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

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

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

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Case no: 23339/2022

In the application between:

P[…] M[…] obo Applicant

M[…] D[…] M[…]

and

MEC FOR HEALTH, GAUTENG PROVINCE Respondent

In re:

P[…] M[…] obo Plaintiff

M[…] D[…] M[…]

and

MEC FOR HEALTH, GAUTENG PROVINCE Defendant

JUDGMENT

DELIVERED: This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email and by upload to CaseLines. The date and time for hand-down is deemed to be 12h00 on 1 February 2024.

1. The plaintiff has sued the MEC for Health, Gauteng on behalf of her minor child, MDM, for loss and damages arising from brain and related injuries that MDM suffered at birth. The plaintiff claimed, and the MEC has admitted, that these injuries were solely the result of negligent care provided to PM during her labour and delivery at Rahima Moosa Mother and Child Hospital. It was also agreed between the parties' experts, and conceded by the defendant in argument, that the minor child suffers from cerebral palsy GFMCS V, MACS V and CFCS, together with a number of other co-morbidities, which have rendered her severely disabled. She is incapable of independent mobility, and needs substantial and ongoing care and assistance.

2. The plaintiff now applies for interim payment in an amount of R12 million in terms of Rule 34A of the Uniform Rules of Court.

RULE 34A

3. Rule 34A permits the plaintiff in an action for damages for personal injury to apply to court for interim payment in respect of claims for medical costs and loss of income at any time after delivery of the notice of intention to defend. Rule 34A(2) requires the applicant, in her application, to motivate for the interim payment by

setting out the amount of damages claimed, and the grounds for the application, as well as supplying documentary evidence in support of her claim.

4. The jurisdictional prerequisites to the grant of an interim payment award are (*a*) that the defendant has admitted or been found liable for the plaintiff's damages,[1] and (*b*) that the court is satisfied that the defendant is insured in respect of the plaintiff's claim or has the means at its disposal to make payment.[2] If these requirements are met, the Court has a broad discretion, under Rule 34A(4), to order the defendant 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 court's opinion, are likely to be recovered by the plaintiff in due course. The court also has a discretion to direct the terms on which payment shall be made,[3] and to give directives as to the further conduct of the trial.[4]

5. The following is immediately apparent from the terms of the Rule:

   5.1. First, Rule 34A(2) expressly provides that an application brought under its terms, and the affidavit in support thereof, are subject to the provisions of Rule 6. They must therefore comply with the ordinary requirements of an application brought on motion. Among others, it means that an applicant must make averments, and put up evidence, in her founding papers that establish her entitlement to the relief she seeks.[5]

   5.2. Second, the Rule provides for only a proportion of the total damages likely to be paid, and then on an interim basis – that is, pending the final determination of the trial. In that sense, it is intended to tide the plaintiff over pending the outcome of the trial. Further applications for interim payment can be sought later, on good cause shown.[6]

   5.3. Third, the provision permits payment to be sought only after pleadings have closed, and liability has been admitted or determined. It means that

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[1] Rule 34A(4).
[2] Rule 34A(5).
[3] Rule 34A(6).
[4] Rule 34A(7).
[5] See, for example, Transnet Ltd v Rubenstein 2006 (1) SA 591 (SCA) at para 28; NCSPCA v Openshaw [2008] 4 All SA 225 (SCA) at para 29.
[6] Rule 34A(3).

by the time the application is brought, the plaintiff is aware of the defences pleaded by the defendant in respect of quantum and, potentially, the alleged legal and factual basis for them.

5.4. Fourth, the Court is afforded a broad discretion to order such proportion of the total damages, and thus such amount, as it considers appropriate. But such discretion must be exercised judicially – meaning that it must be informed by the facts placed in evidence before the court. "*A discretion exercised on no grounds cannot be judicial*".[7]

6. Taken together, these provisions require that the founding papers in an interim payment application contain facts and evidence to persuade a court that the amount claimed, and terms on which it is to be paid, are appropriate. That requires, among others, that the plaintiff adduce expert evidence on the total quantum likely to be granted, and the appropriate amount to be paid on an interim basis, given the particular facts and exigencies of the case. That may require her to engage with the defences raised by the defendant, and their implications for the damages sought and likely to be granted.

