Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MTHATHA)

REPORTABLE

Case No: 2728/2019

Date heard: /2023

Date delivered: 04/07/2023

In the matter between:

NONCEBA SOFUTHE obo S **PLAINTIFF**

and

MEMBER OF THE EXECUTIVE COUNCIL FOR THE DEPARTMENT OF HEALTH, EASTERN CAPE PROVINCE **DEFENDANT**

JUDGMENT

Notyesi AJ

Introduction

[1] This is a matter in which the plaintiff is claiming damages in both her personal and representative capacity as the mother and natural guardian of her minor child, A S. The merits were decided in her favour on 8 October 2020. The trial is pending before Nhlangulela DJP concerning the appropriate award of the quantum of damages.

[2] The applicant, relying upon the provisions of Uniform Rule 34A, asked for an order directing the respondent to effect an interim payment in the sum of R20 502 163, alternatively, R15 million. The application was launched on an urgent basis. The respondent opposed the application. On 27 April 2023, I heard the urgent application in the opposed court, and subsequent thereto, on 2 May 2023, I granted the following order with no reason–

> "(1) The applicant is hereby granted leave to proceed by way of urgency in accordance with the provisions of Rule 6(12)(*a*) and (*b*) and that this court hereby condones the non-compliance and departure from the Uniform rules of court;
>
> (2) The respondent is ordered to make an interim payment to the applicant, in her representative capacity, in the sum of R3,200,000-00 (three million two hundred thousand rands) within 30 (thirty) calendar days of this order;
>
> (3) The respondent shall pay interest at the prescribed legal rate should the amount fixed for interim payment remain unpaid within 30 (thirty) calendar days of this order;
>
> (4) The reserved costs of 4 April 2023 shall stand over for determination by the trial court when the quantum of damages is finally determined;
>
> (5) The parties are granted leave to file additional submissions, should they so wish, regarding the reserved costs of 4 April 2023;
>
> (6) The respondent is ordered to pay the costs of this application;
>
> (7) Any party desiring reasons for this order, may request the reasons through the office of the Registrar within 15 (fifteen) days from today."

[3] On 12 June 2023, I was advised by the registrar of this Court that the respondent's attorneys filed a notice requesting reasons for the order. These are my reasons.

Parties

[4] The applicant is the plaintiff in the pending trial, which concerns the determination of the quantum of damages to be awarded consequent to an order dated 8 October 2020 awarding 100% liability on the merits in favour of the applicant. The respondent is the defendant in the pending trial. The parties shall simply be referred to as ‘the applicant’ and ‘the respondent’.

Issues

[5] The questions for determination were–

(a) Urgency of the rule 34A application; and

(b) If urgency is established, whether or not the applicant has met the requirements under rule 34A and the appropriate amount for an interim payment.

Background

[6] The applicant instituted the present application on an urgent basis during March 2023. The application was initially set down for hearing on 4 April 2023. The main relief sought on behalf of the applicant was that the respondent should be ordered to pay to the applicant, in her personal and in her representative capacity (as the case may be), interim damages and/or agreed damages within 30 (thirty) calendar days of the date of the order in the following sums–

(a) Plaintiff (personally) – R500 000

(b) Plaintiff (representative capacity on behalf of her minor child, A) – R20 002 163

[7] In the alternative to the relief set out above, the applicant asked that the respondent should be ordered to make an interim payment in the sum of R15 million or such lesser amount as the court deems meet and to effect the interim payment within 15 calendar days of the grant of the order, and an order that the defendant pay interest on the aforesaid interim payment at the legal rate, from a date 15 days after the date of the order to date of payment.

[8] In support of the relief sought, the applicant alleged in the founding affidavit that the merits of the trial were concluded in her favour and in favour of her minor child and in that regard, the respondent had been ordered to pay 100% of the proved or agreed damages. The order on the merits was granted on 8 October 2020.

[9] The applicant complains, in the founding papers, that although the matter had been ongoing since 2019 and the order on merits was granted on 8 October 2020, the issue of quantum of damages, notwithstanding the resolution of the merits, remains unresolved. According to the applicant, when the question of quantum was set down for hearing on 20 October 2022, the respondent, shortly before the commencement of the proceedings, sought to amend the plea and introduce the 'State Healthcare Defence'.

