

SOUTH AFRICA / JUDGMENT

Apleni v Minister of Police; Mashiyana v Minister of Police (8084/2018; 8085/2018) [2021] ZAWCHC 275 (21 July 2021)

[2021] ZAWCHC 275**COURT**

Western Cape High Court, Cape Town

BEFORE

Mangcu-Lockwood

CASE / FILE NUMBER

8084/2018; 8085/2018

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Source record**THE****REPUBLIC OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****(WESTERN****CAPE DIVISION, CAPE TOWN)****Before:**

The Hon. Ms Acting Justice Mangcu-Lockwood

Date

of hearing: 13 July 2021

Date

of judgment: 21 July 2021

Case

No: 8084/2018

In

the matter between:

VUYOKASI

APLENI

Plaintiff

and

MINISTER

OF

POLICE

Defendant

And

Case

No: 8085/2018

NONTSINDISO

PEGGY

MASHIYANA
Plaintiff

JUDGMENT

DELIVERED ELECTRONICALLY

MANGCU-LOCKWOOD J,

I.INTRODUCTION

1. These two matters came before me on the unopposed roll. They are applications for interim payment in terms of Uniform Rule 34A, against the same respondent, the Minister of Police (“the Minister”). Two days before the hearing of the matters, the respondent delivered notices of intention to oppose, but did not deliver answering

affidavits. However, on the day of the hearing, Mr Manuel from the state attorney appeared to represent the respondent and proceeded to argue against the granting of the orders sought. The basis for the opposition is dealt with later below.

II.THE RELEVANT FACTS

2. In both matters the applicants are plaintiffs who have instituted actions against the Minister for damages arising out of a shooting incident of 14 March
2016. According to the summons in both matters, the applicants, who were employed at McDonald's fast food restaurant in Kuilsriver, were passengers together with seven other staff members in a white Quantum vehicle (“the Quantum”), when members of the police (“SAPS”) fired gunshots at the Quantum, apparently mistaking it for another similar vehicle.
3. The applicants’ claims for interim payment are based on loss of income flowing from physical disability which, in turn was caused by the shooting incident. They furthermore state that the delay in finalizing the action, which they attribute to the respondent, is causing them undue hardship. The hardship is further exacerbated by the effects of the COVID-19 pandemic on their social support structures. They have both set out their personal circumstances,

which remain unopposed, showing that that they are both unemployed; both unmarried with three minor children; and are both unable to work as a result of the injuries sustained in the incident of 14 March

2016. Both of the applicants reside with their boyfriends, who are also currently unemployed. For each applicant the main source of income is a disability grant, as well as SASSA benefits for the three minor children, which they state are inadequate to meet their families’ needs.

4. For the purposes of the applications for interim payment, the applicants mainly rely on the respondent's pleas in response to paragraphs 12 and 13 of the summons in both matters, which stated as follows:

"12. The members of SAPS fatally shot two (2) staff members and three (3) of them sustained serious gunshots wounds.

13. The members of SAPS wrongfully and negligently shot the Plaintiff."

5. In response to these paragraphs, the respondent's pleas in both matters state as follows:

"Ad Paragraph 12 & 13

13. Defendant admits that specific passengers traveling in the quantum were found to have been fatally wounded and that certain other passengers, including Plaintiff, were found to have been injured in that Plaintiff had been shot by the police.
14. Defendant admits that the shooting of Plaintiff was unjustified and consequently wrongful."

III.ADMISSION OF LIABILITY FOR DAMAGES

6. The applicants rely on the admissions made in the above-quoted portion of the plea, as well as a letter from the respondent's attorneys, in which a similar concession was made - that the shooting was unlawful - for the Rule 34A applications. They state that these concessions amount to a written admission of liability for their damages, as contemplated in Uniform Rule 34A(4)(a). This formed the first basis for argument by Mr Manuel. He argues that the applicants have not met this jurisdictional requirement in that the respondent has not admitted to liability for the applicants' damages in compliance with the Rule.
7. It is convenient to set out the relevant provisions of the Uniform Rule at this point. It provides as follows:

"34A Interim payments

- (1) In an action for damages for personal injuries or the death of a person, the plaintiff may, , 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 any 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. According to Mr Manuel, in order to meet the requirement in Uniform Rule 34A(4)(a), it must be shown that the respondent has admitted to liability for the quantum or part of the quantum of damages. It is not sufficient that his client has admitted to the wrongfulness of the shooting. What the provision requires according to Mr Manuel, is admission of liability for damages proved. The Rule, according to him, is meant for situations in which a defendant admits liability for payment of damages but the parties do not agree on the amount of quantum payable. In this regard, he referred to paragraph 19 of the summons in both matters in which the applicants have set out the quantum of damages claimed in respect of loss of income; and to the response in the plea in which those amounts are denied by the respondent. Accordingly, it was argued that the respondent has not admitted liability for payment of damages.
9. Not only is the interpretation contended by Mr Manuel not sustainable, but it is not supported by the case law. It is well to remember the context for the Rule. The context is to alleviate hardship which a plaintiff may suffer while waiting for the claim to be brought to finality, in other words, before final determination of the quantum of damages payable in the main action. According to subrule (1) an application may be brought at any time after the expiry of the period for the delivery of the notice of intention to defend, a clear indication that the Rule does not require admission of proven damages by a defendant. The Rule envisages that an application of this nature may be brought even before a defendant has delivered a plea. This was the view of the Court in *Karpakis v Mutual & Federal Insurance Co Ltd*[1]. Regarding the objective of the Rule, the Court held that it is to afford a plaintiff an adjectival or procedural remedy to obtain, by way of interim payment some of the medical costs and loss of income arising from his physical disability. It is not an advance

payment in respect of the damages which the plaintiff hopes will be awarded to him at some future time once proved. As the Court stated:

“It appears quite clearly that the interim payment envisaged by the Rule is well and truly an interim one, that is to say, it is one 'on account' of what plaintiff (ie the claimant or applicant for the interim payment) must still prove in order to obtain judgment in his favour at the trial where he is the plaintiff. It is, I think, also clear that it never was, nor is it, the intention of the Rule that the Court, when it grants an interim payment, actually pronounces judgment against defendant in plaintiff's favour on the cause of action which forms the subject-matter of the dispute between the parties, nor does the Court give judgment as to part of plaintiff's claim. On the contrary, the entire claim remains extant and still has to be proved at the trial - including also those very portions of it as may be covered by the interim payment or part thereof. What is more, no part whatsoever of plaintiff's claim becomes extinguished or satisfied by the interim payment and the entire interim payment is repayable, in whole or in part, under certain circumstances when the Court makes 'a final order' (subrule (10)(a)). 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, ie after it has heard all the evidence touching upon the quantum of damages and has thereafter decided what the exact amount of its award of damages should be. On the contrary, the Court merely exercises a judicial discretion under subrule (4) 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). If the interim payment were to be equated to, or indeed be, a final judgment relating to damages of part of the amount of damages claimed (or suffered) by plaintiff in the main action, subrule (5) would have no place whatever in the entire Rule and be completely nugatory because the possible impecuniosity of the defendant or the fact that he is not insured against plaintiff's claim can, in the case of a judgment for damages, not possibly have any bearing on the judgment for damages, for in such event the defendant's impecuniosity or his inability to satisfy the judgment or the fact that he is not insured for the event giving rise to plaintiff's claim, are entirely irrelevant.”[2]

10. In the case of Karpakis, as in the present one, the defendant had conceded liability on the merits and the only issue remaining for determination was the quantum of damages. The Court in Karpakis interpreted the requirement in Rule 34A(4)(a) to mean that the defendant has conceded the merits of the action.[3] A similar view is espoused in Erasmus where, in relation to Uniform Rule 34A(4)(a) the authors state that the “subrule distinguishes between ‘liability’ and ‘damages’. An agreement of finding on liability disposes of everything bar the quantum of damages and hence the willingness to afford the plaintiff interim payments”.[4]
11. There is accordingly no support for the view that Uniform Rule 34A(4)(a) requires that the quantum of damages be admitted by a defendant. I was not referred to any authority for this argument in any event. Rather, the authorities show that an admission of merits is what is intended by the requirement of an admission of liability for damages.[5] There is no dispute before me about the fact that the portion of the plea that I have quoted above amounts to a written admission of the merits of the applicants’ claims. I am satisfied in this regard that the requirement of Rule 34A(4)(a) is met.