THE PRESENT PROCEEDINGS

Procedural background

7. The present application was launched in October 2023, shortly after the MEC conceded liability on the merits. Its progress has been marred by preliminary skirmishes and objections between the parties.

8. The defendant, the MEC, filed a notice of intention to oppose the application, but failed thereafter to file answering affidavits.

9. Approximately a week before the hearing, the State Attorney withdrew and new attorneys came on record for the MEC. The plaintiff then lodged a notice in terms of Rule 7 challenging their authority to act on the MEC's behalf, but elected to withdraw the objection at the outset of hearing, in the face of potential delay. The authority of the MEC's legal team is consequently no longer in issue.

[7] Ritter v Godfrey 1920 2 KB 47, quoted with approval in Merber v Merber 1948 (1) SA 446 (A) at 452-453. See also Notyawa v Makana Municipality and others [2020] 4 BLLR 337 (CC) at paras 40-41 and the cases cited therein.

10. The MEC's counsel, Mr Dlamini, then indicated that the MEC sought a postponement of the matter, in order to file answering affidavits – but without bringing any formal application for postponement. The plaintiff opposed any postponement of the matter based, among others, on the need to avoid any delay in providing care and support to the minor child. For my part, I indicated that I would hear a postponement application brought from the bar, but would not permit reference to or reliance on any matter extraneous to the papers. The MEC then elected not to proceed with the postponement.

11. Thereafter Mr. Dlamini recorded that the MEC intended to oppose the application on the papers as they stand. That could only be on the adequacy of the founding papers since they were the only papers before Court. Mr Dlamini also recorded, during the initial address of the plaintiff's counsel, Mr Phaladi, that the MEC took issue with the plaintiff's reliance on expert reports and/or affidavits that had not been referred to in the founding affidavit in the interim payment application, and that they were not properly before court.

12. Mr Phaladi's response, at that time, was that although they were not referred to in the interim payment founding affidavit and had been uploaded to Caselines only the week before the hearing, those expert reports had been served on the MEC earlier, before the interim payment application had been launched. He submitted that I could, in those circumstances, properly have regard to them. Mr Phaladi was unable at that stage to provide me with the dates on which those reports had been served, nor with authority in support of such proposition.

13. I consequently stood the matter down for a day, to afford the plaintiff and her legal team sufficient time to prepare and to address me on the point.

14. At the resumption of the proceedings, Mr Phaladi indicated that the plaintiff stood by her founding papers and that he would address me on the admissibility and adequacy of the evidence relied upon – but that, as a matter of caution, the plaintiff wished to bring a condonation application. Before that application was filed or handed up, I enquired whether condonation would be opposed by the MEC. On confirmation that the MEC intended to oppose and required time to file answering papers, the plaintiff elected not to file the condonation application and to argue the

matter on the papers as they stand. Mr Phaladi then proceeded to do so. (I deal with argument on the mertis below.)

15. Mr Dlamini argued in answer. In opposing the matter, he submitted:

15.1. First, that the application was not competently brought, both because it did not contain the amount of damages claimed (as required by Rule 34A(2)) and because the application itself did not make out a proper case for interim payment. It did not, he submitted, refer to or put up any evidence to justify the extent of the damages or the interim payment claimed. Instead, it relied on expert reports and supporting affidavits filed separately, and after the application was launched. In consequence, he argued that it did not fulfil the requirements or objectives of a competent application in terms of Rule 6.

15.2. Second and as to the merits, he argued that even if I were willing to have regard to the plaintiff's expert reports, they do not establish a proper case for interim payments. That, he submitted, was because the State has relied on the public interest defence in its plea, and an analysis of the expert reports, on their terms, demonstrate that the minor child can, and is already, receiving medical care from the public healthcare system. It meant, he submitted, that the total amount of damages claimed in the action was overstated and unlikely to be awarded, and that the interim payment sought was similarly overblown. The MEC's position was that if the application was found to be competent (which was denied), then the appropriate amount for an interim payment – which amount was formally but conditionally tendered – was R1 million.[8]

16. In reply, Mr Phaladi objected to the MEC raising these points at all. He argued that once the MEC had failed to file answering papers, the only option available to her in opposing the application was to formally raise a point of law, in accordance with the Rules. The MEC could not, he submitted, take a point *in limine* or go to the pleadings or the plaintiff's papers to argue against the relief sought. Doing so, he submitted, amounted to an ambush of the plaintiff.