[10] According to the applicant, given the dilatory nature of the intended amendment, which was only sought at the commencement of the hearing, she instructed her legal team to object to the application for amendment. The applicant averred that the grounds for opposing the proposed amendment included its lateness, and the inherent irreparable harm to her minor child and the interest of justice regarding the right to a speedy trial and quick resolution of disputes. Arising from that objection on the proposed amendment, the respondent brought an application for leave to amend, accompanied by another application for the separation of issues and items of damages which implicated, according to the respondent, the 'State Healthcare Defence'. The applicant opposed both applications. Sequel thereto, the parties were directed to file heads of argument dealing with the issues raised in the two applications. Both the applicant and the respondent filed their heads of argument in respect of those two applications on 4 October 2021 and 13 October 2021, respectively.

[11] The applicant alleged that prior to the unfolding of the events referred to above, at some stage, the parties filed comprehensive joint minutes from various experts. The joint minutes were incorporated by reference to these proceedings. According to the joint minutes by the experts, there is a high degree of unanimity and agreement in respect of the quantum of damages, especially for the minor child and in respect of what would constitute fair, reasonable and appropriate damages.

[12] The applicant avers that, at the hearing on 20 October 2022, she was ready to proceed with the determination of quantum, and in that regard, the applicant had arranged for the availability of her quantum experts. However, the respondent, for

the reason of the intended amendment, was not ready to proceed with the trial on the merits.

[13] Realising that the matter would not be proceeding, the legal representatives engaged in various discussions regarding those issues that the respondent had belatedly sought to introduce and as a result of those extensive communications, negotiations and discussions, agreements on a large portion of items of damages, were agreed to and those agreements between the parties form part of the reports and joint minutes. The aforesaid agreements regarding fair, reasonable and appropriate damages have been incorporated in these proceedings by reference, and therefore they form part of the record in this application.

[14] According to the applicant, the aforesaid agreements and common cause matters were referred for calculation by the respondent and recorded by Manala Actuaries, who then prepared a report dated 10 September 2021 on the instructions of the respondent's legal representatives. The applicant had alleged that the report, which is an exhibit before Court, reflected the agreed liability of the respondent in the following sums for the minor child–

(a)	General damages	-	R22 000 000
(b)	Loss of earnings	-	R1 175 947
(c)	Future medicals	-	R16 626 216
	Total claim	-	R20 002 163

The future medical costs were broken down as follows–

(c.1)	Occupational therapy	-	R1 642 080
(c.2)	Physiotherapy	-	R1 285 522
(c.3)	Nursing	-	R6 782 732
(c.4)	Orthoptist	-	R1 501 778
(c.5)	Speech therapy	-	R 890 931
(c.6)	Architecture (described as instructed amount)		R1 400 000
(c.7)	Dietician	-	R 274 942
(c.8)	Dentist	-	R 253 547
(c.9)	Urology	-	R 221 184
(c.10)	Educational psychology	-	R 345 632
(c.11)	Orthopaedic Joint Minutes	-	R 322 775

(c.12)	Vehicle (based on the trade-in value of R369 500 as instructed)	-	R1 705 094
Total		-	R16 626 216

[15] According to the applicant, the amount does not include the costs of protection of funds which is usually at 7.5% of the capital award.

[16] The applicant further averred that except in respect of architecture expenses in respect of which the respondent had later sought disputation and other few items referred to in summary, the parties were generally in agreement about the damages. On a further report produced by Manana Actuaries, apparently on further instruction from the respondent's legal representatives, there was a further quantification of damages, and that was embodied in a further report dated 12 September 2021.

[17] According to the latter report, the total payment in respect of the minor child is reasonably estimated at R15 168 105 (excluding the costs of protection of funds), and the future medical costs summary breakdown, which is itemised and totals R11 792 158. The applicant further avers that in terms of the agreements and submissions regarding the quantum of damages, there is a high degree of unanimity and agreement between the parties that the disputation of damages is a sum less than the lower sum of R16 626 216 for medicals and R20 002 163 total should not be considered as reasonable, or responsible, or constitutionally compliant on the part of the respondent. The applicant avers that the disputed items in respect of caregiving costs and the other disputed items, together with costs of protection of funds, would need to be added.

