan Lewensversekeringsmaatskappy Bpk v Louw 1981 (4) SA 329 (O) at 332 B – C.

off of the matter. The respondent has not complained of any inconvenience in this respect.

[40] On the issue of costs, I am satisfied that the applicant has been substantially successful, and these should follow the result. The applicant has prayed for costs on the scale of attorney and client. In my opinion punitive costs are indeed justifiable due to the obstructive approach adopted by the respondent who as a responsible steward of public funds should not be unnecessarily opposing applications simply for the sake of doing so. In an application of this nature the court would be greatly assisted by meaningful representations that promote a just and equitable determination of the interim payment especially where there is no suggestion that the damages the applicant says are likely to be recovered fall to be assailed on any real basis upon trial.

[41] The only remaining aspect is to note that I raised with Mr. McKelvey my concern that in safeguarding the interim payment the sum advanced should be administered through a trust established for the benefit of the child, which is an inevitability in any event once the court finally pronounces on the quantum. He agreed that this is the appropriate thing to do and suggested that if I were inclined to grant the applicant's motion that the parties should be provided an opportunity to prepare a consensual draft order to accommodate the reservations of the court in this respect.

[42] I intend to issue my order in the meantime however, to be supplemented in due course with the proposed draft.

[43] In the premises I make the following order:

1. The respondent is ordered to pay to the applicant the sum of R5 000 000.00 (five million rands) as an interim payment.
2. Such amount is to be paid within fifteen court days of this order.
3. The parties are directed within 5 days to provide a consensual draft

order proposing the creation or establishment of an appropriate Trust to administer the interim payment on behalf of the minor child pending the finalisation of the action, and ultimately the damages that fall to be awarded.

4. If the parties cannot agree on the terms of such a draft or wish to make further submissions concerning the necessary safeguards to be put in place as envisaged by rule 34A, they shall communicate their intention in this respect to the Registrar and make appropriate arrangements for the matter to be enrolled for this aspect to be addressed and shall in that event supplement their papers if necessary and/or file written heads of argument.

5. In the meantime, the interim payment shall be paid to the applicant's attorneys to be invested in an interest-bearing account in terms of section 86 (4) of the Legal Practice Act, No. 28 of 2014, and to make payment of any reasonable expenses or disbursements for the benefit of the minor child as a trustee would have been able to do pursuant to the objects of the envisaged Trust, and 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. The respondent/ defendant shall be liable for the costs of this application on the scale of attorney and client.

B HARTLE

JUDGE OF THE HIGH COURT

DATE OF APPLICATION: 7 April 2021

DATE OF JUDGMENT: 4 June 2021

*Judgment delivered electronically on this date by email to the parties.

APPEARANCES:

For the plaintiff/applicant: Mr. C McKelvey instructed by Nonxuba Inc. of Rivonia (Mr. Nonxuba).

For the defendant/respondent: Mr. P Dukada instructed by the State Attorney, East London (ref. Mr. Mgujulwa).