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

Case Number: 2022-036615

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
_____	_____
DATE	SIGNATURE

In the matter between:

TSHETLANYANE BOITUMEL Applicant

and

THE ROAD ACCIDENT FUND Respondent

JUDGMENT

Van Aswegen AJ

INTRODUCTION:

[1] The application before me is one where the Applicant seeks an interim payment in respect of past hospital and medical expenses in terms of Section 17(6)

of the Road Accident Fund Act 56 of 1996 ("the Act") read with Rule 34A Uniform Rules of Court, against the Road Accident Fund ("RAF').

[2] Although the matter is opposed there was no appearance on behalf of the Respondent on the hearing date.

[3] Both my registrar and the Applicant's legal representative - Adv RV Mudau telephonically contacted the Respondent's legal representative, Mr. Sondlani, who indicated that he was unaware of the hearing date and that the matter had to proceed in his absence.

[4] Adv. Mudau referred me to the Notice of Setdown for Monday the 24th of February 2025 which was electronically served on the Respondent on 20 January 2025 as well as by hand on 21 January 2025.

[5] I was accordingly satisfied that the Respondent had been informed of the hearing date. I proceeded to hear the matter in the absence of the Respondent, but taking into consideration the opposing papers which were delivered.

CAUSE OF ACTION AND CASE HISTORY:

[6] The Applicant's cause of action is one of delict where the Applicant claims amongst other relief for past medical and hospital expenses.

[7] The cause of action is based upon a collision which occurred on 05 September 2021 at approximately 20h00 at or near, or along the N12 Freeway, in the approximate vicinity of the Kraft Road bridge, Germiston. The collision occurred between a motor vehicle bearing registration numbers *E[…]*driven by the insured driver and a motor vehicle bearing registration letters *J[…]*, there and then being driven by the Applicant.

[8] The Applicant had sustained serious injuries during the accident.

[9] The injuries sustained and relied upon by the Applicant are summarized as follows:

[9.1] a head/brain injury with loss of consciousness,

[9.2] laceration under the chin,

[9.3] undisplaced bilateral 1st rib fractures,

[9.4] small right apical pneumothorax and a small right haemothorax,

[9.5] left lower liver laceration,

[9.6] fracture of the L3 to L5 transverse process,

[9.7] comminuted fracture of the right 91 sacral alae and both S2 sacral alae,

[9.8] comminuted fracture of the left inferior pubic ramus,

[9.9] transverse laterally displaced fracture of the right midshaft humerus with nerve damage,

[9.10] fractured through base of right hand fourth metacarpal bone,

[9.11] transverse fracture through the distal diaphysis of the left radius with negative ulnar variation,

[9.12] laterally displaced further fracture of the right midshaft femur,

[9.13] undisplaced fracture of the right medial malleolus, permanent disfiguring scarring due to the injuries sustained and the resultant surgery and psychological sequelae due to the injuries and the accident itself.

[10] The Applicant's case is reliant upon the fact that the negligence of the insured driver was the sole cause of the accident and that the Respondent is liable to compensate the Plaintiff for damages suffered in an amount of R8 188 183.14.

EVALUATION OF MERITS:

[11] After consideration and evaluation of the Applicant's claim the Respondent resolved that the abovesaid motor vehicle collision was indeed as a result of the sole negligence of the insured driver.

[12] On 7 October 2022 the Respondent voluntary offered a settlement of the merits. The Respondent accepted that it would be liable for 100% of the Applicant's agreed or proven damages.

[13] The Respondent's settlement offer was contained in a letter[1] worded as follows:

> "*The Road Accident Fund (RAF) has considered the available evidence relating to the manner in which the motor vehicle accident giving rise-to this claim occurred. The RAF has concluded that the collision resulted from the sole negligence of the RAF's insured driver. Consequently; without prejudice, the RAF offers to settle the issue of negligence vis-a-vis the occurrence of the motor vehicle collision on the basis that the insured driver was solely negligent in causing the motor vehicle collision.*
>
> *This offer is limited to the aspect of negligence as to the manner in which the collision occurred. This offer may not be interpreted or construed in a manner that would have the RAF concede any other aspect of the claim. To avoid doubt, the RAF reserves all its rights in law with regards to all other procedural and substantive aspects of the claim. Acceptance of this offer will only be effective when the RAF receives this document with the portion "Acceptance of Offer" fully completed. If this offer was made after prescription of the claim, it will not be deemed to be a waiver of prescription, and any purported acceptance will not be enforceable*…"

