

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG**

Case Number: 2022/03746

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

\_\_\_\_\_  
DATE

\_\_\_\_\_  
SIGNATURE

In the matter between:

**JORDAAN, JEANINE MARIA**

Plaintiff

AND

**THE ROAD ACCIDENT FUND**

Defendant

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**JUDGMENT**

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**OPPERMAN AJ**

## *Introduction*

- [1] The plaintiff is claiming damages suffered by the plaintiff arising from the injuries that she sustained as a result of a motor vehicle accident that occurred on 5 May 2018, as well as loss of support suffered by the plaintiff and her two minor children due to the death of the family's breadwinner in the accident. The defendant previously conceded that the negligence of the insured driver was the sole cause of the accident.
- [2] In her particulars of claim, the plaintiff claims damages for personal injuries sustained as well as loss of support for her and the minor children in the amount of R2 300 000.00. In her application for default judgment, the plaintiff claims an amount of R2 500 000.00.

## *The default judgment application*

- [3] This matter came before me on 24 October 2023 for default judgment on the basis that the defendant failed to file an appearance to defend. According to the documents filed of record, summons was served on the defendant on 14 June 2022.
- [4] On 23 October 2023, the plaintiff served and filed a notice in terms of Rule 28(1) of the Uniform Rules, dated 18 October 2023, amending the quantum claimed, as follows —
- a. Payment in the amount of R5 007 673.00 in respect of past and future medical expenses, past and future loss of earnings and generals; and
  - b. Payment in the amount of R3 848 956.99 in respect of past and future loss of support.
- [5] As a result of this proposed amendment, the quantum is now set to the tune of R 8 856 629.99 as opposed to R2 300 000.00 as claimed in the particulars of claim.
- [6] Unsurprisingly, the defendant then filed a notice of intention to defend on 23 October 2023, a day before the hearing. I use the word “unsurprisingly” because in a number of matters during my stints in the default judgment trial

court it has become the norm for matters to be defended on the day of the hearing or pleadings to be amended after service of set down for default judgment, resulting in precious time for preparation and court resources going to waste. However, I do accept that parties are entitled to have their disputes resolved as provided for in the Constitution of the Republic of South Africa, 1996 and the applicable legal principles. Effectively, the matter became a defended action and the defendant will inevitably have to file a plea.

[7] After having expressed my concerns regarding the proposed amendment, plaintiff's Counsel, Mr. Smit, requested that the matter stand down to engage with the defendant's representative, Mr. Sondlani, with the view of partially settling the matter. I was subsequently informed from the bar that settlement negotiations failed.

[8] I was advised by Mr. Smit that the plaintiff intends bringing an application for an interim payment in the amount of R 498 166.00 in respect of past loss of earnings and same was uploaded onto CaseLines the morning of 25 October 2023. Argument ensued on 25 October 2023 as to whether the plaintiff would be entitled to an interim payment. It should be noted that in her unamended particulars of claim, the plaintiff claims R 250 000.00 for past loss of earnings.

[9] However, before even considering this aspect, I firstly had to establish whether the default judgment application was procedurally correct before me in light of the substantial late amendment by the plaintiff.

*Applicable legal principles on litis contestatio*

[10] Having read the papers in preparation for the hearing, the proposed amendment became a major concern to me. I requested both parties to address me on this aspect and during argument Mr. Smit submitted that the amounts claimed were justified by expert medico-legal reports and I can therefore accept that the plaintiff will ultimately be successful in her claim for damages. The real question, however, as to whether the issues in dispute have been clearly defined as set out in Rule 29 of the Uniform Rules of Court, remained unanswered. I deal with applicable legal principles hereinafter.

