IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case no: 104/2018

In the matter between:

B.E.M Applicant

and

THE MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH OF THE FREE STATE PROVINCIAL GOVERNMENT Respondent

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CORAM: WRIGHT AJ

HEARD ON: 5 AUGUST 2021

DELIVERED ON: 12 August 2021

INTRODUCTION

[1] The Applicant instituted action against the Respondent on behalf of her minor son, whom I will only refer to as K, claiming damages following alleged negligence of employees of the Respondent during the birth of K at a public hospital. He has since been diagnosed with cerebral palsy. On 4 February 2020 the parties settled the merits of the claim and the Respondent conceded liability for 80% of the proven or agreed upon damages. No trial date has so far been set for the adjudication of the *quantum* of the Applicant's claim.

[2] In the main action the Applicant claims damages under the following headings:

(i) Estimated Future Hospital, Medical and Related Expenses;

(ii) Future Loss of Earnings / Loss of Earning Capacity / Loss of Employability;

(iii) General Damages for Pain and Suffering, Loss of Amenities of Life, Disability and Disfigurement;

(iv) Cost of a Trustee.

[3] The Applicant launched an application in terms of Rule 34A for an order directing the Respondent to effect an interim payment towards the Applicant's claimed damages in the amount of R 2 500 000.00. The application is opposed.

RULE 34A

[4] Rule 34A allows for interim payments in respect of claims for medical costs and loss of income arising from physical disability or the death of a person.

[5] In a letter dated 3 March 2020 addressed to the State Attorney in Bloemfontein, the Applicant's attorneys requested the Respondent to make an interim payment in the amount of R 2 500 000.00. This was shortly after the merits were settled between the parties. The letter was only responded to on 13 May 2020, with the Respondent's attorney indicating that he awaits written instructions from client. Whether such written instructions were ever received we do not know as no further correspondence was apparently forthcoming. The current application was then only issued around 15 months later.

[6] In the letter it was stated on behalf of the Applicant that the interim payment then requested only related to the *general damages* portion of the Applicant's claim.[1] The premise of the request as set out in the letter was of course wrong. Interim payments may only be ordered in relation to claims for medical expenses and loss of income. In as far as this might have been the reason why no further

[1] *". . . at this stage we only request the portion relating to general damages*".

responses were received from the Respondent, the Respondent would have been justified in denying the request. It is of course regrettable that the State Attorney's office did not indicate such. In as far as the specific attorney in the Bloemfontein office of the State Attorney neglected to or refrained from further communicating with the Applicant's attorneys, for whatever reason, present as unprofessional. No explanation is before court as to why the attorney did not convey his client's instructions, whatever those might have been, to the Applicant's attorneys as promised in the one email communication which he did send.

[7] In the application itself the Applicant correctly focused her request on immediate and recurring medical and related expenses.[2] In the answering affidavit the Respondent attacks the basis on which the application is brought, stating that it the Applicant incorrectly requests an interim payment in regard to general damages. The Respondent is wrong on this point, as should be evident from a clear reading of the whole of the Applicant's founding affidavit. I assume that the Respondent's view in this regard emanates from the wording of the earlier letter of demand. I am however satisfied that the application correctly focusses on medical expenses as provided for in Rule 34A.

[8] In terms of subrule (5) no order shall be made unless it appears that a 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. In his answering affidavit the Respondent relies on the provisions of this subrule as one of the grounds on which the application is opposed.[3] It is not necessary to adjudicate this point as the Applicant ran into trouble on another more fundamental aspect. Suffice to point out that the Respondent may well have failed to properly present his case

[2] Paragraph 23 of the Founding Affidavit.

[3] The relevant portions of paragraphs 18, 19 and 20 of the Answering Affidavit read as follows:

[18] "*. . . it is now a renowned fact that the National Department of Health, not even to speak of the provincial departments, is in a financial crisis where it concerns claims of this nature and the pay out of claims and/or judgments against it*."

