

SOUTH AFRICA / JUDGMENT

Alexander v Road Accident Fund and Three Other Related Matters (2021/53043; 2021/26274; 2020/15348; 2022/5105) [2023] ZAGPJHC 112 (11 February 2023)

[2023] ZAGPJHC 112

COURT

South Gauteng High Court, Johannesburg

BEFORE

RJ Moultrie

CASE / FILE NUMBER

2021/53043; 2021/26274; 2020/15348; 2022/5105

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IN THE HIGH COURT OF
SOUTH AFRICA
(GAUTENG DIVISION,
JOHANNESBURG)

Case no: 2021/53043

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER

JUDGES: YES

(3) REVISED.

Date: 11 February 2023

In

the matter between:

ALEXANDER,
GALE BELINDA
Applicant
and
THE
ROAD ACCIDENT FUND
Respondent
Case no: 2021/26274
MORRIS,
CHARMAINE PATRICIA
Applicant
and
THE
ROAD ACCIDENT FUND

Respondent
Case no: 2020/15348
HARRIPERSHAD,
NISHMA PREMDAW
Applicant
and
THE
ROAD ACCIDENT FUND
Respondent
Case no: 2022/5105
MABOYA,
SEETA ELIZABETH
Applicant
and
THE
ROAD ACCIDENT FUND
Respondent

JUDGMENT

This judgment is handed down electronically by circulation to the parties' legal representatives by e-mail and by uploading the signed copy to Caselines.

Motor vehicle accident — Compensation — Claim against Road Accident Fund — Application for interim payment under rule 34A for medical costs already incurred — Written admission of liability for damages in rule 34A(4)(a) — Written admission that accident caused by sole or contributory negligence of insured driver insufficient to satisfy court that Fund has admitted liability — Terminology: Potential confusion arising from statement that defendant has conceded 'the merits' (which may only dispose of issue of fault), as opposed to concession of 'liability' (which disposes of all issues other than the quantum of damages) — Uniform Rules of Court, rule 34A; Road Accident Fund Act, 56 of 1996, s 17(6).

MOULTRIE AJ

- [1] These four matters all served before me in the unopposed motion court on 25 January 2023. [1] Having identified significant commonalities in the facts and the legal question that arises for determination, and in view of the fact that all of the applicants are represented by the same attorneys, I ordered that they be heard together. Mr Mudau appears in the first matter and Mr Molojoa appears in the other three. I am grateful to both counsel for their submissions.
- [2] The applicants are all plaintiffs in actions instituted against the Road Accident Fund in which they seek to recover compensation in terms of section 17(1) of the Road Accident Fund Act, 56 of 1996 for loss or damage suffered as a result of bodily injuries caused by or arising out of the driving of a motor vehicle. Each of them seeks an order for an interim payment under Rule 34A(4)(a). This rule provides that a court may grant an order requiring

the defendant in an action for damages for personal injuries to make an interim payment in respect of medical costs and loss of income arising from the plaintiff's physical disability if it satisfied that the defendant "has in writing admitted liability for the plaintiff's damages". The Fund has not opposed any of the applications.

- [3] In view of the proviso contained in section 17(6) of the Act,[2] the Fund may only be ordered to make an interim payment in respect of medical costs that have already been incurred under Rule 34A.[3] The applications are all appropriately limited to such costs. In the absence of opposition, I also have no reason to doubt that the incurrence of the medical costs has been adequately proved in the founding affidavits,[4] and that the amounts claimed will not exceed a reasonable proportion of the damages which are likely to be recovered by the plaintiffs (assuming the Fund is found to have admitted liability) taking into account any contributory negligence, set off or counterclaim.[5] In addition, I accept that the Fund has the means at its disposal to enable it to make the claimed payments.[6]
- [4] My sole difficulty with the relief sought arises from the documents upon which the applicants rely as constituting the Fund's written admissions of liability.
- [5] In the Alexander and Maboya matters, the documents in question are duly accepted "without prejudice" offers from the Fund that read in relevant part as follows:

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

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

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

- [6] Although an identical offer is relied upon in the Harripershad matter (annexure "LL2" to the plaintiff's founding affidavit), it does not purport to bear a signature of acceptance. However, paragraph 5 of the founding affidavit states that the offer was indeed accepted by the plaintiff, and I have no reason to doubt the correctness of this allegation.[7]
- [7] The document relied upon in the Morris matter is also almost identical, save for the fact that the Fund only admitted contributory negligence of its insured driver in the proportion of 50%. Nothing turns on this.
- [8] I was assured by both counsel that it is widely considered by practitioners – and indeed the Fund itself – that these documents (I was advised that they are 'standard forms') constitute sufficient written admission of liability on the part of the Fund for the purposes of Rule 34A. For the reasons set out below, I respectfully disagree. Although counsel further assured me

that courts routinely grant applications for interim payments based on identical documents, I was not referred to or furnished with any judgment in which this was the case, and I have been unable to locate any.[8]