[11] Rule 29 provides that pleadings will be considered closed —

- “(a) if either party has joined issue without alleging any new matter, and without adding any further pleading;
- (b) if the last day allowed for filing a replication or subsequent pleading has elapsed and it has not been filed;
- (c) if the parties agree in writing that the pleadings are closed and such agreement is filed with the registrar; or
- (d) if the parties are unable to agree as to the close of pleadings, and the court upon the application of a party declares them closed.” (my underlining)

[12] Rule 29 of the Uniform Rules of court is subject to the parties’ entitlement to amend pleadings in terms of Rule 28. Of importance rule 28(8) provides—

“Any party affected by an amendment may, within 15 days after the amendment has been effected or within such other period as the court may determine, make any consequential adjustment to the documents filed by him, and may also take the steps contemplated in rules 23 and 30.”

[13] In *Nkala v Harmony Gold Mining Co Ltd*<sup>1</sup> it was stated that—

“The issue as to when the stage of *litis contestatio* is reached in the modern-day law is a complicated one. It is reached when pleadings are closed. But this is no simple matter. Guidance as to when pleadings are closed can be found in Rule 29 of the Uniform Rules of Court. It advises that pleadings are closed if all parties to the case have joined issue and there are no longer any new or further pleadings, or the time period for the filing of a replication has expired, or the parties have agreed in writing that the pleadings have closed and have filed their agreement with the registrar of the court, or the court, on application, has declared that the pleadings are closed. At that point the pleadings are treated as being closed and the proceedings are said to have reached the stage of *litis contestatio*. In everyday practice, they are normally closed as soon as the period for the filing of the replication has expired, for at that stage the issues have become identified and parties are able to commence preparation for battle. Pleadings, though closed, will be re-opened should an amendment be effected, or should the parties agree to alter the pleadings. Amendments to pleadings can be brought by any party any time before judgment is delivered.”

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<sup>1</sup> 2016 (5) SA 240 (GJ) at para188.

[14] Further the court stated<sup>2</sup>—

“In our law even when the defendant fails to adhere to the time periods afforded to him to identify his defence he is always given the opportunity to seek condonation for his failure to adhere to those time periods. It follows that in our legal system it takes much longer for the stage of *litis contestatio* to be reached. [I]n our law pleadings can be re-opened at any stage before judgment.”

[15] This is in line with *Milne, NO V Shield Insurance Co Ltd*<sup>3</sup> where the court stated —

“Closing of pleadings is designed by the Rules of Court as a purely procedural matter and is intended to fix the time for setting down, discovery and related matters. Whereas in the Roman Law *litis contestatio* was crucial in determining the rights of the parties, the modern view is against any such formalistic approach. Thus, subject only to prejudice, pleadings can be amended at any time before judgment, and fresh allegations can be made after the pleadings have been closed.”

[16] I am mindful of the fact that different courts have different views on *litis contestatio*. For example, in *Ngubane v Road Accident Fund*<sup>4</sup>(*Ngubane*) (an application for default judgment in which general damages were claimed in respect of injuries sustained in a motor vehicle accident) the court at paragraph 18 said —

“*Litis contestatio* is, in modern practice, synonymous with the close of pleadings as envisaged by rule 29 of the Uniform Rules of Court. As the defendant has never entered the fray and did not deliver a plea, the pleadings could not close and *litis contestatio* could not be reached.”

[17] Further, at paragraph 20 the court said —

“On the most liberal of interpretations, *litis contestatio* would occur when the application for default judgment is launched.” Additionally, at paragraph 34: “Not every amendment to pleadings will have the effect of reopening the pleadings. In

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<sup>2</sup> At para 189.

<sup>3</sup> 1969 (3) SA 352 (A) at p355.

<sup>4</sup> 2022 (5) SA 231 (GJ).

my view the potentially harsh effects of a reopening of pleadings and the shifting of *litis contestatio* can be addressed on a case-by-case basis.”

