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

Case number: 22236/2013

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

24 August 2023 .....
.....
SIGNATURE DATE

In the matter between:

SIBONGILE THULUSILE NGCOBO Applicant

and

DR L.F. OELOFSE Respondent

In re

SIBONGILE THULUSILE NGCOBO Plaintiff

and

DR. D.P. MASEKO – MAGONGO First Defendant

DR L.F. OELOFSE Second Defendant

JUDGMENT

FORD, AJ

Introduction

[1] This is an application for an interim payment, as provided for in Rule 34A of the Uniform Rules of Court.

[2] The application comes pursuant to a first interim payment made to the applicant in August 2019, the merits having been resolved, in a judgment, in October 2016.

[3] The applicant contends that she is entitled to a further interim payment, as provided for in the relevant Rule, whereas the respondent challenges the basis for the entitlement and the relief sought in respect thereof.

Purpose of the application

[4] As stated above, the merits in the main action was resolved in a judgment in October 2016. A first interim payment of R 350 000.00 was made to the applicant in August 2019.

[5] The applicant contends that:

5.1. she has been unemployed since 2020;
5.2. has no income;
5.3. has depleted the first interim payment and all other resources available to her;
5.4. her medical aid has been suspended for non-payment of premiums; and
5.5. the trial date is unlikely to be set down on a date before 2024.

[6] In light of the above, the applicant brings this application for a second interim payment in the sum of R 650 000.00.

Brief factual matrix

[7] The applicant is the plaintiff in the main action and sues the first and second defendants herein for damages arising from injuries she sustained during a surgical procedure on her cervical spine on 3 August 2010. She suffered a plunge injury to her spinal cord when a surgical instrument penetrated her spinal cord.

[8] Following the surgical procedure, the applicant awoke paralysed.[1] She was unable to move her legs, and was unable to lift her hands above elbow level. The first defendant arranged for her to receive rehabilitative treatment, and after nearly a month in hospital, the plaintiff was able to walk out of the hospital with the aid of crutches.

[9] She continued to recover at home but lost her job as a consequence of taking two months sick leave following her injury.[2] She thereafter managed to secure work with Adv. M. Khoza SC ("Khoza") as a typist and assistant in his practice, starting in February 2011.[3] Khoza retrenched the applicant effective in January 2020[4] and she has been unemployed since February 2020 (a period of nearly three years).

[10] The applicant has an adult daughter, a minor son aged 9 years, and is separated from her partner.

[11] Following the injury, the applicant was diagnosed with Brown Sequard Syndrome. A syndrome that affects a patient in such a way that she loses sensation on one side of the body and suffers a loss of power or strength on the other side. The applicant manifested these symptoms, as well as consequential psychological overlay of symptoms. The applicant has suffered relapses or regressions in her functionality in 2011, 2015 and 2019 and is required to take Lyrica and Neurobion chronically.

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[1] CaseLines: 0004-6, paragraphs 9 and 10 (Pleadings); CaseLines 0012-8 to 0012-15 (First Defendant's clinical notes); 0012-123 to 0012-132 (Post-op nursing notes)
[2] CaseLines: 0013-49 to 0013-104 (CCMA proceedings)
[3] CaseLines: 0013-105 to 0013-106 (Letter from Adv Khoza SC confirming appointment)
[4] CaseLines: 0012- 109 to 0013- 110. (Letter from Adv Khoza SC retrenching the plaintiff)

[12] The summons in this matter was issued in June 2013[5] and has been running for almost ten years.

[13] The trial on the question of liability proceeded in August 2016, and judgment in favour of the applicant was handed down on 26 October 2016.[6] The first and second defendants were found jointly and severally liable. The first defendant did not defend the matter and subsequently moved to Eswatini. The second defendant (the respondent herein) joined the first defendant as a third party[7].

[14] On 1 August 2019, following a discussion between the parties, the respondent offered the applicant an interim payment of R350 000.00[8], which was accepted by the applicant.[9] There was no formal application, nor a Court order in respect thereof.

[15] The interim payment was made three years ago, and the present application is for a second interim payment.

[16] Most of the expert reports and joint minutes have been filed. However, there are reports and minutes still outstanding at this time. In addition, so it was argued, the parties would need to hold a pre-trial conference, and then apply for a trial date of long duration. By current estimations, according to Ms. Munro, it is unlikely that this matter will come to trial before 2024.

[17] The matter has been hard fought, with two opposed applications, and multiple exchanges of Rule 35(3) notices. The papers in the matter are in excess of 3800 pages uploaded.

[18] The applicant contends that she has run out of money, and her medical aid has been suspended effective July 2021[10]. The applicant's attorneys have also made

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[5] CaseLines: 0004-1 to 0004-4. (Combined summons)
[6] CaseLines: 0020-1 to 0020-11 (Judgment of Wiener J, as she then was) and 0019-7 (Court Order of Weiner J, as she then was.)
[7] CaseLines: 006-1 to 0006-27 (Second Defendant's Third Party Notice to First Defendant) and 0019-3 (Court Order of Modiba J, joining the first defendant as a third party)
[8] CaseLines: 0017-1527 to 0017-1528 (item 95 under Notices)(Second Defendant's Offer of interim payment)
[9] CaseLines: 0017-1529 to 0017-1530 (item 96 under Notices) (Plaintiff's acceptance of the offer.)
[10] CaseLines: 0015-14 (Annexure "TT 52": Letter from Discovery Medical Aid terminating the applicant's membership with the scheme)

numerous requests for a second interim payment by way of various correspondences, all of which were declined.

[19] In the last letter to the respondent, dated 20 June 2022, in which she requested a second interim payment, the applicant provided a substantive description of how the first interim payment was expended, and set out the basis of the request for the second interim payment.[11] The respondent however declined the request for the second interim payment,[12] giving rise to this application, launched on 9 September 2022.[13]

[20] The first interim payment was made for R 350 000.00 and the second interim payment has been requested in the sum of R 650 000.00. If awarded, this would bring the total of interim payments to R1 million.

[21] The defendant opposes the application and has not made any counter-offer for a second interim payment whatsoever.

The applicant's arguments

[22] It was argued, by Ms. Munro, on behalf of the applicant that, that in terms of Rule 34 A (1), (4) and (5), a litigant is entitled to an interim order for damages, provided that liability has been admitted in writing or judgment has been obtained, and the defendant has insurance or has the means to pay.

[23] The applicant contends that she has established her entitlement to an interim payment, as liability has been determined in a judgment in October 2016, and the respondent is insured. Further that the respondent does not deny the ability to pay.