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[8] The MEC had earlier tendered payment of an interim amount of R2 million. The plaintiff had not accepted the tender and it had lapsed by the time the matter came before me.

17. I do not agree. The MEC's failure to file answering papers deprived her of the opportunity to place evidence before the court that contradicted that of the plaintiff. The consequence is that such evidence must be accepted as undisputed. But a respondent is entitled to oppose proceedings on the basis that founding affidavit does not make out a case for the relief sought.[9] That is a corollary of the plaintiff's duty to make out her case in the founding papers. Where she does not do so, or where she fails to meet the requirements of Rule 34A and 6, she has not established an entitlement to interim payment.

18. Nor is the defendant precluded from referring to the pleadings in the main action, as Mr Phaladi suggested. The application for interim payment is an interlocutory application to the action. Its existence derives from and is premised on the contents of the action. There is no principled reason why the pleadings in the action should be disregarded.

19. I also do not accept that the plaintiff was ambushed. As set out above, Mr Dlamini recorded his client's position and basis for opposition early in the proceedings. The matter stood down thereafter, and only continued the following day. The plaintiff and her team had ample time to prepare for the case made against them.

20. I accordingly find that Mr Dlamini's opposition was properly advanced, and falls to be determined.

Competence and merits of the application

21. What, then, is the plaintiff's case for interim payment in an amount of R12 million?

22. The founding affidavit in the interim payment application is deposed to by her attorney, and is confirmed by the plaintiff (albeit that her confirmatory affidavit appears to have been signed approximately a month after his). Among others, it provides a synopsis of Ms M**[…]**'s labour and birth, the acts and omissions of the

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[9] Valentino Globe BV v Phillips & another 1998 (3) SA 775 (SCA) at 779FI; Taylor v Welkom Theatres (Pty) Ltd & others 1954 (3) SA 339 (O) at 344-345A; Bader & another v Weston & another 1967 (1) SA 134 (C) at 136FG; Aspek Pipe Co (Pty) Ltd & another v Mauerberger & others 1968 (1) SA 517 (C) at 519CG; Hart v Pinetown DriveIn Cinema (Pty) Ltd 1972 (1) SA 464 (D) at 465EG; Pearson v Magrep Investments (Pty) Ltd & others 1975 (1) SA 186 (D) at 187CE; Bowman NO v De Souza Roldao 1988 (4) SA 326 (T) at 327CJ; Hubby's Investments (Pty) Ltd v Lifetime Properties (Pty) Ltd 1998 (1) SA 295 (W) at 297AE.

State actors involved, the action brought, and the admission of negligence by the MEC. It also sets out the injuries and sequelae suffered by the minor child, with reference to the expert reports and joint minutes filed before the admission of liability. It then sets out the plaintiff's financial position, and makes a series of broad statements on the general medical needs of children with cerebral palsy, and on interim payments awarded in allegedly similar cases. In relation to the child at issue in this case, it states that "*the medical treatment required by the minor child are to be set out in the expert reports filed by the applicant onto the caseline, particularly that of the physiotherapist and specialist professional nurse, both which will emphasize both the need for each facet of care of treatment required in the meantime and the costs of obtaining same privately"*. It concludes by stating, in paragraph 14.1.3, that "*the applicant has claimed damages in the sum of R38 000 000, it is highly unlikely that the trial Court will award anything less than R12 000 000*".

23. I accept that the plaintiff has formally complied with the requirements of Rule 34A(2) by stating the total amount of damages claimed in the action. But apart from recording the nature and extent of the minor child's injuries and sequelae (which are common cause), no evidence is given in the founding affidavit to motivate for the extent of damages claimed, nor is any evidence provided regarding the nature and extent of the minor child's medical needs or the costs thereof. The founding affidavit instead refers to, and purports to incorporate by reference, expert reports allegedly filed onto Caselines.