[19] "*The Department of Health therefore does not have the means to pay interim payments*."

[20] "*The Defendant is also not insured in respect of the Plaintiff's claim and . . . does not have the means at its disposal to enable it to make such an interim payment*."

relating to the lack of means to pay any amount in the interim. The answering affidavit was deposed to by the Respondent's attorney,[4] without any confirmatory affidavit attached. Surely it would have been expected of the Respondent himself, or some or other official in his/her department, to pertinently address the issue of lack of resources, substantiated in some way or form.

[9] The Applicant's dilemma lies in the peremptory provisions of Rule 35(2) which provides the following:

"*. . . 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*." [own emphasis]

[10] The amount of the damages claimed by the Applicant in the main action is set out in her founding affidavit as well. She grounds her application on the opinions and recommendations of alleged experts. An actuarial report is attached to the founding affidavit, containing calculations relating to K's loss of income[5] and future medical expenses. The amounts used in the actuarial calculation for future medical expenses are dependent on the contents of reports by experts. Although names of experts appear in the appendix to the actuarial report alongside a description of their respective occupations, the actuary did not include any reference to the dates of the reports he relied on or the relevant paragraphs in the reports he used.

[11] This lack of detail crept through to the application papers. Under the heading "***MEDICAL REPORTS AND RECOMMENDATIONS BY THE MEDICAL EXPERTS FOR THE MINOR CHILD***" the Applicant makes averments relating to certain experts, referring to them by name and occupation, without any reference as to dates of reports detailing the recommendations she rely on.[6] The reports were not attached nor were references provided to the specific

[4] Incidentally the same attorney who failed to write any follow-up letter concerning the Applicant's request for interim payment, as discussed herein earlier.
[5] I point out here that the amount claimed should more correctly be referred to as a loss of earning capacity.
[6] The relevant portion of paragraph 29 reads as follows: ". . . *I shall rely on the recommendations of the experts nominated hereunder . . .*"

portions of the individual reports relied on.[7] Essentially therefore, the Applicant failed to present documentary proof as provided for in Rule 35(2).

[12] During oral argument counsel for the Applicant submitted that it should be accepted that the Applicant relies on the expert reports discovered and filed in the main action in terms of Rule 36(9)(a) and (b). His submission followed questioning from the Bench and was not set out in his heads of argument. There is indeed a bundle of expert reports in the court file. Unfortunately for the Applicant, her application papers contain no reference to the reports filed in terms of Rule 36(9)(b), and was already stated, none of the reports were annexed to her affidavits.[8]

[13] In the matter of **Van Wyk v Santam Bpk**[9] Hancke J was also confronted with an application in terms of Rule 34A for interim payments without any actual expert reports or documentary proof having been attached to the application papers. After considering the wording and purport of the deeming provisions of subrule (2), Hancke J came to the conclusion that in that particular case the non-compliance with subrule (2) was no obstacle to the success of the application.

[14] The facts in the present matter differs from those in the **Van Wyk** matter in at least the following respects:

(i) In the **Van Wyk** matter the applicant pertinently referred to medico-legal reports as provided to the respondent earlier, whereas no such averment is contained in the Applicant's papers *in casu*;

[7] It is assumed that the Applicant, although not stating it, relied on the various reports discovered on her behalf in terms of Rule 36(9)(b) in the main action. The entire court file relating to the main action was placed before me.
[8] Not even after this failure was pounced on by the Respondent in the answering affidavit.
[9] **1997 (2) SA 544 (OPD).**

(ii) In the **Van Wyk** matter the parties' legal representatives have essentially come to an agreement regarding various amounts, whereas the parties in the present matter are clearly miles away from any such agreement.[10]

[15] A reading of the whole of the founding affidavit reveals that the Applicant is relying on only portions of expert reports.[11] This compounded her dilemma and further highlighted her non-compliance with subrule (2). In no way was the Respondent placed into a position to properly consider the "evidence" forming the basis for the Applicant's assertions.[12] During his oral submissions, Applicant's counsel admitted that the non-compliance with the subrule had not been considered.[13] This is incomprehensible, considering that the Respondent attacks the non-compliance in the answering affidavit as well as in their heads of argument. Any diligent legal representative would, and should, have realised the dilemma. At no stage was a request made for condonation for the failure to comply with subrule (2), not even when I pressed counsel as to whether there is some way in which he can overcome this shortfall in the Applicant's case.