[24] An interim payment does not have the characteristics of a final payment nor of judgment as to part of a plaintiff's claim. Accordingly, it was submitted that, such

[11] CaseLines: Annexure "TT 53" to the founding affidavit 0015-142 to 0015-148, plus annexures 0015 – 0149 to 0015-185.
[12] CaseLines: Annexure " TT 54" to the founding affidavit 0015-186 to 0015- 187.
[13] CaseLines: 0015-1 to 0015-3 (Notice of Motion).

an award can be made on a robust approach, "*which does 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"* (Rule 34 A (4))

[25] Ms. Munro relied on a decision in *Fair vs S A Eagle Insurance Co Ltd*[14], for advancing the applicant's case, where the Court, per Jennet J, held, that:

> 'despite the yardsticks and safeguards in the rule that have to be applied before the Court will grant an interim payment of such amount *"as it thinks just"*, an interim payment as provided for in the Rule has none of the characteristics of a final payment nor of a judgment as to part of a plaintiff's claim.'

[26] It was submitted that an interim payment can be made against the claims in respect of special damages (i.e. including past and future loss of income and past and future loss of earnings, but excluding general damages for pain and suffering). Further that in other delictual matters, the applicant is entitled in accordance with Rule 34A, and the case law, to make a claim in respect of both past and future claims for special damages. In this regard, I was directed to *Karparkis v Mutual and Federal Insurance Co Ltd*[15], where Lichtenberg J, held at page 500 I – J, as follows:

> "Subrule (1) makes no mention of either past of future medical costs and loss of 'income', nor, for that matter , does it add the qualifications that these costs must be 'present costs' or that the interim payment can only be granted 'after these costs have been incurred' In view of the clear reading of subrule (4) , namely that *'the Court may, if it deems fit,…order the respondent to make an interim payment of such amount as it thinks just'* (my italics), it is abundantly clear that the Court's discretion is not fettered in any way by the impending or restricting implications which Mr Claasen says must be read into the Rule. The only restrictions to which an interim payment is subject are the ones contained in the Rule itself, and these do not prohibit an interim payment to relate to future medical costs and future loss of earnings."

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[14] 1995 (4) SA 1995 (4) SA 96 at page 99 D

[15] 1991 (3) SA 489 See also *Fair v S A Eagle Insurance Co Ltd* 1995 (4) SA 96 (E) at 100(D), and the unreported judgment of Gyanda J, in *Harilall and another v Ramdeo and another [case no 9224/99] KZN* at page 12

[27] It was argued that a litigant may bring more than one application for an interim payment as was the case in *Karpakis*[16] where the applicant in that matter was applying for a second interim payment.

[28] It was further argued that a robust approach can be made in respect of the award for the interim payment, and the amount awarded is not simply to tide the applicant over, but is limited only by the discretion of the court[17]. In *Karparkis*[18] the court held as follows:

> "It is quite clear that the Court, when it decides to grant an interim payment, does not in any way whatsoever quantify and assess plaintiff's damages in the way it would do when giving judgment., i.e. after it has heard all the evidence touching upon the quantum of damages and has thereafter decided what the exact amount of its award for damages should be. On the contrary the Court merely exercises a judicial discretion under subrule (40 and, having applied certain yardsticks and safeguards mentioned in the Rule, grants an interim payment in 'such an amount as it thinks just, taking into account the criteria set out in subrules (4) and (5)."

[29] In response to the respondent's contention that the applicant is using the second interim payment to fund her litigation, which the applicant denies, it was argued that the applicant has served a bill of costs on the respondent, and the recovered funds will be used to fund the litigation further. The applicant concedes however that her attorneys used R87,500.00 from the first interim payment to pay disbursements.

[30] Ms. Munro submitted that an interim payment can be used to pay legal costs. In this regard reliance was placed on what the court said in *Karparkis:*[19]

> "Subrule (6) can never have been intended (by the use of the words "be paid in full to the plaintiff") to prohibit the plaintiff to pay any amount of an interim payment to his attorney. If that was what the Rules Board intended, it would most certainly have used language by which, as it were, 'strings were attached' to the manner in which the plaintiff could spend the money which he receives as an interim payment."

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[16] *Karparkis v Mutual and Federal Insurance Co Ltd* 1995 (4) SA 1995 (4) SA 96 at page 99 D see in particular page 499 E,

[17] See in this regard the *Harillal* judgment (*supra)* at page 14 paragraph 12.

[18] Page 496 E – F

[19] Page 507 B,

[31] The only reason why the issue of R87,500.00 was raised, so it was argued, had to do with the fact that it was set off against the applicant's disbursements in the case, for which she is personally liable for, and is not in respect of this application for a second interim payment.

[32] It was submitted that the applicant's attorneys have no intention of requesting the applicant to pay any further legal costs at this stage, particularly given her dire circumstances including suspension of her medical aid, and in respect of which her minor son was also a beneficiary on the medical aid. Further that, it is not only the applicant who suffers, but her minor son as well. Moreover, the applicant has no source of income and, day by day, her situation becomes worse and she falls further into arrears with her creditors, including her landlord.

[33] In response to the respondent's assertion that the first interim payment has not been accounted for, and that there are insufficient vouchers attached, which the applicant denies, and the respondent's assertion that there are no vouchers for the application for the second interim payment, the applicant stated that:

33.1. she has fully explained how the first interim payment was used as set out in the founding affidavit at paragraphs 44 to 59 starting at page 14 and ending on page 21[20];

33.2. the information which has been disclosed constitutes a full and detailed accounting of the employment of the first interim payment of R 350, 000.00;

33.3. the respondent's complaint of a lack of vouchers is without merit because there are no less than 46 invoices or vouchers attached to the founding affidavit;

33.4. the applicant cannot furnish vouchers for future expenses.

[34] It was argued that the standard of proof in an application for an interim payment is not the same as the standard required at trial for a claim for damages.

[20] CaseLines: 0015-17 to 0015-24

Reliance was placed in this regard on a decision in *Van Wyk v Santam BPK*[21] Hancke J, held as follows:

> "Dit moet in gedagte gehou word dat 'n Hof op hierdie stadium slegs 'n tussentydse vasstelling moet maak wat later selfs gewysig kan word en is die bewysmaatstaf nie so hoog soos wat die geval sal wees waneer hierdie saak op verhoor sou gaan nie."

[35] The basis of the applicant's request for a further interim payment is set out in detail at paragraphs 65 to 82, starting at page 28 and ending on page 32.[22] It is submitted that this is a detailed exposition of the basis of the applicant's claim for a further interim payment. It was further submitted that the applicant has made out a full and proper case for the relief sought.

