

SOUTH AFRICA / JUDGMENT

N.J v Member of the Executive Council (Health) Western Cape Provincial Government (15364/16) [2017] ZAWCHC 75 (3 July 2017) [2017] ZAWCHC 75

COURT

Western Cape High Court, Cape Town

BEFORE

R.C.A. Henney

CASE / FILE NUMBER

15364/16

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII Policy

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

[REPORTABLE]

Case No: 15364/16

In the matter between:

N J Applicant/Plaintiff

vs

MEMBER OF THE EXECUTIVE COUNCIL Respondent/Defendant

(HEALTH) WESTERN CAPE PROVINCIAL

GOVERNMENT

JUDGMENT: 3 JULY 2017

HENNEY, J

Introduction

and Background

- [1] The Applicant/Plaintiff, to whom I will for the sake of convenience refer to in this judgment as the Plaintiff, is an adult female who is acting in a representative capacity as both mother and natural guardian of her minor son, CSJ (“CSJ”), who was born on [...] October 2006. She instituted an action against the Respondent/Defendant, who I will also for the sake of convenience refer to as the Defendant, in her capacity as the Minister in the Western Cape Provincial Government under whose authority and control the Western Cape Provincial Department of Health falls. Mr Van Den Heever appears for the Plaintiff and Miss De La Hunt for the Defendant.
- [2] The action proceedings were instituted as a result of CSJ who at the time of his birth on 12 October 2006, suffered hypoxic ischemic encephalopathy[1], which ultimately led to cerebral palsy. This condition and diagnosis are based on expert medical reports and summaries as well as the relevant hospital records, which the Plaintiff attached to the founding affidavit in this application. At this stage of the proceedings, the merits and detail of these reports is not relevant for the determination of the dispute in these proceedings. Even though for the purposes of this application, it is a requirement that copies of such reports be attached.
- [3] On 12 October 2006, the Plaintiff was admitted to the Knysna Provincial Hospital with labour pains. She was 16 years old at the time. The Plaintiff alleges that the labour and delivery of CSJ was negligently and poorly managed by the relevant medical personnel at the hospital. And despite evidence of an obstructed labour and extended labour period, the medical personnel opted for the forceful route of vaginal delivery, using vacuum extraction with the application of fundal pressure. In essence, it contributed to shoulder dystocia[2] which prolonged the period of asphyxia for CSJ.
- [4] According to the Plaintiff, hospital and medical records indicates severe birth asphyxia and severe hypoxic ischemic encephalopathy,
- which led to CSJ suffering from cerebral palsy. The Plaintiff as a result of this issued summons against the Defendant for damages suffered in the amount of R18 450 000.
- [5] As a result of his condition CSJ is unable to take care of himself, is unable to walk and is in need of constant care on a 24-hour basis. He is also in need of constant medical assistance and care. The Plaintiff and her family finds themselves in dire financial circumstances and appalling living conditions, that needs to change in order to alleviate the plight of CSJ and of the family.
- [6] The Plaintiff issued summons on the Defendant in the action proceedings on 30 August 2016. Prior to the service of the summons on the Defendant, an entity known as Christopher Consulting in December 2015, notified the Defendant in writing of the Plaintiff’s

intention to institute legal proceedings, in compliance with the provisions of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002. The Plaintiff's attorney, under the mistaken belief, only afforded the Defendant a 10 day time period in which to enter an appearance to defend, whereas the period should have been 20 days. The correct dies would have been at the end of September 2016.

[7] The Plaintiff's attorney based on this mistaken belief caused an email to be sent to the Defendant on 22 September 2016, reminding the Defendant of the fact that the summons had been served in August 2016 and the Plaintiff had not yet received a Notice of Intention to Defend the action and to this no response was received. Thereafter the Plaintiff's attorney sent another email to the Defendant's attorney by 31 October 2016, reminding them that the Defendant to date had not filed a Notice of Intention to Defend the action. From the 'read receipt' of the email, it is clear that the email was read by the Defendant. The Plaintiff's attorney further states that as of 1 March 2017, which is the date on which the founding affidavit was deposed to, no Notice of Intention to Defend was received. It needs to be mentioned that the Defendant only filed a Notice of Intention to Defend on 11 May 2017, which was also a day after (12 May 2017) her opposing affidavit in these proceedings were filed. As a result of the conduct of the Defendant, the Plaintiff instituted these proceedings in terms of the provisions of Rule 34A of the Uniform Rules of Court.