[18] In contrast to *Ngubane* above, in *Olivier NO v MEC For Health, Western Cape and Another*<sup>5</sup>(*Olivier*) the plaintiff had effected a third amendment to her pleadings and thus increasing the quantum claimed for future medical and hospital expenses. Shortly afterwards, and prior to the expiry of the 15-day period afforded to the first defendant to file an amended plea in response to the amended particulars of claim, which it had not done, the plaintiff died. In contrast to *Ngubane*. the court said the following —

“At the outset, this Court has to analyse whether the facts of this matter support the outcome that is sought by the plaintiff. This Court is called upon to determine five questions as stated in the first paragraph of this judgment. The first, is whether the amendment of the plaintiff's particulars of claim on 4 October 2017 had an effect of reopening the pleadings and that *litis contestatio* fell away. The plaintiff has not disputed the fact that *litis contestatio* is the stage at which a claim becomes certain and/or fixed. Due to the fact that at that stage, the parties were attempting to settle the matter, it was agreed that further expert reports be procured in order to quantify the deceased's claim. This resulted in the deceased's claim for future medical and hospital expenses increasing and thereby further increasing the quantum. This necessitated the amendment of the deceased's particulars of claim.”<sup>6</sup>

[19] The court went further to state that —

“When due consideration is had to the amended particulars of claim, the amendments are substantial and material. There are new aspects that in my view would require some consideration. It may be so that this increase in quantum did not alter the cause of action, the identity of the parties and the scope of the issues in dispute as it was stated by the plaintiff. Notwithstanding, the scope of damages has been increased significantly and it would without a doubt require a pleading. This Court is unable to agree with the plaintiff that the amendment did not redefine the issues in relation to the claim for general damages, as the amount remained the same. This assertion, in my view, is somewhat mischievous as it is not for the plaintiff to prescribe how the first

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<sup>5</sup> 2023 (2) SA 551 (WCC).

<sup>6</sup> *Olivier* at para 20.

defendant should conduct their defence. In my view, the plaintiff's amended particulars of claim reopened the pleadings and interrupted *litis contestatio* and/or *litis contestatio* fell away. Since *litis contestatio* fell away, the first defendant was yet to file its amended plea by the date of the death of the deceased.”<sup>7</sup>

[20] The Supreme Court of Appeal decision in *Natal Joint Municipal Pension Fund v Endumeni Municipality*<sup>8</sup> affirmed this principle by stating the following —

“The answer is that when pleadings are reopened by amendment or the issues between the parties altered informally, the initial situation of *litis contestatio* falls away and is only restored once the issues have once more been defined in the pleadings or in some other less formal manner. That is consistent with the circumstances in which the notion of *litis contestatio* was conceived. In Roman law, once this stage of proceedings was reached, a new obligation came into existence between the parties, to abide the result of the adjudication of their case. Melius de Villiers explains the situation as follows: ‘Through *litis contestatio* an action acquired somewhat of the nature of a contract; a relation was created resembling an agreement between the parties to submit their differences to judicial investigation . . .’”

[21] Accordingly, it is my considered view that there is no basis for deviating from the common law principle and the Rules as it stands. The Constitutional Court in *MEC for Health and Social Development, Gauteng v DZ obo WZ*<sup>9</sup> warned that a development of the common law cannot take place in a factual vacuum and any development of the common law requires factual material upon which the assessment whether to develop the law must be made.

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<sup>7</sup> *Olivier* at para 21.

<sup>8</sup> 2012 (4) SA 593 (SCA) at para 15.

<sup>9</sup> 2018 (1) SA 335 (CC) at para 27.

### *Applicable legal principles pertaining to interim payments*

[22] As alluded to above in paragraph 8, the plaintiff applied for an interim payment in terms of rule 34A and section 17(6) of the Road Accident Fund Act (the RAF Act). The defendant argued that it only conceded liability and not the damages that the plaintiff needs to prove. In this regard, the defendant relied on the judgment by van Nieuwenhuizen AJ in the matter of *Qelesile v RAF*<sup>10</sup> in which it was stated that written admission (of liability) that an accident caused by sole or contributory negligence of insured driver is insufficient to satisfy court that the defendant has admitted liability. I was then referred to the matter of *Karpakis v Mutual & Federal*<sup>11</sup>, also referred to in *Qelesile*, in which the court distinguished between liability (for all elements of delict) for the accident and liability for quantum of damages.