[14] The abovesaid offer was accepted by the Applicant.[2]

APPLICANT'S CLAIM FOR INTERIM PAYMENT:

[15] Since the merits had become settled between the parties the Applicant's legal representatives on 5 December 2022 in writing - via electronic mail - appealed - to the Respondent for an interim offer in respect of past hospital and medical expenses.[3]

[1] 04-266
[2] 04-268
[3] 04-271

[16] In doing so the Applicant provided the Respondent with a schedule of past hospital and medical expenses totalling *R988 183.14*[4] (paid by the Applicant's medical aid), and hospital records from Netcare Union Hospital, Auckland Park Rehabilitation Hospital and Glynwood Hospital.[5]

[17] The Applicant's request stemmed, as explained in his affidavit, from the incurrence of substantial hospital and medical expenses and the availability of the necessary and disposable means by the Respondent as it receives fuel levies.

[18] The rule, providing a mechanism to obtain an interim payment pending the finalization of a Plaintiff's Road Accident claim, is Rule 34A of the Uniform Rules of Court which was introduced by GN R2164 of 2 October 1987.

[19] Rule 34A affords interim financial relief to a Plaintiff in an action for damages for personal injuries, or injuries consequent upon the death of a person and is worded as follows:

> "*34A (1) Interim payments. — (1) In an action for damages for personal injuries on 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—*

[4] 04-274
[5] 04-25

(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 defendant for damages to be determined, the court may if it thinks fit but subject to the provisions of sub-rule (5), 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 opinion of the court are likely to be recovered by the plaintiff taking into account any contributory negligence, set off or counterclaim."

[20] Rule 34A provides a procedure which alleviates the financial burden suffered from medical treatment and/or loss of earning capacity caused by the often long- and extended-time frames within which a trial action is ultimately finalised.

[21] It is well known that road accident victims often experience dire financial straits due to the burden of medical treatment and a partial reduction, or even total loss, of earning capacity. The third-party claims against the Road Accident Fund are prone to delay. This is due to various reasons for instance the large number of accidents on South African roads giving rise to third party claims, the Fund's incapacity, and the congested South African court rolls to name a few. Whilst these victims may have a claim against the Road Accident Fund, such claims may take years to finalize.

[22] The Applicant/Plaintiff in an action for damages for personal injuries may therefore apply to the court for an order requiring the Defendant/Respondent to make an interim payment after delivery of a Notice of Appearance to Defend in respect of a claim for medical costs and loss of income arising from his/her physical disability. The relief in Rule 34A is restricted to the Plaintiff's claim for medical costs and loss of income arising from physical disability or the death of another person.

[23] The Applicant in this matter had entered an appearance to defend, filed a Plea and is therefore entitled to bring an application for an interim payment order.

[24] However more importantly, at the hearing the Applicant had to, in terms of Rule 34A(4)(a)–(b) satisfy the court that the Respondent/Defendant had:

[23.1] *either in writing admitted liability for the Applicant/Plaintiff's damages or*

[23.2] that the Plaintiff/Applicant had already obtained a judgment confirming the Defendant/Respondent's liability for damages (my underlining).

[25] In *Harmse v Road Accident Fund*[6] these abovesaid requirements for an interim order at the hearing is confirmed:

"*The court held that only in instances where the respondent has admitted liability or Applicant had obtained judgment for damages, may a court order an interim payment. Rule 34A envisages a clear, unequivocal and unconditional admission of liability for it to find application." (*my underlining)

[26] Rule 34A accordingly envisages a clear, unequivocal and unconditional admission of liability for its application. The court may therefore only grant an interim order in terms of Rule 34A, if liability is admitted in writing or there is a judgment.

[27] The question for consideration in this matter boils down to whether there was a written admission of liability for damages or not, as there is clearly no judgment against the Respondent for damages.

[28] In assessing whether there is a written admission of liability for damages, I will examine the wording of the offer made by the Respondent, the Plea and the Answering Affidavit.

