

SOUTH AFRICA / JUDGMENT

Road Accident Fund v Manqina

(CA20/2019) [2020] ZAECHHC 5; 2020 (5) SA 202 (ECB) (2 February 2020)

[2020] ZAECHHC 5

COURT

Eastern Cape High Court, Bhisho

BEFORE

Jolwana, Beshe, Smith

CASE / FILE NUMBER

CA20/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

[EASTERN

CAPE LOCAL DIVISION: BHISHO]

Case No. CA20/2019

In

the matter between:

ROAD
ACCIDENT FUND
Appellant
And
MAVIS
NONTEMBISO MANQINA
Respondent

JUDGMENT

JOLWANA J

- [1] The issue we are called upon to decide in this appeal is whether the respondent was entitled to an order for an interim payment in terms of Rule 34A of the Uniform Rules of Court which was granted by the court a quo against the appellant.
- [2] The appellant is a juristic person established in terms of section 2 of the Road Accident Fund Act 56 of 1996 whose sole object is the compensation of road accident victims in respect of loss or damage wrongfully caused by the driving of motor vehicles.

- [3] Sinalo Manqina (the minor child) a girl born on 02 September 2005 was crossing a road near Green Point at NU7 in the township of Mdantsane on the 04 October 2011 when a collision occurred between herself and a motor vehicle insured by the appellant.
- [4] The respondent instituted legal proceedings against the appellant in her capacity as the mother and natural guardian of the minor child. She was granted an order in terms of which the appellant was held liable for all proven or agreed damages sustained as a result of the said accident. The quantum of damages so sustained was to be determined at a later stage.
- [5] Pending the hearing of the matter on the quantum of damages payable to her, the respondent lodged an interlocutory application in the court a quo in terms of Rule 34A of the Uniform Rules of Court for interim payment of R950 000.00. This amount was said to be in respect of the future medical treatment of the minor child and school fees in a special school.
- [6] The respondent had obtained expert reports in preparation for the determination of the quantum of damages. Dr Mkize, a neurosurgeon recommended treatment for post traumatic seizures and headaches related to the accident. He further recommended psychotherapy by an appropriate expert. Dr Hardy, a clinical psychologist made a finding that the minor child sustained injuries that constitute a severe alteration in mental status which has led to minimised educational, vocational and psychosocial potential all of which would require various types of interventions. Dr Rudenberg, an educational psychologist recommended weekly psychotherapy for about a year. She further recommended a remedial intervention of placing the minor child at a special high school where she could receive some vocational training on the basis that she was unlikely to cope at a mainstream high school.
- [7] In light of these reports, the respondent became concerned about the wellbeing and the future of the minor child as she felt that the appellant was unduly delaying the finalization of the main action to the prejudice of the minor child. It appears from the founding affidavit filed in support of that application that the respondent does not have the wherewithal for the said treatment and fees for a special high school as recommended by relevant experts. Because of her rather precarious financial situation the respondent decided to launch an application to court for an order for an interim payment in respect of the said future medical expenses and fees for a special high school to alleviate the predicament of the minor child.
- [8] The court a quo granted an order directing the appellant to pay the respondent R500 000.00 as an interim payment pending the final determination of the quantum of damages payable to the respondent in the main action. It rejected as a basis for denying interim payment to the respondent, Dr Muballe's report, also a neurosurgeon who had been commissioned by the appellant, whose opinion was that the minor child had sustained a mild traumatic brain injury and that her recovery was near complete with her academic performance being slightly above average. The court reasoned that Dr Muballe was neither a clinical nor an educational psychologist and therefore the recommendations of those experts in those fields

could not be ignored on the basis of his opinion.

[9] The court identified the issues before it as being first whether the respondent is entitled to interim payment as envisaged in Rule 34A of the Uniform Rules of Court.

[10] The relevant part of Rule 34A reads as follows:

“(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.”

[11] The court found that the jurisdictional prerequisites for a court to exercise its discretion and grant an order for an interim payment had been met in that the merits had been settled in favour of the respondent. The court reasoned that a period of over seven years had elapsed since the accident occurred and the minor child had yet to be compensated for her injuries. The respondent’s expert reports had been available to the appellant since 2016 and yet it was only in 2018 that the appellant rejected the RAF4 serious injury assessment report thus delaying the finalization of the matter. The court further reasoned that the appellant as an organ of state is enjoined by the Constitution^[1] to perform its obligations diligently and without delay as articulated in Mlatsheni^[2] where Plasket J said:

“It is expected of organs of State that they behave honourably- that they treat the members of the public with whom they deal with dignity, honestly, openly and fairly. This is particularly so in the case of the defendant: it is mandated to compensate with public funds those who have suffered violations of their fundamental rights to dignity, freedom and security of the person, and bodily integrity, as a result of road accidents. The very mission of the defendant is to rectify those violations, to the extent that monetary compensation and compensation in kind are able to. That places the defendant in a position of great responsibility: its control of the purse strings places it in a position of immense power in relation to the victims of road accidents many of whom, it is wellknown, are poor and ‘lacking in protective and assertive armour’.”