[23] Against this background, the question is whether (based on an admission) the plaintiff is entitled to an interim payment, taking into consideration that there is, conflicting views on this issue.

### *Rule 34A of the Uniform Rules of Court in general*

[24] Rule 34A was introduced by GN R2164 of 2 October 1987 to afford interim financial relief to a plaintiff in an action for damages for personal injuries, or injuries consequent upon the death of a person. Rule 34A is subject to section 6(1)(a) of the Rules Board for Court of Law Act 1985,<sup>12</sup> as the rule is procedural in character, not substantive.<sup>13</sup> The relief is restricted to the plaintiff's claim for medical costs and loss of income arising from physical disability or the death of another person.<sup>14</sup> It is worth noting that a plaintiff cannot obtain interim advance payment under rule 34A of 'a single cent of his general damages'.<sup>15</sup>

[25] Rule 34A also applies to claims for damages for loss of support, which is the only type of 'loss of income arising from the death of a person' to which the rule

<sup>10</sup> [2023] ZAGPJHC 221 (24 February 2023).

<sup>11</sup> 1991 (3) SA 489 (O).

<sup>12</sup> Act 107 of 1985.

<sup>13</sup> *Karpakis v Mutual & Federal Insurance Co Ltd* 1991 (3) SA 489 (O) at 495–499; *Fair v SA Eagle Insurance Co Ltd* 1995 (4) SA 96 (E) at 99–100.

<sup>14</sup> Rule 34A(1); *Muller v Mutual & Federal Insurance Co Ltd* 1994 (2) SA 425 (C) at 448I–449B; *Nel v Federated Versekeringsmaatskappy Bpk* 1991 (2) SA 422.

<sup>15</sup> *Karpakis v Mutual & Federal Insurance Co Ltd* 1991 (3) SA 489 (O) at 499C–D.



can pertain.<sup>16</sup> Thus, where an applicant for an interim payment was not earning an income; was compelled to borrow substantially in order to support her family after her husband's death; and was being required to secure her overdraft by mortgaging her home, the court exercised its discretion to order an interim payment in her favour.<sup>17</sup>

[26] It should be noted that when a court orders an interim payment in terms of rule 34A it does not give judgment against the defendant, even for part of the plaintiff's claim. On the contrary, the entire claim has still to be proved at the trial, including such portions of it as have been covered by the interim payment.<sup>18</sup>

*Is Rule 34(A) applicable to RAF cases?*

[27] An interim payment of damages may be ordered under rule 34A in RAF cases. It cannot therefore be argued that the rule was not intended to be applied in RAF cases merely because no mention of such cases is made in the rule.<sup>19</sup> Road accident victims often suffer dire financial straits due to the burden of medical treatment and a partial reduction, or even total loss, of earning capacity. While these victims may have a claim against the defendant, such claims may take years to finalise.

[28] Rule 34A of the Uniform Rules of Court provides a procedure to alleviate the burden endured by these victims, as it provides a mechanism to obtain an interim payment pending the finalisation of the plaintiff's claim. It should, however, be noted that the rule 34A interim payment procedure is available to a person who sustained injuries in a road accident as well as the dependents of a deceased road accident victim.

[29] In *Karpakis v Mutual & Federal Insurance Co Ltd*<sup>20</sup> the court rejected the respondent's contention that rule 34A makes no provision for motor vehicle cases and is ultra vires as substantive, not procedural, because it makes

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<sup>16</sup> *Nel v Federated Versekeringsmaatskappy Bpk* 1991 (2) SA 422 (T) at 426H–427B.

<sup>17</sup> *Id* at 428B–430A.