The Relief

[8] In the Notice of Motion, the Plaintiff seeks the following relief:

- a) that it be declared that the Defendant is liable to the Plaintiff for the proved or agreed upon damages suffered by the Plaintiff in her representative capacity as mother and natural guardian on behalf of her minor son, CSJ, as a result of the sub-standard management and care afforded to the Plaintiff by the Defendant before, during and after the delivery of CSJ;
- b) that the Defendant be ordered to pay the Plaintiff an amount of R2 907 333,00 or such other amount that this court determines, in the exercise of its discretion, to be reasonable in terms of the provisions of Rule 34A (1) and (2) of the Uniform Rules of Court;
- c) that the amount referred to in paragraph
- (b) be paid to the Plaintiff's attorney of record within 7 (seven) days of the date of this court giving such an order;
- d) that the party and party or agreed costs of this application be paid by the Defendant;
- e) that the parties be directed to request a conference before a Judge in chambers in terms of the provisions of Rule 37 (8) of the Uniform Rules of Court within 15 (fifteen) days from the date of an order that would be made in terms of paragraph (a), so that the court may prescribe the procedure for the further conduct of the action and, in particular, the allocation of an early trial date in terms of the provisions of Rule 34A (7).

- [9] It would be appropriate and convenient at this stage to have a look at the provisions of Rule 34A:

“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.
- (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) The fact that an order has been made under subrule (4) shall not be pleaded and no disclosure of that fact shall be made to the court at the trial or at the hearing of questions or issues as to the quantum of damages until such questions or issues have been determined.
- (9) In an action where an interim payment or an order for an interim payment has been made, the action shall not be discontinued or the claim withdrawn without the consent of the

court.

- (10) If an order for an interim payment has been made or such payment has been made, the court may, in making a final order, or when granting the plaintiff leave to discontinue his action or withdraw the claim under subrule (9) or at any stage of the proceedings on the application of any party, make an order with respect to the interim payment which the court may consider just and the court may in particular order that:
- (a) the plaintiff repay all or part of the interim payment;
 - (b) the payment be varied or discharged; or
 - (c) a payment be made by any other defendant in respect of any part of the interim payment which the defendant, who made it, is entitled to recover by way of contribution or indemnity or in respect of any remedy or relief relating to the plaintiff's claim.
- (11) The provisions of this rule shall apply mutatis mutandis to any claim in reconvention.”

The Plaintiff's case

- [10] The Plaintiff submits that the Defendant, after having failed to enter an appearance to defend in the action proceedings and having failed to respond to two e-mail Notices to enter an appearance to defend, invited the intractable and inevitable inference that the Defendant has no defence to the Plaintiff's claim and that her conduct equates to an admission of liability or judgment as is required by the peremptory provisions of Rule 34A (4) of Uniform Rules of Court.
- [11] In this regard, the Plaintiff argues that she has elected to utilize the provisions of Rule 34A (1) and (2). She decided to proceed with this application, in this manner, rather than to apply for default judgment. If she had applied for default judgment, it would be open to the Defendant to enter an appearance to defend the action, after the delivery of the default judgment application and tender wasted costs. This cause of action would have effectively resulted in the delay in the adjudication of this matter for a considerable period, which would have been contrary to the best interest of the Plaintiff and the minor child.
- [12] The Plaintiff states that in view of the constitutional injunction the child's best interest is of paramount importance in any matter involving a child, and submits that she has established good cause, and that it would be just and equitable that the relief sought in the prayers in the Notice of Motion be granted with an appropriate order as to costs.
- [13] Mr Van den Heever argued that the rule permits the Plaintiff to bring an application in terms of the provisions Rule 34A(1) and (2) and that he can bring a substantive application in terms of these two sub-rules. He further argued that the rule does not prescribe that all applications has to comply with the provisions of sub-rule (4) which requires that an applicant must: a) either satisfy the court that the Defendant against whom the order is sought, has in writing admitted liability for the Plaintiff's damages; or b) that the Plaintiff has obtained judgment against the Defendant for damages to be determined.