[18] The applicant contended that the marginalised and compromised position of the minor child is comprehensively dealt with in various joint minutes and the reports to which the joint minute relates. Accordingly, the applicant submitted that any delay or interruption in the finalisation of the matter and interruption or delay in the provision of funds which can be administered to the benefit of the minor child for the provision of long overdue necessary treatments and aids and the like, cannot and should not be accepted.

[19] In relation to the delays, the applicant submitted that insofar as the application for leave to amend the pleadings is concerned, the respondent is *dominus litus* and for some inexplicable reasons, the respondent has not advanced the application towards the disposition and that is prejudicial to the minor child. The applicant complains that the respondent has not even made payment of the agreed damages. According to the applicant, evidence was led before the Presiding Judge in respect of certain issues and the matter is now partly heard. The Presiding Judge became unavailable in due course and that resulted in the matter not proceeding towards finality. The application for leave to amend and the related application for separation of certain issues, according to the applicant, has not been heard. There is a delay in the finalisation of the matter of approximately a year and a half from the last day of postponement of the trial and that contributed to the immense prejudice that the minor child is continuously suffering.

[20] Regarding urgency, the applicant submitted that consideration of circumstances pertaining to the minor child must be taken into account, the excessive delays in the finalisation of the issues and the contents of the joint minutes which reflect the condition of the child and the urgent overdue needs of the minor child. In this regard, the applicant contended that the best interest of the minor child should overshadow any objection regarding the urgency of the matter.

[21] In opposing the relief sought by the applicant, the respondent filed an affidavit deposed by Ntethelelo Ziyanda Paulette Khumalo, an attorney of this Court employed by Norton Rose Fulbright South Africa Incorporated. She testified that the applicant filed a defective application for the reason that when the matter was served before Brooks J on 17 March 2023, he found that the matter was not certified as urgent because there was insufficient urgency to warrant the hearing of the matter on a non-motion court day. According to Khumalo, Brooks J directed that the applicant could seek a *rule nisi* with interim relief in motion court with or without invoking Uniform rule 6(12) and upon due notice being given to the respondent. Khumalo contended that the effect of the directive by Brooks J is that the application, in its present form, is unacceptable and, therefore, all the dates furnished by the applicant to the respondent should not apply.

[22] According to Khumalo, the question of an interim payment had been dealt with in the respondent's application of 7 September 2021, and the respondent's application for separation dated 27 September 2022 and the respondent had offered an interim payment to the applicant, which was refused. Khumalo then averred on this basis that the issues should all be heard before Nhlangulela DJP, who is seized with the main trial as an interlocutory application.

[23] Regarding the certificate of urgency, Khumalo averred that the applicant's certificate of urgency is only signed by the applicant's counsel in circumstances when a directive was already issued on 17 March 2023 in which it was clearly stated that there was insufficient urgency to warrant approaching a court on a non-motion court day. Khumalo contended that the matter was not certified urgent as it is required by the Uniform rules. Khumalo proceeded to submit that the matter ought not to have been set down by the applicant for hearing on the unopposed roll of 4 April 2023 and that the applicant was not authorised to dispense with the periods as provided for in the ordinary Uniform rules of court relating to the application. In a nutshell, Khumalo submitted that the matter is not urgent and thus should be struck off the roll.

[24] On the merits, Khumalo has averred that it is common cause that the matter regarding trial on quantum is part heard by Nhlangulela DJP, and that matter is set down for hearing on 26 June 2023. Accordingly, Khumalo refers to the joint letter, which was signed by both parties, and addressed to Nhlangulela DJP dated 1 July 2022. According to Khumalo, Nhlangulela DJP, following the hearing of the evidence on 22 November 2021, advised the parties that he would wait for the judgment in the application which had been brought in the Makhanda High Court under case number 2091/2021 to which the respondent is a party (*MEC for Finance and Others v Legal Practice Council and Others*) as the outcome of that case had the potential to render any judgment in respect of the respondent's application to amend its plea, appealable.

[25] Khumalo contended that Nhlangulela DJP is aware that the Makhanda High Court was due to determine whether the MEC for Health in the Eastern Cape would be allowed to plead that the quantum of damages to be paid to the applicant be

reduced by the medical services and equipment which the respondent can provide and that the payment of damages in monetary form be subject to payment in instalments. According to Khumalo, the respondent did offer to pay an amount of R500 000, as an interim payment, for the reasons of the envisaged delays in the trial for quantum. The offer of interim payment, according to Khumalo, was not a proposal to settle any dispute, and it was an offer to relieve prejudice suffered by the applicant due to the delay in finalising the matter.