[36] In response to the respondent's assertions pertaining to the other payments received, and the way in which she spent those monies. The applicant draws, for purposes of contesting the assertions, *inter alia* on the principle of *res inter alios acta*[23]*, and* claims further*,* that those assertions are irrelevant to the application. The applicant, so it was argued, is entitled to spend her award in any way she deems fit. While she may have been extravagant on one or two occasions, for example taking her family to lunch on her birthday, there is, according to the applicant, no pattern of reckless overspending.

[37] It was submitted that the applicant was earning a good salary whilst working for Khoza, and lived according to her means. Whilst she may not have understood the gravity of the loss of her employment, she is certainly well aware of it now.

[38] It was submitted further that the applicant has been unemployed for two years and ten months and that by the time this application is argued, it will be three years. The amount of R 350, 000.00 was considered by the applicant's attorneys to be sufficient to get the applicant to the trial date, but with the advent of the pandemic and the delays that has caused, in conjunction with the fact that the

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21 1997 (2) SA 544, at page 547 B at 547 (B – D)

22 CaseLines: 0015-65 to 0015-82

23 A law doctrine which holds that a contract cannot adversely affect the rights of one who is not a party to the contract.

respondent set up a new consultation with an occupational therapist, which report has not yet been received, the applicant does not believe that this matter will come to trial before 2024. By that time, so it was argued, the applicant would have been unemployed for 4 - 5 years.

[39] The applicant contends that she has run out of funds. Her medical aid has been suspended. In addition to the interim payment, she has used her own her savings, insurances pay outs and retirement funding to pay her way thus far. The respondent has demanded sight of the applicant's bank accounts going back to 2004. The respondent has also demanded sight or information relating to her medical aid and insurance payouts. These are all *res inter alios acta* and irrelevant to the matter at hand. The respondent cannot rely on the applicant's medical aid (where she has to pay a premium of over R 7 000,00 per month) to compensate her for her loss which has been caused by the respondent.

[40] Ms. Munro referred to *Standard General Insurance Co Ltd v Dugmore NO*[24] and the cases cited therein.) The principle enunciated therein is that if the policies covering loss of income are taken out by an employer and form part of the benefits of employment, then the amounts are deductible. However, if the policies and medical aid are taken out privately then the defendant cannot claim a deduction of these amounts from the damages award. The defendant cannot rely on other insurances, paid for by the claimant, to defray their own liability for damages. These amounts are therefore *res inter alios acta.*

[41] In response to the respondent's assertion that the quantum in this matter, must still be proved at trial, and that interim payments cannot be made until the matter is finalised, the applicant contended that, if it were true that the *quantum* had to be proved at trial before an interim payment could be made, it would render Rule 34A and interim payments nugatory. It was submitted that by granting an interim payment, a court does not need to assess the damages or make any findings, the court is required to apply its judicial discretion to determine an award that it

[24] 1997 (1) SA 33 (A) at 41 to 43

deems just, but is unlikely to exceed a final award, and is rather a reasonable proportion of what the final award might be.

[42] It was further submitted that, when considering the balancing of prejudice between the parties, the prejudice to the applicant should she not receive a further interim award is self-evident. She is already in dire circumstances and would have to endure the situation for another two years. It was further contended that the experts are *ad idem* that the applicant requires ongoing treatment which is now not accessible to her.

[43] It was contended further, that the respondent was found jointly and severally liable for the applicant's damages in October 2016 and that the only reason, the respondent has not paid the damages thus far, is because the matter has not been finalised. It was further argued that the respondent is liable for interest on damages from the date of demand in terms of Section 2A of the Prescribed Rate of Interest Act. And that, if payments for past losses are made, the interest cease to run on the date of payment, which would be to the advantage of the respondent.

[44] Furthermore, so it was argued, any potential prejudice to the respondent is mitigated by virtue of the following:

44.1. in terms of Rule 34(10) the interim payment is not a *"once and for all" payment"*. In the unlikely event of overpayment, the respondent can request an order for repayment;

44.2. an overpayment is unlikely since the applicant cannot claim an interim payment against general damages. Accordingly, the likelihood of an overpayment being granted is virtually nullified;

44.3. the past medical expenses alone, come to R 219 566,38.[25]

44.4. whatever is paid in terms of an interim payment is deducted from the final award, and there will be no duplication of payment.

[25] CaseLines 0011-7

[45] It was submitted further that the prejudice to the applicant in not receiving a further interim payment, is far greater than any prejudice that may be suffered by the respondent's insurer.

[46] In conclusion, the applicant sets out the basis for the amounts claimed for a second interim payment, as follows:

[47] The claims on the pleadings, are as follows:

47.1.	Past Hospital and Medical Expenses:	R 400 000.00
47.2.	Future Hospital, Medical and Related Expenses:	R5 731 097.00
47.3.	Past and Future Loss of Earnings:	R5 257 602.00
47.4.	General Damages for Pain and Suffering:	R 800 000.00
	TOTAL	R12 188 699.00.

[48] The applicant submits that the second application for an interim award of R 650 000,00 will bring the total of the two interim awards to R 1 million, which would be deducted from the final award.

[49] It was submitted further that the medical records (annexures "TT56 and TT57"[26] to the founding papers) describe the initial injury and the fact that the applicant was *paralyzed* when she awoke form surgery on 3 August 2010. It took nearly a month of rehabilitation for her to be able to ambulate on crutches.

[50] Further that the psychiatrists for both parties agree, that the applicant has developed a depressive disorder secondary to her medical condition, chronic pain and impaired mobility. They also agree that without a lot of assistance she is *"not fit to function."* (See paragraph 69 of the founding affidavit and the reference therein).[27] This is supported by Dr. Radebe, clinical psychologist. (See paragraph 70 of the founding affidavit and the references cited therein.)[28] Ms. Poswayo, physiotherapist notes that the applicant requires ongoing treatment by a multidisciplinary team. (See paragraph 71 of the founding affidavit and the

[26] CaseLines: 0015-189 to 0015-100
[27] CaseLines: 0015-26
[28] CaseLines: 0015-26

references cited therein).[29] This is confirmed by the orthopaedic surgeons for both parties. (See paragraph 72 of the founding application and the references cited therein.)[30]

[51] The applicant's future loss of medical expenses, and past and future loss of earnings have been actuarially calculated according to the expert reports filed on behalf of the plaintiff. The future medical expenses and past and future loss of earnings comes to R 10 988 699,00. (See paragraphs 73 to 74 of the founding application and references cited therein.)[31]

[52] The applicant's monthly living expenses which would be paid from her claim for loss of earnings is set out in an amount of R 20 632.00 for the basics, which is R247 584.00 per annum. (See paragraphs 77 to 78 of the founding papers and the refences cited therein.)[32]

[53] It was argued that the applicant has made out her case in detail, and that the amount of R 650 000,00 (bringing the total interim payments to R1 million) is a reasonable proportion of the anticipated award, will not exceed the award and in particular will not exceed the special damages portion of the anticipated award. Further that the applicant is entitled to an interim payment by operation of the law, save that this court is vested with the discretion to determine the amount to be awarded.