- [14] For this proposition Mr Van den Heever relied heavily on the decision in *Nel v Federated Versekeringsmaatskappy BPK*[3], where no written admission of liability was made by the Respondent, but the court held that in the absence of that, after having had regard to various written correspondence, it was evident that it was overwhelmingly apparent that the Defendant admitted liability to the claim of the Plaintiff. There was also evidence that during the pre-trial conference such admission of liability was reduced to writing.
- [15] Mr Van Den Heever in this particular case argues that after summons was issued and after various requests were made by the Plaintiff to the Defendant to deliver a Notice of her Intention to Defend, that by such failure to do so, the inescapable conclusion can be drawn that the Defendant will not dispute the allegations made by the Plaintiff in the summons. Based on the conduct of the Defendant, he argues, the inference can safely be drawn that the Defendant admits to liability of the claim the Plaintiff has instituted against her.
- [16] He further invited the court to give a disjunctive interpretation to Rule 34A. In this regard, he argues that the court can grant the relief purely on the basis of Rule 34A (1) and (2), so that an application in terms of this rule would be permissible without having regard to the onerous provisions and requirements as set out in sub-rule (4). This will then make it possible for a Plaintiff to bring an application in a substantive manner in terms of sub-rule (1) and (2) without either having to satisfy the court that the Defendant has in writing admitted liability for the Plaintiff's damages or that the Plaintiff has obtained judgment against a Defendant for damages to be determined.
- [17] He stressed that it was particularly necessary in this case, where the person that suffered the damages is a minor, that the court should embark upon such a manner of interpretation, if regard is to be had to the provisions of section 28 of the Constitution, which enjoins a court to have regard to the best interests of the child. He further drew the court's attention to the provisions of section 6 and 7 of the Children's Act 38 of 2005. According to section 6 (2)(a), a court in all proceedings, actions or decisions in a matter concerning a child, must respect, protect, promote and fulfill the child's rights as set out in the Bill of Rights, the best interests of the child standard set out in section 7 and the rights and principles set out in that act, subject to any lawful limitation. He further referred to the decision of *H v Fetal Assessment Centre*[4] where it was held:
- "That our law, including our common law, must conform to the values of the Constitution and that its development must promote the 'spirit, purport and objects of the Bill of Rights' is the given starting point for determining the viability of the child's claim in the circumstances of this case. The particular values and rights that are at the forefront are those of equality, dignity and the right of children to have their best interests considered of paramount importance in every matter concerning them."*
- [18] He also argued that from the wording it is apparent that a court is permitted to make a substantive order purely in terms of sub-rule (1) without having regard and without having to apply the provisions of sub-rule (4). In this regard, he refers to the provisions of sub-rule (2), which prescribes what specific detail the affidavit shall contain (i.e. the amount of

damages claimed; the grounds for the application; documentary proof thereof etc) in support of such an application. Particularly, if such an application is launched in terms of the provisions of sub-rule (1), whereas if the application is made in terms of sub-rule (4), it is specifically required that the Plaintiff must satisfy the court that the Defendant has admitted liability for the Plaintiff's damages or the Plaintiff has obtained judgment against the Defendant.

- [19] He also referred to the provisions of sub-rule (7) which states that where an application has been made under sub-rule (1), the court may prescribe the procedure for the further conduct of the action and in particular may order the early trial thereof. This is an indication that the court can act independently in terms of sub-rule (1) without having regard to the provisions of sub-rule (4).
- [20] According to him a further indication of the disjunctive operation of Rule 34A, is to be found in the wording of sub-rule (8), which states that the fact that an order has been made under sub-rule (4) shall not be pleaded and no disclosure of that fact shall be made to the court at the trial or at the hearing of questions or issues as to the quantum of damages until such questions or issues have been determined.

