REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, JOHANNESBURG

Case No: 2018/32706

Case No: 2016/0042569

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED. NO

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SIGNATURE **DATE: 28 October 2022**

In the matter between:

MPHO LESEGO MOHLALA APPLICANT

and

ROAD ACCIDENT FUND RESPONDENT

QUINETT SWART APPLICANT

and

ROAD ACCIDENT FUND RESPONDENT

JUDGEMENT

,

MOOKI AJ

1 The two applications were consolidated. Applicants in both matters seek interim payment for past hospital and medical expenses, pursuant to Rule 34A of the Uniform Rules of Court. The Road Accident Fund ("the Fund") is the respondent in both matters. Both matters are unopposed.

2 The two applications are identical as to form and content. They differ as to the applicant and the supporting documents in support of the relief being sought.

3 The supporting documents included invoices by healthcare providers. The medical aid scheme, of which each applicant was a member, paid for all the medical expenses incurred by each applicant. An employee of the medical scheme deposed to an affidavit stating, amongst others, essentially that the medical aid was entitled to the funds expended on behalf of the applicants.

4 The court raised with counsel whether the relief sought was competent, given the facts at hand. Mr. Rossouw, who appeared for the applicants in both matters, submitted that the applicants met all the requirements for the grant of interim payment; including that the Fund had admitted liability

in writing. Mr. Rossouw referred the court to the matter of *Rayi NO v Road Accident Fund*[1] in support of the case on behalf of the applicants.

5 *Rayi* claimed damages from the Fund for injuries sustained in a motor vehicle accident. The claim included past medical expenses. A medical aid scheme of which *Rayi* was a member paid for past medical expenses incurred by *Rayi*. *Rayi* had signed an undertaking with the medical aid scheme that he would reimburse the medical aid scheme for all costs incurred by the medical aid scheme on his behalf in connection with the claim against the Fund in the event of a successful recovery from the Fund.

6 *Rayi* was determined as a stated case. Rayi contended that the Fund was liable to pay him "in terms of the doctrine of subrogation." The Fund denied liability, saying in part that payment to Rayi would amount to enrichment.

7 The court in *Rayi* defined the issue for decision as follows: "The question is whether the defendant is liable to compensate plaintiff for the past hospital and medical expenses in light of the fact that they have already been paid by [the medical aid scheme]."[2] The court concluded that the Fund remained obliged to compensate Rayi for past medical expenses, notwithstanding that the medical aid scheme had settled Rayi's past medical expenses. That was because, according to the court, Rayi was obliged to reimburse the medical aid scheme in terms of an undertaking by Rayi to that scheme; and that such undertaking was triggered immediately once Rayi received payment from Fund for past medical expenses. The court ultimately

[1] (343/2000) [2010] ZAWCHC 30 (22 February 2010), a decision by Zondi J of the High Court, Western Cape.

[2] See paragraph 9.

concluded that the Fund was liable to pay Rayi the claimed amount for past medical expenses.

8 This court reserved judgement in the two applications.

9 Mr. Rossouw very kindly, whilst the court had reserved judgement and was considering the matter, drew my attention to the decision in Heerden v Road Accident Fund, a decision by the High Court in the Eastern Cape[3] and the decision in Discovery Health (Pty) Ltd against the Fund and the Minister of Transport; a decision by the High Court in the Gauteng Division, Pretoria.[4]

10 The Fund in *van Heerden* refused to pay for past medical expenses incurred by van Heerden because, according to Fund, van Heerden's medical aid scheme had already paid expenses on behalf of van Heerden. The Fund further contended that van Heerden had not, because of payment by the medical scheme, sustained any loss or incurred any expense in respect of the claimed past medical expenses and that the Fund had no duty to reimburse van Heerden.

11 It was common cause in *van Heerden* that the medical scheme paid van Heerden's expenses. The High Court assumed the following in making its decision:

[3] Unreported. Case number 845/2020, a decision by Rugunanan J of the High Court, Eastern Cape Division, Gqeberha.

[4] Case number 2022/016179 (unreported), per Mbongwe J, delivered on 27 October 2022.