[54] It was pointed out that the respondent has made no counter-offer and that the applicant accordingly seeks an award for costs on the High Court scale as between party and party.

<u>The respondent's arguments</u>

[55] The respondent refuses to make a further interim payment to the applicant. The reasons for such refusal, are set out and discussed below.

[29] CaseLines: 0015-27
[30] CaseLines: 0015-27
[31] Caselines: 0015-27
[32] CaseLines: 0015-28

[56] The respondent does not dispute the fact that the applicant sustained a plunge injury to her spine during an operative procedure performed by the first defendant and that the respondent (second defendant) has together with the first defendant been found liable for damage flowing from such injury.

[57] Further that, quite aside from the fact that the applicant had a pre-existing injury which must be taken into account in assessing the damage of the plunge injury, it is common cause between the parties that the plunge injury has resulted in what is termed a *Brown-Sequard Syndrome*[33].

[58] In a joint minute dated 26 July 2016, the neurosurgeons agreed that the applicant had suffered a Brown Sequard syndrome. This is confirmed by the applicant in her founding affidavit stating *"… there is no doubt that that the applicant suffered what is termed a Brown Sequard Syndrome*."[34]

[59] However, according to Dr. Osman, the neurosurgeon instructed at the instance of the respondent, the symptoms now displayed by the applicant is not in keeping with a Brown Sequard Syndrome[35].

[60] This, according to the respondent, accords with the factual evidence that the applicant secured work in February 2011, some 5 months after the surgery, which may well have been sooner, had she not been dismissed from the employment she previously enjoyed. The applicant was thereafter able to successfully sustain such employment up to January 2020 (a period of nine years).

[61] It is evident from the above that the respondent challenges whether the loss of employment and medical expenses incurred, by the applicant is in consequence of the Brown-Sequard Syndrome or some other reason (i.e. the issue for

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[33] Brown-Séquard Syndrome is a neurologic syndrome resulting from hemisection of the spinal cord. It manifests with weakness or paralysis and proprioceptive deficits on the side of the body ipsilateral to the lesion and loss of pain and temperature sensation on the contralateral side.

[34] Case Lines – 0015 – 26 para 67 & 0010 – 1 (para 6)

[35] Case Lines – 0015 – 216 & 217 (para 13.3 and 13.6)

determination is one of causation). It is contended that this is an issue for determination by the trial court.

[62] That this is so, is confirmed by the applicant in her replying affidavit stating "*The respondent is not satisfied that all her symptoms are as a consequence of the instrument plunge injury into her spinal cord. This is an aspect which is to be canvassed at the trial…*" [36]

[63] The respondent submits that this court has a discretion to be exercised judicially upon a consideration of all the facts and that in the exercise of its discretion, the court will not order that an interim payment be made in circumstances where the defendant raises some doubt as to the damages or as to whether the plaintiff will be able to prove any damages[37].

[64] In addition to this, so Mr. Patel, for the respondent argued, Rule 34A(4) expressly gives the court a discretion whether to order an interim payment or not with the result that even if all the other prerequisites for an interim payment have been proved, but the defendant raises some doubt as to the damages or as to whether the plaintiff will be able to prove any damages, then no interim payment will be ordered at all.

[65] The respondent contends that it has done more than raise some doubt. In the event that the applicant fails to establish causation, the loss of employment (nine years after the event) and medical expenses incurred cannot be attributed to the respondent. There is thus a real prospect that a further interim payment will exceed the amount of damage that the applicant is entitled to recover from the defendant.

[66] It was submitted further that, given the applicant's alleged financial situation and her demonstrated spending habits, the prospect of recovering any overpayment from her is non-existent. In the circumstances of this case the protection afforded in terms of subrule 10, affords no relief to the respondent. And that on this

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[36] Replying Affidavit para 41, Case Lines – 0015 – 396 (para 41)

[37] *Karpakis v Mutual & Federal* 1991 (3) SA 489 (O) at 498G

ground alone, the respondent argued, the application should be dismissed with costs.

[67] With reference to the issue of the burden of proof in interim payment applications, Mr. Patel referred me to *[V]..[D…obo M[…] D…]/ MEC Eastern Cape*[38] In *Van Wyk v Santam Bpk*[39], where the court held that the standard of proof referred to in the jurisdictional requirements outlined in sub-rule (2) is not as high as it will be when the action goes on trial. The degree of evidence required by the Court at this stage in order to be able to direct an interim payment will vary from case to case and according to the circumstances of each case.

[68] The respondent points out that, having regard to the founding affidavit, the application for the interim payment appears to be based on four grounds:

68.1. past medical expenses;
68.2. legal fees;
68.3. household expenses; and
68.4. loans made to the applicant by family and friends.

[69] The above grounds are discussed below, followed by the respondent's contentions in respect of *good cause*, *delay*, *requests for interim payments*, and *vague documentary proof*.

Past Medical Expenses

[70] The past medical expenses relied upon by the applicant for this interim payment amount to R46 402.37. It is pointed out that these expenses were incurred at a time when the applicant was still on a medical scheme. Further, that this court has not been made privy to what expenses the medical scheme provided cover for, and what the applicant had to bear herself. It can however be reasonably assumed that the bulk of the expenses would have been covered by the medical aid scheme.

[38] (634/2017) [2021] ZAECBHC 10 (13 August 2021)
[39] 1997 (2) SA 544 (O) at 546G – 547E, (para 19)

[71] In an event, so it was argued, such expenses would have been satisfied by the previous interim payment, as such expenses having been incurred prior to the making of the first interim payment.

[72] The respondent contends, that the applicant asserts the fact that she was covered by a medical scheme is *res inter alios acta*. It accepts that this may well be true in the main action, but that it's clearly relevant in an application for an interim payment where the applicant needs to establish a need. Moreover, the applicant does not allege having undertaken to repay the Medical Scheme nor that the applicant is liable to the Medical Scheme in terms of the doctrine of subrogation.

[73] The respondent contends that the crux of the matter is that at this stage neither of the parties can be certain as to what medical accounts relate to the Brown Sequard Syndrome. Further that the applicant does not quantify in any detail her immediate medical needs[40].

[74] The respondent submitted that Rule 34A requires an applicant to set about the *"grounds"* for the relief sought. According to the respondent, it was required of the applicant to say more than that she was injured, that her medical scheme had paid for the expenses, that liability was admitted in writing and that the respondent was able to pay.