Defendant's Opposition

- [21] Miss De La Hunt, argued that even though the Defendant only filed a Notice of Intention to Defend on 11 May 2017, it does not preclude her from defending the action and filing a Plea. She argued that the Plaintiff is correct when she states that she should have applied for default judgment and that it be open to the Defendant to deliver a Notice of Intention to Defend the action after delivery of the default judgment application and tender wasted costs.
- [22] She further argued that Rule 19 (5) of the Uniform Rules of Court is clear this regard. According to her, notwithstanding the provisions of sub-rules (1) and (2) of Rule 19, a Notice to Defend may be delivered after the period referred to in the summons.
- [23] She was further of the view that it could not be argued that in applying for default judgment, that it would have been contrary to the best interests of the minor child if the Defendant enters an appearance to defend. In this regard, she refers to the SCA

judgment

matter of Singh and Another v Ebrahim[5], where the court considered the jurisprudence relating to the best interests of the minor child provided for in section 28 (2) of the Constitution and pointed out that section 28 (like all other rights contained in the Bill of Rights) is subject to reasonable and justifiable limitations.[6] In that matter, as in this case, the minor child was duly represented by his parents and legal representatives and the court was of the view that a duly represented minor child is an equal party to the litigation.[7] She therefore argues that the Plaintiff has not made out a case for the elevation of the rights of the minor child above other rights in the Bill of Rights, such as the right to equality and the right to a fair public hearing

before the court.

- [24] The Plaintiff's argument that an application under Rule 34A sub-rule (1) and (2) without having to comply with the provisions of sub-rule (4) (a) and (b) is wrong. The provisions set out in sub-rule
- (4) (a) and (b) are jurisdictional requirements which must be complied with before a court can exercise its discretion to order an interim payment. It is therefore not competent for the court to grant relief as set out in the Notice of Motion, which is to the effect that the Defendant is liable to the Plaintiff for the proved or agreed upon damages suffered by the Plaintiff in her representative capacity as mother and natural guardian on behalf of a minor son in terms of Rule 34A.
- [25] She submits that there are a number of reasons for this, and these are: firstly, a Plaintiff has the remedy of an application for default judgment; secondly, application proceedings are not appropriate where disputes of fact are anticipated; and thirdly, if such relief should be competent, it would not have been included under sub-rule (4). It is common cause that the Defendant has not admitted liability for the Plaintiff's damages in writing. The Plaintiff has also not obtained judgment against the Defendant for damages to be determined.
- [26] Miss De La Hunt, therefore submits that as a matter of fact and of law, the Plaintiff is not entitled to the relief prayed for or any relief under Rule 34A of the Uniform Rules of Court. She therefore argues that the application is ill-conceived and should be dismissed with costs.

Analysis

- [27] Although the court has sympathy for the dire financial position and the appalling living conditions in which the Plaintiff and CSJ find themselves, I am not convinced that Rule 34A can be interpreted and should be interpreted in the manner as submitted by Mr Van Den Heever. Whilst the purpose of the rule is to alleviate the plight of a Plaintiff in an action for damages for personal injuries or the death of a person, the rule cannot be applied indiscriminately.
- [28] As pointed out by Miss De La Hunt, the purpose of the rule is to be fair to both parties. It would be highly prejudicial and unfair to the Defendant to grant an interim order for the payment of damages where there is no indication that the Defendant is liable, or where such a Defendant has not admitted liability, especially in a case like this, where liability for damages for such a large amount of damages is still in dispute.
- [29] It would be highly prejudicial and unfair if such an order for interim payment is made for an amount of almost R3 million, and the Plaintiff at a later stage during the trial in the action proceedings fails to prove any liability on the part of the Defendant. The manner in which it is argued that Rule 34A be interpreted is not consistent with the ordinary rules of interpretation as laid down by our courts.

[30] In *Natal Joint Municipal Pension Fund v Endumeni Municipality*[8] Wallis JA states the following about the present state of the rule of interpretation:

“[...] The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”

[31] In my view, if regard is to be had to the other provisions of Rule 34A, sub-rule (1) and (2) and the ordinary principles of

interpretation as set out above, it does not make provision for a substantive application that can be made in terms of those specific

sub-rules without having regard to the other provisions of the rule. To hold otherwise would lead to absurd consequences and would undermine the purpose of this rule as discussed earlier.