- [9] In my view, the documents in question are not sufficient to satisfy a court that the Fund “has in writing admitted liability for the plaintiff’s damages”. This has been referred to as a “jurisdictional requirement” that has to be present before the rule may be applied.[9] To the contrary, as the portions that I have underlined in the extract quoted above expressly state, the Fund has only admitted “the issue of negligence ... as to the manner in which the collision occurred” and that the “collision resulted from the ... negligence of the insured driver”, who was “negligent in causing the ... collision”.
- [10] Proof or admission of negligence is but one of the elements of a plaintiff’s cause of action against the Fund for compensation under the Act: a plaintiff who seeks to recover compensation “must establish the normal delictual elements”.[10]
- [11] 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 (ii) that any such bodily injury arose from the negligently-caused collision. [11] 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).
- [12] As Fisher J observed in *MS v Road Accident Fund*:
- ... once negligence of the third party driver is proved, wrongfulness is generally assumed. It must then be shown that the loss suffered by the claimant is due to the negligent/wrongful act in issue. This is when the causation phase of the enquiry begins.[12]
- [13] It is apparent from my engagement with counsel that there is much confusion around terminology. According to counsel, the documents under consideration in the current matters constitute an admission of (and indeed finally resolve) the question of ‘the merits’ of the actions against the Fund. It must, however, be emphasised that the term ‘the merits’ as employed in this context has an attenuated meaning that, at most, refers to the question of whether the accident was caused by the sole or contributory negligence of the defendant’s insured driver. While a concession of ‘the merits’ in this sense will undoubtedly have the result of significantly reducing the scope of the issues to be determined at trial, it must be emphasised that such a concession does not mean that the Fund has conceded or “admitted liability for the plaintiff’s damages” for the purposes of Rule 34A(4)(a).

[14] This was made abundantly clear by Fisher J in *MS v RAF*. Although the court labelled the enquiry into whether the collision was caused by the insured driver's sole or contributory negligence as "the Merits Enquiry", [13] it emphasised that:

A concession by the RAF as to (the "Merits") cannot, unless otherwise specifically agreed, denote anything more than that the RAF admits that the negligence of the insured driver caused the accident. Thus, such concession or a determination of the Merits in favour of the plaintiff is no more than a finding that the insured driver was negligent and, given that the claim is for personal injury under the Act, of the assumed wrongfulness element as well. [14]

[15] In *Mnisi* (which did not involve Rule 34A), the court considered an identically worded document and observed that there had been no settlement of 'the merits' in the sense of the question of liability. It found that apart from negligence ...

... all the other elements of the RAF cause of action remains to be proven by the plaintiffs. This includes: (a) the loss resulted from bodily injury to the plaintiff or, in the case of a dependant claiming loss of support subsequent to the death of a breadwinner, such loss; (b) the loss arose from the driving of a motor vehicle; and that (c) the injury was due to negligence or other wrongful act. It should also be immediately apparent that the causal link between the negligent act of the insured driver which was the sole or contributory cause of the collision, the injuries that were sustained by the victim and the pecuniary or non-pecuniary loss suffered as a result of the collision must be proven. [15]

[16] For these reasons, while I agree with the court in *Apleni v Minister of Police* [16] that Rule 34A(4)(a) does not require the quantum of damages to have been admitted by the defendant, I do not think that the statement in the judgment that "an admission of merits is what is intended by the requirement of an admission of liability for damages" [17] supports the applicants' contention in these matters that the rule allows a court to award an interim payment merely upon admission by the defendant of one element of liability. To the extent that the court may have found otherwise, I respectfully disagree. The meaning of 'the merits' when that term is intended to be equivalent to 'liability' was explained in *Tolstrup* as follows:

An agreement or finding on liability (which is the equivalent of the merits) clearly disposes of everything bar the quantum of damages, and hence the willingness to afford the plaintiff interim payments. Quantum would not include a consideration of defences on the merits, be they defences raised by way of special plea, such as lack of jurisdiction, non locus standi, prescription or the like, or substantive defences such as absence of negligence, mistaken identity, contributory negligence and so on, all of which relate to whether damages are payable. Once that is out of the way, the parties can concern themselves with how much is payable. [18]

[17] I therefore conclude that the documents relied upon by the applicants in the current cases do not evidence an admission of liability by the Fund as required by Rule 34(4)(a), and that the applications all fall to be dismissed. In the absence of any opposition, there should be no orders as to costs.

[18] In closing, I consider it appropriate to observe that my understanding of counsels' submissions was that (despite Fisher J's

deprecation of the practice in *MS v RAF*)[19] it is not an uncommon occurrence for the term 'the merits' in the attenuated sense described above (i.e. limited to the question of the negligence of the insured driver) to be employed in contradistinction to 'the quantum', when the parties' legal representatives record (solely on the basis of documents such as those considered in the current applications) in a pre-trial minute that 'the merits' of a claim have been 'agreed' or 'settled'; or when they advise the court during pre-trial procedures on the basis of such documents that the only outstanding issue for determination is 'the quantum'. For the reasons set out above, this is a misdirection. In view of what appear to me to be a number of inappropriate but prevalent practices referred to in this judgment, I will be requesting that it be brought to the attention of the Chief Executive Officer of the Road Accident Fund.

