

SOUTH AFRICA / JUDGMENT

Haupt; Ex Parte Esterhuizen (21458/2021 ; 10857/2023), Ex parte [2025] ZAWCHC 330 (5 August 2025) [2025] ZAWCHC 330

COURT

Western Cape High Court, Cape Town

BEFORE

Moosa

CASE / FILE NUMBER

21458/2021 ; 10857/2023

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FLYNOTES:

CIVIL

PROCEDURE – Curator bonis – Child
with disability – Road
Accident Fund award – Best interests of child –
Medical evidence confirmed minors' disabilities and inability
to
manage affairs – Jurisdictional requirements for curator
appointments met due to disabilities – Guardians'
opposition rejected – Lack of financial expertise –
Inability to provide security – Proposed use of awards
for
family benefit rather than child's exclusive interest –
Application succeeded – Uniform Rule 57(13)
–

Children's Act 38 of 2005, s 6(2)(a).

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)

CASE

NO: 21458/2021

REPORTABLE

In

the ex parte application
of: NICOLA
KARIN HAUPT
APPLICANT
in re
the application for a curator bonis to
[L]...
[P]... [G]
THE
MINOR
[N]...
[M]
INTERVENING
PARTY
CASE
NO: 10857/2023
CARIKA
ESTERHUIZEN
APPLICANT
In

re the appointment of a
curator bonis to: [R]...
[D]... [S]
THE
MINOR
[P]...
[J]... [D]... [S]
INTERVENING
PARTY

Coram: MOOSA AJ

Heard: 27 MAY 2025

Delivered: 5 AUGUST 2025 (delivered electronically
to the parties)

Summary: Child law - child with disability awarded compensation –
appointment of curator bonis – rights
of guardian willing to
manage award – test enunciated in Ex parte Oppel and Another
2002 (5) SA 125 (C) reconsidered – Uniform Rule 57(13) applied
– notion of ‘transformation imperatives’
interpreted and
applied.
ORDER
Case no. 21458/2021
1.
Pursuant to Uniform Rule 57(13), [L] [P] [G]
(L) is declared to be a child with a disability incapable
of managing her own affairs.
2.
Ntuthuko Mitchell Msomi is appointed curator bonis to the Road
Accident Fund compensation awarded to [L] (‘the property’),

subject to the following terms:

- [a]
The curator bonis shall be vested with such powers and/or capacities as are more fully set out in annexure A1. Only the powers listed in paragraphs (a), (b), (d), (g), and (j) of annexure A1 are to be exercised subject to prior approval by the Master of the Western Cape High Court;
- [b]
the curator bonis is exempted from the furnishing of security as required in terms of section 77 of the Administration of Estates Act No. 66 of 1965 (as amended), for as long as he is practicing as an attorney and the holder of sufficient Fidelity Fund Indemnity Cover to protect the full value of the minor's assets under his curatorship;
- [c]
the curator bonis shall administer the property in the minor's best interest taking into account all relevant considerations including, but not limited to, the provisions of s 28 of the Constitution, 1996 and ss 6, 7, 9, 10, and 11 of the Children's Act, 2005;
- [d]
the party-party costs of the application for the appointment of the curator bonis except for the costs of opposition, as well as the fees and costs of the curator bonis on the applicable statutory tariff, shall be paid by the Road Accident Fund which costs shall include, although not limited to, the costs of administering the undertaking given by the Road Accident Fund under case no. 17799/2017 in respect of [L's] future medical and related expenses;
- [e]
the additional costs occasioned by the Intervening Party's opposition shall be borne by the estate of [L], with Counsel's fees to be on tariff scale C;
- [f]
when [L] turns 18, the curator bonis is directed to inform her that she is entitled to apply to a competent high court to be released from curatorship;
- [g]
if the curator bonis is unable or unwilling to take up his appointment, or becomes disqualified for any reason, then the Master of the Western Cape High Court is authorised to appoint an alternative as curator bonis to be selected from the remaining

candidates on the approved list for [L], subject to the terms of this order.

Case no. 10857/2023

3.

Pursuant to Uniform Rule 57(13), [R] [D] [S]

(R) is declared to be a child with a disability incapable of managing his own affairs.

4.

Francois Hamman is appointed curator bonis

to the Road Accident Fund compensation awarded to [R], subject to the

following terms:

[b]

the curator bonis is exempted from the furnishing of security for as long as he is

practicing as an attorney and the holder of sufficient

Fidelity Fund Indemnity Cover to protect the full value of the minor's

assets under his curatorship;

[c]

the curator bonis shall administer the property in the minor's best interest

taking into all relevant considerations including, but

not limited to, the provisions of s 28 of the Constitution, 1996 and ss

6, 7, 9, 10, and 11 of the Children's Act 38 of 2005;

[d]

the party-party costs of the application for the appointment of the curator bonis

except for the costs of opposition, as well as the fees

and costs of the curator bonis on the applicable statutory tariff, shall

be paid by the Road Accident Fund;

[e]

the additional costs occasioned by the Intervening Party's opposition shall

be borne by the estate of R[...] on a

party-and-party scale, with Counsel's fees to be on tariff scale C;

[f]

the curator bonis is

directed to inform [R], when he turns 18, that he is entitled to

apply to a competent high court to be released from curatorship;

[g]

the curator ad litem, Advocate Stacey Hendricks, shall retain

her powers relating to the further prosecution and/or settlement of the minor's

claim against the RAF, with her discharge being

automatic upon finalisation of the minor's claim; and

[h]

if the curator bonis is unable or unwilling to take up his appointment, or becomes

disqualified for any reason, then the Master is authorised to appoint an alternative person as curator bonis to be selected from the remaining candidates on the approved list of persons for [R], but subject to the terms of this order.

JUDGMENT

Introduction

- [1] This judgment engages the rights of children. It is a single judgment on two applications initiated under Uniform Rule 57(13) (UR 57(13)) to protect awards paid by the Road Accident Fund (RAF). They raise common issues of law.
- [2] In both instances, the Intervening Party is a parent who is a legal guardian of the child for whose benefit the compensation is sought to be placed under the management of a curator bonis. N[...] M[...] (M[...]) is an African woman residing in the township of Makhaza, Cape Town. She is the mother of [L] [G] (L), age 11 years. This Division awarded the minor R6 202 808,00 (Six Million Two Hundred and Two Thousand Eight Hundred and Eight Rands) as damages.
- [3] P[...] J[...] D[...] S[...] (D[...] S[...]) is a White male residing in Witteklip, Hopland, in Vredenburg. He is the father of [R] [D] [S] (R), age 14 years. The minor was awarded interim damages totalling R900 000,00 (Nine Hundred Thousand Rands). The balance of his claim is subject to on-going litigation.
- [4] M[...] and D[...] S[...] want to manage their child's award as guardian.
- [5] M[...] and D[...] S[...] argue that their backgrounds in poverty is no basis to be denied the equal opportunity to manage the sums awarded to their respective children. M[...] and D[...] S[...] point to the fact that this Court, as upper guardian of [L] and [R], permit them, as parents, to retain full custody of their children and to make key life decisions on their behalf. Therefore, so they aver, they ought to be allowed to manage the awards. A similar argument was
- made in *Moleté v MEC for Health, Free State* (2155/09) [2012] ZAFSHC 126 (22 June 2012) paras 7, 37 - 39.
- [6] Mr Molefe, appearing for M[...], cited *Ex parte Oppel and Another* 2002 (5) SA 125 (C). In that case, Ngwenya J (at 131G - I) held that if a guardian is available to manage a child's property, then an applicant for a curator bonis must 'show good reasons why' a court should interfere with the guardian's rights and duties

vis-à-vis the administration of his/her child's estate. A common thread running through the submissions by Mr HG McLachlan

and Ms JH McCarthy, appearing for the applicants, is that Ngwenya J's decision is bad in law and ought not to be followed; alternatively, that the decision is not applicable to curator bonis applications under UR 57(13).

Issues

for adjudication

- [7] The first issue for determination is whether, on a conspectus of the evidence, [L] and/or [R] suffer from a 'disability' of the kind envisaged by UR 57(13). [1] If insufficient evidence to this effect is found in relation to [L] or [R], then the relevant application must fail. See *Judin v Wedgwood and Another* 2003
- (5) SA 472 (W) paras 11 - 13. See the discussion in paragraphs [12] to [37] below.
- [8] If the factual issue identified in the preceding paragraph is answered in the affirmative in respect of [L] and/or [R], then the legal issue arising from paragraph [6] would be the second issue requiring adjudication, namely, whether *Ex parte Oppel supra* is good in law. See the discussion in paragraphs [38] to [85] below.
- [9] If the second issue is decided in the applicants' favour, then the third issue is whether I should exercise my discretion to appoint a curator bonis for [L] and/or [R]. See the discussion in paragraphs [86] to [95] below. If yes, then a suitable candidate must be selected for appointment for the relevant patient (that is, [L] and/or [R]. In that context, Practice Directive 24G (PD 24G) requires interpretation and application. See the discussion in paragraphs [96] to [149] below.
- [10] Finally, if the opposition to either application fails, then the issue of liability for costs arising from the opposition requires determination. See the discussion in paragraphs [150] to [151] below.
- [11] Each of these issues are now discussed in turn, so far as may be necessary.

Issue 1: Does [L] or [R] have a 'disability' envisaged by UR 57(13)?

In re [L]:

- [12] On 16 October 2016, and at age 2, [L] was involved in a motor vehicle accident. She sustained serious head trauma and other bodily injuries.
- [13] [L's] injuries were life-altering. [L] suffered a depressed skull fracture and a traumatic brain injury which left her significantly impaired at a cognitive level. [L's] physical injuries included her left arm being mangled and crushed, and her right upper arm was surgically amputated. She is now permanently disabled.