[32] Sub-rule (1) is merely an empowering provision, which permits a Plaintiff to bring an application for an interim payment. Sub-rule

(2), merely sets out, subject to the provisions of Rule 6 which ordinarily deals with the manner in which applications should be

dealt with in motion proceedings, the nature and the contents of the affidavit, and the documentary proof that should accompany the affidavit filed in terms of this rule. The next step in such an application is set out in sub-rule (4).

[33] Clearly when reference is made in sub-rule (4) to the “hearing of such an application”, it is meant as at the hearing of an application as contemplated in sub-rule (1). Therefore, the requirements as set out in sub-rule (4) which rests on a Plaintiff to show that the Defendant made an admission of liability in writing for the Plaintiff’s damages, or that the Plaintiff has obtained judgment against the Defendant for damages to be determined, are requirements that must be satisfied when an application is brought in terms of sub-rule (1). These requirements are peremptory.

[34] To interpret it otherwise would be absurd and nonsensical. Such an interpretation is also consistent with what has been held in *Karpakis v Mutual & Federal Insurance Co Ltd*[9] where the following was said:

“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).”

[35] If Rule 34A, is to be interpreted in such a manner as proposed by Mr Van Den Heever, it would not have regard to the circumstances

attendant upon its coming into existence, the context in which the provision appears and the apparent purpose to which it was directed.

In interpreting sub-rules (1) and (2) the court should also have regard to the other provisions of Rule 34A, which would include

having regard to the provisions of sub-rule (4) (a) and/or (b).

[36] Mr Van Den Heever also otherwise requested the court to interpret the rule in a manner that would be in the best interest of the minor child, as the court is required to do in terms of section 28 of the Constitution, and the provisions of section 6 and 7 of the Children’s Act 38 of 2008. This enjoins a court in proceedings, actions and decisions concerning a child to respect, promote and fulfill the child’s rights as set out in the Constitution.

[37] The court is well aware of the fact that it is required to interpret legislation in a manner that would be consistent with the Constitution, where possible and necessary. This was the approach laid down by the Constitutional Court in *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others*[10] where Langa DP (as he then was) stated the following:

“[22] The purport and objects of the Constitution find expression in s 1, which lays out the fundamental values which the Constitution is designed to achieve. The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.

[23] In *De Lange v Smuts NO and Others*, Ackermann J stated that the principle of reading in conformity does

‘no more than give expression to a sound principle of constitutional interpretation recognised by other open and democratic societies based on human dignity, equality and freedom such as, for example, the United States of America, Canada and Germany, whose constitutions, like our 1996 Constitution, contain no express provision to such effect. In my view, the same interpretative approach should be adopted under the 1996 Constitution.’

Accordingly, judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section.” (own emphasis)

[38] What is however clear, is that such an interpretation as proposed by Mr Van Den Heever is not possible and cannot be “reasonably ascribed” to Rule 34A. The reasons therefore is obvious and these are that a Plaintiff would be given an unfair advantage in an action for damages for personal injuries where such a Plaintiff would be entitled to an interim payment for damages in the

absence of having to show that the Defendant is liable for such damages.

[39] That would infringe upon a Defendant’s right to have a dispute resolved by the application of law decided in a fair public hearing before court as guaranteed in terms of section 34 of the Constitution. Such an interpretation would also not be fair, reasonable and rational which would be inimical to the ethos and values as prescribed by the Constitution. An interpretation of a rule or legislation which seeks to protect and promote a right, like the rights of a child, cannot be constitutional if such an interpretation cannot be “reasonably ascribed to” or would not be possible.

[40] Mr Van Den Heever further requested the court to deal with the question as to whether there was an admission of liability on a similar basis to which the court had dealt with that very question in the matter of *Nel v Federated Versekeringsmaatskappy Bpk* (supra), where the court in the absence of an express written admission of liability, made such an inference on the facts of the case. In this regard, he argued that by failing to respond to file a Notice of Intention to Defend, that such conduct of the Defendant amounts to an intractable and inevitable inference that the Defendant has no defence against the Plaintiff’s claim.

