

SOUTH AFRICA / JUDGMENT

Ex Parte: Beukes (3016/2009)

[2011] ZAWCHC 267 (15 June 2011)

[2011] ZAWCHC 267**COURT**

Western Cape High Court, Cape Town

BEFORE

Binns-Ward

CASE / FILE NUMBER

3016/2009

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Source record**REPORTABLE**Republic
of South Africa**IN****THE HIGH COURT OF SOUTH AFRICA****(WESTERN****CAPE HIGH COURT, CAPE TOWN)****CASE****NO: 3016/2009****Before;****The Hon. Mr Justice Binns-Ward****In**the ex parte application
of:

HENDRIKA

CECILIA BEUKES

.....Applicant

In

re: the appointment of a curator bonis

to

the property of

HENDRIK

NIEKLAAS BEUKES ('the

patient')

JUDGMENT

DELIVERED: 15 JUNE 2011

BINNS-WARD J:

- [1] On 27 February 2009, a judge sitting in the unopposed motion court appointed Advocate MJM Bridgman as curator ad litem to the patient to assist the patient to claim compensation from the Road Accident Fund in respect of the damages he had sustained as a result of being injured in a motor vehicle collision in Kakamas, in the Northern Cape Province. The appointment was made on the application of the patient's sister. According to the founding papers in the application, the patient currently resides with his sister in Kakamas. The application was made because, as a consequence of the head injuries he sustained in the collision, the patient was alleged to be incapable of adequately managing his own affairs. The order appointing Mr Bridgman expressly provided that if the action against the Road Accident Fund were successful, Mr Bridgman would furnish this court with a report regarding the necessity, if any, of the appointment of a curator bonis to administer the patient's estate. The applicant was also given leave to apply to this court on the same papers, supplemented as necessary, for the appointment of such a curator bonis. Proceedings against the Road Accident Fund were thereafter duly prosecuted on behalf of the patient in the Northern Cape High Court. Those proceedings were settled by the curator ad litem on terms which resulted in the patient receiving payment of an amount of nearly half a million rands in compensation.
- [2] Counsel for the applicant was not able to enlighten me as to why the application for a curator ad litem had been made in this court, rather than in the Northern Cape High Court. The founding papers contained a bald allegation that the applicant and the patient were domiciled in the area of this court's jurisdiction, but the facts discernable from the medical reports

attached to the founding affidavit suggest that the patient was born in the Northern Cape, and had lived and worked in that region for his entire life prior to being injured in the collision. The allegation that the patient is (or was) domiciled in the jurisdiction of this court would therefore appear to be erroneous. Nevertheless, on the strength of it, this court made the aforementioned orders, apparently being persuaded thereby that this jurisdiction was the forum domicilii of the patient. The order having been made, and the action for compensation thereafter having been prosecuted by the curator ad litem acting within the powers conferred by the court without objection from the Road Accident Fund, it is, in my view, too late now for any person to question the effectiveness of the appointment (cf. *Curator ad litem of Letterstedt v Executors of Letterstedt* 1874 4 Buch 42). For the reasons discussed below, it seems to me that the competence of the appointment by this court of Mr Bridgman as curator ad litem to the patient for the purpose of the application currently pending for the appointment, in terms of rule 57, of a curator to the patient's property might in any event have been unexceptionable.

[3] Rule 57 requires the submission of the supporting papers, together with a report from the curator ad litem, to the 'Master of the Supreme Court having jurisdiction for consideration and report to the court. See rule 57(6) and (7) of the uniform rules. Thereafter, the application for the appointment of a curator bonis may be enrolled for hearing only after receipt of the report of the Master, which must be included in the papers placed before the court. See rule 57(8).

[4] The Master at the seat of this court, in Cape Town, has declined to make a report in terms of rule 57 in respect of the application for the appointment of a curator bonis to the patient. The Assistant Master of the High Court at Cape Town asserts that the Master at the seat of this court does not have

jurisdiction in the matter because the patient lives in Kakamas. Kakamas falls within the territorial jurisdiction of the Master

having his office at the seat of the Northern Cape High Court, in Kimberley. It is not apparent on the papers whether the Master at Kimberley has ever been requested to make a report. There is a letter from the Assistant Master at Kimberley in the papers, in which he enquires why the application for the appointment of a curator bonis was brought in this court rather than in the Northern Cape High Court.

[5] The applicant has now applied for an order directing the Master at Cape Town to furnish this court with the required report. Although the application was served on the Master on 2 June 2011, the Master has not favoured the court with the assistance of her views on the relief sought.

