



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 949/17

In the matter between:

N[....] C[....] obo E[....] C[....]

Plaintiff/Applicant

and

THE MEMBER OF THE EXECUTIVE COUNCIL
FOR THE HEALTH, FREE STATE

Defendant/Respondent

HEARD ON: 28 OCTOBER 2021

JUDGMENT BY: DANISO, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email and by

release to SAFLII. The date and time for hand-down is deemed to be 12H00 on 08 February 2022.

- [1] In this opposed application, an interim payment in the amount of R5 000 000.00 (five million rand) is sought by the applicant in her personal and also in her capacity as a mother and natural guardian of EC (“the minor child”) for damages arising from a permanent brain injury the minor child sustained during birth.
- [2] It is common cause that on 15 February 2010 the applicant gave birth to her minor child at the Katlego Virginia hospital and that due to the negligence of the medical practitioners (the defendant’s employees) who assisted with the labour and the delivery the minor child suffered a brain injury which rendered him cerebral palsied. The applicant’s action¹ in that regard was defended but later settled on 1 June 2021 on the basis that the respondent conceded 80% liability in respect of the merits. The amount of damages to be awarded to the applicant and the minor child is yet to be determined.
- [3] Rule 34A provides 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.*

¹ Summons were issued on 24 February 2017 for R31 789 970.00.

(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..."

[4] It is the applicant's case that the progress of this claim has been hampered by the respondent's failure to file its experts reports with the result that the trial on quantum has been postponed *sine die*. Part of the award is urgently required in order to provide the minor child with the specialized medical care and treatment necessary to improve and enhance the quality of his life and to also prevent the deterioration of his medical condition.

[5] According to the expert reports filed by Dr Robert Campbell, Ms. Grace Hughes, Ms Sue Anderson and Mr Gregory Shapiro (the medical doctor, physiotherapist, professional nurse and industrial psychologist) attached to the founding affidavit the minor child suffered a permanent brain injury which involves both spastic and dystonic cerebral palsy.² The condition is irreversible and long-lasting. It can only be managed by a structured medical care which must be commenced soonest to prevent further complications and to optimise the quality his life.

² Pages 15 to 156 of the paginated papers are the expert reports and their confirmatory affidavits.

- [6] The applicant contends that it would be in the best interests of the minor child that he receives the said medical care and that the amount that would be fair, reasonable, equitable for the required medical costs at this stage would be R5 000 000.00 payable within 30 days of the service of this order on the defendant.
- [7] The application is opposed on various grounds, namely, that the applicant has not complied with the provisions of sub-rule (2) in that she seeks an interim payment for past medical expenses without having attached any proof of the expenses allegedly incurred, the applicant is not entitled to a part payment of future medical expenses where the respondent would be relying on a defence of “*public healthcare*” which essentially allows the respondent to make an undertaking similar to that in section 17(4)(a) of the Road Accident Fund Act³ (“The RAF Act”) instead of a cash payment and the applicant has also failed to prove that the respondent is insured in respect of the applicant’s claim and that it has means at its disposal to make such a payment as provided for in sub-rule (5).
- [8] It is the respondent’s case that this application has nothing to do with the minor child’s need for medical treatment but everything to do with money and this is due to the fact that the minor child can access the medical care and treatment required for free at public health facilities as they have done before the incident. The applicant has not provided any proof that such medical care is not available at any of the public health facilities. The applicant must stop wasting time with these applications and finalize the claim. There is no need for the interim payment the application ought to be dismissed with costs.
- [9] The respondent’s contentions have no merit. It is a gross distortion of facts that the applicant is seeking an interim payment for medical costs and loss already incurred the founding affidavit (paragraphs 14 and 22) clearly sets out that the interim payment is required for medical care and treatment that the minor child

³ Act 56 of 1996.

requires and as proof thereof the applicant has referred to the expert documentary evidence duly attached therein.

- [10] There is nothing untoward about the applicant's claim for interim payment in respect of future medical expenses. The respondent's reliance on section 17 (4) (a) and 17(6) of the RAF Act is misconstrued. Claims under the Road Accident Fund Act are *sui generis*. It was in any event conceded by the respondent that this provision does not apply to medical negligence claims.
- [11] As regards sub-rule (5), the respondent's financial management is regulated by the Public Finance Management Act⁴ (as amended) therefore there is nothing peculiar about the respondent not being insured. The respondent's bare allegations pertaining to its inability to satisfy the applicant's claim do not constitute proof of the respondent's lack of means. The duty is on the respondent to allege and prove its inability to pay the claim.
- [12] In its callous averments that the minor child should obtain the required treatment from public health facilities as "before the incident," finalize the matter and stop wasting time by launching interim payment applications, the respondent eschews the fact that "*before the incident*" the applicant did not and had no reason to require such medical care and treatment as the minor was only born during the incident which resulted in him sustaining the brain injury. The respondent also ignores the fact that the delay in the finalization of the matter is attributed to its non-compliance with the rules of court by failing to file its expert notices.
- [13] It is indeed correct that the final amount to be awarded to the applicant is not yet determined however, at this stage this court is not required to embark on a quantification of the claim. As correctly pointed out by the applicant, having regard to the extent of the brain injury sustained by the minor child and its sequelae it is highly unlikely that the amount of R5 000 000.00 would exceed the amount of R31 789 970.00 claimed by the applicant.

⁴ Act 1 of 1999.

[14] In terms of Rule 34A the applicant is entitled to an interim payment in respect of her claim for medical costs. I accordingly find that the applicant has made out the case she seeks in the notice of motion.

[15] On the available facts (paragraph 19 at 19.1 to 19.2.2. of the applicant's particulars of claim) it has been established that the minor child is incapable of managing his affairs including the award therefore in terms of section 28(2) of the Constitution⁵ I deem it appropriate that a *curator bonis* ought to be appointed to manage the award.

Costs

[16] I have found no reasons militating against the rule that costs follow the result of the application. According to the applicant the application was opposed on unmeritorious grounds the respondent must accordingly pay the costs on a punitive scale.

[17] I'm in agreement with the applicant's contention that the opposition was unnecessary considering the defences raised by the respondent. I'm however not persuaded that the respondent's actions are so reprehensible to warrant a punitive cost order.

[18] In the result I make the following order:

(1) In terms of Rule 34A of the Uniform Rules of Court the respondent is ordered to pay the applicant an interim payment of R5 000 000.00 within 30 days from the date of this order by depositing it into the account of a *curator bonis*.

(2) The applicant is granted leave to apply on the same papers (supplemented, if necessary) for the appointment of a *curator bonis*.

⁵ The Constitution of the Republic of South Africa Act No, 108 of 1996.

- (3) The respondent shall pay the costs on party and party scale. Such costs to include the costs of counsel.

NS DANISO, J

APPEARANCES:

Counsel on behalf of the plaintiff/applicant:

Instructed by:

Adv. C Cremen

Nonxuba Inc.

C/O Webbers Attorneys

BLOEMFONTEIN

Counsel on behalf of the defendant/respondent:

Instructed by:

Adv. Hellens SC

The State Attorney

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