- [14] All this is common cause. On 14 February 2022, Papier J appointed Adv L Gabriel as curator ad litem to [L]. That appointment was made under UR 57(1) pursuant to Papier J being satisfied that [L] suffered from a disability of such a serious nature and degree that she was unable to manage her own affairs.
- [15] Pursuant to his appointment, the curator ad litem prosecuted [L's] claim against the RAF, culminating in the damages award of more than R6,2m. It is that property which is now sought to be protected by an appointment of a curator bonis to be vested with the usual powers conferred and whose conduct is to be subject to the control of the Master of the High Court, Western Cape (the Master), where necessary.
- [16] The application is brought for [L's] benefit by Ms Nicola Karin Haupt, an attorney at Kruger & Co who represents [L] in the action instituted against the RAF. Ms Haupt has the necessary standing under UR 57. See *Van Rensburg NO v Cornelius* (A31/2023) [2023] ZAWCHC 190 (7 August 2023) paras 20 - 23.
- [17] In support of her application under UR 57(13), Ms Haupt relies on the detailed report and recommendation by the curator ad litem, and the medical evidence of a registered neurosurgeon and registered clinical psychologist respectively, namely, Prof. Anthony Figaji and Ms Elspeth Burke.
- [18] A neuropsychological assessment of [L] was conducted by Ms Elspeth Burke. For present purposes, the relevant extract from her report reads: 'Given the severity of the brain injury and inability to cope adequately in the classroom, it would be undoubtedly in her best interests that she be assisted by the appointment of a Curator ad Litem and Curator Bonis.' Ms Burke concludes that, owing to the brain injuries suffered by [L], she does not have the mental acuity to manage her own affairs at present and will unlikely have that ability on reaching the age of majority.
- [19] Prof. Figaji also expressed the view that [L] is presently unable to manage her own affairs and, on attaining majority, will unlikely be able to manage her own affairs. This conclusion is based on [L's] disability arising from her injuries.
- [20] Prof. Figaji filed a medicolegal opinion in which he indicates that, in the compilation of his report and formulation of his opinion, he gave due regard to [L's] hospital records and the reports filed by the following medical practitioners: [L's] orthopaedic surgeon, Dr JS Sagor; [L's] prosthetist, Mr Eugene Russouw; and [L's] clinical psychologist, Ms Elspeth Burke.
- [21] Prof. Figaji's report indicates that [L] underwent a CT brain scan which 'showed a left frontal extra-axial collection and brain swelling'. His report also records that [L] underwent various operations, including neurosurgery which involved 'elevation of the depressed skull fragments and closure of the torn underlying dura'. Prof. Figaji notes that 'during surgery she [L] required ongoing aggressive resuscitation'. As regards [L's] serious head injuries and their long-term effects, Prof. Figaji opines as follows:

‘It is likely that the cognitive and behavioural deficits will become more apparent over time and as the cognitive demands of school increase. Given the fact that she sustained a severe TBI (and an open wound of cranium), it is very likely that she will have cognitive and behavioural limitations that become more apparent as she gets older.’

[22] The curator ad litem, Adv L Gabriel, filed a detailed report recommending that the appointing a curator bonis serves [L’s] best interests. He opines that [L] is unable to manage her own affairs and, based on the facts emerging from his investigation, will be unable to manage her own affairs on attaining majority. Adv Gabriel records further that, by reason of [L’s] brain injuries, her award includes R3 202 808,00 for future loss of earnings. This is a substitute for earnings that [L] may never have the opportunity to earn. This award is itself evidence that [L] suffers from serious brain injuries consistent with that described by Prof. Figajji and Ms Elspeth Burke. Based on the evidence, I find that [L] will, owing to her brain injuries, endure long-term effects consistent with that opined by Ms Burke, Prof. Figaji, and the curator ad litem in their respective reports filed of record.

[23] The Master filed a report dated 7 February 2025. It bolsters the applicant’s case. She opines that, based on the papers filed of record, [L] has ‘sustained serious bodily injuries, traumatic brain injuries which will and has permanently impaired her intellectual and mental capacity’. The Master’s report records no objection to the nominee curators, subject to the imposition of the Master’s terms of appointment.

[24] M[...] filed no report by any medical or other practitioner, nor tendered any other evidence which casts doubt on the veracity of the opinions expressed by Prof Figaji, Ms Burke, and Adv Gabriel. In these circumstances, I find that Ms Haupt proved that [L] suffers from a disability which renders her unable to manage her own affairs properly. This merits some intervention to protect [L’s] RAF award.

In re [R]:

[25] On 2 December 2016, and at aged 5 years, [R] was involved in a motor vehicle collision which caused him to sustain serious head and other physical injuries.

[26] [R’s] injuries were life changing. He suffered a brain injury which left [R] impaired at a cognitive and behavioural level. An initial CT brain scan showed that [R] suffered a right parietal fracture with an underlying subdural haematoma and brain swelling. A later CT brain scan showed that the haematoma increased in size. [R] continues to suffer from the effects of his head trauma and bodily injuries.

[27] On 4 August 2023, and acting pursuant to the provisions of UR 57(1), Allie J appointed Adv S Hendricks as curator ad litem. That appointment was made after Allie J was satisfied that [R] suffered from a disability that was of such a serious nature and degree that [R] was rendered unable to manage his own affairs.

- [28] Pursuant to her appointment, Adv Hendricks prosecuted [R's] claim against the RAF. This culminated in the interim damages award of R900 000,00. It is that property which is now sought to be protected by the appointment of a curator bonis under the control of the Master, where necessary, and to be vested with the usual powers conferred on persons appointed as curator bonis under UR 57(13).
- [29] This application is brought for [R's] benefit by Ms Carika Esterhuizen, an attorney at Esterhuizen Attorneys representing [R] in the action instituted against the RAF. Ms Esterhuizen's standing is undisputed. I find that she has locus standi.
- [30] Ms Esterhuizen relies on a report filed by the curator ad litem. Adv Hendricks filed a comprehensive report in which she recommends that a curator bonis be appointed to [R]. Her conclusions are informed by a comprehensive investigation, including all necessary consultations and a consideration of various medical reports. The medical evidence relied on by Adv Hendricks is that of Dr Zayne Domingo, a registered neurosurgeon, and Dr Rosa Bredenkamp, a registered psychologist, both of whom were interviewed by Adv Hendricks as part of her investigation.
- [31] [R] is experiencing learning difficulties and requires special attention. According to Dr Domingo, these problems are directly linked to deficits caused by [R's] brain injury. Dr Domingo reports that [R] is unable to concentrate and focus for long periods because of the brain injury which, in turn, prevents [R] from performing well at school. Dr Domingo opines that this problem will persist as [R] grows older because the pressures of school and life in general will increase over time.
- [32] Based on his assessment of [R's] medical records and his prognosis for R[...], Dr Domingo concludes that [R] is currently unable to manage his own affairs and will unlikely be able to do so upon attaining the age of majority. This is directly attributable to the serious nature and extent of [R's] injuries, and their long-term effects on his abilities. Dr Domingo recommends the appointment of a curator.
- [33] Dr Rosa Bredenkamp expresses a similar opinion to that of Dr Domingo. She too examined the nature and extent of R[...]'s brain injuries and its on-going impact on his cognitive abilities. Dr Bredenkamp reports that R[...] 'suffers from mild neurocognitive disorder with deficits in attention and concentration, auditory processing and memory. He struggles with language, spelling, reading and his short-term memory is poor and his reduced cognitive efficiency and lessened ability has resulted in the inability to perform or excel in mainstream education.'

- [34] Dr Bredenkamp maintains that [R] is susceptible to manipulation and potential abuse by third parties, particularly if [R] is in control and possession of his own funds. Dr Bredenkamp opines that [R] is now, and will on attaining the age of majority be, unable to manage his own affairs properly, including not being able to manage the compensation payout from the RAF. Dr Bredenkamp opines that this money requires protection through the appointment of a curator bonis for [R].
- [35] Adv Hendricks' reports explains the minutia of her investigation which led to her recommendation that the appointment of a curator bonis is in [R's] best interests. She concludes that [R] is presently unable to manage his own affairs and, based on facts emerging from her investigation, will unlikely be able to do so when 18 years.[2]
- [36] The Master filed a report dated 28 November 2024 in which she abides the decision of this Court as to whether [R] suffers from a disability that renders him unable to manage his own affairs. The Master indicated that she has no objection to the nominee curators, provided that the usual terms of appointment are met.
- [37] Except for his say so, D[...] S[...] filed no report(s), nor tendered other evidence which challenges the medical conclusions and opinions by Drs Domingo and Bredenkamp, nor the opinions expressed by the curator ad litem for that matter. Under these circumstances, I conclude that Ms Esterhuizen proved that [R] suffers from a disability which renders him unable to manage his own affairs properly. Subject to the discussion below concerning issue 2, this finding justifies an intervention to protect R[...]’s RAF award against diminution through potential losses.

Issue 2: Is Ex parte Oppel good precedent and/or inapplicable under UR 57(13)?

- [38] A ‘Court will not appoint a curator bonis until it is absolutely satisfied that the patient has to be protected against loss which would be caused because the patient is unable to manage his affairs’ (Ex parte Klopper: In re Klopper 1961 (3) SA 803 (T) at 805E). See also WD v RAF supra para 12; Ex parte Kotze 1955 (1) SA 665 (C) at
666. [L] and [R] are unable to manage their own affairs owing to a medical disability. As such, their RAF awards are to be protected, at least while they are minors.
- [39] M[...] and D[...] S[...] are available and willing to manage their child’s RAF award in their roles as legal guardians. Therefore, they oppose the applications. Ngwenya J, in Ex parte Oppel, held that courts should not make inroads into a guardian’s legal position to administer a minor’s estate, unless it is shown that the guardian suffers from ‘the same handicap as would entitle the Court to appoint a curator to a major person’

(at 131I). I am required to decide whether this approach is bad in law. If not, then whether that decision applies to curatorship

applications brought under UR 57(13). I now discuss these questions of law.

(a) Ex parte Oppel supra: its precedential value

[40] This issue has not been considered in this Division from whence Ex parte Oppel originates. There is also a paucity of case law on all fours with the applications forming the subject of this judgment. Applicants' counsel drew my attention to cases where Ex parte Oppel was considered but not followed. These are: *Molete v MEC for Health, Free State* supra paras 15, 59 - 66; *Dube NO v RAF* 2014 (1) SA 577 (GSJ) paras 17 - 21; and Ex parte Willem Nicolaas Cornelius Buitendag (in re appointment of a curator bonis to SLD) (WCHC case 19326/2022) unreported (28 November 2023) para 18.