[26] According to Khumalo, the respondent was not appraised of the reasons why the applicant would refuse interim payment, which would alleviate the minor child's medical condition. Khumalo alleged that the offered interim payment of R500 000 was rejected without a rational basis. She further alleged that the respondent had attempted to arrange for the examination of the minor child to commence some form of treatment for the reasons of the continued alleged prejudice suffered by the minor child. However, the applicant refused to attend any hospital for the purposes of determining the most suitable treatment for the minor child.

[27] Khumalo disputed that the respondent had caused unreasonable delays in the finalisation of the applicant and her minor child's claim. She suggested that the applicant is partly to be blamed for the delays. Finally, Khumalo contended that the applicant had not taken the Court into its confidence regarding the actual events which led to the launch of the respondent's application to amend its plea and the later application for separation of issues. Khumalo had averred that the respondent made proposals to the applicant, and the applicant rejected those proposals with no valid or proper reasons. She suggested that the offer of R500 000 was even increased to R1,5 million, and the applicant still rejected the offer.

[28] Khumalo contended that the issue of interim payment should be dealt with by Nhlangulela DJP as an interlocutory issue in the part-heard matter.

Contentions of the parties

[29] Mr *Dugmore SC*, counsel for the applicant, submitted that the respondent had delayed the enforcement of the rights of the applicant's minor child to the benefit of

much-needed compensatory damages since the order on the merits on 8 October 2020. He contended that the Court, as the upper guardian of all minors and the Bill of Rights in the Constitution, provide the remedy for the protection of the rights of the minors. Mr *Dugmore* relied on the provisions of the Children's Act 38 of 2005, which, *inter alia*, provides that the rights, that a child has in terms of the Act, supplement the rights that a child has in terms of the Bill of Rights and that all organs of State in any sphere of government and all officials, employees and representatives of an organ of State must respect, protect and promote the rights of children contained in the Act.

[30] Mr *Dugmore* submitted that the Court should take into account that the present application involves the minor child's constitutionally protected rights to prompt effective justice and the partial or interim realisation of rights to be paid damages which are not readily or properly disputed, or which are due in terms of the agreement between the parties' legal representatives. The gravamen of Mr *Dugmore*'s submission is that the respondent has avoided paying any damages to the benefit of the minor child or the applicant personally purportedly by reason of a desire to obtain an amendment impacting on a limited number of issues relating to quantum. Mr *Dugmore* laid entirely, the delays in the finalisation of the trial on quantum on the respondent, alleging that the respondent has failed to take any concrete or effective steps to finalise the issue concerning amendment or to pay to the benefit of the minor child the agreed or appropriate damages on an interim basis. Mr *Dugmore* pointed out that the proposed offers of interim payment by the respondent were woefully inadequate and simply imposed upon the applicant.

[31] Regarding urgency, Mr *Dugmore* submitted that the respondent's dispute of urgency of the matter simply lacks merit for the reason that the constitutionally protected rights of the minor child and the facts of the case reasonably require the grant of the relief on an urgent basis. Mr *Dugmore* submitted that the respondent has effectively obtained a delay of approximately a year and a half in which the applications for amendment and separation have been held in abeyance. He did point out that the finalisation of the trial on quantum is not imminent as it largely depends on the availability of the Presiding Judge and the readiness of the respondent.

[32] On the contrary, Mr *Van der Linde SC*, counsel for the respondent, contended that the trial would not be delayed as the hearing of the application to amend the respondent's plea, which will determine whether the values of the heads of damages are to be paid to the applicant in cash or kind, has been set down for hearing on 26 June 2023. He submitted, in this regard, that it would be inappropriate for this Court to hear the application as the decision of the Court would affect the issue of the quantum of damages to be paid in monetary form to the applicant and the date of such payment would usurp the function of and interfere with the discretion of Nhlangulela DJP, who is seized with the matter. Mr *Van der Linde* conceded, though, that the applicant is entitled to interim relief and submitted that the applicant has failed to show good cause that she is entitled to the amount claimed. He questioned the amount of R20 502 163 and R15 million and submitted that these amounts are not justified, and that the applicant has not led evidence regarding the interim medical treatment and relief that the minor child requires immediately and on an interim basis.