24. As set out above, Mr Phaladi submitted that this was permissible and appropriate because those expert reports had been prepared and served on the defendant *before* the application for interim relief was launched. I stood the matter down, among others, to permit those dates to be compiled and provided to me – but Mr Phaladi ultimately did not do so. On going through the reports in open court, it became apparent that all the expert reports relating to the child's medical needs and the costs thereof had been prepared <u>after</u> the application for interim relief was launched, and that they could not have been available to the MEC at the time. Mr Phaladi's submission on this score was recklessly made.

25. He then contended, on the authority of *Van Wyk v Santam Bpk*,[10] that the approach to evidence in Rule 34A proceedings is permissive, and that the Court should consequently have regard to the expert reports and accompanying affidavits as they were part of the court file – notwithstanding their preparation and filing substantially after the application was launched (and, indeed, after notice of intention to oppose was delivered by the MEC).

26. I accept that the standard of proof is lower in Rule 34A proceedings than it would be at trial. Nevertheless, the application must meet the requirements of Rule 6 and of applications generally. That means that, at the time it is brought, the applicant must have sufficient evidence to hand to make out a case for the relief sought. She cannot seek an interim payment based on evidence yet to be procured and put up.

27. In this case, the plaintiff appears not yet to have had the relevant evidence at the time of launching this application. It was consequently prematurely brought and deficient.

28. Even if I were to have regard to the expert reports, in my view, the plaintiff's case falls short of establishing that a total amount of R38 million is likely to be awarded at trial, or that a payment of R12 million is justified on an interim basis.

29. The expert affidavits, taken together, attest to the plaintiff's future expenses, over her lifetime, totalling an amount of just over R13.8 million. While I accept Mr Phaladi's submission that that figure may increase as further experts are consulted, that is the only figure available on the papers before me. There is no further evidence on which to conclude that a total amount of R38 million is likely to be awarded, nor to justify an interim payment, at this stage, of more than 85% thereof.

30. Moreover:

    30.1. Contrary to the recordal in the founding affidavit, the expert reports do not differentiate between medical and other costs required immediately and in the short to medium term, and those that will be incurred later over the minor child's life.

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[10] 1997 (2) SA 544 (O)

30.2. The MEC has raised the public healthcare defence in the pleadings, placing in issue whether the plaintiff is entitled to damages based on the cost of procuring future medical expenses privately. If the services procured or to be procured by the minor child are the same as or better than the services available from private healthcare providers, the plaintiff is unlikely to receive damages in respect of those expenses.[11] The expert reports make clear that the minor child currently receives at least some medical services (namely physiotherapy) from the public healthcare system – yet, the cost of procuring all the child's medical services privately costs are included in the actuarial calculation quantifying the plaintiff's total future expenses. Neither the founding affidavit for interim payment nor the expert reports engage with the MEC's defence and its implications for the plaintiff's claim – whether by addressing why private medical services are needed in the short term or at all.

31. In my view, then, neither the founding affidavit in the interim payment application, nor the expert affidavits filed after its launch, provide sufficient evidence to enable the Court to exercise the discretion conferred on it by Rule 34A judicially.

32. This is perhaps the reason underpinning the varying amounts proffered by the parties. The notice of motion seeks an interim payment in the amount of R12 million. At the hearing of the matter, counsel for the plaintiff submitted the appropriate amount was R6 million, while the MEC motivated for an award (if such could be competently made) of R1 million. After the hearing, the plaintiff filed two draft orders – one seeking an interim payment of R10 million, the other standing by the amount of R12 million. In argument, counsel for the plaintiff was unable to substantiate any of these figures on any objective basis. He merely submitted that it was in the court's discretion to determine the correct amount, with reference to existing case law. The judgments to which he referred the Court in his heads of argument each awarded an interim payment of R5 million – but on the facts and evidence before those courts. Those orders do not provide an adequate basis to determine an appropriate amount in this case. Accompanying evidence is required.

