

SOUTH AFRICA / JUDGMENT

Hlatshwayo v Wilsnach and Another

[2023]

ZAGPPHC 360; 25753/2010 (12 May 2023)

[2023] ZAGPPHC 360

COURT

North Gauteng High Court, Pretoria

BEFORE

PA Van Niekerk

CASE / FILE NUMBER

25753/2010

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HIGH

COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: 25753/2010

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED.

DATE:

2023-05-12

SIGNATURE:

In

the matter between: SENZO
 MZAMO PERCIVAL HLATSHWAYO
 Applicant
 (Identity
 no: 0[...])
 and
 CONSTANT
 WILSNACH
 First
 Respondent
 (Identity
 no: 5[...])
 THE
 MASTER OF THE HIGH COURT
 Second
 Respondent
 In

re: LALU
 SHEILA MKHONTO obo SZP HLATSHWAYO
 Plaintiff
 ROAD
 ACCIDENT
 FUND
 Defendant

JUDGMENT

PA VAN NIEKERK, AJ

- [1] A Notice of Motion was issued from this Court on the 2nd of February 2023 accompanied by a document which purports to be a Founding Affidavit and wherein a 21 year old male whose names and identity number appears in the heading of the Notice of Motion are purportedly cited as the Applicant. I intentionally used the words “purportedly” in relation to the citation of the Applicant and the “Founding Affidavit” for the reasons that will follow hereunder. For purposes of this judgment I will refer to the adult male cited as Applicant as “Applicant” and I will refer to the document which purports to be a Founding Affidavit as “Founding Affidavit”.
- [2] First Respondent is a practising attorney who was appointed as the Curator Bonis for the Applicant in terms of an order of this Court dated 31 July 2017 under Case no. 25753/2010. The appointment of the First Respondent as Curator Bonis to the Applicant followed after the Applicant’s mother in her capacity as the guardian of the Applicant (who at that time was still a minor) claimed damages in terms of the Road Accident Fund Act 56 of 1996 (RAF Act) resulting in an award of damages which was ordered to be administered by the First Respondent as Curator Bonis for the Applicant. The appointment of the First Respondent as Curator Bonis was ordered by this Court pursuant to an application which the Applicant’s

mother launched for such purposes.

- [3] Prior to dealing with the merits of the application, I deem it necessary to make certain remarks concerning this matter. For reasons that will follow hereunder, I have serious doubt whether the Applicant has the necessary mental capacity to understand the contents of the “Founding Affidavit” which he purportedly deposed to. When I raised this issue with Counsel appearing on behalf of the Applicant at the hearing of this matter, he agreed with me and positively confirmed that Applicant does not understand the contents of the affidavit and “merely signed” the affidavit. It was further apparent to me that Counsel acting on behalf of Applicant did not appreciate the consequences of this issue (such Counsel apparently being the author of the Founding Affidavit) nor what the ethical duties of a legal representative in such circumstances are. Apart from the aforesaid, the Notice of Motion is couched in the terms of an interlocutory application

brought under the same case number as the action instituted against the Road Accident Fund during 2010. Such action is *res iudicata* and not susceptible to any interlocutory applications. The Applicant’s attorneys of record and Counsel acting on behalf of the Applicant could not appreciate this point. The Founding Affidavit is not deposed to properly, nor are the different pages of

the Founding Affidavit initialled by either the deponent or the Commissioner of Oaths. The same applies to annexures to the

Founding Affidavit.

- [4] Save for the aforesaid procedural deficiencies, portions of the Founding Affidavit as well as the Replying Affidavit are virtually incomprehensible. Suffice it to say that the standard of legal representation which the Applicant received in the matter in my view disentitles the Applicant’s legal representatives of remuneration for the services rendered by them.
- [5] The Opposing Affidavit filed by First Respondent is not of a much higher standard. Certain sentences as contained in the Opposing Affidavit simply makes no sense at all. Issues which patently should have been addressed in the Opposing Affidavit, considering the nature of the relief sought in the notice of motion and allegations made by the Applicant against the First Respondent calls for a proper response from the First Respondent, but the Opposing Affidavit contains no averments to deal with these issues. In this respect I refer to the contents of paragraphs [11] and [13] *infra*.
- [6] Considering the background to the appointment of the First Respondent as Curator Bonis to the Applicant as will be set out *infra*, I am of the view that there was a duty on the legal representatives acting for both parties to appoint a curator ad litem for and on behalf of the Applicant who could have assisted this Court on the issues raised in the application. When I raised this issue with the legal representatives in Court, it was Applicant’s Counsel’s contention that the appointment of a curator ad litem is not necessary and it was the First Respondent’s contention that it was not the duty of the First Respondent to apply for the