[12] The second issue before the court was whether the respondent was precluded by the provisions of section 17(4)(a) and 17(6) of the Road Accident Fund Act (the RAF Act) from launching an application for an interim payment for future medical expenses.

[13] Section 17 (4)(a) and (6) provide:

“17(4) Where a claim for compensation under subsection (1) –

- (a) includes a claim for the costs of the future accommodation of any person in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him or her, the Fund or an agent shall be entitled, after furnishing the third party concerned with an undertaking to that effect or a competent court has directed the Fund or the agent to furnish such undertaking, to compensate –
- (i) the third party in respect of the said costs after the costs have been incurred and on proof thereof; or
- (ii) the provider of such service or treatment directly notwithstanding section 19(c) or (d), in accordance with the tariff contemplated in subsection (4B).

...

17(6) 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 subsection (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 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.”

[14] The court a quo was referred to and placed reliance on its interpretation of Allpay Consolidated and Endumeni. In essence the Constitutional Court in Allpay[3] said that it was no longer practical nor desirable to adopt a mechanical approach to the words “mandatory” or “peremptory” on the one hand and “directory” on the other. What is now necessary is to check the meaning of the statutory provisions in light of their purpose.

[15] In Endumeni Municipality[4] the Supreme Court of Appeal said that the interpretation of any document must take into account the context of the provision being

interpreted gleaned from the document as a whole, the circumstances which led to its existence as well as the language used in the document itself. Preference is to be given to a sensible meaning as against the insensible meaning or one that undermines the very purpose of the document. The court a quo came to the conclusion that in the light of the rules of interpretation as explained in Allpay and Endumeni as well as the best interests of the minor child provided for in section 28 of the Constitution, section 17(6) of the RAF Act could

not have been intended to exclude claimants who, because of their indigence, are unable to incur the costs of the treatment and claim later. It thereupon found that the respondent is entitled to an order for interim payment in terms of rule 34A of the Uniform Rules of Court.

[16] It is against this finding by the court a quo that the appellant launched these appeal proceedings citing many grounds of appeal. However, I do not consider it necessary to enumerate or even deal with all of them. In my view this matter can be dealt with and concluded on the basis of the correct interpretation of the provisions of section 17(6) of the RAF Act. There is no point in dealing with the other grounds of appeal whose determination will not take the matter any further and will therefore serve no purpose either way. It is the contention of the appellant with regard to the interpretation of the relevant provisions of section 17 that this appeal will be determined.

[17] The appellant contends that it does not dispute that the appellant was created to offer the widest possible protection and compensation to victims of road accidents, as provided for in sections 3, 4 and 7 of the RAF Act and as articulated in Radebe[5]. However, the appellant is a creature of statute and therefore cannot provide compensation beyond the proscription and ambit of its founding and enabling statute, the RAF Act in particular section 17(4) and (6) thereof. The appellant further submits that the above is the case even on matters concerning the best interest of the child as provided for in section 28 of the Constitution unless the respondent had challenged the constitutional validity of section 17(6) which the respondent did not do.

[18] I am unable to find fault with the above submission. In fact, to argue otherwise would be to throw caution to the wind, the very caution that the court clearly sounded in Endumeni Municipality. In Endumeni, the Supreme Court of Appeal cautioned judges against the temptation “to substitute what they regard as reasonable, sensible or businesslike for the words actually used.” The words used in section 17(6) clearly prohibit against making an interim payment in respect of future medical expenses, regardless of the provisions in any law. In my view Rule 34A is the “any law”

referred to in section 17(6) where the relevant part of this subsection reads:

“...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”.