IV.THE LOSS OF INCOME

12. The next argument by Mr Manuel related to whether or not the applicants have indeed incurred a loss of income. I was referred to actuarial reports which are attached to the applicants' applications. In each one it is recorded that each of the applicants was unable to return to work to date but "have received their income to date". Indeed, the actuarial report in both instances is based on an assumption that the applicants continue to receive their salaries

after the shooting incident. Through these statements Mr Manuel sought to cast doubt on whether the applicants have stopped working

and earning an income. In response to this charge the applicants' counsel, Ms Davids, pointed to the applicants' affidavits in which they state that they do not receive any salaries or income but rather receive disability and SASSA grants, but which are inadequate. I was also referred by Ms Davids to other expert reports in which it is recorded that the applicants have lost the ability to work, and specifically an ability to stand for long periods of time, which is what is required for their work at McDonald's. As I have previously stated, the applicants' version is not contradicted on the evidence before me. I have no reason to reject it. I am satisfied on the papers that the applicants have each incurred a loss of income. The next question is how much should be awarded as interim payments.

13. Ms Apleni seeks an amount of R130 380 as interim payment, whereas Ms Mashiyana seeks an amount of R81 400. Neither applicant has set out in the papers how these amounts are computed. In terms of Rule 34A(4), the Court has a discretion to order such amount as it thinks just, but the amount must 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. In the summons

Ms Apleni seeks a total amount of R1 172 500,00 in respect of loss of income, and Ms Mashiyana seeks R1 202 800. I was informed from the Bar that these amounts include past and future loss of income. There is furthermore no claim of contributory negligence, set off or counterclaim raised. I consider the amounts claimed to be reasonable amounts for interim relief, given that the applicants were employed as waitresses at MacDonald's and have been unemployed since March 2016, and continue to suffer financial hardship whilst awaiting finalisation of this matter. According to the actuarial reports, Ms Apleni earned approximately R2173 per month, and Ms Mashiyana R2030 per month. I am of the view that the amounts claimed are reasonable, just and appropriate in the circumstances.

14. At the hearing of the matter, the applicants also sought relief in terms of Rule 34A(7), asking the Court to prescribe a procedure for the further conduct of the action, including the allocation of an early trial. The basis for this relief is said to be the respondents' conduct which has caused delays in finalising the matter, despite the admission of liability in the papers. Although it does appear from the papers that there have been regrettable delays in the matter, it also appears that there are certain expert reports which are still sought by the

respondent before it can commit itself to finalising the matter. The matter is therefore not ready for trial. However, given the uncontradicted and detailed version of the applicants - that it is the conduct of the respondent which has caused unnecessary delays in the matter - it is appropriate that an order should be granted that any outstanding expert reports should be requested and received by end of August 2021.

15. From the papers it is evident that the respondent's attorneys have been approached on numerous occasions with a view to bringing finality to the matter. This, especially in light of the respondent's admission to the merits of the applicants' claims, which was contained in the plea delivered as far back as November 2018. Whilst it is so that the respondent is entitled to pursue every avenue it wishes to in order to oppose the claims, including by seeking as many expert reports it wishes to, it is also a fact that, by any account, these matters have incurred unnecessary delays. The shooting incident was in March 2016. The summons and plea were delivered in 2018. When regard is had to the fact that the respondent admitted liability to the merits in 2018, the delays are regrettable, and induce no surprise for the applications that have now been brought. Indeed, the respondents have themselves been numerously warned of the imminence of these applications.

V. ORDER

16. In the result, the following order is made:
 - a. In case number 8084/2018, the respondent shall pay an amount of R130 380 as an interim payment in terms of Uniform Rule 34A to the bank account of the applicant's attorney, by 5pm on Friday 20 August 2021;
 - b. In case number 8085/2018, the respondent shall pay an amount of R81 400 as an interim payment in terms of Uniform Rule 34A to the bank account of the applicant's attorney, by 5pm on Friday 20 August 2021;
 - c. In the event of the respondent failing to comply with paragraphs (a) and (b) above, the applicants are granted leave to approach this Court on the papers filed of record, supplemented, if necessary, for judgment against the respondent in the total sum prayed for.
 - d. Any further expert report required by either party in cases 8084/2018 and 8085/2018 shall be requested and received by 31 August 2021;
 - e. The respondent is directed to pay the costs of the application for Rule 34A interim payment in both cases 8084/2018 and 8085/2018, including costs of counsel.

N MANGCU-LOCKWOOD

Judge of the High Court

[1] 1991

(3) SA 489 (O) at 495

- [2] At 496B - H
- [3] At 497E
- [4] At D1-453.
- [5] See also Tolstrup NO v Kwapa NO 2002
- (5) SA 73 (W) at 77E-H.
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Prepared on 11 October 2026 · Esheria