<sup>18</sup> *Karpakis v Mutual & Federal Insurance Co Ltd* 1991 (3) SA 489 (O) at 495J–496I.

<sup>19</sup> *Id* at 496J–497B, 497F–H.

<sup>20</sup> At pages 496–497

provision for interim payouts in personal injury matters. The court held that this argument was fallacious because the wording of subrule (1) of Uniform Rule 34A is clearly wide enough to encompass such cases and does not make a substantive finding on the merits of the litigation in actions for damages for personal injuries or loss of support.

*Under which circumstances is the plaintiff entitled to interim payment against the Road Accident Fund?*

[30] The circumstances under which the court may make an order for interim payment are set out in rule 34A(4)(a)-(b). In terms of rule 34A(4)(a)-(b) the court may only grant an interim payment when the defendant has, in writing, admitted liability for the plaintiff's damages or the plaintiff has already obtained a judgment confirming the defendant's liability for damages. In *Harmse v Road Accident Fund*<sup>21</sup>, where the applicant sought an interim payment, he relied on an offer of settlement made by the respondent's claims handler. This offer of settlement had previously been rejected by the applicant's attorney before the application was instituted. In dismissing the application, the court stated that there was no consensus between the parties on the liability of the respondent for the applicant's damages. The court held that only in instances where the respondent had admitted liability or the applicant had obtained judgment for damages, may a court order an interim payment. Rule 34A envisages a clear, unequivocal and unconditional admission of liability for it to find application.

[31] The provisions set out in rule 34A(4)(a)-(b) are jurisdictional requirements which are a pre-requisite for the court to exercise its discretion to order an interim payment. In other words, a court dealing with the rule 34A application must first establish whether the merits of the particular matter which is subject to the interim payment have been settled in favour of the plaintiff. If the court is of the opinion that the merits have been settled in favour of the plaintiff, it therefore follows that the plaintiff would have met the jurisdictional requirement to launch the application for interim payment. It was held that a formal written

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<sup>21</sup> [2010] ZAGPPHC 11 (24 February 2010).

admission of liability is not a prerequisite if the admission can be deduced from correspondence.<sup>22</sup>

[32] Rule 34A(4)(a) sets out jurisdictional requirements and this issue was first considered in *Alexander v Road Accident Fund and Three Other Related Matters*<sup>23</sup> (*Alexandra*). In *Alexandra*, the applicants (who were plaintiffs in their four respective claims against the defendant) each sought an order for an interim payment under rule 34A(4)(a). The four matters all served before Moultrie AJ in the unopposed motion court on 25 January 2023 and having identified significant commonalities in the facts and the legal question that arises for determination, and in view of the fact that all of the applicants were represented by the same attorneys, Moultrie AJ ordered that they be heard together for the purposes of deciding their rule 34A(4)(a) applications.

[33] The main issue which the court had to resolve was whether the documents upon which the applicants relied as constituting the defendant's written admissions of liability could be construed as admission of liability by the defendant as envisaged by rule 34A(4)(a).<sup>24</sup> The defendant did not oppose any of the four applications. In the three applications before Moultrie AJ (i.e. *Alexander v RAF*, *Maboya v RAF* and *Harripershad v RAF*<sup>25</sup>) the documents in question were duly accepted "without prejudice" offers from the defendant that read in relevant part as follows —

"The RAF has concluded that the collision resulted from the sole negligence of the RAF's insured driver.

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<sup>22</sup> *Nel v Federated Versekeringsmaatskappy Bpk* 1991 (2) SA 422 (T) at 427.

<sup>23</sup> [2023] ZAGPJHC 112 (11 February 2023).

<sup>24</sup> In paragraph 8 of the judgment, Moultrie AJ explains that the court was assured by both counsel that it is widely considered by practitioners – and indeed the Fund itself – that the documents in question were 'standard forms' and constituted sufficient written admission of liability on the part of the Fund for the purposes of Rule 34A.