[33] Mr *Van der Linde* contended that the applicant refused to accept interim payments of R500 000 on 30 August 2021 and a later offer of R1,5 million on 3 April 2023 and that such refusal to accept interim payment was not justified by expert reports indicating the immediate and urgent needs of the minor child or why such amounts were insufficient. Mr *Van der Linde* relied on the authority of *V.D obo M.D v Member of the Executive Council, Department of Health, Eastern Cape,*[1] where it was held–

> "Regarding the other required services (apparently vouched for in medico-legal reports already filed of record), the file in action was not even placed before the court, not that the court must wade through the papers and glean this information for itself.
>
> 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 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."

[34] Mr *Van der Linde* submitted that despite the reduced standard of proof in a rule 34A application, the applicant, in this case, has failed to provide any evidence

[1] *V.D obo M.D v Member of Executive Council, Department of Health, Eastern Cape* [2021] ZAECBHC 10 paras 31-32.

which will support the amount claimed in respect of interim payment and that the amount claimed is the entire quantum of the applicant's claim in the main action which is to be held and decided by the Presiding Judge. Mr *Van der Linde* submitted that the mere annexing of the joint minutes of the experts filed in the main action does not constitute sufficient evidence which would allow the Court and the respondent to determine the immediate and interim needs of the minor child. In this regard, Mr *Van der Linde* called for the aid of authority in the matter of *V.D obo M.D v the MEC*[2] where it was stated–

> "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 be 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."

[35] Mr *Van der Linde* contended that the amounts that have been agreed are merely values which are to be used in the exercise of leading evidence regarding the medical treatment and equipment which can be provided to the applicant's minor child if it is successful in the application to amend the plea, in which circumstances the respondent would then lead the necessary evidence regarding the medical treatment and equipment to be provided. Mr *Van der Linde,* in fortifying his point, again relied on the authority of *V.D obo M.D v the MEC*[3] where it was held–

> "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.
>
> In reckoning with the probabilities that this "defence" may succeed at the 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

[2] Above n 1 para 35.
[3] Above n 1 paras 42-44.

> 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.
>
> 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."

[36] Mr *Van der Linde* contended that any value in respect of the applicant's heads of damages, whether agreed or not, does not constitute interim relief and does not absolve the applicant from her duty to furnish the court with the necessary evidence to support her application for interim relief. He, however, conceded that the Court has the discretion to grant interim payment and that such discretion is to be exercised judiciously. Mr *Van der Linde* submitted that the respondent would be allowed to reduce the damages to be paid to a claimant in medical negligence cases by the medical services and equipment, which the respondent can provide and further, whether any damages which were to be paid in monetary form could be made to the claimants in such matters in instalments if such application for an amendment to the respondent's plea to provide medical services and equipment was granted.

[37] I turn to consider the submissions of the parties.

Urgency

[38] Uniform rule 6(12) provides–

"(12)

(*a*) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place in

such manner and in accordance with such procedure (which shall as far as practicable be in terms of these sub-rules) as it deems fit.

(*b*) In every affidavit or petition filed in support of any application under paragraph (*a*) of this subrule, the applicant must set forth explicitly the circumstances which is averred render the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course."

[39] In *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Limited and Others*[4] it was held–

> "The import thereof is that the procedure set out in Rule 6(12) is not there for the taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the applicant must state the reasons why he claims that he cannot be afforded substantial readdress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial readdress in the application in due course. The rules allow the court to come to the assistance of a litigant because of the latter, were to wait for the normal course laid down by the rules, it will not obtain substantial readdress.
>
> It is important to note that the rules require absence of substantial redress. This is not equivalent to irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course, but it may not be substantial. Whether an applicant will not be able to obtain substantial redress in any application in due course will be determined by the facts of each case. An applicant must make out his case in this regard."

[40] Rule 6(12) confers a general judicial discretion on a court to hear a matter urgently. The dominant consideration for the court in determining the issue of urgency should and must always be a question of whether the applicant would be afforded substantial redress at a hearing in due course. If the applicant cannot establish prejudice in this sense, the application cannot be one of urgency, and however, if prejudice is established, other factors come into consideration. The other factors include–

(a) Whether the respondent can adequately present their case in the time available between the notice of the application to them and the actual hearing;

(b) Prejudice to the respondent and the administration of justice;

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[4] *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Limited and Others* [2011] ZAGPJHC 196 paras 6-7.