[6] As mentioned, rule 57 requires a report from the Master 'having jurisdiction'. The appointment and jurisdiction of the masters of the High Courts are matters provided for in terms of the Administration of Estates Act 66 of 1965. The provisions of s 4(2)-(4) of the Act are pertinent to the current issue. They read as follows:

- (2) In respect of the property belonging to a minor, including property of a minor governed by the principles of customary law, or property belonging to a person under curatorship or to be placed under curatorship, jurisdiction shall lie-
 - (a) in the case of any such person who is ordinarily resident within the area of jurisdiction of a High Court, with the Master appointed in respect of that area; and
 - (b) in the case of any such person who is not so resident, with the Master appointed in respect of any such area in which is situate the greater or greatest portion of the property of that person:

Provided that-

- (i) a Master who has exercised jurisdiction under paragraph (a) or (b) shall continue to have jurisdiction notwithstanding any change in the ordinary residence of the person concerned or in the situation of the greater or greatest portion of his or her property; and

(ii) in the case of any mentally ill person who under the Mental Health Act, 1973 (Act 18 of 1973) has been received or is detained in any place, jurisdiction shall lie with the Master who immediately prior to such reception or detention, had jurisdiction in respect of his or her property under paragraph (a) or (b).

- (3) No act performed by a Master in the bona fide belief that he has jurisdiction shall be invalid merely on the ground that it should have been performed by another Master.
- (4) If more than one Master has in such belief exercised jurisdiction in respect of the same estate or property, that estate or property shall, without prejudice to the validity of any act already performed by or under the authority of any other Master, as soon as it becomes known to the Masters concerned, be liquidated, distributed or administered as the case may be, under the supervision of the Master who first exercised such jurisdiction, and any appointment made and any grant, signing and sealing or endorsement of letters of executorship, tutorship or curatorship, by any other Master in respect of that estate or property, shall thereupon be cancelled by such other Master.
- [7] The applicant's counsel and the curator ad litem submitted that the Master in Cape Town had jurisdiction because by far the greater portion of the patient's property, being the proceeds of the settlement of the abovementioned action for compensation, are held within the area of this court's territorial jurisdiction in the trust account of the Cape Town attorneys who were appointed to represent him in the proceedings instituted in the Northern Cape High Court. They called in aid the provisions of s 4(2)(b) of the Act in support of that argument. In my judgment the provisions, of s 4(2)(b) do not sustain the contention.
- [8] The relevant provisions of s 4(2)(b) apply only in respect of the property of a person under curatorship or to be placed under

curatorship if such person is not ordinarily resident within the area of jurisdiction of a High Court. The patient plainly does not qualify as such. As mentioned, he resides within the jurisdiction of the Northern Cape High Court. The provisions of s 4(2)(b) are of application in respect of the local property of an affected person who is not ordinarily resident in the country, but who owns property that is held or situated here.¹ They might also apply in respect of a person who has no fixed place of residence in South Africa, but constantly moves about the country staying at different places from time to time,

consequently not being 'ordinarily resident' anywhere in the country. Thus the only Master 'having jurisdiction' in this case is the Master at the seat of the High Court in Kimberley. [9] The curator ad litem stoutly resisted that conclusion. He argued, with reference to the provisions of the proviso to s 4(2) and to sub-sections 4(3) and

- (4) of the Administration of Estates Act, that the legislation is intended to operate flexibly and pragmatically and that a territorial causa for a master's jurisdiction is not imperative. There is some merit in those contentions, but in the abstract they do not afford a reason to depart from the limits of the instances expressly specified in the Act in which the flexibility and

pragmatism referred to by counsel is afforded scope for application. Those instances occur (i) in situations in which the person whose property is concerned changes residence in South Africa to a place within the territorial jurisdiction of different High Court after a master having original jurisdiction has exercised it: the master having originally exercised jurisdiction continues to have jurisdiction in such a case: (ii) similarly, in a case in which the greater part of the property of a minor or other person referred to in s 4(2) is moved from, or ceases to be in, the territorial jurisdiction of the High Court in which the master originally exercised jurisdiction, the master who originally exercised jurisdiction retains jurisdiction over the estate wherever its property subsequently might be moved to in South Africa; and (iii) in a case where a master not having jurisdiction in terms of s 4(2)(a) or (b) bona fide purports to exercise jurisdiction before the master actually having original jurisdiction in respect of the property does so. the actions of the first actor are not rendered invalid by reason of his lack of jurisdiction. The provisions on which the curator ad litem relies for his arguments that the Act allows a flexible and pragmatic approach also determine which master shall continue to exercise