<sup>25</sup> The offer relied upon in the *Harripershad v RAF* application did not purport to bear a signature of acceptance. However, on the basis of paragraph 5 of the founding affidavit (which stated that the offer was indeed accepted by the plaintiff) Moultrie AJ found no reason to doubt the correctness of this allegation.

... the RAF offers to settle the issue of negligence vis-à-vis the occurrence of the motor vehicle collision on the basis that the insured driver was solely negligent in causing the motor vehicle collision.

This offer is limited to the aspect of negligence as to the manner in which the collision occurred. This offer may not be interpreted or construed in a manner that would have the RAF concede any other aspect of the claim. To avoid doubt, the RAF reserves all its rights in law with regards to all other procedural and substantive aspects of the claim."<sup>26</sup>

[34] On the fourth application (*Morris v RAF*) the document relied upon was also almost identical to the above-mentioned document relied upon in the three applications, except for the fact that the defendant only admitted contributory negligence of its insured driver in the proportion of 50%.<sup>27</sup> Accordingly, Moultrie AJ was of the view that the documents relied upon in the four application were substantively similar hence they formed part of one judgment and reasoning.

[35] On whether the documents upon which the applicants relied as constituting the defendant's written admissions of liability could be construed as admission of liability by the defendant as envisaged by rule 34A(4)(a), Moultrie AJ held as follows —

"In my view, the documents in question are not sufficient to satisfy a court that the Fund "has in writing admitted liability for the plaintiff's damages".<sup>28</sup>

[36] Moultrie AJ further held —

"In the current applications, the documents relied upon by the plaintiffs could hardly be clearer: the Fund's admission is "limited to the aspect of negligence as to the manner in which the collision occurred". It is expressly stated that no concession is made in relation to "any other aspect of the claim" and that the Fund "reserves all its rights in law with regards to all ... procedural and substantive aspects" of the claims, other than negligence. In particular, the Fund has neither admitted (i) that the plaintiffs are suffering any bodily injury at all; nor

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<sup>26</sup> See *Alexandra* at para 5.

<sup>27</sup> Moultrie AJ was of the view that the exception was not material to the determination of whether the document constitute admission of liability by the Fund as envisaged by 34A(4)(a).

<sup>28</sup> *Alexandra* at para 9.

(ii) that any such bodily injury arose from the negligently-caused collision. In other words, apart from quantum, both bodily injury (or “harm” in delictual terms) and causation remain in dispute, and there has been no admission of “liability” for any damages that might in due course be proven, as required by Rule 34A(4)(a).”<sup>29</sup>

[37] As I have indicated, a court dealing with the rule 34A application must first establish whether the merits of the particular matter which is subject to the interim payment have been settled in favour of the plaintiff. In my view, Moultrie AJ clarifies this requirement as follows —

“It is apparent from my engagement with counsel that there is much confusion around terminology. According to counsel, the documents under consideration in the current matters constitute an admission of (and indeed finally resolve) the question of ‘the merits’ of the RAF Actions against the Fund. It must, however, be emphasised that the term ‘the merits’ as employed in this context has an attenuated meaning that, at most, refers to the question of whether the accident was caused by the sole or contributory negligence of the defendant’s insured driver. While a concession of ‘the merits’ in this sense will undoubtedly have the result of significantly reducing the scope of the issues to be determined at trial, it must be emphasised that such a concession does not mean that the Fund has conceded or “admitted liability for the plaintiff’s damages” for the purposes of Rule 34A(4)(a).”<sup>30</sup>

[38] The judgment in *Alexandra* was subsequently discussed in *Qelesile and Another v Road Accident Fund*<sup>31</sup> (*Qelesile*). It was stated in *Qelesile* that the *crux* of *Alexander* was to the effect that the admission of liability by a defendant in terms of rule 34A(4)(a) necessitated an admission of all the requirements of the elements of a delict, not only negligence.<sup>32</sup> In other words, the admission of negligence by the defendant is not all that is required to meet the requirements of rule 34A(4)(a).