[19] I make the following order in relation to the application for an interim payment in terms of Rule 34A in each of the above matters:

- (a) The application is dismissed.
- (b) There is no order as to costs.

RJ Moultrie AJ

Acting Judge of the High Court

Gauteng Division, Johannesburg

DATE HEARD: 25 January 2023

JUDGMENT

DELIVERED: 11 February 2023

APPEARANCES

Counsel for the applicant in case number 2021/53043:

RV Mudau instructed by A Wolmarans Inc.

Counsel for the applicant in case numbers 2021/36274; 2020/15348 and 2022/5105:

BD Molojoa instructed by A Wolmarans Inc.

[1] This was prior to the Deputy Judge President's clarification on 2 February 2023 that applications for interim

payments under Rule 34A(4)(b) should not be enrolled on the unopposed motion court roll, but on the general civil roll. It would seem to me that there is no difference in principle between such applications and applications such as the current ones under Rule 34A(4)(a) and that such applications should in future also be enrolled on the civil trial roll.

- [2] Section 17(6) provides that: “[t]he 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 subsection (1) to the third party in respect of medical costs, ... loss of income and loss of support: Provided that the Fund or such 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.”
- [3] Road Accident Fund v Manqina 2020 (5) SA 202 (ECB) paras 17 – 22. I do not read this judgment as entirely excluding the operation of Rule 34A in relation to the Fund. It seems to me that it merely narrows the scope of the Rule insofar as it may be applied to the Fund, as was the position in relation to the similar previous provision that section 17(6) replaced: see Fair v SA Eagle Insurance Co Ltd 1995 (4) SA 96 (E) at 100E–G.
- [4] Rule 34A(2).
- [5] Rule 34A(4).
- [6] Rule 34A(5).
- [7] I should note further that I consider the document annexed as annexure LL3 to be irrelevant. As Mr Molojoa conceded at the hearing, while this document evidently constituted a signed written offer by the RAF “in full and final settlement” of the plaintiff’s claim, it was not accepted on behalf of the plaintiff, who unilaterally amended and signed the document, and the amendments were not accepted by the RAF. In any event, on the plaintiff’s own version, annexure LL3 relates to another amount not claimed by the plaintiff in this application. Furthermore, if there is any doubt in this regard, the document (even assuming that it was agreed to in its amended form) expressly states that it would be an agreement to pay “without ... admission of liability” and, as such, suffers from the same deficiency discussed below.
- [8] Although the applicant in Kaufmann v The Road Accident Fund 2019 JDR 2018 (GJ) attempted to rely on a similarly worded document, it is apparent from paragraph 18 of the judgment that the court was doubtful as to whether the document was adequate, and that it was only prepared to award the interim payment in view of the fact that the Fund itself had disclosed that it had made a written offer in relation to past medical and hospital expenses, and it was not suggested that this offer had been made without admission of liability, as is the case in the Harripershad matter referred to in footnote 7 (above).
- [9] J v MEC Health, Western Cape
- [2017] ZAWCHC 75 para 24. In this case, following an extensive discussion of the court’s discretion under the rule, Henney J held that there is no scope for a court to award an interim payment unless one of the requirements set out in either Rule 34(4)(a) or
- (b) has been met.

- [10] Law Society of South Africa and Others v Minister for Transport and Another 2011 (1) SA 400 (CC) para 25.
- [11] In MS v Road Accident Fund
- [2019] 3 All SA 626 (GJ) para 12, Fisher J refers to this as the “First Causation Enquiry”.
- [12] MS v Road Accident Fund (above) para 9.
- [13] MS v Road Accident Fund (above) para 12.
- [14] MS v RAF (above) para 13.
- [15] Mnisi v RAF and other related matters
- [2022] JOL 53515 (MM) paras 27 – 28 and 32 – 33.
- [16] Apleni v Minister of Police and a related matter [2021] JOL 56020 (WCC) para 11.
- [17] This is also the sense in which the term was employed in Karpakis v Mutual & Federal Insurance Co Ltd 1991 (3) SA 489 (O) at 497E–G and 498D.
- [18] Tolstrup NO v Kwapa NO 2002 (5) SA 73 (W) at 77F–G. In Road Accident Fund v Krawa 2012 (2) SA 346 (ECG) at paras 28 to 33, the court held on the facts that the Fund’s concession of “the merits” was not limited merely to a concession that the insured driver was negligent and that as such the case was distinguishable from Tolstrup. In my view, the current applications are not similarly distinguishable from that case.
- [19] MS v RAF (above) para 2.

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