[41] *Molete v MEC for Health, Free State* supra dealt with an application for the appointment of a curator ad litem and bonis to a minor. Similar to Ex parte Oppel, the application in *Molete v MEC for Health, Free State* was not rooted in UR 57 but rather in the common law. Rampai J observed (at para 65), correctly so, that Ngwenya J, in Ex parte Oppel, made no reference at all to s 28 of the Constitution of the Republic of South Africa, 1996 (the Constitution), nor sought to justify his decision in the light of imperatives in s 28(2). In terms thereof, in every matter concerning a child, the best interests of the child are 'the overriding consideration above all others' (para 64).

[42] Rampai J held that '[t]he special circumstances outlined in that decision [Ex parte Oppel] cannot and should not be regarded as the exhaustive grounds on which applications of this nature can be based' (para 63). Consistent with the 'supreme protection' (para 64) accorded to a minor's best interests under s 28(2), Rampai J held:

'The test is not whether the parents are capable or not of managing the estate of the minor child. The test is whether the appointment or non-appointment of a curator(s) will serve the best interest of the minor child regard being had to the peculiar circumstances of this particular matter.' (para 58)

[43] A similar question arose in *Dube NO v RAF* supra. In that case, a minor became entitled to an RAF award of R3 150 488,80. The provisions of UR 57 was not applied. The common law was used. The trial judge mero motu raised the issue of how the award should be protected. Although the guardian was available to manage the award, he consented to a court order that allowed the award to be paid into a trust to be created and managed for the minor's sole benefit. An order to that effect was granted.

[44] Fisher AJ, in *Dube NO v RAF* supra para 19, did not adopt the approach of Ngwenya J in Ex parte Oppel supra. She used the best interests of the child test. Fisher AJ, at paras 15 - 17, observed, correctly in my view, that Ngwenya J's approach conflicted with that in *Southern Insurance Association Ltd v Bailey NO* 1984 (1) SA 98 (A) at 120G - H. In *Bailey NO*, the Appellate Division (AD) endorsed the 'good reason' standard followed in *Van Rij NO v Employers' Liability Assurance Corporation Ltd* 1964 (4) SA 737 (W). In *Van Rij NO*, Trollip J held that even when a guardian is available to manage a child's money, a court can use its reservoir of common law discretionary powers to appoint a curator to administer the child's property if 'good cause' (at 739F) exists for doing so, having regard to the facts of the

particular case at hand.

- [45] Ngwenya J, in *Ex parte Oppel* supra at 129F, decided that he was not bound by the AD's decision in *Bailey NO* supra because, so he reasoned, the AD's decision on the question of a curatorship appointment was obiter. With respect, that is factually incorrect. This appears from the extract in *Bailey NO* quoted below which makes clear that the AD was seized with a consideration whether the guardian should be appointed the child's curator so that the AD's decision thereon was not obiter:

'The second matter concerns the administration of the sum awarded. It is plain that Danderine's father and natural guardian has neither the ability nor the qualifications to administer the proceeds of this litigation.' (at 120F - G) (Emphasis added)

- [46] The italicised portion of the quoted extract in *Bailey NO* supra reveals that the need for a curator, despite the availability of a guardian, was a key issue in the appeal. Therefore, the AD's embracing of Trollip J's approach in *Van Rij NO* supra was integral to the AD's ratio decidendi. On this basis, the AD's decision in *Bailey NO* was binding on Ngwenya J, who ought to have followed it. That duty flows from the doctrine of *stare decisis*. See *Ayres and Another v Minister of Justice and Correctional Services and Another* 2022 (2) SACR 123 (CC) paras 16-17.
- [47] Ngwenya J did not follow *Bailey NO* supra and *Van Rij NO* supra for a second reason, namely, they supposedly failed to 'clearly set out under what circumstances the Court will appoint a curator ad litem [or curator bonis] to the estate of a minor where there is a guardian available'. With respect, this too is incorrect. Both cases clearly held that a curator may be appointed if 'good cause' is found to exist.
- [48] What constitutes 'good cause'? This is a factual enquiry in each case. No hard and fast rules can be laid down in advance. In *Bailey NO* supra and *Van Rij NO* supra, the parents were found to be neither qualified nor competent to administer their child's monies. Hence, there was good reason to place the funds under the control of a third party for protection. The same approach was followed in an earlier judgment, namely, *Woji v Santam Insurance Co Ltd* 1981 (1) SA 1020 (A) at 1031A - B.
- [49] The 'good cause' jurisdictional criterion used in *Woji* supra and *Bailey NO* supra sets a lower threshold than the 'exceptional circumstance' criterion which Ngwenya J held must be met whenever a curator is sought to be appointed and 'there is a guardian alive and available' (at 131D).[3] Ngwenya J provided no reasons for requiring a higher threshold in the face of clear authority in *Bailey NO* supra favouring the lower threshold of 'good cause' (even if it was obiter as viewed by Ngwenya J). He then proceeded to provide a numerus clausus of 'exceptional circumstances', namely:

'These would be where the guardian refuses to act, where the minor litigates against the guardian or where there is a clash of interests between that of the minor and that of the guardian.' (at 131 D - E)

[50] Each of these circumstances ought, in my view, to qualify as a good reason when, at common law, a curator bonis is sought to be appointed to administer a minor's patrimonial affairs instead of placing the property in a guardian's hands. I also endorse the non-exhaustive list of other 'good cause' grounds enumerated in *Moleté v MEC for Health, Free State* supra para 67 and in *Dube NO v RAF* supra paras 19 - 20.

[51] Children are 'the most vulnerable members of society' (*S v S and Another* 2019 (6) SA 1 (CC) para 35). The preamble to the Children's Act 38 of 2005 (the Children's Act) records that 'children are entitled to special care and assistance'. This entitlement flows directly from s 28 of the Constitution which confers special protection to children, 'a person under the age of 18 years' (s 28(3)). Section 28(2) of the Constitution reads:

'A child's best interests are of paramount importance in every matter concerning the child.'

[52] Linguistically, the word 'every' expands to an unlimited degree the remit of the word to which it relates. See *Arprint Ltd v Gerber Goldschmidt (SA) Ltd* 1983 (1) SA 254 (A) at 261; *Southern Life Association Ltd v CIR* (1984) 47 SATC 15 (C) at 18-19. In the context of the extract quoted above from s 28(2), the word 'every' casts extremely widely the net of the kinds of 'matter' which would be encompassed. By casting the net of matters very broadly, the best interests of the child standard imposed by s 28(2) is able to play a role in all affairs ('matter') concerning a child.

[53] On this interpretive basis, s 28(2) applies in every case when a court considers the appointment of a curator to a child, whether ad litem or bonis. See *Moleté v MEC for Health, Free State* supra para 58; *Dube NO v RAF* supra para 19; *Ex parte Willem Nicolaas Cornelius Buitendag* (in re appointment of a curator bonis to SLD) supra para 18. Therefore, Ngwenya J's omission to apply s 28(2) is, in my view, a material error.

[54] In the present context, s 9 of the Children's Act is also relevant. It reads:

'In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied.'

As stated in paragraph [51], the Children's Act gives effect to s 28 of the Constitution. Section 1 of the Children's Act defines 'care' as including 'generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child'. For purposes of s 9 quoted above, the appointment of a curator bonis is a 'matter' within the scope of the phrase 'the care, protection and well-being of a child'.

[55] The appointment of a curator bonis serves as a legal mechanism that safeguards a child's property, ensuring that it is preserved for the child to gain the maximum possible benefit from it. A patrimonial loss suffered by a child's estate would potentially adversely affect the level of care and protection that the child would be able to enjoy. That, in turn, would potentially negatively affect the child's well-being and undermine the extent to which s/he is able to enjoy the amenities of a life with dignity.

[56] To give effect to s 28(2) of the Constitution, the ‘best interests of the child’ standard is given substance in s 7 of the Children’s Act. In terms of s 7(1), this standard necessitates consideration being given to circumstances pertaining to a child which relates to specific aspects of life regarded as important. They are listed to be:

‘(a) the nature of the personal relationship between—

(i)

the child and the parents, or any specific parent; and

(ii)

the child and any other care-giver or person relevant in those circumstances;

(b) the attitude of the parents, or any specific parent, towards—

(i) the child; and

(ii) the exercise of parental responsibilities and rights in respect of the child;

(c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;

(d) the likely effect on the child of any change in the child’s circumstances, including the likely effect on the child of any separation from—

(i) both or either of the parents; or

(ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;

(e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child’s right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;

(f) the need for the child—

(i) to remain in the care of his or her parent, family and extended family; and

(ii) to maintain a connection with his or her family, extended family, culture or tradition;

(g) the child’s—

(i) age, maturity and stage of development;

(ii) gender;

(iii) background; and

(iv) any other relevant characteristics of the child;

- (h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;
- (i) any disability that a child may have;
- (j) any chronic illness from which a child may suffer;
- (k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;
- (l) the need to protect the child from any physical or psychological harm that may be caused by —
- (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or
- (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;
- (m) any family violence involving the child or a family member of the child; and
- (n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.'

[57] When adjudicating the issue whether a child's property ought to be managed by a parent qua guardian or by third party as curator bonis, the factors listed above in, inter alia, ss 7(1)(a), (b), (c), (g), (h), (i), and (n) appear to be contextually relevant.

[58] I pause to mention that when curators ad litem compile reports pertaining to a child's affairs, the considerations in s 7(1) of the Children's Act ought to be referenced to assist a court in reaching a decision that advances the best interests of the child concerned. The factors listed in s 7(1) would, in that setting, serve merely as a guide. Additionally, other contextually relevant factors would need to be dealt with, including the child's voice as required by s 10 of the Children's Act read with UR 57(5), where applicable. Moreover, a curator bonis should administer a child's estate in a manner that takes account of, inter alia, ss 6, 7, 9, 10, and 11 of the Children's Act. To ensure compliance, reference thereto ought to be included in an order appointing a curator.