appointment of a curator ad litem but the duty of the Applicant's legal representatives, being dominus litis. Considering the personal circumstances of the Applicant as will appear infra, I regard this attitude as irresponsible and deplorable.

[7] Notwithstanding the deficiencies in the procedure adopted by the Applicant's legal representatives launching this application and the fact that there is no proper Founding Affidavit as required in terms of the provisions of Rule 6 before this Court, I will deal with the matter as if the matter is properly before this Court in the interests of justice to dispose of the matter.

[8] In the Notice of Motion the relief claimed is formulated as follows:

"1.

That the appointment of Constant Wilsnach as a Curator Bonis of Identity No: 5[...] for SMP Hlatshwayo of Identity No: 0[...] is hereby with immediate effect withdrawn and set aside as per mutual agreement between the parties and as directed by this Court.

2.

That the Master of the High Court is hereby with immediate effect authorised and directed to withdraw and to terminate the appointment certificate under estate no: M[...] 3[...] granted by this Honourable Court as per Court order dated 31 July 2017 under case no: 25753/2010.

3.

That the Curator Bonis to wit: Mr Constant Wilsnach is hereby directed and ordered to immediately request the following investment to Wit: Investech Bank R200 000-00, Mariot assets Managers R1000 000-00 and Allen Grey R900 000-00 plus the Nedbank balance of R377 890 63 (sic) and to submit a final statement account thereof to the Applicant during the hearing of this Application.

4.

That the total investment amount including interest is plus minus R2 753 657-57 after deduction of the annually 6% of the Curator fees plus the Nedbank balance of R3 77 890-63 that the grand total of the aforesaid amount is R3 131 548-20, that the Curator is with immediate effect authorised and directed to transfer same into the Trust Account of Brian Maphanga Incorporated Standard Bank

Trust Account no: ____ (deleted for purposes of the judgment)

Branch: ____ (deleted for purposes of judgment)

Branch code: _____ (deleted for purposes of judgment).

5,

That Brian Maphanga Incorporated are hereby directed to pay the Applicant the amount received on the Applicant's behalf after the deduction of their fees and disbursement for the execution of their mandate into the Applicant's account:

ABSA Bank

Account No: _____ (deleted for purposes of judgment)

Branch Code: _____ (deleted for purposes of judgment)

Deponent SMP HLATSHWAYO (sic)

6.

That this order is a mutual Settlement Agreement between the parties and that no costs order prayed against each other.

7.

Further and or alternative relief.

8.

That the Court declares the Applicant capable and fit to run his own affairs and takes (sic) care of his finances (sic)."

[9] On an analysis of the relief as claimed in the Notice of Motion, it is clear that the Application is aimed at obtaining a declaratory order to the extent that Applicant is fit and proper to manage his own affairs, that he be released from curatorship under the Curator Bonis, and further that the funds invested by the First Respondent be paid into the trust account of the Applicant's attorneys of record to be thereafter paid into the Applicant's bank account after the deduction of their fees and disbursement for the execution of their mandate. Of significance is the fact that the prayers as couched in the Notice of Motion refers to a "mutual agreement between the parties" as grounds for the relief sought.

[10] In the Founding Affidavit the averment that the relief for the removal of the First Respondent as Curator Bonis is by agreement between the parties is repeated. In paragraph 8 of the Founding Affidavit the averment is made that the parties had a meeting on 30 November 2022 where it was agreed that an application for the setting aside of the appointment of the First Respondent as Curator Bonis would not be opposed, that the parties have reached "a mutual agreement" and that Senzo (the Applicant) had attained majority age and is capable to run his own financial affairs and that once the Court set aside his appointment as curator bonis, he (referring to Second Respondent) will let Senzo have access to his finances.