- [19] A further submission was made on behalf of the appellant that reading section 17 of the RAF Act as a whole a system is legislated in terms of which the Fund issues undertakings under certain circumstances in respect of future losses whether they be future loss of income, future loss of support and future medical expenses. The findings of the court a quo in respect of section 17 throws into a tailspin the whole legislated mechanism for compensation in respect of these types of losses.
- [20] It seems to me that changing the mechanism in which the Road Accident Fund in general operates as it relates to how future losses are paid is a matter for the legislature and not for the courts. That this is so is obvious from the fact that there are budgetary considerations that came into play. The appellant would suddenly have to find the money to pay claims for future losses on an interim basis under Rule 34A. The legislature decided, in its wisdom, to exclude road accident fund claimants from the benefits of Rule 34A and legislated a reimbursement system. Our courts have repeatedly cautioned against making policy laden decisions which are reserved by the Constitution for the other arms of the state to whom due deference is mandatory.
- [21] Even the constitutionally guaranteed interests of minor children which courts as upper guardians of all minors are required to protect, that cannot be done in isolation of the general constitutional framework. It might very well be so that indeed the minor child and many other road accident fund claimants are in dire need of assistance through interim payments to afford much needed medical treatment. However, and to the extent that the constitutional validity of the provisions of section 17(6) are not challenged, it is not for the courts to tell the legislature how to deal with that situation which may be dire as pointed out above absent considerations of constitutional validity. As long as that section remains in the statute book in its current form, the courts are not entitled to usurp the constitutionally ordained power of the legislature to pass legislation, based not on what the clear purpose of the statute is, but on what the court considers to be fair.
- [22] Even in situations in which the courts are exercising their jurisdiction in terms of section 172(1) of the Constitution[6] to grant a relief that is just and equitable courts are still required to thread carefully. In *Land Access Movement*[7] the Constitutional Court expressed itself as follows:

“This Court has held that its powers under section 172(1)(b) are restrained to the extent that they do not allow this Court to traverse into the terrain of the other arms of government. Thus the broad extent of the powers under section 172(1)(b) must be balanced with the separation of powers principle. A just and equitable order under paragraph 7 of the order must not enter into the terrain of legislating. The order, if granted, will remain intact and will not be changed once Parliament enacts a new Amendment Act. In ITAC, this Court said:

‘Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would be especially so where the decision in issue is policy laden as well as polycentric.’[8]

It follows that the appeal must succeed in light of the clear meaning of the words used in section 17 (4) and (6) of the RAF Act considered in light of the whole purpose of the legislation and the context in which section 17 as a whole is crafted.

[23] Lastly, there is one aspect that I believe, needs to be addressed by this court. Whilst the respondent’s attorneys filed all the papers including very useful heads of argument, dishearteningly neither they nor counsel appeared for the respondent to make submissions in court or even respond to submissions made on behalf of the appellant. The respondent’s attorneys filed, at the eleventh hour, a notice to abide with no explanation for their sudden non-appearance. That this is totally unacceptable is obvious. Legal representatives cannot fail to appear without the leave of court, even worse without an explanation, and belatedly hide behind a notice to abide. I consider it necessary to emphasize that legal representatives are first and foremost officers of the court. As such, they are expected not only to represent their clients as instructed but also they are expected to assist courts in arriving at a just decision. It is regrettable that respondent’s legal representatives left the respondent with no one appearing for her to champion her cause. If it is the respondent herself who instructed them to merely file a notice to abide and not appear, which remains doubtful, they owed a duty to this court to appear even under those

circumstances and at the very least seek leave of the court to be excused.

[23] In the result the following order will issue:

1. The appeal succeeds.
2. The order of the court a quo is substituted with the following order:
 - 2.1 The application is dismissed.
3. The respondent is ordered to pay costs of the application including costs of appeal.

MS JOLWANA

JUDGE OF THE HIGH COURT

BESHE J

I agree.

NG BESHE

SMITH J

JE SMITH

Appearances:

Counsel for the Appellant: ADV DUGMORE SC with ADV BESTER

Instructed by: DANDALA ATTORNEYS

KING WILLIAM'S TOWN

Counsel for the Respondent: No Appearance

Instructed by: SMITH TABATA ATTORNEYS

Heard on : 28 January 2020

Delivered on : 25 February 2020

- [1] Constitution of the Republic of South Africa, 1996.
- [2] Mlatsheni v Road Accident Fund 2009 (2) SA 401(E) at 406 para 17 (F-G).
- [3] Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, And Others 2014 (1) SA 604 (CC) at 616 para 30 (D-F).
- [4] Natal Joint Municipality Pension Fund v Endumeni Municipality 2012 (4) SA 593 SCA para 18. The Court said: "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 instruments, 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.”

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- [5] Mutilateral Motor Vehicle Accidents Fund v Radebe [1995] ZASCA 80; 1996 (2) SA 145 (A) at 152 para E - F

- [6] Section 172(1)(b) provides: “Power of courts in constitutional matters 172.

- (1) When deciding a constitutional matter within its power, a court – (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and (b) may make any order that is just and equitable, including – (i) an order limiting the retrospective effect of the declaration of invalidity; and (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”

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- (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”

[7] Speaker of the National Assembly and Another v Land Access Movement, South Africa and Others 2019 (6) SA 568 (CC) para 57.

[8] Footnotes omitted.

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Prepared on 11 October 2026 · Esheria