[39] *Qelesile* agreed with the *Alexandra* reasoning and went further to strengthen the reasoning in *Alexandra* by dismissing the argument (by the

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<sup>29</sup> *Alexandra* at para 11.

<sup>30</sup> *Id* at para 13

<sup>31</sup> [2023] ZAGPJHC 221 (24 February 2023).

<sup>32</sup> *Qelesile* at para 5.

plaintiff/applicant) that rule 34A(4)(a) was merely a procedural mechanism invoked in conjunction with rule 34A(1) to compel the defendant to discharge its concomitant obligation under section 17 of the RAF Act.<sup>33</sup>

[40] For a better understanding of the defendant's obligation under section 17 of the RAF Act, it is imperative (for the purposes of interim payment) to look into the proviso in section 17(6) of the RAF Act. Section 17(6) of the RAF Act provides as follows —

“The Fund, or an agent with the approval of the Fund, may make an interim payment to the third party out of the amount to be awarded in terms of section (17)(1) to the third party in respect of medical costs, in accordance with the tariff contemplated in subsection (4B), loss of income and loss of support: Provided that the Fund or agent shall, notwithstanding anything to the contrary in any law contained, only be liable to make an interim payment in so far as such costs have already been incurred and any such losses have already been suffered”.

[41] The court in *Qelesile* stated that section 17(6) of the RAF Act is couched in permissive language having employed the word “may”.<sup>34</sup> The court went further to state that, despite the word “may”, the proviso contained in section 17(6) that attaches liability for interim payments does place a duty on the defendant to make such interim payments.<sup>35</sup> However, so explained the court, such a duty is not unqualified but is qualified by section 17(1) of the RAF Act. In other words, any interim payment (in terms of section 17(6)) shall be made from the compensation to be awarded in terms of section 17(1) of the RAF Act.<sup>36</sup>

[42] In so far as section 17(1) of the RAF Act is concerned, it is worth noting that the section provides that an award for compensation may only be made if the loss or damage suffered by a third party was caused by, or arose from, the driving of a motor vehicle and only if the injury or death was due to negligence or other wrongful act of such a driver.

[43] The court therefore concluded that, even if it can be argued that rule 34A(4)(a) was merely a procedural mechanism invoked in conjunction with rule 34A(1) to

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<sup>33</sup> This argument is found in paragraph 5 of the *Qelesile* judgment.

<sup>34</sup> *Qelesile* at para 16.

<sup>35</sup> *Id* at para 17.

<sup>36</sup> *Id*.

compel the defendant to discharge its concomitant obligation under section 17 of the RAF Act cannot be upheld.<sup>37</sup> In this regard, the court held that the express phrases in section 17(1) patently relate to and require causation (one of the essential elements of a delict) to be proved or conceded.<sup>38</sup> Further, given the fact that any interim payment (in terms of section 17(6)) shall be made from the compensation to be awarded in terms of section 17(1), the admission of liability solely on negligence will not suffice. Accordingly, the court held that section 17(6) read with section 17(1) of the RAF Act does not cure the *prima facie* hurdle faced by the plaintiff in proving the admission of liability by a defendant in terms of rule 34A(4)(a).<sup>39</sup>

[44] As it was the case in *Alexandra*, the applicants/plaintiffs in *Qelesile* relied on a document which admitted the defendant's negligence in the accident. Regarding this, the court held —

“In order for the Plaintiffs' contention to have any merit, the word “*liability*” in Rule 34A(4)(a) would have to be interpreted as meaning “*negligence*”. Such an interpretation would have the effect of defeating the very circumscription of the substantive right set out in section 17(6) read with section 17(1) of the RAF Act. Such an interpretation is impermissible as it would mean that Rule 34A(4)(a), which is the procedure created to give effect to claims as is envisaged in terms of section 17(6) read with section 17(1) of the RAF Act, would bring in or allow claims that do not fall within the said sections' purview.”<sup>40</sup>