(c) The strength of the case made by the applicant and any delay by the applicant in asserting his or her right; and lastly

(d) The question of whether urgency is not self-created.

[41] In cases involving minors, the court must have regard to the Constitution and the Children's Act and the nature of the dispute presented. Section 6(1) of the Children's Act provides–

> "(1) The general principles set out in this section guide–
>
> (*a*) the implementation of all legislation applicable to children, including this Act; and
>
> (*b*) all proceedings, actions and decisions by any organ of state in any matter concerning a child or children in general."

[42] Section 6(2) of the Children's Act provides–

> "(2) All proceedings, actions or decisions in a matter concerning a child must–
>
> (*a*) respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 and the rights and principles set out in this Act, subject to any lawful limitation;
>
> (*b*) respect the child's inherent dignity;
>
> (*c*) treat the child fairly and equitably;
>
> (d) protect the child from unfair discrimination on any ground, including on the grounds of the health status or disability of the child or a family member of the child;
>
> (*e*) recognise a child's need for development and to engage in play and other recreational activities appropriate to the child's age; and
>
> (*f*) recognise a child's disability and create an enabling environment to respond to the special needs that the child has."

[43] In this case, I have considered the fact that the application concerns the minor child's constitutionally protected rights to prompt and effective justice and interim realisation of rights to be paid damages which are due in terms of agreements between the parties legal representatives, experts and the reports which are readily available. I have considered the fact that both parties agree that the child should not suffer perpetual prejudice and that the child is prejudiced by the delays in the trial regarding quantum. This Court also took into account that the respondent was able

to produce a substantive affidavit within the time provided in the notice of motion and before the actual hearing.

[44] I also considered that Brooks J only determined in the directive that the matter was not urgent and could not wait for an ordinary motion court day. Effectively, Brooks J agreed that the matter could be enrolled on a motion court day, provided that notice was given to the respondent. I quote from the directives of Brooks J issued on 17 March 2023–

> ". . . Insufficient urgency is shown to warrant approaching a court on a non-motion court day."

[45] Similarly, Brooks J concluded in the directive–

> ". . . The applicant can seek a rule nisi with interim relief in any motion court with or without invoking Rule 6(12) of the Uniform Rules of Court and upon due notice being given."

[46] Indeed, the applicant enrolled the matter for hearing on Tuesday, 4 April 2023, which was an ordinary motion court day. The applicant needed no directive to enrol a matter on a motion court day. The interpretation of Brooks J's directive by the respondent has no merit. It bears mentioning that when the matter was served before this Court on 27 April 2023, all papers were filed by both parties. Substantive heads of argument were filed. It served before this Court as an opposed application and the Court was prepared to hear the parties on the strength of the fact that the rights of a minor child were the subject of litigation. In terms of section 6(2)*(a)*, a child's rights must be respected, protected, promoted and fulfilled as set out in the Bill of Rights, and the best interests of the child as set out in this Act, subject to any lawful limitation.

[47] I must point out that Khumalo, in the answering affidavit averred–

> "The offer of an interim payment was not part of a proposal to settle any dispute and was in order to relieve any prejudice suffered by the Applicant due to the delay in finalising the matter and therefore correspondence in connection therewith cannot be "without prejudice"."

[48] Once again, Khumalo made this concession about prejudice–

> "The Applicant's attorneys responded to the letter on the same date in a letter headed "without prejudice". The letter is attached above marked "NK22". I submit that the letter in no

> way attempts to compromise what we have advised that we intend to do in our letter marked "NK21" above. I therefore respectfully submit further that the labelling of the letter "without prejudice" by the Applicant's attorney is an attempt to avoid showing the Applicant's unwillingness to accept an interim payment on what appears to be spurious ground."

[49] In my view, it is obvious that both parties agree that the child was prejudiced by the delays occasioned as a result of the prolonged trial and that prejudice was continuous for as long as the child did not get immediate redress to ameliorate the medical condition of the child. The child needed immediate redress, which she was not getting because the legal representatives were unable to agree on the proportionate and appropriate amount to be paid on an interim basis.