WORDING OF THE OFFER:

[29] The offer was worded as follows:

*"The Road Accident Fund (RAF) has considered the available evidence relating to the manner in which the motor vehicle accident giving rise-to this claim occurred**. The RAF has concluded that the collision resulted from***

[6] [2010] ZAGPPHC 11 (24 February 2010),

the sole negligence of the RAF's insured driver. Consequently; without prejudice, the RAF offers to settle the issue of negligence vis-a-vis the occurrence of the motor vehicle collision on the basis that the insured driver was* solely negligent *in causing the motor vehicle collision.
This offer is limited to the aspect of* negligence *as to the manner in which the collision occurred. This offer may not be interpreted or construed in a manner that would have the RAF concede any other aspect of the claim. *To avoid doubt, the RAF reserves all its rights in law with regards to all other procedural and substantive aspects of the claim".* (my accentuation and underlining)

[30] It is abundantly clear from the wording that the Respondent recurrently declares that the issue of negligence had been settled and more specifically in amplification states that the said offer was limited or restricted to the aspect of negligence as to how the collision occurred.

[31] The Respondent thereafter explicitly asserts that the interpretation of the offer was not open to construction in a way that would have the Respondent concede to any other aspect of the claim.

[32] My reading and understanding of this offer is therefore that there is simply an admission of negligence. All other aspects of the delictual claim namely the causality, the injuries sustained, and all the damages (hospital, medical and related expenses) suffered are all still in dispute and needed to be proven by the Applicant.

[33] The Respondent is unambiguously stipulating and declaring that the Fund is not agreeing or conceding to any other part of the Applicant's claim and that same will have to be proved with evidence.

[34] If one has regard to the Respondent's Plea[7] it is evident that the Respondent denies causality, the injuries sustained, the damages and the amount claimed. The

[7] 02-12

past hospital and medical expenses in respect of various institutions and practitioners are also denied.[8]

[35] In the Answering Affidavit the Respondent specifically states that the Applicant must prove the admitted liability.[9] The deponent to the said affidavit, in addition, clearly pleads that the merits offer was only a written admission that the accident was caused by the sole negligence of the insured driver.

[36] The Respondent specifically states that the Applicant did not admit liability.[10]

[37] The Respondent also places causality between the injuries sustained and the accident in dispute.[11]

[38] I can accordingly not come to any other conclusion than that, save for admitting the issue of negligence, the Respondent did not in writing admit liability. All other aspects of the claim are in dispute and need to be proven by the Applicant at trial stage.

[39] In *Alexander & three others v Road Accident Fund*[12], an application like the one before me, the court also had to decide whether the offer upon which the Applicants relied as constituting the Defendant's written admissions of liability could be construed as admission of liability by the Defendant as envisaged by rule 34A(4)(a). The relevant part of the document reads as follow:

> "*The RAF has concluded that the collision resulted from the sole negligence of the RAF's insured driver.*
> *… the RAF offers to settle the issue of negligence vis-à-vis the occurrence of the motor vehicle collision on the basis that the insured driver was solely negligent in causing the motor vehicle collision.*
> *This offer is limited to the aspect of negligence as to the manner in which the collision occurred. This offer may not be interpreted or construed in a manner*

[8] Ad Par 10 – 18 at 02-17
[9] Par 12 at 04-494
[10] Par 14 at 04-494
[11] Par 14 at 04-494
[12] [2023] ZAGPJHC 112 (11 February 2023)

that would have the RAF concede any other aspect of the claim. To avoid doubt, the RAF reserves all its rights in law with regards to all other procedural and substantive aspects of the claim."

[40] At paragraph 36 of the *Alexander* matter Moultrie AJ stated:

"*In the current applications, the documents relied upon by the plaintiffs could hardly be clearer: the Fund's admission is "limited to the aspect of negligence as to the manner in which the collision occurred". It is expressly stated that no concession is made in relation to "any other aspect of the claim" and that the Fund "reserves all its rights in law with regards to all ... procedural and substantive aspects" of the claims, other than negligence.* In particular, the Fund has neither admitted (i) that the plaintiffs are suffering *any bodily injury at all; nor (it) that any such bodily injury arose from the negligently caused collision. In other words, apart from quantum, both bodily injury (or "harm" in delictual terms) and causation remain in dispute, and there has been no admission of "liability" for any damages that might in due course be proven, as required by Rule 34A(4)(a)."*

[41] The wording of the offer in the *Alexander* matter is identical to the matter before me in that it states:

"*This offer is limited to the aspect of negligence as to the manner in which the collision occurred. This offer may not be interpreted or construed in a manner that would have the RAF concede any other aspect of the claim."*

[42] Moultrie AJ interpreted and read the offer in the exact same manner as I did.

[43] Subsequently in *Qelesile v Road Accident Fund* [13] it was confirmed that Rule 34A (4) necessitated an admission of all the delictual elements and not only negligence.