[59] *Molete v MEC for Health, Free State supra* and *Dube NO v RAF supra* are not the only cases reinforcing my view that the test enunciated by Ngwenya J in *Ex parte Oppel supra* has, over the years, not enjoyed universal judicial support. Another case is *Ex parte Willem Nicolaas Cornelius Buitendag (in re appointment of a curator bonis to SLD) supra*. There Francis J, in this Division, was required to decide whether to appoint a curator bonis under the common law to manage an RAF award of R2,9m for a child, age 12 years, or whether to allow the child's guardian to manage those funds. Francis J cited *Dube NO v RAF supra* para 19 as authority for the following decision:

‘When dealing with issues regarding minor children, the court is enjoined to act in the child’s best interest, and this is of paramount importance in every matter concerning the child. Where relatively significant sums of money are awarded to minors, it is imperative that a court enquires into the circumstances relating to the persons to whom the money is sought to be released for the purpose of satisfying itself that any order would serve the best interests of the minor in relation to the payment and subsequent administration of the funds. This includes assessing the motivations, qualifications, and ability of a guardian to properly administer the funds to be paid in the event that it is sought that the payment is made to such guardian.’ (Emphasis added)

[60] In the matter before Francis J, the mother of the minor, who was also the child’s guardian, opposed the appointment of a curator bonis asserting that she was available and capable of managing the minor’s affairs. Francis J did not expressly refer to *Ex parte Oppel supra*. However, by citing *Dube NO v RAF supra* as authority for his decision to adopt the best interests of the child test, Francis J, by necessary implication, indicated his lack of support for the test laid down by Ngwenya J. This must be so because, as discussed above in paragraph [44], Fisher AJ, in *Dube NO v RAF*, was critical of Ngwenya J’s test. Logic dictates that Francis J aligned himself with Fisher AJ’s comments and the reasons underpinning her preferred approach.

[61] Two further judgments of this Division did not follow Ngwenya J’s approach: see *WD v RAF supra*; and *AD and Another v MEC for Health and Social Development, Western Cape Provincial Government (27428/10)*

[2016] ZAWCHC 116 (7 September 2016). In *WD v RAF*, Savage J had to decide how best to protect a minor’s RAF award in the sum of R624 500,00. Despite the guardians being available to manage the award, and contrary to the curator ad litem’s recommendation favouring a trust, Savage J directed that it be paid into the Guardian’s Fund for protection. She held that doing so was in the minor’s best interests.[4] Rogers J, in *AD v MEC for Health supra* paras 76 - 78, also applied the best interests of the child standard. Rogers J did not follow *Ex parte Oppel supra*. He expressed the view that Ngwenya J’s approach ‘does not seem to be borne out by the authorities he cited’. I align myself with this view for substantially the same reasons (see discussion in paragraphs [45] to

[46] above).

[62] Relying on s 28 of the Constitution, the apex court has also adopted the best interests of the child standard when dealing with the question of the appointment of a curator to protect a child’s interests. See *Du Toit and Another v Minister of Welfare and Population Development and Others [2002] ZACC 20; 2003 (2) SA 198 (CC) para 3*.

[63] The ‘best interests of the child’ test must be understood vis-à-vis the ‘good cause’ test used in *Woji supra* and *Bailey NO supra* (see paragraph [48]). The ‘child’s best interest’ standard is but a specific form of ‘good cause’. In other words, when it is found that the best interests of a child warrants appointing a curator, a valid reason exists for proceeding with that appointment. Therefore, any of the non-exhaustive ‘good cause’ grounds envisaged above in

paragraph [50] could potentially, if proved in any instance, justify the appointment of a curator on the basis that it is in the child's

best interest to do so, rather than permit a guardian to manage the child's property.

[64] In sum: Ngwenya J's approach conflicts with established binding precedent emanating from the AD (now SCA). Also, it is unduly guardian-centric. The legal position of guardians to administer a child's property is elevated to a superior status vis-à-vis the constitutional entitlements of a child to have every matter affecting him/her decided with reference to the 'child's best interests'. On these legal cum constitutional bases, the test enunciated in *Ex parte Oppel* is clearly wrong and should not to be followed. Consistent with s 28(2) of the Constitution read with the Children's Act (and the case law cited in paragraphs

[59] to [62] above), when a court exercises its discretion to appoint (or not to appoint) a curator ad litem or bonis to any child, whether at common law or under UR 57(1) and/or (13), then a court should adjudicate that matter through the lens of the child's best interest. This is the gold standard.

[65] The principles laid down in s 6(2) of the Children's Act fortifies my view that the existing legal framework favours a child-centred approach in all judicial proceedings related to a child or a child's patrimonial interests, including applications for a curator to be appointed for a child's benefit. Section 6(2) reads:

'All proceedings, actions or decisions in a matter concerning a child must—

- (a) respect, protect, promote and fulfil the child's rights 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 this Act, subject to any lawful limitation;
- (b) respect the child's inherent dignity;
- (c) treat the child fairly and equitably;
- (d) protect the child from unfair discrimination on any ground, including on the grounds of the health status or disability of the child or a family member of the child;
- (e) recognise a child's need for development and to engage in play and other recreational activities appropriate to the child's age; and
- (f) recognise a child's disability and create an enabling environment to respond to the special needs that the child has.' (Emphasis added)

[66] Grammatically, the word 'all' in the opening phrase 'All proceedings, actions or decisions in a matter concerning a child' indicates that s 6(2) encompasses within its radar each and every proceeding, action or decision pertaining to a child, regardless whether it is judicial, quasi-judicial, or otherwise in nature. By giving s 6(2) an extremely wide berth and making compliance with its principles compulsory ('must'), the legislature aims to

ensure that the principles in s 6(2) are universal, pervasive, and permeate ‘all proceedings, actions or decisions’, nothing excluded from its net (scope).

[67] The principles legislated in s 6(2) are important. The principles originate from the children’s rights provisions outlined in the Bill of Rights. Section 6(2)(a) of the Children’s Act expressly refers to the rights of children in the Bill of Rights and that a child’s best interests must be respected, protected, promoted, and fulfilled in ‘all’ proceedings involving a child. Logic dictates that this must include court proceedings in which a curator is sought to be appointed for a child (whether ad litem or bonis).

[68] Respect for the inherent dignity of a child is a stand-alone principle in s 6(2)(b) of the Children’s Act.[5] This principle, when considered with that in s 6(2)(a), precludes the rights of a child being relegated to secondary importance behind those of, for e.g., a guardian. Since the Children’s Act was not in force when *Ex parte Oppel* supra was adjudicated, this may account, at least in part, for the guardian-centric approach embraced by Ngwenya J, rather than the child-first approach required by s 6(2).[6] The child-centred approach forms part of South Africa’s international obligations after it ratified the United Nations Convention on the Rights of the Child on 16 June 1995.

(b) *Ex parte Oppel* supra: applicable in casu for purposes of UR 57(13)?

[69] If I erred above in paragraphs [64] to [68] that the test enunciated in *Ex parte Oppel* is no longer good in law (assuming it was previously), then I am still not bound by it. This is because: (i) as shown in paragraphs

[70] to

[73] below, *Ex parte Oppel* is, in material respects, factually distinguishable from the applications with which I am seized; and (ii) the view expressed by Ngwenya J is distinguishable with reference to the facts in casu (see below in paragraph [75]). His views also appear to be incompatible with statutory provisions designed to protect children with disabilities.[7] I now deal with them in turn.

[70] *Ex parte Oppel* supra involved an unopposed application brought under the common law for the appointment of a curator ad litem to investigate the possible need for appointing a curator bonis to a 14-years old child who had been awarded damages of R861 338,00. The application was brought by the child’s parents who were also his legal guardians. They litigated on his behalf against the RAF for the damages award.

[71] In the founding affidavit, the child’s father averred that he completed up to standard 4 at school while his wife, the child’s mother and the second applicant, completed matric and later became a qualified nurse. She was employed on a full-time basis from 1987 to 1999, at which point she resigned to provide full-time care for her child due to his injuries that were sustained in a motor vehicle accident.

- [72] The parents averred that, although they were available to manage their son's RAF award, they were unable to do so with the requisite skill. They expressed concern that they may make bad decisions regarding financial and investment matters owing to inadequate knowledge and experience on their part. Despite the guardians' concerns, Ngwenya J dismissed their application.
- [73] Accordingly, *Ex parte Oppel* is factually distinguishable from the applications being adjudicated by me. Whereas the application before Ngwenya J was brought by the guardians and was unopposed, the applications currently before me are brought by the children's attorneys and are opposed by the guardians. Unlike the facts in *Ex parte Oppel*, the applications here concern minors, namely, [L] and [R], both of whom suffer from a medical disability of the kind envisaged by UR 57(13). I have already found that [L] and [R] are, for that reason, unable to manage their own affairs. See above in paragraph [38]. As stated earlier, this was the reason that curators ad litem were appointed for [L] and [R] pursuant to UR 57(1).
- [74] In *Ex parte Oppel supra*, Ngwenya J refused to appoint a curator ad litem under the common law, despite the guardians seeking that relief in the best interests of their child. The guardians admitted that they lacked the requisite knowledge, skills and experience to manage their child's RAF award. On that basis, they believed that their child's patrimony may endure pecuniary losses at their hands which, in their capacity as guardians, they averred merited a curator ad litem investigating the appointment of a curator bonis to protect their child's RAF award against diminution through losses.
- [75] Despite not being seized with an application involving a child with disability, Ngwenya J expressed views pertaining to curatorship applications for minors with disabilities. Therefore, those views are obiter. Ngwenya J held that 'the duty to administer the estate of a minor, whether mentally or physically disabled or not, falls within the realm of guardianship' (at 130G). On this basis, he held that 'the disabilities of a minor will not generally warrant the appointment of a curator, be it bonis or ad litem' (at 130G). He said: 'Even if a Court were to declare the minor mentally disordered, nothing would turn on that as long as the guardian is available.' (at 131G)
- [76] Under UR 57(13), a curator bonis may be appointed to protect the estate of a child with a disability. In that context, the principle in s 6(2)(f) of the Children's Act is relevant. It stipulates that, where necessary, recognition must be given to a child's disability. Section 7(1)(i) of the Children's Act quoted above in paragraph [56] is also germane. In terms thereof, the child's best interest standard, being a principle legislated in s 6(2)(a), includes consideration of 'any disability that a child may have'.
- [77] Section 11(1) of the Children's Act also applies. In terms thereof, in every matter concerning a child with a disability, it is mandatory to consider providing the child '(c) ... with conditions that ensure dignity' and '(d) ... with the necessary support services'. In s 1, 'care' is defined as including '(b) safeguarding and promoting the well-being of the child', and '(d) respecting,

protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act'. Based on reasons provided in paragraphs [54] to [55] and [76] above, I interpret s 11(1)(c) and (d) read with paras (b) and (d) of the definition of 'care' to include a curator bonis appointment. This is a mechanism to safeguard a child's

property and protect a child's dignity rights, while also promoting a life with quality.