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40 Mohlala & Swart v RAF Case No 208/32706 GD (para 21)

Legal Fees

[75] The respondent contends that legal costs do not constitute a basis for an interim payment. The respondent opined that *Karpakis* is authority to the effect that the applicant may defray her legal expenses from an interim payment, but that this *dicta* is clearly wrong. Further that it is in any event the *dicta* of a single judge in another division which this court is not obliged to follow. Holding out that Karpakis, is merely persuasive authority.

[76] The respondent submits that if the *dicta* is correct, it would lead to an untenable situation where an applicant can bring an application for an interim payment based on past medical expenses and loss of earnings and then to defray legal expenses from such award. The applicant would then immediately be entitled to bring a further application for an interim payment based on the same grounds on the basis that the initial interim payment was used to defray legal costs and that a further interim payment is required in respect of the medical costs and loss of earnings and so on.

[77] The respondent points out, that significant portions of the costs referred to by the applicant relate to disbursements already incurred in the build-up to the quantum trial and in respect of which the applicant has served a bill of costs, subsequent to the institution of this application.

[78] The respondent remains fortified that legal costs are irrelevant and has no place in the determination of an interim payment. Further that, the application is intended to fund the litigation and/or for the recovery of legal costs is evident from the confirmatory affidavit of the applicant stating as she does that "*I believe that my attorney and I have made out a case for the relief sought*." The only interpretation to be accorded to this sentence is that the attorney is a party to this application[41].

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41 Case Lines – 0015 -206 (para 26)

Household Expenses

[79] The respondent contends that household expenses do not form a basis for an interim payment under Rule 34A. The respondent notes however, the estimate figures are provided in respect the monthly disbursements[42]. It points out that no documentary proof is attached to support the alleged basic monthly expenses incurred by the applicant. For example , no rental agreement, no electricity or water account etc. Nor is any account taken of the applicant's child's father's contribution to these alleged expenses. The respondent contends that this falls short of the prescripts of the Rule.

[80] The respondent submits that it is noted that the alleged costs for rental and including water and lights are reduced going forward. It is pointed out that the rental, electricity and water expenses that have been incurred in the past amount to R8 150.00 per month, whilst going forward these expenses amount to R7 000.00 per month. Which highlights the need for documentary proof of such expenses.

Loans from family and Friends

[81] The applicant alleges that the interim payment will enable her to pay her debts and loans from friends and family[43]. The respondent contends that this issue finds no place in an application for an interim payment and raised in addition, the concern that the applicant has failed to furnish any details of the debts and/or the loans made to her by family and friends. Further that there are no confirmatory affidavits by any of these anonymous family members or friends attached to the papers. It also begs the question, so the respondent argues, whether the applicant intends to use the interim payment for her monthly expenses going forward, or repayment of the above debts for what the Rule provides for, i.e. medical expenses.

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[42] Case Lines – 0015-23 and 0015-28

[43] Case Lines – 0015 - 29

Good cause

[82] The respondent notes that this application constitutes a second interim payment requiring the applicant to show good cause, more particularly how the first interim payment was disposed of. It argues that the way in which the first payment has been spent will, in an application for a further interim payment be taken into consideration in the exercise of the court's discretion[44].

[83] Mr. Patel submitted that an applicant who has already received an interim payment and applies for a further such payment should set out what she has done with the first payment. If she squandered the first payment by, e.g. losing it on betting transactions or buying an expensive motor vehicle with it, the court to which she applies for a further interim payment, might be very reluctant to grant her application. Further that, it is clear that the reasons which would motivate the court to refuse the second interim payment would be dependent on whether the court considers the applicant an irresponsible spendthrift who squanders funds which were meant, as it were, to *'tide her over'* until her case can be tried.

[84] The respondent directed the court to consider how the initial interim payment was utilised by the applicant. To this end it was pointed out that the initial interim payment of R350 000.00 was made on 19 August 2019 at a time when the applicant was still employed by Khoza and whilst still belonging to a medical aid scheme[45]. Of this amount the applicant's attorneys retained the sum of R87 500.00 and the balance of R262 500.00 was paid over to the applicant on 29 August 2019. It appears that an amount of R225 000.00 was then transferred by the applicant into an Allan Grey account on 11 September 2019.

[85] Between October 2019 and January 2020, whilst still employed by Khoza and whilst still on a medical aid the applicant transferred R156 537.46 from the Allan Grey Account into her FNB account leaving a balance of R68 462.54 in the Allan Grey Account assuming that it had a nil balance to start with[46].

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[44] *Karpakis v Mutual & Federal* at 504

[45] Case Lines – 0015 - 210

[46] Case Lines – 0015 – 226 to 227

[86] The respondent contends that these transferred amounts were used to fund a lifestyle rather than its intended purpose i.e. payments to Makro, Truworths, YDE, Ackermans, Turn & Tender etc. The respondent submits that it is not suggested that the applicant should not purchase clothing and/or food but that there were no payments made in respect of medical expenses.

[87] It contends further that the interim payment has not been fully utilised but more significantly what has been used, was not used for medical expenses. In the premises it was submitted that the applicant has failed to establish good cause.

[88] The respondent points out further that on 30 September 2020, the applicant received a significant amount of R840 731.25 into her FNB Cheque Account, which was not disclosed to this court. This amount was disseminated as follows:

88.1. R450 000.00 was transferred to the applicant's gold card;
88.2. R300 000.00 was transferred to another of the applicant's FNB accounts annotated as household upkeep; and
88.3. R90 731.25 was retained[47].

[89] From October 2020 to September 2021, at a time when the applicant was unemployed, she spent R450 000.00 i.e. an average of R37 500.00 per month on various items none of which related to medical expenses. The respondent submits that if, as the applicant avers, she is without any funds having spent the entire amount of R840 731.25 this monthly spending would increase to R70 061.00 per month. Further that, what appears with startling clarity is the fact that if the applicant is in a perilous financial situation, as alleged, such is of her own making.

[90] The respondent points out further, that it is significant to note that the first request for the second interim payment was made on 28 September 2020, two days before receipt of the sum of R840 731.25. In his opinion, so contended Mr, Patel, this smacks of opportunism and greed.

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[47] Case Lines – 0015 - 228

The delay

[91] Touching on the issue of delay, the respondent submits that on 11 March 2015 the respondent's Rule 30 application was dismissed with costs and on 25 October 2016 the negligence issue was determined in favour of the applicant with costs. It has taken the applicant seven and six years later respectively, to submit her bill of costs for these successful proceedings[48].

[92] A bill of costs was finally served on 20 October 2022 as per Annexure TT59 to the replying affidavit[49]. The matter was set down for the determination of quantum on 16 August 2018. The applicant removed the matter from the roll having failed to file expert reports. This is more than four years ago. The matter was again set down for determination of quantum on 24 August 2020. The respondent alleges that the applicant's failure to disclose that she was the director of three companies caused the matter to be postponed once again. All of this at additional costs to the respondent[50].