jurisdiction when two or more masters have purported to exercise jurisdiction in respect of the property. In such a case the bona fide acts of the masters not having original jurisdiction are not rendered invalid, and the master first purporting to exercise jurisdiction is constituted as the master with continuing and overriding jurisdiction in the matter. [10] The flexible and pragmatic operational framework provided in terms of the provisions relied upon by counsel do not afford any warrant to the court to vest the Master at Cape Town with a jurisdiction she does not have in terms of the Act. Nor does it empower the court to impose upon the Master at the seat of this court an obligation to assume jurisdiction. [11] The jurisdiction of the Master, which is determined by the Administration of Estates Act, is something which is quite distinguishable from the jurisdiction of the court, which, in general, is determined by the Supreme Court Act 59 of 1959 and the common law. If this court has sole or concurrent jurisdiction to appoint a curator to the patient's property, the incidence of the provisions of the Administration of Estates Act, discussed above, might entail that a Master with an office at the seat of another High Court is the Master 'having jurisdiction'. The effect of the jurisdictional provisions in s 4 of Act No 66 of 1965, read with the provisions of rule 57(6)-(8). is that such Master (in this case, the Master at Kimberley). and not the local Master (the Master at Cape Town), is responsible for making the required report. The applicant would therefore be well advised to bring this judgment to the attention of the Master of High Court, Kimberley. [12] It is not necessary to determine the question at this stage of the proceedings, but it seems to me prima facie that this court may have concurrent jurisdiction with the Northern Cape High Court to appoint a curator bonis for the patient. The jurisdiction of this court to do so might be founded by reason that the greatest part of the patient's assets is held within the territorial jurisdiction of this court. An assumption of concurrent jurisdiction in such cases seems to have

originated in matters in which a court with territorial jurisdiction over the place where the party subject to curatorship or

guardianship owned fixed property (*forum rei sitae*) would exercise the power to make appointments; such power vesting concurrently in the different court of the place where the patient

was domiciled [*forum domicilii*]. See Voet Commentarius ad Pandectas 26.5.2.5.2 In modern times, the courts have also had regard to the location of moveable assets in determining upon the assumption of jurisdiction

to appoint a curator bonis. *Ex parte Gardiner and Another* 1934 CPD 304 was a matter in which this court exercised jurisdiction to appoint a curator bonis in a case where the patient was committed in a mental hospital in the Transvaal. It did so on the -grounds that she had been domiciled

here before falling ill while on a visit to the Transvaal, and that she had all her property here - there is no indication in the judgment that the property concerned was fixed property. In *Ex parte Isakow* 1944 CPD 331, Fagan J (as he then was) referred to *Gardiner's* case as having decided that 'the court in which the property is situated may have jurisdiction* to appoint a curator bonis when the patient was living outside the area of jurisdiction. The effect of the decision in *Gardiner's* case was referred to in similar terms by Lucas J, Bresler AJ concurring, in *Ex parte Aserman* 1951

(2) SA 561 (T). See also the most helpful discussion by CaneyJ in *Ex parte Berry: in re Berry* 1961

(4) SA 79(D). Caney J concluded (in *Berry* at 84E) 'in my judgment, any Division of the Supreme Court has jurisdiction to declare incapable of managing his affairs and place under

curatorship any person who is domiciled within its area of jurisdiction or whose assets are within the area, notwithstanding

that he is not himself within the area'. [13] I gave the question of the court's jurisdiction some consideration at this stage because if it were clear that the court did not possess the power to determine the application for the appointment of a curator bonis, it would be proper, without further ado, to transfer the proceedings to the Northern Cape High Court, either in terms of s 9 of the Supreme Court Act. or s 3 of the Interim Rationalisation of Jurisdiction of High Courts Act 41 of 2001. When I raised the prospect of a transfer of the proceedings during argument, however, the idea was resisted by both counsel for the applicant and the curator ad litem. Therefore, accepting, for the reasons given earlier, that there might be a cogent basis for them to contend for this court's concurrent

jurisdiction to appoint a curator bonis, I have decided that a conclusive determination as to whether the main application can, or should, be entertained by this court,

alternatively, whether - despite the preference of counsel and the curator ad litem - the matter must be transferred, should stand over until the main application is ripe for hearing, after the receipt of a report in terms of rule 57 from the Master at Kimberley. [14] The application for an order directing the Master of the High Court, CapeTown, to furnish a report in terms of rule 57 is

refused. A.G. WNNS-WARD Judge of the High Court Dates of hearing: 7 and 8 June 2011 Date of judgment: 17 June 2011 Applicant's counsel: A.J. Du Toit Curator ad litem to the patient: M.J.M. Bridgman Applicant's attorneys: DSC Attorneys Cape Town

consequently not being 'ordinarily resident' anywhere in the country. Thus the only Master 'having jurisdiction' in this case is the Master at the seat of the High Court in Kimberley.