[11] Save for the aforesaid averments, the First Respondent is accused of refusing to pay any monthly allowances to the Applicant and of a failure to submit annual financial reports to the Second Respondent.

[12] In the Opposing Affidavit filed on behalf of the First Respondent a point in limine is raised that, insofar as reliance is placed on the existence of an agreement that the relief as claimed in the Notice of Motion may be granted, such version of the Applicant is denied and that the Applicant failed to provide particulars of the terms of the agreement, and who represented the respective parties when the agreement was entered into as is required when an agreement, being contractual in its nature, is pleaded. Astoundingly, in the Applicant's Replying Affidavit the Applicant deals with

this point in limine by stating that it was never the Applicant's case that there was an agreement between the parties, and that such a point in limine has no merit. When I questioned Counsel acting on behalf of Applicant about this stark discrepancy during argument, Counsel for Applicant informed me from the bar that there was in fact an agreement between the parties as pleaded, that the First Respondent however reneged on the agreement and for that reason the Replying Affidavit are couched in the terms that it is. I need say no more about this except that it illustrates the point I made in paragraph [3] supra.

[13] In the Answering Affidavit First Respondent does not deal with the allegation that no monthly substance allowances were paid to the Applicant. Considering the fiduciary duty of First Respondent I cannot understand why a reasonable explanation which may explain this issue was not proffered. It further appears from the papers and more specifically the Master's report that financial reports from 2017 to 2022 was submitted to the Office of the Second Respondent recently. No reason is provided why same was not done previously.

[14] I however add that, notwithstanding aspersions cast by the Applicant on the conduct of the First Respondent, there is no factual basis provided in the papers indicating that the First Respondent at any stage acted dishonestly, and all indications are to the contrary having regard to the fact that the funds were invested into different accounts, where the funds were protected and accrued interest. It must further be mentioned that there is no allegation in the Founding Affidavit that the Applicant, or his mother or any other party for that matter at any stage approached the First Respondent with a request for a contribution towards living expenses and nor is there an allegation that the Applicant was prejudiced at any stage due to a lack of means. Indications in the papers are namely that the Applicant has progressed with his High School education, is presently

repeating matric, and residing with his mother and brother. According to the papers the Applicant's mother is employed at the Department of Correctional Services and indications are that she takes care of her children in an exemplary fashion.

[15] It must further be noted that there was no medical evidence attached to the founding affidavit in support of the declaratory order that the Applicant is fit to manage his own affairs and should be placed in possession of the substantial amount of funds as set out in the Notice of Motion. This lacuna in the Applicant's papers must be considered in the context of the fact that the appointment of the curator bonis followed extensive medical evidence on which reliance was placed during the proceedings in terms of the Road

Accident Fund Act, wherein there were indications of head injuries which would impair the Applicant's cognitive abilities in the long term. However, shortly before the matter was heard, the Applicant caused two reports to be filed being a report of a Clinical Psychologist and a report of a Neurologist.

[16] The recommendation of the Clinical Psychologist culminates in the following:

"It is my opinion that he does not need assistance by a curator in decision making; and it should be noted that he is able to manage his own affairs. Presently he possesses the necessary mental capacity to handle or manage the funds awarded in his personal capacity. He may need guidance on how to manage the funds so that he can be able to sustain himself long term, and since he is still living with his mother, she can be able to provide the assistance when necessary."

The conclusion of the report of the Neurologist reads as follows:

"Mr Hlatshwayo Mzamo Senzo Percival sustained moderate traumatic brain injury (concussion) and facial soft tissue injuries more than 10 years ago. He was awarded funds from the Road Accident but because he was a minor at the time funds were protected and the curator bonis was appointed on his behalf to secure the funds. He has since been asymptomatic for more than 10 years. On clinical assessment he does not have any neuro-cognitive or physical deficits and is bio-psycho-socially functional. He can take care of his life personally and all other responsibilities independently as an adult. Thus I recommend that the funds which were issued to him whilst he was still a minor must now be released to his personal account. He will however need guidance on how to manage the funds so that he can be able to sustain himself and earn decent living long term."

[17] In my view, these reports relied on by the Applicant's legal representatives does not support the relief as claimed in the Notice of Motion as both reports contain a caveat that the Applicant requires assistance in the management of the funds.