[93] The respondent submits that conveniently, no mention was made of these two postponements occasioned by the applicant in her founding affidavit. Further that, in her replying affidavit she disputes the reasons set forth by the respondent for the postponements in the answering affidavit but strangely, proffers no alternate reason for the postponements alleging that this is an issue for the trial court[51].

[94] According to the respondent, these delays have resulted, in the medico-legal reports becoming stale and the applicant has taken no further steps to have the matter set down. The respondent points out that the non-production of the occupational therapist report is no bar to holding a pre-trial conference, at which the respondent could be placed on terms to serve the report of the occupational

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[48] Case Lines – 0015 – 212 & 213

[49] Case Lines – 0015 - 401

[50] Case Lines – 0015 – 214/215 paras 12.10 to 12.15

[51] Case Lines – 0015 - 387 para 7

therapist. Further that there have been no requests for a pre-trial conference to date[52].

Request for interim payments

[95] The respondent submits that on 9 July 2019 the applicant requested an interim payment of R350 000.00, which request the respondent acceded to. Fourteen months later, and on 28 September 2020 a further interim payment request was made by the applicant, this time for a further amount of R400 000.00. On that occasion, the respondent sought certain information from the applicant more particularly how the first interim payment had been utilised. No response was forthcoming from the applicant despite further correspondence from the respondent[53].

[96] Eight months later, and on 8 June 2021 once again the applicant sought an interim payment this time for an amount of R600 000.00. The same sequence of events ensued as with the request for an interim payment of R400 000.00[54].

[97] One year later, and on 20 June 2022 the applicant requested, for the fourth time, an interim payment of R650 000.00 which has led to this application[55]. The respondent contends that with each passing year the amount increases for no apparent reason.

Lack of documentary proof

[98] The respondent points out that the applicant alleges that she suffered relapses over time requiring hospitalisation for "*different reasons.*"[56] However, the hospital records pertaining to such admissions are not attached to the founding affidavit.

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[52] Case Lines – 216 - para 12.23
[53] Case Lines – 0015 – 221 para 16.4
[54] Case Lines – 0015 – 222 (para 16.7)
[55] Case Lines – 0015 – 222 (para 16.9)
[56] Case Lines – 0015 – 14 para 28

It noted however that post the initial discharge two hospital admission records were uploaded onto CaseLines. The first is dated 22 December 2015. The clinical notes record – "*Transfer ordered from Mulbarton ICU to Union Cardiac ICU, admitted on 17 [unclear] with hypertension and dizziness, patient wrongly given undiluted adrenaline to increase blood pressure. Patient arrested and CPR performed*…" The initial reason for the hospital admission appears to be hypertension. The Mulbarton hospital records have not been uploaded[57].

[99] The second admission is dated 30 January 2019. The applicant's diagnosis was an unstable angina[58]. According to the respondent, the admissions for different reasons speak for themselves.

[100] The respondent submits in response to the applicant's allegation that the father of her child is co-responsible for the financial maintenance of her son, born in 2013, but does not state the precise financial obligations of the father. No documentary proof of any agreement is annexed to the papers[59].

[101] The applicant alleges that she has incurred medical expenses periodically for physiotherapy, counselling, doctors and special investigations and that she is unable to continue such due to lack of funds and because of the suspension of her medical aid on 31 July 2021. According to the respondent, no invoices/documentary proof is annexed to confirm this allegation[60].

[102] The applicant alleges that she requires ongoing therapies. Notwithstanding the fact that the respondent contends that it does not accept that such further treatment is necessitated by the Brown Sequard Syndrome, the applicant does not identify the ongoing therapies nor the costs thereof[61].

[103] The applicant alleges that her condition worsened and that her condition was worse in April 2019 and that her treating doctors had warned her that that this

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[57] Case Lines 0012-158

[58] Case Lines 0012 -216

[59] Case Lines – 0015 – 14 – para 29

[60] Case Lines – 0015 – 15 – para 32

[61] Case Lines – 0015 – 29 (para 80)

was to be expected. The respondent in turn points out, that the applicant failed to identify the treating doctors and or to annex any clinical notes more particularly relating to the underlying cause of the applicant's condition[62].

[104] The respondent contends that the replying affidavit constitutes an opportunity for the applicant to make good and rectify shortcomings in the founding affidavit, more particularly, in an application for an interim payment, to attach the documentary proof not attached to the founding affidavit. Mr. Patel points out, that this opportunity was forsaken by the applicant.

[105] The respondent contends in conclusion that the Rule provides for a procedural remedy to a claimant who has suffered damage in the form of medical costs and loss of income from physical disability, to apply for an interim payment on account of what the plaintiff must still prove in the action, provided the prescribed jurisdictional facts are met. Further that the Rule was clearly introduced to alleviate hardship that a plaintiff may suffer pending the determination of the main action and that sufficient detail is required in the quantification of the medical costs and/or loss of earnings. To this regard, according to the respondent, it is contemplated that the Rule requires documentary proof.

[106] The respondent submits that it is obvious, that the Court, if it includes future medical costs and future loss of earnings in an order for interim payment, will, in the exercise of its discretion pay heed to hazards and contingencies and will keep future medical costs and future loss of earnings within such time limit to safeguard the defendant. Further that subrule 4(b) provides that the award for an interim payment must not exceed a reasonable proportion of the damages which in the opinion of the court are likely to be recovered by the plaintiff. It is according to the respondent impossible *in casu* to formulate an opinion on the damages to be awarded in light of the dispute between the parties.

[107] The respondent contends that the applicant has failed to detail what medical services are necessary in the immediate future as well as the costs thereof and that applications of this nature are not for the mere asking and in respect of

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[62] Case Lines – 0015 – 203 (para 14)

which it is submitted. Further that the respondent rightfully challenges the medical expenses incurred and to be incurred as well as the loss of employment and that in such instance an interim payment cannot be ordered.

[108] The respondent contends further, that the applicant has failed to establish good cause and her founding affidavit is devoid of proper documentary proof in respect of medical expenses (save for that covered by the medical aid scheme), household expenses and loans from family members and friends. It was submitted by the respondent, if indeed, the applicant is under financial constraints, such situation is self-inflicted by both overspending and inordinate delays in the prosecution of the action and that there is clearly no safeguard for the respondent in the event of an overpayment.