[50] I was satisfied that the applicant, in her founding affidavit, has set out explicitly the circumstances on which she relies to render the matter urgent and the reasons why she claims that she cannot be afforded substantial relief at a hearing in due course. There are obvious delays in the trial regarding quantum. There are disputed claims which need to be resolved. It was not guaranteed that the matter would proceed to finality on 26 June 2023 for various reasons, including the availability of the Presiding Judge. Prejudice to the child was apparent, and it was a common cause between the parties; hence the respondent had made some offers, though such offers were rejected.

[51] The complaint of the respondent about the procedures adopted by the applicant's legal representatives did not detract from the urgency of the underlining issue pertaining to the rights of the minor child. The respondent merely complains about the procedure adopted by the applicant, not the substantive issue of the Rule 34A application. Mr *Van der Linde* conceded the urgency of the matter, although submitting that the appropriate court to hear the matter would have been the trial judge, who is seized with the matter regarding the quantum of damages. This submission stands to be rejected for the reason that this is a Rule 34A application. In *N.M obo A.M v The Member of the Executive Council for Health, Eastern Cape*[5] Hartley J held–

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[5] *N.M obo A.M v The Member of the Executive Council for Health, Eastern Cape* (Judgment in respect of interlocutory application for interim payment) [2022] ZAECBHC 47 para 25.

> "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."

[52] I agree with Hartley J for a reason that rule 34A provides a unique procedural remedy to a claimant who has suffered damages in the form of medical costs and loss of income arising from physical disability. The enforcement of this remedy is entirely in the discretion of the court. The respondent seems to conflate the Rule 6(12) and Rule 34A degrees of urgency and the extent of grounds required for the urgency in each of the rules.

[53] For those reasons, I found that the application was urgent and that the non-compliance with the rules should be condoned.

Whether or not the applicant has met the requirements under rule 34A

[54] Rule 34A deals with interim payments. The rule provides–

> "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 any 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 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 may consider 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;

(*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."

[55] Rule 34 is intended to alleviate the hardship which a plaintiff may suffer as a result of having to lay out or borrow funds pending the determination of a claim. An interim payment can be made only in relation to claims in terms of the nature mentioned under the sub-rule. In *Karpakis v Mutual & Federal Insurance Co Ltd*[6] it was held that there is nothing in the rule which prohibits an interim payment in respect of future medical costs and future loss of earnings. Sub-rule 4 provides that if

[6] *Karpakis v Mutual & Federal Insurance Co Ltd* 1991 (3) SCA 489 (O) at 501C.

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 a 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.

[56] The applicant has met the requirements under rule 34A. On 8 October 2020, the merits of the claim were disposed by an order awarding the applicant 100% of proved damages, both in her personal capacity and representative capacity. The outstanding issues which have delayed the finalisation of the matter is limited to issues relating to an application for an amendment and the separation of certain disputed issues and heads. I agree with Mr *Dugmore* that the net result, when the whole case is considered, is that the respondent has admitted liability of R20 002 163, according to the applicant, or an amount between R18 million to R19 million according to the respondent.

[57] I had regard to the reports, joint minutes and the agreements reached by the parties regarding the quantum of damages. There can be no doubt that liability by the respondent is no longer a serious issue other than the form of payment with regard to certain heads of damages. In this regard, Mr *Van der Linde* submitted, quite correctly, that the application to amend the respondent's plea, will determine whether the values of the heads of damages, are to be paid to the applicant in cash or in kind. I disagree with the submission that it would be inappropriate for this Court to hear and determine the application as the decision would affect the issue of the quantum of damages to be paid in monetary form to the applicant. Whatever amount that would have been paid in the form of interim payment would be deducted, in terms of whatever value that would have been determined, whether it was to be a payment in kind or cash.

[58] The evidence is overwhelming about the medical needs of the child, and such evidence is contained in joint minutes of the experts and the reports, which had been

incorporated into this application by reference. I accept the joint minutes of the experts regarding the child's needs. I, therefore, reject the suggestion that the applicant has led no evidence regarding the interim medical treatment and the relief that the minor child requires immediately and on an interim basis.

[59] The applicant has explained the exigency and objective for approaching the Court for an interim payment. It is common cause that she does not have the financial means at her disposal to make provision for the needs of the child caused as a result of her medical condition. Although the respondent suggests that there are some State interventions available to provide certain medical treatments required by the minor child, the parties have not agreed on the adequacy or whether the suggested treatment would be commensurate with what the child needs. The parties are still locked in dispute regarding public healthcare facilities. The belatedly introduced amendment has not been effected.