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[11] See MSM obo KBM v MEC for Health Gauteng 2020 (2) SA 567 (GJ) at para 207; Mashinini v MEC for Health and Social Development, Gauteng 2023 JDR 1207 (SCA) para 25.

33. In short, I consider the plaintiff's papers to be inadequate to substantiate the award of any interim payment at this stage. For an interim award to be made, the papers must be supplemented so that the Court can consider and determine the application, with a proper assessment of the interests of the minor child, on the one hand, and of the public purse on the other. The delay that this will entail is regrettable, but is attributable to the conduct of the matter by the plaintiff. The costs award I intend to make reflects as much.

34. A further issue ought to be noted on this score. At the hearing of the matter, I indicated that if I were to direct an interim payment, I would require it to be paid into a trust to be administered in the interests of the minor child. Both parties were amenable to that arrangement. I accordingly requested them to prepare a joint draft order that appropriately catered for a trust arrangement, if the terms of such could be agreed or – if not – that each party upload a draft order that proposed appropriate terms for the creation and administration of a trust.

35. I also indicated that I was inclined to require safeguards that would ensure the interim payment monies were used only for the purposes identified in the Rule and in the founding affidavit – that is, on medical costs and the plaintiff's financial needs. The plaintiff's counsel opposed that suggestion and submitted that the interim payment could permissibly be used to meet legal fees. He referred me in this regard to *MEC for Health and Development, Gauteng v DZ*,[12] which he submitted was authority for the proposition that legal fees may, on success, be paid out of awarded medical costs. *DZ* does not deal with either interim payments or the payment of legal costs incurred under a contingency fee agreement. Mr Phaladi was unable to refer me to any other authority that permitted legal costs to be paid out under an interim payment made in terms of Rule 34A – nor is a factual case made out for doing so in the founding affidavit. In the absence of a motivation otherwise, such a safeguard may well remain appropriate.

36. The parties subsequently proved unable to agree terms, and each uploaded their own draft order. The plaintiff's draft proposed that the monies be paid over to the plaintiff's attorney who, it was explained in a letter, "*will appoint its own trustees*

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[12] Member of the Executive Council for Health and Social Development, Gauteng v DZ obo WZ (CCT20/17) [2017] ZACC 37; 2017 (12) BCLR 1528 (CC); 2018 (1) SA 335 (CC) (31 October 2017).

and create trust. In the meantime, the funds will be invested in the LPC investment account for the benefit of the minor pending finalisation of this matter by trial court". The MEC proposed the creation of a trust under an independent trustee and proposed terms for the administration of the trust (which included a safeguard of the kind adverted to above). That triggered an objection from the plaintiff that "*the defendant has no right to commander trustees and create trust. . . [and] amount[ed] to conduct of lawlessness*".

37. To avoid future delays in the payment of any interim payment awarded, as well as further skirmishes around the terms on which a trust may be formed, I consider it appropriate to direct the plaintiff's attorneys to establish a trust before the interim payment application is re-enrolled. The facts and terms on which such trust is established can then be disclosed to the Court in due course.

38. In the circumstances, I make the following order:

38.1. The matter is removed from the roll.

38.2. The plaintiff is not permitted to re-enroll and set down the matter until:

38.2.1. an affidavit or affidavits have been filed on her behalf dealing with at least the following:

(a) the total damages believed likely to be recovered by the plaintiff in due course, and the basis for such belief;

(b) when the trial in respect of quantum is likely to be ready for trial;

(c) the minor child's likely medical and other needs and expenses until that date; and

(d) any other facts relevant to determining the reasonable proportion of the total damages which should be paid on an interim basis; <u>and</u>

38.2.2. the plaintiff’s legal representatives have established and registered a trust to control and administer the interim payments on behalf of the minor child.

38.3. The wasted costs of this application are to be paid by the plaintiff.

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I GOODMAN, AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION JOHANNESBURG

Hearing date:	22 and 23 January 2024
Judgment date:	1 February 2024

Appearances:

Counsel for the plaintiff:	M Phaladi
Instructing attorneys:	Malatji S Legal Practitioners
Counsel for the defendant:	N Dlamini
Instructing attorneys:	MBA Inc.