Analysis

[109] Rule 34A, provides in its relevant portions, for purposes of this application, as follows:

> **34A. Interim payments**
>
> (1) In an action for damages for personal injuries or the death of a person, the plaintiff may, at any time after the expiry of the period for the delivery of the notice of intention to defend, apply to the court for an order requiring the defendant to make an interim payment in respect of his claim for medical costs and loss of income arising from his physical disability or the death of a person.
>
> (2) Subject to the provisions of rule 6 the affidavit in support of the application shall contain the amount of damages claimed and the grounds for the application, and all documentary proof or certified copies thereof on which the applicant relies shall accompany the affidavit.
>
> (3) Notwithstanding the grant or refusal of an application for an interim payment, further such applications may be brought on good cause shown.
>
> (4) If at the hearing of such an application, the court is satisfied that— (a) the defendant against whom the order is sought has in writing admitted liability for the plaintiff's damages; or (b) the plaintiff has obtained judgment against the respondent for damages to be determined, the

court may, if it thinks fit but subject to the provisions of subrule (5), order the respondent to make an interim payment of such amount as it thinks just, which amount shall not exceed a reasonable proportion of the damages which in the opinion of the court are likely to be recovered by the plaintiff taking into account any contributory negligence, set off or counterclaim.

(5) No order shall be made under subrule (4) unless it appears to the court that the defendant is insured in respect of the plaintiff's claim or that he has the means at his disposal to enable him to make such a payment.

(6) The amount of an interim payment ordered shall be paid in full to the plaintiff unless the Court otherwise orders.

(7) Where an application has been made under subrule (1), the Court may prescribe the procedure for the further conduct of the action and in particular may order the early trial thereof.

(8) The fact that an order has been made under subrule (4) shall not be pleaded and no disclosure of that fact shall be made to the Court at the trial or at the hearing of questions or issues as to the *quantum* of damages until such questions or issues have been determined.

(9) In an action where an interim payment or an order for an interim payment has been made, the action shall not be discontinued or the claim withdrawn without the consent of the Court.

(10) If an order for an interim payment has been made or such payment has been made, the Court may, in making a final order, or when granting the plaintiff leave to discontinue his action or withdraw the claim under subrule (9) or at any stage of the proceedings on the application of any party, make an order with respect to the interim payment which the Court considers just and the Court may in particular order that:

(a) the plaintiff repay all or part of the interim payment;

(b) the payment be varied or discharged; or

(c) a payment be made by any other defendant in respect of any part of the interim payment which the defendant, who made it, is entitled to recover by way of contribution or indemnity or in respect of any remedy or relief relating to the plaintiff's claim.

(11) The provisions of this Rule shall apply *mutatis mutandis* to any claim in reconvention."

[110] An application for an interim payment can only succeed when a court is satisfied that the defendant against whom the order is sought has in writing admitted liability for the plaintiff's damages or the plaintiff has obtained judgment against the respondent for damages to be determined. In this matter, the latter position prevails.

[111] The material facts giving rise to this application, are largely common cause. Rule 34A allows for interim payments in respect of claims for medical costs and loss of income arising from physical disability or the death of a person. This application constitutes a second request for an interim payment.

[112] The enquiry that a court adopts in order to determine whether an applicant has made out a proper case for seeking an interim payment, is varied and depends largely on the facts of each case. An applicant approaching a court for an interim payment, must as a bare minimum set out the following:

112.1. proper grounds on which the application is premised, and do so with sufficient detail to enable the court to ascertain with certainty the basis for the relief sought;

112.2. all documentary proof or certified copies on which the applicant relies, for purposes of quantification, must accompany the affidavit;

112.3. where the interim payment is sought in respect of medical costs, the applicant must disclose sufficient detail or quantification of the medical costs in the short term (until the anticipated trial date) to warrant the interim payment;

112.4. where the interim payment is sought in respect of loss of earnings, the applicant must set out sufficient detail or quantification of the loss, and what he/she requires in the short term (until the anticipated trial date) to warrant the interim payment. Full disclosure is preferred;

[113] There are, similarly, certain facts that ought to dissuade a court from granting an interim payment such as the extent of facts in dispute as well as the nature of those facts[63]. Where an applicant approaches a court for a further interim payment, it can only augur well if the court is apprised of how the previous payment was used.

The applicant's reasons for seeking a further interim payment:

63 *V.D obo M.D v Member of Executive Council, Department of Health, Eastern Cape* (634/2017) [2021] ZAECBHC 10 (13 August 2021) para 20

Medical costs

[114] In seeking a further interim payment in respect of medical costs, the applicant stated that she filed schedules and annexures under cover of Rule 36 (9), which the respondent responded to, by denying the amounts, and putting the applicant to the proof thereof, including those accounts which the respondent himself rendered to the medical aid following his treatment of the applicant in 2010.

[115] The applicant stated that the amounts claimed in this schedule, supported by vouchers, equals the sum of R 219 566,38. Further that, of the aforesaid amount, the amount of R46 402,37 formed part of the employment of the first interim payment. Thus, the applicant would be entitled to rely on an amount of R173 164.01 on the second interim payment. This does not mean that the respondent admits or has paid these amounts.

[116] The applicant tabled a list of expenses that she has to meet monthly, and forms the basis for a request for an amount of R650 000.00 pending the finalisation of the matter.

Item 1	Rent (including water & electricity):	R7 000.00
Item 2	Groceries (for two people including applicant and her minor son).	R3 500.00
Item 3	Medical aid:	R7 632.00
Item 4	Sundry additional expenses including, over the counter medication, and items not covered by the medical aid, cell phone data and airtime, transport, seasonal clothing, toiletries	R 2 500,00
	TOTAL	R20 632,00

[117] The applicant stated that excluding her other expenses, her current estimated monthly expenditure is approximately R20 632,00. Noting that the cost of the medical aid is based on what she was paying in 2021, before her medical aid was suspended for non-payment in May 2021. When multiplied by twelve (12), her basic monthly expenses amount to R247 584,00 per year, at a minimum.

[118] The applicant stated further that she requires ongoing therapies, most of which have now ceased completely due to lack of funds and no medical aid and that an amount of R650 000.00 will enable her to pay her debts (for non-payment of other liabilities), and loans from friends and family. Further that she has gouged out every resource she had, and is now in a perilous financial situation.

[119] The respondent took issue with the applicant's claim on various grounds, which I don't intend to repeat save to state that in its contention the past medical expenses relied upon by the applicant for this interim payment amounts to R46 402.37. However, these expenses were incurred at a time when the applicant was still on a medical scheme.

[120] What was pointed out, and I consider gravely important, is the fact that this court has, as Mr. Patel correctly submitted, not been made privy to what expenses the medical scheme provided cover for, and what the applicant had to bear herself. This brings me back to what I said earlier in this judgment, full disclosure is paramount.