[16] Counsel for the Applicant started his oral argument by indicating that affidavits have (now) been obtained from the experts relied on for purposes of the application and that he holds instructions to hand them up. The Respondent objected to this procedure. Dealing with the objection, counsel for the Applicant indicated that during the previous week (during an earlier court date) he personally discussed the affidavits with one of the Respondent's counsel and that their objection was already voiced then. When I enquired why no attempt was made to then prepare a formal application for leave to place the affidavits

[10] In fact, it would appear as if even the nature and extent of K's deficits and needs may be in issue.

[11] So, for example it is alleged that "*the recommendations set out . . . do not represent the entirety of the recommendations made by the experts*" and that the Applicant "*identified the **most essential** costs relating to future medical and related expenses, modalities and services for the immediate period of two years from date hereof*".

[12] The founding affidavit essentially contains double hearsay: the Applicant makes allegations regarding the contents of an actuarial report containing calculations based on portions of reports from other experts.

[13] Counsel specifically said: "*We did not consider it*". It was not explained how the "we" is, but from the context of his submissions I inferred that he meant himself and the Applicant's attorney(s).

before court or why the affidavits were not presented by means of a supplementary affidavit, counsel responded that he “did not think of that”.

[17] I agree with the submissions made on behalf of the Respondent on the issue. Handing up affidavits at such a late stage prejudices the Respondent severely in that they would be forced to respond thereto without any time to even read, much less properly consider, the affidavits. The Applicant did not attempt to address the dilemma by requesting a postponement of the matter to allow the Respondent and its legal representatives time to peruse, and respond to, the affidavits. The Respondent dealt with the lack of compliance with subrule (2) pertinently in the answering affidavit as well as their heads of argument. To reiterate: The Applicant’s legal representatives should have been alive to the dilemma relating to the lack of documentary proof and could, and should, have addressed it earlier. And no formal application was made to explain why the affidavits did not form part of the initial application papers or for condonation for the Applicant’s failure to follow proper procedure in this regard.

[18] Applicant’s counsel submitted that he could choose to present the affidavits at the hearing or have the experts testify. He did not present a legal basis for the submission. This submission runs into the same practical dilemma as the earlier one: either way the Respondent would be prejudiced in that it would then be unable to prepare timeously for the hearing and would not be in a position to respond to the affidavits. And in fear of repeating the point: The Applicant did not request condonation for her non-compliance with subrule (2) or the manner in which it was attempted to overcome the shortcomings in procedure.

[19] The Applicant’s approach to the dilemma also loses sight of the well-known principle that an applicant should make out his or her case for the relief sought in the founding affidavit. From the start the Applicant failed to comply with the peremptory provisions of subrule (2). The application papers contain no explanation as to why the Applicant failed to attach documentary proof of her allegations to the application papers (other than the actuarial report). In as far

as the failure to deal with the expert reports in an acceptable manner lies with the Applicant's legal representatives, they did not present this as an excuse on behalf of the Applicant nor did any one of them depose to an affidavit to explain that he/she is at fault (and that the application should not be dismissed following the blunder by the Applicant's legal team).

[20] In the premises, I denied the request to hand up the affidavits. Arguments continued with the application papers as is.