#### *Conclusion on the plaintiff's application for an interim payment*

[45] In conclusion, it is clear from *Alexandra* and *Qelesile* that the admission of liability by a defendant in terms of rule 34A(4)(a) necessitated an admission of all the requirements of the elements of a delict, not only negligence. In other words, the admission of negligence by the defendant is not all that is required to meet the requirements of rule 34A(4)(a). However, in addition to the admission of negligence, it must also be proved that the defendant has admitted for instance that the plaintiffs are suffering any bodily injury and that

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<sup>37</sup> *Id* at para 19.

<sup>38</sup> *Id*

<sup>39</sup> *Qelesile* at para 14.

<sup>40</sup> *Id* at para 22.

any such bodily injury arose from the negligently caused collision. In other words, apart from quantum, both bodily injury (or “harm” in delictual terms) and causation need to also be admitted by the defendant in order to constitute admission of liability by a defendant in terms of rule 34A(4)(a).

[46] The above conclusion is further strengthened by reasoning of the court in *Qelesile* in which the court held that if the word “liability” in rule 34A(4)(a) would have to be interpreted as meaning “negligence”, such an interpretation would have the effect of defeating the very circumscription of the substantive right set out in section 17(6) read with section 17(1) of the RAF Act. In this regard, the court held that the express phrases in section 17(1) patently relate to and require causation (one of the essential elements of a delict) to be proved or conceded.

[47] In view of the preceding discussion, it would appear that the defendant, in this matter before me, relied on the same document conceding liability but specifically denied that it is liable for any other aspects of the plaintiff’s claim. In light of this, the plaintiff has not proven all the jurisdictional requirements as set out in the rule and therefore her application for an interim payment stands to be rejected.

### *Conclusion*

[48] Finally, in *Olivier supra* the court concluded that had the quantum not been amended, there is no question that *litis contestatio* would be uninterrupted and the claim for general damages remain intact.<sup>41</sup>

[49] I have considered the obiter remarks in the *Ngubane* judgment by my brother Thompson AJ and am of the view that these two cases are not comparable. In this matter the defendant entered an appearance to defend and has accordingly “entered the fray” and the two claims are distinctly different. The issue in *Ngubane* pertained to general damages passing to the deceased estate.

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<sup>41</sup> *Olivier* at para 28.



[50] Accordingly, the *dies* for an objection and for the filing the plaintiff's amended pages would only lapse on 6 November 2023. With the defendant filing an appearance to defend and with the substantial proposed amendment, the application before me was therefore not ripe for hearing.

#### Costs

[51] The plaintiff ought to have known that a late substantial amendment would disturb *litis contestatio* and would render her application for default judgment defective. Without effecting the amendment, the unamended particulars of claim in the amount of R2 300 000.00 is still before this Court.

[52] On the other hand, the defendant's dilatory conduct cannot be excused and filing of its notice to defend at the 11<sup>th</sup> hour borders on gross negligence.

[53] Consequently, both parties are equally to blame for the predicament they found themselves in and I therefore find that each party should pay their own costs.

#### Order

[54] As a result, I make the following order:

1. Default judgment is refused.
2. The application for an interim payment in the amount of R 498 166.00 is refused.
3. Each party to pay their own costs.

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**FF OPPERMAN**  
**ACTING JUDGE OF THE HIGH COURT**  
**GAUTENG DIVISION OF THE HIGH COURT**  
**JOHANNESBURG**

Heard On: 25 October 2023

Date of Judgment: 03 November 2023

For the Plaintiff: Adv DJ Smit

Instructed By: Leon JJ van Rensburg Attorneys, Edenvale

For the Defendant: Mr D Sondlani

Instructed By: State Attorney, Johannesburg

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date for hand-down is deemed to be 03 November 2023.