" *That the crux of Alexander was to the effect that the admission of liability by a Defendant in terms of rule 34(4)(a) necessitated an admission of all the requirements of the elements of a delict, not only negligence. 32 In other*

[13] (2023] ZAGPJHC 221 (24 February 2023)

words, the admission of negligence by the defendant is not all that is required to meet the requirements of rule 34A (4)(a).”

[44] In other words, the admission of negligence by the Defendant is simply not enough to meet the requirements of rule 34A(4)(a). The reasoning in *Alexander* was accordingly accepted.

[45] The Applicant/Plaintiff in the *Qelesile* matter argued that rule 34A(4)(a) was merely a procedural mechanism invoked in conjunction with rule 34A(1) to compel the Defendant to discharge its concomitant obligation under section 17 of the Road Accident Fund Act, 56 of 1996 (“*RAF Act”)*

[46] It is imperative (for the purposes of interim payment) to have regard to the *proviso* in section 17(6) of the RAF Act. Section 17(6) of the said Act provides as follows —

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

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

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

[49] The court accordingly came to the conclusion that, even if it can be argued that rule 34A(4)(a) was merely a procedural mechanism invoked in conjunction with rule 34A(1) to compel the defendant to discharge its concomitant obligation under section 17 of the Road Accident Fund Act the argument can simply not be upheld. In this regard, the court held that the express phrases in section 17(1) patently relate to and require causation (one of the essential elements of a delict) to be proved or conceded. Further, given the fact that any interim payment (in terms of section 17(6)) shall be made from the compensation to be awarded in terms of section 17(1), the admission of liability solely on negligence will not suffice. Accordingly, the court held that section 17(6) read with section 17(1) of the RAF Act does not cure the *prima facie* hurdle faced by the Plaintiff in proving the admission of liability by a Defendant in terms of rule 34A(4)(a).

[50] As was the case in *Alexander,* the Applicants/Plaintiffs, in the *Qelesile* matter also relied on a document which admitted the Defendant's negligence in the accident. The following was stated:

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

[51] Opperman J also indicated and echoed in *Jordaan v Road Accident Fund*[14] at paragraph 47 that the Applicant must proof all the jurisdictional requirements of a delict as set out in Rule 34A(4) and that any document conceding liability must be an admission of all the elements:

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

[52] In the *Jordaan* matter the Defendant/Respondent also relied on a document conceding liability but specifically denied that it was liable for any other aspects of the Plaintiff's claim. Opperman J concluded that the Plaintiff did not proof all the jurisdictional requirements as set out in Rule 34A and rightly so rejected the interim payment.

[53] The court in *Karpakis v Mutual & Federal Insurance Co Ltd*[15] held that the Plaintiff is only able to be awarded an interim payment in terms of Rule 34A(4)(a) if the Defendant has in writing conceded liability or had obtained a judgment under Rule 34A (4)(b).

> "*Under Rule 34A (4)(a) and (b) the respondent's (defendant's) position is a strong one because an interim payment can only be ordered if, inter alia, the defendant has in writing admitted liability for the plaintiff's damages, that is to say if the defendant has conceded the merits of the action (which is the case in the present action) or if the plaintiff has obtained judgment against the defendant for damages still to be determined, that is to say where the issues of the merits and of the quantum of damages were separated at the commencement of the trial in terms of Rule 33(4)." (my underlining)*

[54] In view of the aforesaid, it is evident that the Respondent, in the matter before me, relied on an identical offer as to the offers in the aforesaid matters. The

[14] [2023] ZAGPJHC 1260 (3 November 2023)
[15] 1991 (3) SA 489 (O) at -497D-F.

Respondent conceded liability but specifically denied that it was liable for any other aspects of the Applicant's claim. The Applicant has accordingly not proven all the jurisdictional requirements as set out in rule 34A.

[55] The requirements for an interim order as set out in Rule 34A(4)(a) and (b) namely, a written admission of liability or a judgment are both absent in the application before me. The Respondent had solely admitted negligence to the exclusion of all other aspects of a delict. Accordingly, the Applicant's application for an interim payment stands to be dismissed.

Order

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

[56.1] The Application for an interim payment in the amount of R989 448.84 is dismissed;

[56.2] The Applicant is ordered to pay the costs of this application.

S VAN ASWEGEN
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT
JOHANNESBURG

Heard On: 24 February 2025
Date of Judgment: 6 March 2025

For the Applicant: Adv RV Mudau
Instructed by
A Wolmarans Inc

For the Respondent: No appearance