[21] Consequently, the main problem with the application remained: non-compliance with the peremptory provisions of subrule (2). Applicant's counsel implored me to consider the application favourably regardless, relying on the provisions in the Constitution and the Children's Act dealing with the principle relating to the best interests of the minor child, K.[14]

[22] In as far as the interests of a minor child are paramount in any proceedings regarding such child, it should not, to my mind, be used as an excuse for non-compliance with peremptory regulatory provisions.[15] To think otherwise, could easily lead to a situation where parties and their legal representatives abandon compliance with rules, present improper papers and then hide behind the "best interests of the child" principle. This may on occasion be allowed when a litigant acts in person, but the Applicant is represented by both an attorney and counsel.

[23] The application cannot succeed. This is however not the end of the road for the Applicant. She will always be entitled to launch another application for interim payment, hopefully then in the proper form and complying with all relevant peremptory rules.

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[14] With reference to **Kotze v Kotze 2003 (3) SA 628 (T)** at 630 G.

[15] In **Trans-African Insurance Co Ltd v Maluleka 1956 (2) SA 273 (AD)** it was generally stated at 278 F that: "*No doubt parties and their legal advisors should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice*."

[24] I find it necessary to comment on a worrying aspect of the manner in which the Respondent seems to be conducting himself in the action proceedings. The merits of the Applicant's claim had been adjudicated more than a year ago. To date, no expert reports have been filed by the Respondent and no indication was given as to when they intend to do so. In the answering affidavit the Respondent alleges that they are considering amending the Plea to include allegations relevant to the so-called "public health care" defence. The answering affidavit provides no cogent reason as to why this has not been done yet. Considering the allegations that the Respondent in any event do not have the financial resources to pay medical negligence claims, one cannot help but wonder whether the Respondent is not playing for time. Of course, without more, I cannot make any definite ruling in this regard. However, the Respondent and his legal representatives will be well advised to remember that the merits of the claim had been settled in the Applicant's favour.

[25] It appears that K has not received the treatment or medical care his condition necessitates. He is now 10 years old. The Applicant alleges in this regard:

> ". . . *the only reason why my minor child has not undergone the recommended treatment and why the recommended equipment has not been purchased to date hereof is because I am not in a financial position to afford same. It is also not possible to obtain all the recommended treatment and assistive devices at the government hospitals and/or a person is placed on a long waiting list and/or cannot provide the treatment and assistive devices either immediately or at all*".

The Applicant did not present corroboration for her allegations on this point and the Respondent denies that K cannot be treated at a public health facility. In as far as K has not been treated for his cerebral palsy at a public health care facility, it is regrettable. This situation needs to be addressed properly by both parties as soon as possible.

COSTS

[26] Before I consider cost issues relating to the application itself, it is necessary to deal with the costs of a previous court date. Just a week prior to oral arguments before me, the matter was also on the roll as an opposed motion. The Applicant filed her heads of argument timeously as per the relevant practice directive. No heads of argument were however filed by the Respondent prior to the initial date reserved for the hearing of oral arguments. The presiding judge that day declined to hear arguments in the absence of heads of arguments from the Respondent. The application was postponed, and costs stood over for later adjudication.

[27] As it turns out, counsel for the Respondent drafted heads of argument timeously and delivered it to the State Attorney's office timeously. For some reason, the heads of argument were then served on the Applicant's attorneys, but never filed at court. The situation remains unexplained. What is clear, however, is that the *Respondent* played no part in the failure to *file* heads of argument in terms of the practice directive. Unfortunately, the failure by the State Attorney's office to file the prepared heads of argument resulted in a postponement.

[28] Counsel for the Respondent referred to the failure to file the heads of argument as a "technical fault" and suggested that the costs occasioned by the postponement should follow whatever finding is made as to the merits of the application. At the time it presented as a possibility. And surprisingly, counsel for the Applicant agreed with the suggestion, probably expecting his client to be successful in securing the relief claimed.