- [9] The curator ad litem stoutly resisted that conclusion. He argued, with reference to the provisions of the proviso to s 4(2) and to sub-sees 4(3) and
- (4) of the Administration of Estates Act, that the legislation is intended to operate flexibly and pragmatically and that a territorial causa for a master's jurisdiction is not imperative. There is some merit in those contentions, but in the abstract they do not afford a reason to depart from the limits of the instances expressly specified in the Act in which the flexibility and pragmatism referred to by counsel is afforded scope for application. Those instances occur (i) in situations in which the person whose property is concerned changes residence in South Africa to a place within the territorial jurisdiction of different High Court after a master having original jurisdiction has exercised it: the master having originally exercised jurisdiction continues to have jurisdiction in such a case: (ii) similarly, in a case in which the greater part of the property of a minor or other person referred to in s 4(2) is moved from, or ceases to be in, the territorial jurisdiction of the High Court in which the master originally exercised jurisdiction, the master who originally exercised jurisdiction retains jurisdiction over the estate wherever its property subsequently might be moved to in South Africa; and (iii) in a case where a master not having jurisdiction in terms of s 4(2)(a) or (b) bona fide purports to exercise jurisdiction before the master actually having original jurisdiction in respect of the property does so. the actions of the first actor are not rendered invalid by reason of his lack of jurisdiction. The provisions on which the curator ad litem relies for his arguments that the Act allows a flexible and pragmatic approach also determine which master shall continue to exercise

jurisdiction when two or more masters have purported to exercise jurisdiction in respect of the property. In such a case the bona fide acts of the masters not having original jurisdiction are not rendered invalid, and the master first purporting to exercise jurisdiction is constituted as the master with continuing and overriding jurisdiction in the matter.

- [10] The flexible and pragmatic operational framework provided in terms of the provisions relied upon by counsel do not afford any warrant to the court to vest the Master at Cape Town with a jurisdiction she does not have in terms of the Act. Nor does it empower the court to impose upon the Master at the seat of this court an obligation to assume jurisdiction.
- [11] The jurisdiction of the Master, which is determined by the Administration of Estates Act, is something which is quite distinguishable from the jurisdiction of the court, which, in general, is determined by the Supreme Court Act 59 of 1959 and the common law. If this court has sole or concurrent jurisdiction to appoint a curator to the patient's property, the

incidence of the provisions of the Administration of Estates Act, discussed above, might entail that a Master with an office at the seat of another High Court is the Master 'having jurisdiction'. The effect of the jurisdictional provisions in s 4 of Act No 66 of 1965, read with the provisions of rule 57(6)-(8), is that such Master (in this case, the Master at Kimberley), and not the local Master (the Master at Cape Town), is responsible for making the required report. The applicant would therefore be well advised to bring this judgment to the attention of the Master of High Court, Kimberley.

[12] It is not necessary to determine the question at this stage of the proceedings, but it seems to me *prima facie* that this court may have concurrent jurisdiction with the Northern Cape High Court to appoint a curator bonis for the patient. The jurisdiction of this court to do so might be founded by reason that the greatest part of the patient's assets is held within the territorial jurisdiction of this court. An assumption of concurrent jurisdiction in such cases seems to have

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curatorship any person who is domiciled within its area of jurisdiction or whose assets are within the area, notwithstanding

that he is not himself within the area'.

[13] I gave the question of the court's jurisdiction some consideration at this stage because if it were clear that the court did not possess the power to determine the application for the appointment of a curator bonis, it would be proper, without further ado, to transfer the proceedings to the Northern Cape High Court, either in terms of s 9 of the Supreme Court Act, or s 3 of the Interim Rationalisation of Jurisdiction of High Courts Act 41 of 2001. When I raised the prospect of a transfer of the proceedings during argument, however, the idea was resisted by both counsel for the applicant and the curator ad litem. Therefore, accepting, for the reasons given earlier, that there might be a cogent basis for them to contend for this court's concurrent

jurisdiction to appoint a curator bonis, I have decided that a conclusive determination as to whether the main application can, or should, be entertained by this court,

alternatively, whether - despite the preference of counsel and the curator ad litem - the matter must be transferred, should stand over until the main application is ripe for hearing, after the receipt of a report in terms of rule 57 from the Master at Kimberley.

[14] The application for an order directing the Master of the High Court, CapeTown, to furnish a report in terms of rule 57 is refused.

A.G. WNNS-WARD

Judge of the High Court

Dates of hearing: 7 and 8 June 2011

Date of judgment: 17 June 2011

Applicant's counsel: A.J. Du Toit

Curator ad litem

to the patient: M.J.M. Bridgman

Applicant's attorneys: DSC Attorneys

Cape Town

¹This construction of the provision accords with that given in Meyerowitz on Administration of Estates and Estate Dofy {2004 edition) at §14. See also *ibid* at §1.6.

²Cited in Joubert *et al.* The Law of South Africa {Second Edition) vol. 11 at para 560. fn. 7: *sv* Civil Jurisdiction (Mervyn Dendy). I had reference to Percival Gane's translation in The Selective Voet being the Commentary on the Pandects vol. 4 {Butterworth & Co) 1956.

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