[41] I have a few fundamental difficulties with this proposition, firstly, in the *Nel* case, there was clear evidence of such an admission of liability on the papers filed of record. Secondly, in this particular case there is no such evidence. Thirdly, the mere failure to deliver an appearance to defend is not sufficient evidence from which an inference can be safely drawn that the Defendant has admitted liability or has no defence to the claim of the Plaintiff. Lastly, as pointed out by Miss De La Hunt, in terms of the provisions of Rule 19(5) of the Uniform Rules of Court, where a Defendant has failed to deliver a Notice of Intention to Defend in the time period prescribed, it may deliver such a notice, even after the expiration of the period specified in the summons or periods specified in sub-rule (2).[11]

[42] The Plaintiff has therefore failed to satisfy the court that she has made out a case for an interim payment in terms of Rule 34A of the Uniform Rules, that the Defendant has in writing admitted liability for her damages or she has obtained judgment against the Defendant for damages to be determined in terms of the provisions of sub-rule

(4) (a) and (b).

[43] The relief as requested in paragraph 2 of the Notice of Motion, which was later amended to the extent that the court grant an order for an interim payment in terms of the provisions of Rule 34A (1) and (2) is dismissed. Having dismissed the application by the Plaintiff and given the Defendant's apparent delay in delivering a Notice of Intention to Defend, and, given the dire financial circumstances and appalling living conditions in which CSJ and the Plaintiff find themselves, it would be in the best interests of CSJ, that there be no unnecessary delays in this matter. It would therefore be appropriate, and in the best interests of this disabled and vulnerable child that the court make an order in terms of sub-rule 7, wherein the court can prescribe the procedure for the further conduct of the action and, if possible, order the early hearing of the matter.

[44] Order

I therefore make the following order:

- 1) The application is dismissed.
- 2) The Defendant pay the taxed or agreed party and party costs incurred by the Plaintiff up to and including 11 May 2017, with regard to this application, when the Defendant entered an appearance to defend the action.
- 3) The remainder of the costs of this application stands over for determination at the trial.
- 4) The parties are directed to request a conference before a Judge in chambers in terms of the provisions of Rule 37(8) of the Uniform Rules of Court within 15 (fifteen) days of the date of an order, so that the Court may prescribe the procedure for the further conduct of the action and, in particular, the allocation of an early trial date, in terms of the provisions of Rule 34A (7) of the Uniform Rules of Court.

R.C.A. HENNEY

Judge of the High Court

Appearances

For plaintiff: Adv P. Van Den Heever instructed by Van der Spuy & Partners

For defendant: Adv VLA De La Hunt instructed by the State Attorney

Day/s in court: 21 June 2017

- [1] Brain injury caused by lack of oxygen to the brain or asphyxia. Asphyxia is a condition arising when the body is deprived of oxygen, causing unconsciousness or death; suffocation.
- [2] Dystocia describes a difficult birth, typically caused by a large or awkwardly positioned fetus, by smallness of the maternal pelvis, or by failure of the uterus and cervix to contract and expand normally.
- [3] 1991 (2) SA 422 (T) at 427B-D.
- [4] 2015 (2) SA 193 (CC) with particular reference to paragraph 49.
- [5] (413/09) [2010] ZASCA 145 (26 November 2010).
- [6] Ibid para 125.
- [7] Ibid para 127.
- [8] 2012 (4) SA 593 (SCA) para 18.
- [9] 1991 (3) SA 489 (O) at -497D-F.
- [10] In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others
[2000] ZACC 12; 2001 (1) SA 545 (CC). See also De Lange v Smuts NO and Others
[1998] ZACC 6; 1998 (3) SA 785 (CC) as referred to by Langa DP in the Hyundai matter.
- [11] Rule 19(2) prescribes a period of 20 days after the service of summons to deliver a notice of intention to defend in an action against any minister, deputy minister, administrator, officer or servant of the state in his official capacity.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAWCHC/2017/75.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/nj-v-member-unknown-topic-awchc-2017--6a3ea5133b1caa912980a682>

Prepared on 10 October 2026 · Esheria