[29] Considering the failure of the application and the basis on which it fails, it would be unfair to have the costs of the postponement follow the merits. In the circumstances, the Applicant cannot be expected to bear any of the costs occasioned by the postponement. The Respondent should bear liability for payment of the costs occasioned by the postponement. I am of the view that it would further be a just exercise of my discretion to order that the costs of the postponement be payable on the scale as between attorney and client to show

the Court's displeasure with the failure to fully complying with the relevant practice directive.

[30] As for the costs of the Rule 34A application, it was argued on behalf of the Respondent that costs should follow success and that the Applicant should pay the costs of the application (including the costs of opposition). Applicant's counsel suggested that each party should pay his/her own costs. The only reason advanced for this suggestion was that the Applicant is unemployed and will not be able to pay any of the costs. Unfortunately, the Applicant's lack of financial means does not present as cogent reason for ordering that the Respondent, who emerges victorious, should be denied his costs. The opposition was to my mind not unreasonable or vexatious, and no argument was advanced to the contrary.

[31] Counsel for the Respondent graciously indicated that the Respondent undertakes not to have the cost order taxed or executed prior to the conclusion of the action proceedings. I accept counsel's assurances in this regard and do not find it necessary to include any reference thereto in the order.

[32] The Respondent's heads of argument were drafted by one counsel, Mr *Thompson*.[16] At the hearing of argument, two counsel appear, namely Mr *Thompson* and Mr *Hellens SC*.[17] I was not asked to include the costs of two counsel in any order. And I am of the view that the application was essentially simplistic enough that it warranted the attention of only one counsel. (I do not find it necessary to indicate whether it should have been senior counsel or the more junior counsel.) In fact, on the previous court date, only Mr *Thompson* appeared on behalf of the Respondent.

[33] One further aspect relating to costs remains that to my mind deserves to be considered. The Applicant surely did not draft her own application papers. In as

[16] Only his name appears on the heads of argument.
[17] Mr *Hellens* SC argued the matter.

far as the application is dismissed for non-compliance with the clear provisions of Rule 34A this cannot be laid before her own door. I attempted to engage counsel on this point, but Applicant's counsel merely stated that the Applicant will not be financially able to pay any costs. This may be so, but it does not serve as a reason as to why the legal representative(s) who drafted the founding affidavit, replying affidavit and the "expert" affidavits which they intended to hand up, should be entitled to charge full fees despite the acknowledged failure to pay proper attention to the clear provisions of subrule (2) (as raised by the Respondent in opposition to the application). It is unfortunate, but an attorney's and/or counsel's lack of due diligence should not be awarded, tacitly accepted or encouraged.

[34] Costs are always within the discretion of the presiding officer. I consider it just to include an order that Applicant's counsel and attorney will not be entitled to charge any fees relating to the drafting and preparation of the replying affidavit or the affidavits relating to experts.

ORDER

[35] In the premises, I make the following orders:

1. The application for interim payment is dismissed;

2. The Applicant is to pay the costs of the application, including the costs attendant upon the Respondent's opposition, subject to the following:

   2.1 The Respondent is only entitled to the costs of one counsel for the drafting of the Respondent's Heads of Argument as well as for the representation of the Respondent during oral arguments;

2.2 The Respondent is liable for all costs occasioned by the postponement of the application on 29 July 2021, on the scale as between attorney and client;

2.3 The Applicant's counsel and attorneys shall not be entitled to any fees and disbursements relating to the preparation and drafting of the Applicant's Replying Affidavit;

2.4 The Applicant's counsel and attorneys shall not be entitled to any fees relating to the preparation and drafting of any affidavits deposed to by experts after the date on which the Replying Affidavit was filed.

GJM WRIGHT, AJ

For the Applicant: Adv. T. Mosenyehi
Instructed by: N.J. Belcher Attorneys
c/o Rampai Attorneys

For the Respondent: Adv. M. Hellens SC
Adv. D.R. Thompson
Instructed by: State Attorney