[121] The fact that the applicant asserts that she was covered by a medical scheme is *res inter alios acta*. This is indeed correct, in the main action, but it is clearly relevant in an application for an interim payment where she is required to establish a need.

[122] The respondent contends, contrary to what the applicant asserts, that the crux of the matter is that at this stage neither of the parties can be certain as to what medical accounts relate to the Brown Sequard Syndrome. And unfortunately, the applicant has not quantified, but for stating the amount of the medical cover, in any significant detail, her immediate medical needs[64]. For example, Dr. Osman,

64 Mohlala & Swart v RAF Case No 208/32706 GD (para 21)

the neurosurgeon instructed by respondent, seems to suggest that the symptoms now displayed by the applicant are not in keeping with a Brown Sequard Syndrome[65].

Legal fees

[123] I am in agreement with the respondent that legal costs do not constitute a basis for an interim payment. One need look no further than subrule 1, which provides in its relevant parts that an applicant can 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*. I am not persuaded, nor do I intend to follow *dicta* which I disagree with, and which in my mind at least, offends the spirit of the subrule 2.

Household expenses

[124] I agree with the respondent that household expenses do not form a basis for an interim payment under Rule 34A. It is disconcerting, as Mr. Patel pointed out, that the applicant failed to attach documentary proof to support the alleged basic monthly expenses incurred by her, contrary to what subrule 2 contemplates.

Loans from family and Friends

[125] The applicant stated that the interim payment will enable her to pay her debts and loans from friends and family[66]. The respondent correctly contended, that payments of loans to family and friends, quite apart from the fact that the applicant has failed to furnish any details in this regard, finds no place in an application for an interim payment.

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65 Case Lines – 0015 – 216 & 217 (para 13.3 and 13.6)

66 Case Lines – 0015 - 29

[126] To seek an interim payment under the guise of medical costs and to then apply such for settling loans from family and friends, undermines the basis and rationale behind the spirit of Rule 34A.

Good cause

[127] This application constitutes a second interim payment, which requires the applicant to show good cause, more specifically how the first interim payment was disposed of.

[128] Mr. Patel submitted, correctly in my view, that an applicant who has already received an interim payment and applies for a further payment should set out what she has done with the first payment. Further that, it is clear that the reasons which would motivate a court to refuse the second interim payment would be dependent on whether the court considers the applicant an irresponsible spendthrift who squanders funds which were meant, as it were, to *'tide her over'* until her case can be tried.

[129] I have considered the manner in which the initial interim payment was utilised by the applicant. That payment (R350 000.00) was made on 19 August 2019 at a time when the applicant was still employed by Khoza and whilst still belonging to a medical aid scheme[67]. Of this amount the applicant's attorneys retained the sum of R87 500.00 and the balance of R262 500.00 was paid over to the applicant on 29 August 2019. It appears that an amount of R225 000.00 was then transferred by the applicant into an Allan Grey account on 11 September 2019.

[130] What is further evident is the fact that between October 2019 and January 2020, whilst still employed by Khoza and whilst still on a medical aid she transferred R156 537.46 from the Allan Grey Account into her FNB account leaving a balance of R68 462.54 in the Allan Grey Account[68].

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[67] Case Lines – 0015 - 210

[68] Case Lines – 0015 – 226 to 227

[131] It is not an implausible contention, having regard to the facts of this case, that the transferred amounts were used by the applicant to fund a lifestyle rather than its intended purpose. The first interim payment has not been fully utilised for medical expense purposes.

[132] I have also considered what the respondent pointed out, namely that on 30 September 2020, the applicant received a significant amount of R840 731.25 into her FNB Cheque Account, which was, most disappointingly, not disclosed to this court. This amount was disseminated as follows:

132.1. R450 000.00 was transferred to the applicant's gold card;
132.2. R300 000.00 was transferred to another of the applicant's FNB accounts annotated as household upkeep; and
132.3. R90 731.25 was retained[69].

[133] The respondent pointed out that, from October 2020 to September 2021, at a time when the applicant was unemployed, she spent R450 000.00 i.e. an average of R37 500.00 per month on various items none of which related to medical expenses. The respondent submits that if, as the applicant avers, she is without any funds having spent the entire amount of R840 731.25 over such a short time span, then the applicant's perilous financial situation is of her own doing. I agree.

[134] As previously stated, the respondent contends that the applicant has failed to detail what medical services are necessary in the immediate future as well as the costs thereof and that applications of this nature are not for the mere asking and in respect of which it is submitted. Further that the respondent rightfully challenges the medical expenses incurred and to be incurred as well as the loss of employment and that in such instance an interim payment cannot be ordered.

[135] Further that the applicant has failed to establish good cause and her founding affidavit is devoid of proper documentary proof in respect of medical expenses (save for that covered by the medical aid scheme), household expenses and

[69] Case Lines – 0015 - 228

loans from family members and friends. It was submitted by the respondent, if indeed, the applicant is under financial constraints, such situation is self-inflicted by both overspending and inordinate delays in the prosecution of the action and that there is clearly no safeguard for the respondent in the event of an overpayment.

[136] I am not in a position to ascertain, on the facts presented how the applicant arrives at an interim payment of R650 000.00. Discounting of course, the motivations that have not made it out of the starting blocks of the Rule 34A application. There is a pervasive lack of documentary evidence which ought to have been included in this application.

[137] The only basis on which I can, to a limited extent, grant an interim payment would be in respect of what is not disputed, namely that the applicant requires medical treatment, that her medical aid has been suspended and my view that a restored medical aid fund would assist the applicant in meeting the associated costs, pending the trial.

[138] An order in the terms set out above, cannot by any stretch of the imagination be regarded as the applicant having been successful and therefore entitled to costs. Notwithstanding the limited interim payment, I grant in the applicant's favour, I emphasise that the application was, for all the reasons set out by the respondent (which I agree with) woefully inadequate.

[139] In the result, I make the following order:

ORDER

1. The respondent is ordered, to effect a monthly payment, in the form of an instalment commencing on 1 September 2023, and terminating within 36 months or the date of the trial, whichever occurs first, to the applicant's nominated medical aid, the amount of R7 632.00 (seven thousand, six hundred and thirty-two rand) as an interim payment in terms of Rule 34A(6) of the Uniform Rules of Court.

2. Each party to pay its own costs.

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B. FORD
Acting Judge of the High Court
Gauteng Division of the High Court, Johannesburg

Delivered: This judgment was prepared and authored by the Judge whose name is reflected on 24 August 2023 and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 24 August 2023

Date of hearing: 26 April 2023
Date of judgment: 24 August 2023

Appearances:

For the applicant:	Adv. W. L. Munro
Instructed by:	Nkosi Nkosana Inc
For the respondent:	Adv. M. Patel
Instructed by:	Clyde & Co Inc