[18] During argument of the matter in Court Counsel acting on behalf of the Applicant argued that the Applicant's mother can assist the Applicant. Whereas I accept the bona fides of the Applicant's mother this matter involves the interests of the Applicant. There is no information before me in respect to the ability of the Applicant's mother to administer any funds for and on behalf of the Applicant and the fact that the Applicant's legal representatives suggests that the Applicant's mother should exercise a supervisory function over the Applicant regarding the management of his personal affairs, flies in the face of the relief as claimed in the Notice of Motion.

[19] During argument of the matter I put to Counsel acting for the Applicant that I have a difficulty with the fact that the notice of motion seeks relief in terms whereof the funds administered by Second Respondent be paid into the trust account of Applicant's attorney of record and after legal fees are deducted the balance to paid to Applicant without there being any indication whether or not such fees are to be taxed, whether or not there is a contingency fee agreement in place, and that I am therefore not in a position to determine if such an order is beneficial to Applicant. Applicant's Counsel then disclosed in open court that there was a contingency fee agreement in place, and on further enquiries from me

informed me that he did not obtain permission from the Bar Council of the Pretoria Society of Advocates to enter into such agreement and nor was the agreement approved as required in terms of the applicable ethical rules of conduct.

- [20] The remedy for the release of the Applicant under curatorship is provided for in terms of Rule 57 of the Uniform Rules of Court. In terms of such rule, I am empowered to *mero motu* request the appointment of a curator ad litem to assist the Court and the Applicant in these proceedings. Considering the facts and factors as set out *supra*, I am not prepared to grant the relief as claimed. I am furthermore not inclined to grant any such relief in the absence of a curator ad litem appointed for the assistance of the Applicant and the Court in this application. Given the dismal state of the application, there is no benefit in postponing the matter for purposes of the appointment of a curator ad litem, and in any event the Counsel acting on behalf of the Applicant confidently submitted to me that such an application was not necessary. I am therefore not exercising my discretion to appoint a curator ad litem *mero motu* as it will serve no purpose in circumstances where I am not prepared to grant any relief on the application in the forms that is was brought.
- [21] This is not the first application launched for the release of the Applicant from curatorship and the payment of the monies to the Applicant. On 3 December 2018 this Court Coram Stoop AJ. dismissed a similar application by the Applicant's mother with costs on a punitive scale. The application in *casu* is therefore the second attempt to have the Applicant released from curatorship. I therefore deem it necessary to make an order that no further applications for the release of the Applicant from curatorship may be launched without a curator ad litem being appointed for the Applicant's benefit prior to such application being launched.
- [22] Insofar as the costs of the application is concerned, am I not inclined to make an order for costs against the Applicant in the event of this application being dismissed. I am not convinced that this application was launched at the initiative of the Applicant, and this conviction is affirmed by what the Applicant's Counsel conveyed to me in open Court namely that the Applicant does not understand the contents of the Founding Affidavit and merely signed the document. I am also not inclined to make an order for costs which would favour the First Respondent on the basis that I am of the view that there was a duty on the First Respondent, in the absence of an application for the appointment of a curator ad litem by the Applicant's legal representatives, to take the necessary steps for such appointment. I am also not impressed by the

lack of information in the Opposing Affidavit on the issues referred to *supra*. I am further of the view that the displeasure of this Court in the manner in which the Applicant's legal representatives dealt with the matter should reflect in a suitable order for costs.

[23] I therefore make the following order:

[23.1] The application is dismissed;

[23.2] No future application for the release of the Applicant from curatorship may be instituted without a curator ad litem being appointed to assist the Applicant;

[23.3] The Applicant's legal representatives are disallowed any fees for services rendered and disbursement incurred in the matter;

[23.4] Save as aforesaid, each party is to pay their own costs.

P A VAN NIEKERK

ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

CASE NUMBER: 25753/2010 HEARD ON: 9 May 2023 FOR THE APPLICANT: ADV. S.R.P. MASANGO
INSTRUCTED BY: Brian Maphanga Inc. FOR THE FIRST RESPONDENT: ADV. A. VAN DER
WESTHUIZEN INSTRUCTED BY: Dyason Incorporated DATE OF JUDGMENT: 12 May 2023

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