[60] The delay in the finalisation of the trial on quantum is a relevant factor, in my view, which justifies the applicant’s entitlement to an interim payment. The amendment has been delayed for approximately a year and a half. The respondent has placed no evidence before Court to gainsay the allegations of the applicant regarding her medical needs as set out in the joint minutes and reports. All that the respondent is contending about is the pending amendment where it will seek to convince the Court to provide medical services and equipment and payments in instalments. The respondent provided not even a shred of evidence regarding the appropriate amount to be awarded as an interim payment to the applicant, although conceding that the child is prejudiced by the delay. The amounts offered by the respondent are simply thumb-sucked and there is simply no basis for the proposed amounts. On the one hand, the applicant relies on the actuarial reports and schedules set out therein, together with joint minutes and reports.

[61] The joint minutes indicate that children with cerebral palsy have pressing needs for specialist and multi-disciplinary management to ensure that they are able to develop any possible abilities in spite of their severe neurological and developmental impairment, the complications are prevented in that the quality of life

and burden of care is optimal. For this purpose, there is an urgent need for access to payment of compensation so that the necessary treatment can be provided.

[62] Regarding the amount, the applicant had asked for interim payment in the sum of R20 502 163 and alternatively, R15 million. In the assessment of the needs as set out in the reports, and the schedule that was submitted to this Court, the above amounts are excessive and, in my opinion, would amount to awarding damages which the trial court must determine. I agree with the respondent in this regard. In circumstances where the amount that would be awarded is insufficient or exhausted before the finalisation of the trial, the applicant would be entitled to approach the court and seek for further payment.

[63] I had regard to the fact that the more or less agreed liability is between R20 002 163 and between R18 million to R19 million. Based on these figures, I do consider that R3,2 million would not exceed a reasonable proportion of the damages which the trial court is likely to award to the applicant and I am satisfied that the amount of R3,2 million is just, fair and reasonable in the circumstances.

Findings

[64] For the reasons set out above, I am satisfied that the applicant has made out a case for the grant of a rule 34A interim relief. Accordingly, I would award an amount of R3,2 million to be paid to the applicant, in her representative capacity within 30 calendar days of this order. Both parties did not suggest the creation of a trust and therefore, the amount would be paid to the applicant's attorneys of record and to be kept in their trust account and paid out when the need of the child arises. There should be proper records for the management of the amount.

Costs

[65] I am satisfied that the applicant has been substantially successful and costs should follow the result. However, I reserve the costs occasioned on 4 April 2023. The reason why I reserve the costs of 4 April 2023 is that there were no facts placed before Court as to why the application was postponed on 4 April 2023. The 4th of April 2023 was on a Tuesday, which is an ordinary motion court day. I was not

appraised of the reasons why the matter could not proceed on that date. For the reasons that there were no sufficient facts placed before me, I reserved those costs.

Order

[66] It was for these reasons that the Court granted an order in the following terms:

(1) The applicant is hereby granted leave to proceed by way of urgency in accordance with the provisions of Rule 6(12)*(a)* and *(b)* and that this court hereby condones the non-compliance and departure from the Uniform rules of court;

(2) The respondent is ordered to make an interim payment to the applicant, in her representative capacity, in the sum of R3 200 000 (three million two hundred thousand rands) within 30 (thirty) calendar days of this order;

(3) The respondent shall pay interest at the prescribed legal rate should the amount fixed for interim payment remain unpaid within 30 (thirty) calendar days of this order;

(4) The reserved costs of 4 April 2023 shall stand over for determination by the trial court when the quantum of damages is finally determined;

(5) The parties are granted leave to file additional submissions, should they so wish, regarding the reserved costs of 4 April 2023; and

(6) The respondent is ordered to pay the costs of this application.

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ACTING JUDGE OF THE HIGH COURT, EASTERN CAPE DIVISION MTHATHA

Appearances

Counsel for the Applicant/Plaintiff	Adv *Dugmore SC*
Attorneys for the Applicant/Plaintiff	M Dayimani Incorporated Mthatha
Counsel for the Respondent/Defendant	Adv *Van Der Linde SC*
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