[78] The apex court, in *Independent Institute of Education (Pty) Limited v Kwazulu-Natal Law Society and Others* 2020 (2) SA 325 (CC), held as follows:

'[1] It would be a woeful misrepresentation of the true character of our constitutional democracy to resolve any legal issue of consequence without due deference to the pre-eminent or overarching role of our Constitution.

[2] The interpretive exercise is no exception. For section 39(2) of the Constitution dictates that "when interpreting any legislation . . . every court, tribunal, or forum must promote the spirit, purport and objects of the Bill of Rights". Meaning every

opportunity courts have to interpret legislation must be seen and utilised as a platform for the promotion of the Bill of Rights by infusing its central purpose into the very essence of the legislation itself.' (Footnotes omitted)

[79] The Uniform Rules of Court are in the nature of subordinate legislation. Their interpretation follows the same principles and process as applicable to parliamentary legislation. See *Le Bonheur Wine Estate (Pty) Ltd v Stellenbosch Vineyards (Pty) Ltd* (17111/2021) [2025] ZAWCHC 260 (20 June 2025) paras 44, 48. Accordingly, UR 57(13) must be interpreted through a constitutional lens having regard to constitutional values and the fundamentals of the Bill of Rights entrenched in the Constitution.

[80] A construction of UR 57(13) as outlined in paragraph [77] above promotes, protects, and respects the rights of children entrenched in the Bill of Rights, all of which this Court is bound to do in terms of, inter alia, s 8(1) of the Constitution.[8] This approach also adheres to the principles enumerated in ss 6(2)(a) and (b) of the Children's Act (discussed in paragraphs [65] to [68] above).

[81] Embracing this interpretation of UR 57(13) ensures that this Court, in its role as upper guardian of children is able to create, through the mechanism of a curator bonis appointment in appropriate matters, an environment that is responsive to the special needs of children with disabilities. This advances human dignity, human rights, and responsiveness, all values in s 1 of the Constitution. It also adheres to the principles of promoting children's rights and their inherent dignity, as well as responsiveness to a child's needs as dealt with in ss 6(2)(a), (b), and (f) of the Children's Act.

- [82] Rule 57(13) does not provide protection for every major or minor with a disability. It applies to those who are unable to manage their own affairs by reason of a mental (cognitive) or physical disability (as distinct from a legal disability). Anyone with a disability falling within the intended categories is a vulnerable person in need of special protection. This is even more so for minors. Their age, status, and dependence on carers render them ‘the most vulnerable members of society’ (*S v S* supra para 35).
- [83] The discretionary mechanism permitted by UR 57(13) should be understood in this context. Minors and majors with a disability are treated alike. Persons in either category equally enjoy the right to protection and benefit of the law through a curator bonis. This is consistent with the principle in s 6(2)(c) of the Children’s Act, namely, that a child must be treated fairly and equitably in every proceeding concerning him/her. As a result, I disagree with Ngwenya J’s evaluation that because minors have a different legal capacity to majors, therefore ‘[t]he need to appoint a curator for the minor does not require the same jurisdictional requirements as those of a major’ (at 130G). Under the present structure of UR 57(13), the requirements are uniform to all.
- [84] Ngwenya J’s approach in *Ex parte Oppel* supra prioritises the position of guardians. Children’s rights and a child’s best interests (whether with or without disabilities) must be put first in every matter affecting that child. By law, this ought to have been at the heart of the enquiry in *Ex parte Oppel*. This is what s 28 of the Constitution demands. It was applicable when *Ex parte Oppel* was adjudicated.
- [85] A guardian’s authority and duty to administer a minor’s estate is not absolute. It is fettered by restrictions imposed by law. For e.g., monies inherited by a minor is not managed by a guardian. The funds are deposited into the Guardian’s Fund for management by the Master in accordance with Chapter V of the Administration of Estates Act 66 of 1965; or the inheritance may be held in a testamentary trust managed by trustees under the Trust Property Control Act 57 of 1988. The provisions in UR 57(13) are another limitation in law, but only to the extent that a guardian is not appointed as curator bonis. Under UR 57(13), a guardian may seek such appointment but would, if appointed, be subject to compliance with the Master’s requirements (such as, providing adequate security, unless exempted by court order). See *Ex parte Davidson* 1981 (3) SA 575 (D); *Ex parte Smit: In re Estate Smit* 1983 (3) SA 438 (T).

Issue 3: Should a curator bonis be appointed for L[...] and R[...]?

- [86] I reiterate that the jurisdictional requirements of UR 57(13) have been met for [L] and [R]. Neither is capable of managing their own affairs.[9] Having made these findings of fact, I have a discretion whether to appoint a curator bonis to each.

[87] My discretion to appoint or not to appoint a curator bonis must be exercised judiciously, after having regard to all facts which are relevant to determining what is in the child's best interests. See *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000

(2) SA 1 (CC) para 11.

[88] M[...] and D[...] S[...] have not applied to be appointed curator bonis. As such, neither was vetted by the Master. However, I may permit them to manage their child's award in their capacity as guardian if doing so is in the child's best interest. See *Master of the High Court v Pretoria Society of Advocates* supra para 132. In deciding that issue against M[...] and D[...] S[...] respectively, I rely on the cumulative effect of the facts adduced against each. The following are common reasons of a general nature which, I conclude, justify my finding that it is not in the relevant minor's best interests for M[...] and D[...] S[...] to manage the award: (i) the sums involved are not insubstantial; (ii) there is a lack of adequate knowledge, skills, and experience in the administration of substantial sums; (iii) there is an increased risk of loss being suffered by the minor; (iv) the guardian is unable to provide security to cover any potential financial loss; (v) the likely duration of the fund's management; (vi) the absence of control over the guardian's actions; and (vii) a lack of oversight by the Master to protect against abuse of power, negligence, or failure to account for funds.

[89] On the conspectus of relevant evidence, I also find no merit in the argument advanced by M[...] and D[...] S[...] that they are being targeted by the curators ad litem and are victims of discrimination owing to their social status and background in poverty. Undoubtedly, they love [L] and [R] respectively and want what is best for her/him. However, this is not the test to be applied in matters of this nature.

[90] A child's estate remains vulnerable to losses even at the hands of loving, caring parents. A child's estate is not immune from losses created by well-intentioned parents who, for e.g., simply lack the necessary discipline or skill to manage large sums of wealth placed under their control for the long-term benefit of a child, which funds ought to endure post their age of minority into adulthood. It is injudicious to ignore these realities of life. All this aligns with the following dictum by Savage J in *Van Rensburg NO v Cornelius* supra para 26 (Le Grange ADJP et Cloete J concurring):

'There are compelling reasons why appropriate protections are put in place by courts to protect and preserve both the dignity and interests of vulnerable people from all walks of life, where this is necessary, in relation to their personal or proprietary affairs, not only in this country but in jurisdictions around the world. The suggestions made by the Court a quo that such protections reflect the imposition of "Western ways" imposed on "people who do not conform to the popular Western expectations" are without merit.'

[91] I now cite specific concerns of a material nature raised by the curators ad litem regarding both sets of parents. The curators' concerns are grounded in facts forming part of the evidence before this Court. I find them to be justified and proved. As regards M[...]’s intended use of the R6,2m award, Adv Gabriel reports:

‘29. ... I am alive to the fact that when people suffer from financial hardships they tend to want to rid themselves from the shackles of poverty, and one cannot blame them for that. People who have the financial means tend to have the same attitudes when receiving large amounts of money. This is not because of a lack of education but simply the need to buy into some form of dignity which they believe money can buy.

30. I write about this topic not to place Ms M[...] in a negative light but to highlight the importance of managing the minor’s funds responsibly. ...

37. With this as a background, I began to ask Ms M[...] what she would do with the funds. I did so with a view to ascertain if the funds will be managed responsibly, and for the benefit of the minor.

38. She told me that she will build a block of flats for rental. ...

39. However, it is not a business without its risks. I discussed the risk and pointed out that hundreds of thousands of rand will be used to construct a few apartments. That will be derived from the capital amount received. The income generated will be from rent received. I explained that when a tenant does not pay or refuses to pay, where then will the income be derived from. Defaulting tenants and those who refuse to vacate must be dealt with in a lawful manner, which will require the services of legal representatives and certain court applications. ... The costs thereof will be derived from the

minor’s estate as well as the maintenance of the property.

40. I asked Ms M[...] if she was aware of these risks and expenses. She told me it is for all her children to benefit from and that there are no risks. I was utterly shocked that one, she did not accept my rationale for it being a risk and two that she had not regarded it as a real risk to the capital amount. ...

43. I must highlight that the minor’s funds are not for her siblings to benefit from. ... The applicant [M(...)] does not have any intention to separate the minor’s estate from that of her other children. ...

45. ... Ms M[...] does not have access to significant sums. Save for what she was awarded following her own accident, she has been reliant on her wage as a domestic worker for most of her adult life. It is apparent to me that the funds previously awarded to Ms M[...] allowed her to spoil herself and probably also her family for a while. However, from what Ms M[...] reports to me, those funds are now depleted, or close to it. I cannot ignore the concern that the minor’s funds will serve to keep the family in the lifestyle to which they may have become accustomed by virtue of Ms M[...]’s windfall. While I fully support her desire to give

of her absolute best to her children, the minor [L] included, I am concerned that the minor's funds cannot accommodate both this level of luxury and be sustainable for the minor for the rest of her life. ...