11.1 payments by van Heerden's medical scheme constituted the discharge by the scheme of a contractual obligation flowing from a contract between the medical scheme and van Heerden,

11.2 van Heerden, in return, undertook to reimburse the medical scheme for all medical expenses incurred by the scheme on his behalf in the event of a successful recovery from the Fund, and

11.3 the medical scheme provides for the principle of subrogation, meaning that the scheme may sue the Fund in its own name or in the name of van Heerden.

12 The court in *van Heerden* then considered the law on the relationship between contracting parties to a medical scheme and held that "subrogation is nothing more than a procedural device and where, as in the present case, the [Fund] did not specifically claim to be prejudiced I am of the view that the plaintiff cannot be non-suited by litigating in his own name."[5] The court then concluded that payment by the van Heerden's medical scheme of his past medical expenses did not relieve the Fund of its obligation to compensate van Heerden for such expenses.

13 The dispute in proceedings by Discovery Health (Pty) Limited concerned a directive issued by the Fund. The Fund had made it known in the directive that the Fund would reject claims for medical expenses where a medical aid scheme had already paid for those expenses. Discovery Health (Pty) Limited brought review proceedings, challenging the lawfulness of the directive. The Court set-aside the directive, holding that the directive was

[5] See paragraph 14 of the judgement (internal citations omitted).

an unlawful abrogation of the Fund's statutory obligations in terms of the RAF Act.

14 I am not persuaded that the applicants are entitled to interim payment.

15 The authorities cited by counsel did not concern an application for interim payment. Those authorities essentially dealt with the law in relation to subrogation. The applicants in the matters before court do not invoke that cause of action. They seek relief on the law as it relates to "interim payment" in terms of Rule 34A.

16 The authors of "Erasmus" remark that "The introduction of the rule to some extent alleviated the hardship which a plaintiff may suffer as a result of having to lay out or borrow funds pending the determination of a claim."[6] This sentiment is like that expressed in *Karpakis v Mutual & Federal Insurance Co Ltd*.[7]

17 The plaintiff in *Karpakis* sought interim payment, having contended, among others, that *(a)* she remained unable to obtain gainful employment because of her disabilities; *(b)* detailed how much she spends per month on average on analgesics, anti-convulsant and anti-epileptic medication; *(c)* detailed what her monthly earnings would have been, had it not been for the injuries; *(d)* she has two very small children to look after; *(e)* she gave details of her average monthly household expenses; including that she and her husband experienced a monthly shortfall in their household expenses; and that certain furniture had already been repossessed and that she and her husband relied on her mother for financial assistance.

[6] Erasmus Superior Court Practice (commentary on rule 34A)

[7] 1991 (3) SA 489 (O)

18 The court in *Karpakis* accepted that the plaintiff in that matter, together with the plaintiff's husband, were "… at present living in rather dire financial straits." The court granted interim payment, having considered the case advanced by the plaintiff.

19 Interim payment is not intended to be a means for a litigant to act as a collecting agent for a third party. The applicants in the present cases say that their medical aid has paid for the expenditure. An official from the medical aid confirmed that the medical aid paid for the expenditure and that payments sought by the applicants constitute "the amount owed and due to" the medical scheme.

20 The applicants did not plead subrogation, nor did they plead a cause of action that would entitle them to the amounts claimed to allow the applicants in turn to make the funds available to their medical aid. It would make no difference, given the bases for the relief sought, even if the applicants were not to "pay over" the money to their medical aid or to any other third party. This distinguishes their applications from the cases cited on their behalf.

21 Rule 34A requires that an applicant set out "the grounds" for the relief sought. It was required of the applicants to say more than that they were injured, that their medical scheme had paid for the expenses, that the Fund admitted liability in writing and that the Fund was able to pay.

22 Rule 34A was intended for a court to consider whether to sanction the making of a payment to "tide over" a claimant until his case can be tried. A claimant is therefore required to set-out the circumstances that would

merit a court exercising discretion that a payment be made. The fact of a respondent having admitted liability in writing and being able to pay is not determinative that interim payment would be granted. This is illustrated by the facts in *Karpakis.*

23 I make the following order:

24 The applications are dismissed.

Omphemetse Mooki

Judge of the High Court (Acting)

Heard on: 25 August 2022

Delivered on: 28 October 2022

For the Applicant: G J Rossouw

Instructed by: Levin Tatanis Inc. Attorneys

No appearance for the Respondent