55. ... If the minor is not placed under curatorship, she will be the joint co-owner of immovable property with her siblings. Who will then protect the minor's interests in that property and ensure that her siblings are held accountable for the proper use and management of the property. Property which, it must be emphasised, would not have been purchased with their money collectively, but rather with the minor's money. She will be left unprotected. This does not seem to even have occurred to Ms M[...].'
- [92] Adv Hendricks reports that [R's] parents intend to make significant inroads into the R900 000,00 award within a relatively short period. [R's] parents informed Adv Hendricks that they intend to purchase a vacant plot in Vredenburg and then build a Nutec house on it for the benefit of their family. [R's] parents reiterated this at the hearing. It is common cause that doing so will deplete [R's] award, or most of it.
- [93] Adv Hendricks reports that she enquired from D[...] S[...] and his wife as to how they intend to maintain [R] if the R900 000,00 (or the bulk of it) is spent on a home for themselves and their three children, including [R]. Adv Hendricks reports:
- '49. They indicated that they will work for [R] in order to be able to leave a savings pot or something behind for him – a retirement or something. They still have 15 or 20 years of health left to make provision for when they retire one day. They will then look after [R] until they die – he can stay with them as long as he wants, they will not kick him out of the house, they will make sure they can leave something behind for him and they will have to take guidance for this. ...
76. ... I have concerns that at the age of thirteen, a child is closer to adulthood than not – and thus capable of expressing his/her wishes. What if [R] does not want to spend a large portion of his money on a house for his adult siblings in circumstances where they should be maintaining themselves and their dependants? If [R's] choice is to assist with maintaining his siblings one day, then effect may be given to that choice by the curator bonis. At this stage, one cannot simply assume that he will be prepared to do so. If the house is already bought and the funds are already spent by the time [R] turns 18, then the proverbial ship will have sailed, and [R] will have little say in the matter.'
- [94] I conclude that the appointment of a curator bonis for [L] and [R] is in their best interests. See further reasons in paragraph [149]. A curator exercises fiduciary duties under supervision of this Court and the Master (to a degree). A curator will ensure proper and effective management of the RAF awards so that there would be viable estates for [L] and [R] when they reach 18 years of age. This is important if [L] or [R] suffer the loss of future earnings as is anticipated.

[95] The appointment of a curator bonis does not itself create tensions with a child's parent/guardian. As paid service providers holding the purse strings, curators are in the business of funding the well-being of another's child. All decisions by curators concerning a child must satisfy the prescripts of the Children's Act. If the funding provided does not permit adequate care with dignity, then a parent or other guardian can use the remedies in this statute against the curator bonis. To avoid such tensions, a child's best interests is served when his/her curator and parent/guardian co-operate with each other. After all, they complement each other's care providing roles.

Issue 4: Interpreting the import of 'transformation imperatives' in PD 24G

[96] Having decided to appoint a curator bonis for [L] and [R], it is necessary that an appropriate candidate be appointed from the applicants' nominees. In this context, Practice Directive 24G (PD 24G) dated 12 September 2023 (effective 2 October 2023) of this Division is relevant. It reads:

'In respect of curatorship applications (both for curator ad litem and a curator bonis) the applicant shall file the written consent of three (3) potential curators on the roll of legal practitioners having regard to transformation imperatives.'

[97] In relation to [L] and [R] respectively, three attorneys were nominated. Their signed consents are filed of record. For [L], the nominee curators are: (i) Mr N M Msomi, an attorney practising as a director at DKVG Attorneys in Claremont; (ii) Mr D Flandorp, an attorney practising as a director at Visagie Vos Inc in Goodwood; and (iii) Ms A C Pienaar-Julius, an attorney practising as a director at Venter Van Eeden Attorneys in Bellville.

[98] For [R], the nominee curators are: (i) Mr F Hamman, an attorney practising as a director at Schoeman & Hamman Inc located in Vredenburg; (ii) Ms S Schreuder, a practising attorney for her own account as Shalene Schreuder Attorneys in Durbanville; and (iii) Ms A C Pienaar-Julius, an attorney practising as a director at Venter Van Eeden Attorneys located in Bellville.

[99] In their founding papers, neither Ms Haupt nor Ms Esterhuizen dealt with the transformation imperatives. The plain wording of PD 24G records that the 'applicant' for the appointment of a curator is required to have regard to transformation imperatives. Relevant facts in this regard ought to appear in the applicant's papers.

[100] Linguistically, the phrase 'shall file the written consent of three (3) potential curators on the roll of legal practitioners having regard to transformation imperatives' is a strong indicator that, in the context of PD 24G, the duty imposed on an applicant entails dealing with the transformation considerations in the founding papers. A purposive interpretation of PD 24G supports a construction that compliance with PD 24G is mandatory. Transformation is a vital aim to be heeded. It remains, however, a matter of judicial discretion as to which nominee should be chosen as the curator.

- [101] An applicant must make out a proper case for the appointment of a curator bonis and for the appointment of a nominee curator. The applicant should set out relevant facts in the founding affidavit or, in line with the Swissborough principles, incorporate that portion of a curator ad litem's report annexed thereto where, for e.g., the transformation imperatives are traversed (as it ought to be – see below).[10]
- [102] In the twin applications before me, the curators ad litem screened the nominee curators. However, only the report by Adv Gabriel mentioned transformation, albeit cursorily. Since this aspect was also not addressed in counsels' heads, I raised it.
- [103] I had similar experiences in curatorship applications which came before me in motion court. If this is a trend and it persists unabated, then transformation in the process of curatorship appointments will remain largely elusive. This ought to be a matter of concern in our individual and collective consciousness. A shift in mindset seems necessary. To avoid doubts about a commitment to transformation, its ideals must not only be, but must also be seen to be, in mind when curatorship nominations are made in court papers and are later argued before a superior court judge.
- [104] Curators ad litem perform an indispensable function. They are 'the eyes and ears of the Court' (Stoffberg on behalf of Xaba: in re Xaba v RAF [2018] 3 All SA 145 (GP) para 18). Their reports assist in determining if the jurisdictional requirements for a curatorship appointment are met at common law or for purposes of UR
57. See WD v RAF supra para 12; Modiba obo Ruca; In Re: Ruca v RAF supra paras 37 - 38. In this Division, the importance of a curator ad litem's report is heightened by the duty to ensure that curatorship nominations and appointments take place transformatively.
- [105] Curators ad litem should provide pertinent information about each nominee curator bonis, including aspects like gender, work experience, language(s) spoken, relevant background, and locality of law practice. They should also provide relevant details about the patient (such as, language, place of residence, disability, legal status, and social background). This is not an exhaustive list of relevant facts. Details of this nature facilitate evaluation of the nominee curators to enable a determination to be made of the preferred candidate best suited to serve the patient's interests, but having regard also to transformation. This entire enquiry is, of course, fact and circumstance specific. No hard and fast rules of invariable application may be laid down in advance.
- [106] It is now trite that practice directives issued by Judges President supplement court rules. Since PD 24G has been duly promulgated and remains in place, it 'has the same force and effect as the Uniform rules' (Rossitter and Others v Nedbank Ltd (96/2014) [2015] ZASCA 196 (1 December 2015) para 15. In view of the applicants' non-compliance with PD 24G, I condoned their non-compliance on good cause.

[107] I am grateful to Mr McLachlan, Mr Molefe, Mr Gabriel, Ms Hendricks, and Ms McCarthy for their insightful submissions on how, in their respective opinions, the notion of ‘transformation imperatives’ ought to be interpreted and applied.

[108] Our engagement identified that there is uncertainty among practitioners as to the intended remit of the ‘transformation

imperatives’. This appears to stem from the absence of guidelines in the court directives themselves. The ensuing interpretation is undertaken against this backdrop to resolve the twin applications before me. Therefore, some aspects of PD 24G are not addressed and are for a future judgment.

[109] Interpretation is an objective, systematic exercise that does not occur in stages. Interpretation is a unitary process occurring within a cohesive framework. Interpretation of any document (such as, practice directives) entails a cohesive analysis of the relevant text (such as, PD 24G), having regard to (i) its language (including matters of grammar and syntax); (ii) context (both internal and external); and (iii) intended purpose. Given that PD 24G has the same weight as a court rule and is used in judicial proceedings, it must be read through the prism of the Constitution and its normative value-system. For the principles of interpretation generally, see *Cool Ideas 1186 CC v Hubbard and Another 2014*

(4) SA 474 (CC) para 28.

[110] It has authoritatively been held that the ‘spirit of transition and transformation characterises the constitutional enterprise as a whole’ (*Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others*

[2000] ZACC 12; 2001 (1) SA 545 (CC) para 21). Unmistakably, PD 24G’s transformation philosophy aligns with the Constitution’s mission.

[111] The PD 24G should not be the catalyst for transformation imperatives to be considered when curators are appointed. A commitment to transformation should, on its own, inspire relevant imperatives to be factored into the equation. Thus, the views expressed below ought to be applied whenever a curator bonis is to be appointed.

[112] For PD 24G to be interpreted purposively cum contextually, the question that begs answering is this: what is the past practice and its ill-effects (so-called mischief) which PD 24G seeks to redress? The practice directives are silent on this issue.

[113] In the past, the appointments of curators occurred in a somewhat skewed way. Some practitioners, mainly White males, were advantaged at the expense, and to the detriment, of Black and some female legal practitioners. While curatorship work should be about the needs and best interests of a patient, the truth of the matter is that curatorship appointments create remunerative work for legal practitioners.

- [114] Historically, the skewed curatorship appointments practice deprived Black and female practitioners of a level playing field with equal access to the rewards and experience opportunities flowing from curatorship work. As a result, many practitioners were excluded from this area of practice, while a minority flourished. This situation created a need for transformation in the process of nominating and appointing curators. PD 24G sought to redress this undesirable situation. However, even in the absence of a directive or court rule along its lines, a commitment to transformation demands that the nomination and appointment of all curators occur in a manner that considers a patient's needs and best interests in a way that is transformative in effect.
- [115] Apart from transformation on gender and racial lines, another dimension of transformation relates to redressing the historical practice that favoured one branch of the legal profession (namely, attorneys) for appointment as curator bonis over another branch (namely, advocates).
- [116] Owing to the specialist nature of an advocate's law practice and an advocate's forensic skills, members of the advocates' branch are perceived to be better placed than attorneys for appointment as curator ad litem. I express no view hereon because it is not an issue before me, save to say that UR 57 does not exclude attorneys from consideration for appointment as curator ad litem. Judges have customarily favoured advocates for that role. Similarly, while UR 57 does not exclude an advocate from being appointed as curator bonis, judges have only occasionally appointed an advocate as curator bonis. See *Moleté v MEC for Health, Free State* supra para 70.
- [117] The historical basis for the reluctance to appoint advocates as curator bonis relates, inter alia, to the absence of trust accounts in the ordinary course of an advocate's practice. This changed under the Legal Practice Act 28 of 2014 (the LPA). With the aim to transform the legal profession and to promote greater access to legal services, the LPA created a new sub-category of practitioner, namely, trust account advocates. They operate pursuant to s 34(2) (b) and in a manner similar to attorneys.
- [118] Trust account advocates are not required to work through attorneys. By statute, they are entitled to receive instructions directly from the general public and to receive funds into trust. For purposes of appointing a curator bonis, members of the advocate's branch practising in this category ought, in my view, to be considered alongside attorneys as a matter of routine, rather than as an exception. This is transformative and aligns with the transformation of the legal profession effected by parliament.
- [119] In the applications before me, all the nominee curator bonis are attorneys. No trust account advocate, or other category of advocate, is nominated for consideration to be appointed. This is unexplained on the papers before me. In my view, this is incongruous with the transformative spirit and ethos which should underpin the process of nominating and judicially appointing a curator bonis.

- [120] In a supplementary (post-hearing) report dated 5 June 2025, Adv Gabriel pointed to a shortage of legal practitioners available for consideration as curator bonis. This problem was also highlighted in *Master of the High Court v Pretoria Society of Advocates* supra paras 48, 73. Adding eligible advocates into the mix will address this problem – it will broaden the available pool of talent and skills for curator bonis work.
- [121] Further to the above, transformation in the process of curatorship appointments should not be seen through a narrow judicial lens. The focus of transformation in this context should be multi-dimensional. The patient's rights must also be considered in a way that promotes transformation in the process of appointing curators.
- [122] Historically, the appointment of curators occurred without much, if any, attention to a patient's language, background, locality of residence, and accessibility to a particular nominee curator. These are relevant considerations when relationships are judicially created between patients and their curators, especially where the latter is intended to manage and control the finances of the former.
- [123] In the context of appointing a curator bonis for a child, as required in this matter, the duty to consider factors related to dignity is now statutory. See the principles listed in s 6(2) of the Children's Act enumerated in paragraph [65] above. Also, s 11(1) thereof requires that the care for a child with disabilities must be respectful of, inter alia, the child's dignity rights, religious rights, cultural rights, and educational rights.
- [124] To ensure that the future lived experience of children whose care is provided by curators bonii is better than the lived experiences of children of yester-year, it should be an imperative that consideration be given to whether a nominee curator possesses relevant experience in family/child law, or at least a working knowledge of the duties placed on care providers by the Children's Act. This is key to transforming children's lives, particularly ones with disabilities – they are most vulnerable. The Constitution does so, firstly, by entrenching children's rights in s 28; and, secondly, by including in its aims the promotion of steps geared to '[i]mprove the quality of life of all citizens and free the potential of each person'.^[11] The application of relevant transformation imperatives when appointing a curator bonis aides in fulfilling these critical objectives.
- [125] The import of the foregoing must not be misunderstood. I do not hold that judges are to match patients with curators who share common bonds, whether cultural, religious, ethnic, racial, gender, linguistic, or otherwise. Rather, I hold that relevant information should be placed in court papers and the ad litem reports which would enable judges to determine which nominee curator bonis is better suited in the case at hand to respond to the patient's needs having regard, inter alia, to the nominee's own-life experience, qualifications, and professional experience and/or expertise. This approach is transformational. It ensures that the appointments process nurtures respect for the dignity as well as other fundamental and statutory rights of a patient. The normative value of responsiveness in s 1(d) of the Constitution is also promoted.

- [126] The appointment of a particular person as curator bonis should promote respect for a patient's language rights. This is another transformation imperative. The importance of communication between patients and their curators in a way respectful of a patient's language rights cannot be overstated. The issue of language and communication arose pertinently in the applications before me.
- [127] Whereas [L] and her mother are isiXhosa-speaking, [R] and his parents are Afrikaans-speaking. It is unclear from the court papers whether [L] or [R] can converse in any other language. The curator ad litem in both matters and the parties' counsels accepted that a patient's language is a vital consideration for a transformative adjudicative process for purposes of UR 57(13). I agree.
- [128] Adv Gabriel submitted that a flexible (rather than a rigid) approach ought to be adopted when a court considers the language and other relevant transformation imperatives. This, so his submission went, is to avoid a situation where no curator is appointed because such a situation would be counter-productive to achieving the aims of UR 57(13). I endorse this view too.
- [129] A nominee curator's inability to speak the home language of a prospective child or adult patient ought not to be a basis for disqualification from consideration. Mr McLachlan submitted that a court ought, in such instances, to receive information as to the nature of any intervention which a nominee curator intends to introduce on a practical level to ensure that effective communication takes place with a prospective patient and his/her family (such as, with the aid of an interpreter), subject to respect being shown for a patient's dignity and language rights. This approach is sensible and practical. An intervention should, however, not cause prejudice to a patient, or his/her estate. For e.g., the costs to be incurred for an interpreter's service should not be for the patient's account, nor for that of his/her estate.
- [130] Information of this nature, and any other details relevant to the selection of a suitable curator bonis, ought not to surface for the first time at a hearing and then sought to be placed before court from the bar (as occurred in both applications before me). All pertinent information in this regard ought to appear in the court papers.
- [131] I will now apply the principles discussed here when selecting a suitable curator bonis for [L] and [R].

Issue 5: Who should be appointed as curator bonis for [L] and [R]?

- [132] In this part, I discuss my selection process and the terms of the curator bonis appointments which will form part of the orders granted by me in each application.

- [133] At the onset, I point out that in both applications, an order is sought that caters for the remuneration of the curator bonis to be paid by the RAF. This is customary and I shall grant an order to this effect. Neither application deals with the recovery of out- of-pocket expenses to be incurred by the appointed curator bonis. It ought to do so. See *Master of the High Court v Pretoria Society of Advocates* supra paras 89 - 90.
- [134] Despite this, I will provide for the recovery of out-of-pocket costs and indicate the relevant tariff. I conclude that it would be unfair to expect a curator bonis to fund the out-of-pocket expenses. This is so having regard, inter alia, to the tariff rate of fees for curators. Also, the lacuna in the court papers is due to an oversight by the applicant's attorneys. The curator bonis ought not to be prejudiced as a result thereof.
- [135] The nominee curators listed above in paragraphs [97] to [98] were all approved by the Master. Her report calls on this Court to empower each curator bonis with the usual thirteen (13) separately listed powers itemised in paragraphs marked
- (a) to (m) on the Master's standard form 'Annexure A'. In both applications, the Annexure A includes the following standard statement appearing at the end thereof:
- 'The above powers are subject to the approval of the Master.'
- [136] A Full Court (per Keightley et Millar JJ, Vallaro AJ), in *Master of the High Court v Pretoria Society of Advocates* supra paras 104
- 107, held that most of the powers listed on the Master's Annexure A are not subject to the Master's control in terms of the Administration of Estates Act, 1965. The only powers held to be subject to the Master's prior approval are the corresponding powers listed in paragraphs (a), (b), (d), (g), and (j) of the Annexure A used by the Western Cape Master's office which was enclosed with the Master's report in both applications serving before me.
- [137] The Master is a creature of statute. As such, she and her officials are imbued with only those powers conferred by statute. In every case, the Master is required to show good cause for the judicial conferral of oversight powers beyond those granted by the legislature. See *Master of the High Court v Pretoria Society of Advocates* supra para 106. The Master failed to do so in her report filed in both applications before me.
- [138] In these circumstances, I will not authorise oversight powers in the hands of the Master, except for the powers listed in paragraphs (a), (b), (d), (g), and (j) of Annexure A. This averts micro-management of the curator bonis and promotes the more efficient and effective administration of a patient's patrimonial affairs. It averts undue delays caused by a curator bonis requiring prior authorisation from the Master's office before exercising each power conferred on him/her for the patient's benefit.
- [139] Securing prior approval for every decision of a curator bonis promotes inefficiency in the performance of a curator's

court-assigned functions. Requiring such approval is unnecessary, particularly because the curator bonis is a practising attorney who will, as per my intended order, be required to hold sufficient Fidelity Fund Indemnity Cover to protect the full value of the assets managed under curatorship.

Curator bonis for [L]

[140] Each nominee practices at a firm located a considerable distance from Makhaza township where [L] resides with her mother. Mr Molefe informed me that M[...] has a vehicle so that travelling would not be an issue. Mr McLachlan assured me that, even if circumstances change, each of the nominee curators will make transport arrangements (such as, by way of an Uber). Accordingly, the location of each nominee curator's office favours no one in particular.

[141] As for relevant experience, each nominee has done curatorship work. The key differences being the size of their patient-base and their respective years in practice. No information was placed before me as to whether any nominee has experience in being a curator bonis for a child, or to a patient with cognitive disabilities (as is the position with [L]). As for the imperatives of race and gender transformation, each nominee is Black, although Ms Julius is also Black-female. Adv Gabriel reports that he nominated Mr Msomi also because of shared cultural ties with [L].

[142] I have decided to appoint Mr Msomi as curator bonis. Apart from the considerations mentioned above, he has experience in family law.[12] Therefore, he has either dealt with the Children's Act or will readily be able to navigate his way around it. This is necessary to ensure that the administration of [L's] RAF award occurs in compliance with the provisions of the Children's Act and with due respect for her dignity and other rights as a child. Mr Msomi's curatorship practice is far smaller than the other candidates, and his years of experience is lesser too. In keeping with the transformation imperative of PD 24G to afford opportunities to Black practitioners so they can grow professionally as curators, Mr Msomi's appointment would advance that aim. This would then also grow the pool of more experienced, young Black legal practitioners as curator bonis.

[143] Viewed from the patient's vantage point, [L] will have more personalised interaction with Mr Msomi, especially because he speaks isiXhosa. The other nominees intend to use an intermediary (i.e. in the form of an interpreter). I also took into account that Mr Msomi comes from a similar background to [L].[13] As such, he would be able to identify and respond to religious, social, and other needs that [L] will have.

Curator bonis for [R]

[144] Considering the imperatives of race and gender transformation, Ms Schreuder and Ms Pienaar-Julius feature prominently based on gender. However, the latter is also Black-female. As for relevant experience, each nominee has done curatorship work, the key differences being the relative sizes of their patient-base and their respective working years

in legal practice. No information was placed before me as to whether any nominee has experience in being a curator bonis for a child, or to any patient with cognitive disabilities (as is the position with [R]). As for language, each of the nominees speaks Afrikaans, being [R's] home language. Each nominee will, therefore, be able to communicate directly with [R] (and his parents).

- [145] I have decided to appoint Mr Hamman as curator bonis. In addition to the foregoing considerations so far as it concerns Mr Hamman, he is an experienced practitioner with knowledge that will enable him to ensure that the administration of R[...]’s award occurs in a manner compliant with the Children’s Act, and with due respect for [R’s] dignity and other rights as a child. Mr Hamman operates his law practice in Vredenburg. This is where [R] lives with his parents. Therefore, Mr Hamman knows and understands the local community where [R] resides. In these circumstances, and based on the facts before me, Mr Hamman is more appropriately suited to being able to identify [R’s] needs and to respond thereto appropriately.
- [146] [R] will continue to live in Vredenburg for the foreseeable future. He attends school there, and his parents are employed there. Vredenburg is the place where [R] has his roots. Therefore, [R] is likely to identify easier with Mr Hamman, particularly as [R] grows older (and if he remains under curatorship in adulthood).
- [147] [R] is a minor. He is wholly dependent on his parents for transport. He will need their assistance when dealing with the curator. At the hearing, both of [R’s] parents indicated that they work during the week and will not be able to attend the offices of a curator located far from Vredenburg. [R’s] parents indicated that they have financial constraints which will hamper their ability to travel to and from Cape Town (or its surrounds). In view of their personal circumstances and financial constraints, as well as [R’s] dependence on his parents for support and transport, appointing either Ms Schreuder or Ms Pienaar-Julius would impose practical hardships on [R] and his parents. This consideration too favours Mr Hamman’s appointment.
- [148] The information placed before me reveals that Mr Hamman has far less curatorship patients than the other candidates. In making his appointment, I took account that opportunities for curatorship work in towns and outlying (or rural) areas situated far from the seat of this Court (such as, in Vredenburg) are much less than the opportunities for practitioners operating in the inner city or towns close to the seat of this Court. As a result, there is a shortage of experienced practitioners with skills in curatorship work practising in small towns and outlying areas. Accordingly, appointing a male practitioner in Vredenburg ahead of a female practising in Durbanville or Bellville is, in my view, in keeping with the transformative ethos underpinning PD 24G.
- [149] For completeness’ sake, it bears stating that I considered whether to direct that R[...]’s interim award be deposited into the Guardian’s Fund. I decided against that route for various reasons. Important among these are: First, the fees and costs of the curator bonis

will not be borne by [R's] estate, but rather by the RAF. Therefore, the appointment of a curator bonis will not cause financial prejudice to [R], or his estate. Secondly, the use of the Guardian's Fund will necessitate that [R] and/or his parents as his guardians travel to Cape Town from time to time to engage with the office of the Master in relation to funds required for any specific purpose. For the same reasons explained in paragraph [147], this will place undue hardship on them which would be averted through the appointment of a curator bonis whose office is in Vredenburg where they live and work. Thirdly, the R900 000,00 award may increase, possibly substantially, once [R's] loss of future earnings claim is finalised. Those additional funds would need to be held with the interim award. Having regard to the sums involved, matters of practicality, and the general practice in matters of this kind, appointing a curator bonis is preferable (rather than using the

Guardian's Fund).

Costs

[150] There is no reason why costs should not follow success. The opposition by M[...] and D[...] S[...] were based on arguments that allowing the guardians to administer the RAF award would be beneficial to the minors concerned. For the reasons outlined above, I found that these contentions lack merit. It would be unfair to saddle the public purse with the costs of the failed opposition by directing that the RAF be liable for same. It will be liable for the cost of the curatorship applications.

[151] In view of the substantial awards made to [L] and [R], their estates can afford the additional costs incurred by their guardian's failed opposition initiated on behalf of the minors. Consequently, an order will be granted that the additional costs incurred in relation to the failed opposition are recoverable from the minor's estates on a party and party basis, with Counsel's fees to be on tariff scale C. In the exercise of my discretion on costs, I took into consideration the factors listed in Uniform Rule 67A(2) and (3)(b). The issues at hand had considerable complexity.

Order

[152] In the result, the following orders are made:

[152.1] Pursuant to Uniform Rule 57(13), [L] is declared to be a child with a disability incapable of managing her own affairs.

[152.2] Ntuthuko Mitchell Msomi is appointed curator bonis for the Road Accident Fund compensation awarded to [L], subject to the following terms:

[d] the party-party costs of the application for the appointment of the curator bonis (except for the costs of opposition), as well as the fees and costs of the curator bonis on the applicable statutory tariff, shall be paid by the Road Accident Fund, which costs shall include, although not limited to, the costs of administering the undertaking given by the Road Accident Fund under case no. 17799/2017 in respect of [L's] future medical and related expenses;

[e] the additional costs occasioned by the Intervening Party's opposition shall be borne by the estate of [L] on a party and party tariff, with Counsel's fees to be on tariff scale C;

[g] if the curator bonis is unable or unwilling to take up his appointment, or becomes disqualified for any reason, then the Master of the Western Cape High Court is authorised to appoint an alternative as curator bonis to be selected from the remaining candidates on the list approved for [L], subject to the terms of this order.

[152.3] Pursuant to Uniform Rule 57(13), R[...] is declared to be a child with a disability incapable of managing his own affairs.

[152.4] Francois Hamman is appointed curator bonis for the Road Accident Fund compensation awarded to [R], subject to the following terms:

[f] the curator bonis is directed to inform R[...], when he turns 18, that he is entitled to apply to a competent high court to be released from curatorship;

[h] if the curator bonis is unable or unwilling to take up his appointment, or becomes disqualified for any reason, then the Master is authorised to appoint an alternative person as curator bonis to be selected from the remaining candidate on the list of persons already approved for R[...], but subject to the terms of this order.

F. MOOSA

ACTING JUDGE OF THE HIGH COURT

Appearances

Case no. 21458/2021

For Applicant:

H G McLachlan

Instructed by:

Kruger & Co Inc (Ms N K Haupt)

For Intervening Party: B Molefe

Instructed by:

Botho Molefe & Associates Inc Attorneys

Case no. 10857/2023

For Applicant:

J H McCarthy

Instructed by:

Esterhuizen Attorneys (C Esterhuizen)

For Intervening Party: In person

For Mrs S[...]

(R[...]'s mother):

In person

- [1] UR 57(13) reads: 'Save to the extent that the court may on application otherwise direct, the provisions of subrules (1) to (11) shall, with the necessary changes required by the context, apply to every application for the appointment of a curator bonis to any person on the ground that such person is by reason of some disability, mental or physical, incapable of managing his or her own affairs.'
- [2] The following dictum is instructive: 'The position of a curator ad litem appointed by the court "is one of considerable responsibility and the court is greatly dependent upon the proper exercise of a curator's duties in arriving at a just decision in any particular case". Faced with an application in terms of rule 57 of the Uniform Rules of this Court for an order declaring another person (the patient) "to be of unsound mind and as such incapable of managing his affairs", the Court will consider ordering the appointment of a suitably qualified curator bonis, following the receipt of reports from the curator ad litem and the Master, and if it is satisfied that the patient should to be protected against loss because of his or her inability to manage affairs.' (W.D v RAF and Two Other Cases (12648/2014; 4082/2016; 20263/2013) [2019] ZAWCHC 151 (15 November 2019) para 12). Also, see Modiba obo Ruca; In Re: Ruca v RAF (12610/2013; 73012/13) [2014] ZAGPPHC 1071 (27 January 2014) paras 35 - 38.
- [3] An 'exceptional circumstance' is something out of the ordinary (i.e., unusual). See NR and Others v Director General: Home Affairs and Another (21762/2024) [2025] ZAWCHC 189 (5 May 2025) para 34.1. Whether a circumstance is 'exceptional' in the sense indicated here depends on the

facts

of each case. See Koyabe and Others v Minister for Home Affairs and Others 2010 (4) SA 327 (CC) para 39.

- [4] For an analysis of the general costs associated with holding a minor's funds in a trust registered under the Trust Property Control Act 57 of 1988 as compared with depositing same in the Guardian's Fund administered by the Master, alternatively to be held in trust with a curator bonis, see WD v RAF supra para

7. Also, see Master of the High Court v The Pretoria Society of Advocates and Others 2022

(6) SA 446 (GP) paras 75 - 79, 81 - 90.

- [5] Section 10 of the Constitution reads: ‘Everyone has inherent dignity and the right to have their dignity respected and protected.’
- [6] The Children’s Act was assented to on 8 June 2006. Some of its provisions commenced operation on 1 July 2007 (see Proc 13 in GG 30030 of 29 June 2007), while the remainder of its provisions commenced operation on 1 April 2010 (see Proc R12 in GG 33076 of 1 April 2010).
- [7] Section 11(1) of the Children’s Act deals with, inter alia, the subject of ‘children with disability’.
- [8] Section 8(1) of the Constitution reads: ‘The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.’
- [9] The absence of proper justification for any curatorship appointment would violate the dignity and/or status rights of the patient concerned. See *Judin v Wedgwood* supra para 17.
- [10] Joffe J, in *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999
- (2) SA 279 (T) at 324D-G, held: ‘The facts set out in the founding affidavit (and equally in the answering affidavit and replying affidavit) must be set out simply, clearly and in chronological sequence and without argumentative matter. ... Regard being had to the function of affidavits, it is not open to an applicant or a respondent to merely annexe to its affidavit documentation and to request the Court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof.’ (My emphasis) (Footnotes omitted)
- [10] Joffe J, in *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999
- (2) SA 279 (T) at 324D-G, held:
- ‘The facts set out in the founding affidavit (and equally in the answering affidavit and replying affidavit) must be set out simply, clearly and in chronological sequence and without argumentative matter. ... Regard being had to the function of affidavits, it is not open to an applicant or a respondent to merely annexe to its affidavit documentation and to request the Court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof.’ (My emphasis) (Footnotes omitted)
- [11] Preamble, the Constitution.
- [12] This information was sourced from Mr Msomi’s public profile available on the website of DKVG Attorneys. See <https://dkvg.co.za/the-team/directors/nthuthuko-msomi>.

[13] This information was sourced from Mr Msomi's public profile available on the website of DKVG Attorneys. See <https://dkvg.co.za/the-team/directors/nthuthuko-msomi>.

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CASE PAGE <https://chat.esheria.ai/case-law/south-africa/haupt-ex-v-parte-esterhuizen-unknown-topic-awchc-2025--6a3ea5143b1caa912980c07d>

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