

SOUTH AFRICA / JUDGMENT

Molatudi v Molatudi (2205/09) [2010] ZANWHC 6 (20 May 2010) [2010] ZANWHC 6

COURT

North West High Court, Mafikeng

BEFORE

M M Leeuw

CASE / FILE NUMBER

2205/09

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REPORTABLE

NORTH

WEST

HIGH COURT, MAFIKENG

CASE

NO: 2205/09

In

the matter between:

NTITI
MERRIAM MOLATUDI
APPLICANT
and
SEDITSE
GERT MOLATUDI
PATIENT
IN
RE
SEDITSE
GERT MOLATUDI PLAINTIFF
ROAD
ACCIDENT FUND
DEFENDANT

JUDGMENT

LEEuw JP

Introduction

[1] This is an ex-parte application for the appointment of Mr Moolman Wessels as a curator bonis to the patient.

[2] The order granted in this Court on 26 November 2009 by Pistor AJ appointing Advocate C J Zwiigelaar as a curator ad litem to the patient read as follows:

“1. THAT: Advocate C Zwiigelaar, an Advocate of the High Court, be and is hereby Appointed as Curator ad Litem to the Patient for the purpose of investigating the question of whether the Patient be and is hereby capable of managing his own affairs and to report the Court on this question;

2. THAT: The Curator ad Litem be and is hereby also requested to investigate the question of whether Mr Moolman Wessels should be appointed as Curator Bonis to the Patient;

3. THAT: Appointment Curator Bonis of be and is hereby postponed sine die.”

[3] It is important to note at the outset that Advocate Zwiigelaar was required, in terms of this order, to first investigate whether or not the patient “is capable of managing his own affairs” as well as to investigate whether or not Mr Moolman Wessels is a suitable person to be appointed as a curator bonis to the patient.

[4] The order for the appointment of a curator ad litem was granted on the basis of an affidavit of applicant (who is the wife to the patient) and the medical reports dated 9 December 2006 compiled by Dr A P Rossouw, who is a Neurologist, as well Lenmarie Stanton, a “Senior Clinical Psychologist,” which report is dated 26 October 2009.

[5] According to the applicant (Mrs Molatudi), in her affidavit dated 15 October 2009, she is married to the patient according to civil rites and they have eight (8) children who are all majors. Their joint estate only consists of a house and some furniture.

[6] She states that the patient was involved in a motor vehicle accident which caused him to sustain the following injuries: intra-cerebral

haemorrhage, hip dislocation and injury to the ear.” For ease of reference, I restate the effect of those injuries on the patient as described by Mrs Molatudi:

“6.1 The Patient is withdrawn.

6.2 The Patient started to suffers from mood swings and temper outbursts. This results in the Patient becoming aggressive and irresponsible;

6.3 The Patient, on more than one occasion, walked away from home. During these excursions the Patient wanders around through the town and begs from other people.

6.4 The Patient often becomes confused of his surrounding.

6.5 The Patient has no apprehension of the value of the money and for what purposes it needs to be utilized.

6.6 The Patient's memory is affected.

6.7 Prior to accident the Patient acted normal and none of the abovementioned anomalies were present."

[7] She also states that a claim was instituted against the defendant (the RAF) and that a settlement offer of R400 000-00 compensation was made for the injuries sustained by the patient. According to her, no payment was made at that stage.

[8] She further states that the patient is a pensioner and that he receives a monthly social pension of R1 010-00 which pension she collects and manages on his behalf and for the benefit of the joint estate. She is unemployed.

[9] She states that she approached Advocate Zwiegelaar to act as curator ad litem and Mr Moolman Wessels, an attorney, to act as curator bonis for the patient. I must pause here and remark that the initial application which were launched by Tsitsi Koos Molatudi (Molatudi)

the son of the patient and Mrs Molatudi, was for the appointment of Mr Moolman Wessels as both curator ad litem and curator bonis removed from the roll on 27 August 2009.

MEDICAL REPORTS:

[10] I refer to some findings of Dr Rossouw captured in his report about his conclusions reached after the clinical examination of the patient: his mental ability has been affected in that he "cannot understand properly when you talk to him. His speech has also been affected. His son mentioned that patients (sic) speech was not normal before the accident. It was like that from childhood days. People had difficulty in understanding him."

[11] Dr Rossouw also came to the conclusion, that the patient is deaf in one ear and his vision is impaired in the left eye. He walks with the assistance of a walking stick and experiences headaches but is not on any form of medication for this condition. He has not developed epilepsy and his memory is affected. He can however "perform all the activities of daily living. He however went to school. He had difficulty in understanding what is expected of him for instance, he did not know who the President was and in which town we were etc.

[12] Dr Rossouw is of the opinion that the patient's headache will probably improve over the next 3 to 4 years and that although he had a depressed fracture of the skull which did not require surgery, his mental ability is below normal and his memory and comprehension poor. However, contrary to what Mrs Molatudi said in her affidavit, Dr Rossouw's conclusion is that the patient's speech was fairly normal, and were fairly fluent in Afrikaans. He recommends that a curator bonis be appointed for the patient.

[13] Ms Stanton after evaluating the patient, concluded that "there is a strong indication of deterioration of intellectual functions,

probably due to the accident. It also appears that Mr Molatudi is unable to live independently." She recommended the appointment

of a curator bonis to assist the patient "in the management of his financial affairs."

[14] I have already alluded to the fact that when Advocate Zwiegelaar was appointed as a curator ad litem, it was on the basis of the above information from Mrs Molatudi and the medical reports. In her report, wherein she recommends that Mr Wessels be appointed as a curator bonis to the patient, Advocate Zwiegelaar states that she has satisfied herself that "the patient is not capable to manage his own affairs." She goes further to state in conclusion, that "although I have no reason to doubt the bona fides of the applicant and that of Molatudi I am of the view that it would be proper and appropriate for this Honourable Court to appoint a curator bonis to the patient."

[15] Of significance, which will have a major effect on whether or not this application should be granted, is what Advocate Zwiegelaar states in her report in paragraph 5.

"At the outset of the interview I enquired from the Patient whether he was aware of the application whereupon he replied in the affirmative."

I then showed the Patient the application and referred him to the notice of motion therein to explain the purpose and nature of the application to him. The Patient confirmed that he understood the explanation given to him and that he had no objection against the granting of the relief as set out in the notice of motion. I gained the impression that the Patient followed the explanation and that he was satisfied with the state of affairs."

[16] She further states that during the interview she conducted with the patient, Mrs Molatudi and their son Molatudi, it came out that the family was "living below the bread-line," and that Molatudi was assisting with the maintenance of the family. Mrs Molatudi, was managing the applicant's financial affairs which were basically his social pension grant of R1 010-00. Advocate Zwiegelaar also states in her report, that the family indicated to her that they intended buying furniture as well as renovate the house they are staying in with the RAF compensation money. She was shown invoices, which amount was approximately R64 000-00.

- [17] A statement of account from the attorneys indicated that after deducting fees and other expenses from the R400 000-00, an amount of R303 450-51 was to be paid into the Trust account of the attorney Moolman Wessels, who is recommended by Advocate Zwiegelaar as the curator bonis.
- [18] What needs to be established, is whether or not, in this case, the application for the appointment of a curator bonis, is based on the ground that the patient, by reason of some disability, mental or physical, is incapable of managing his own affairs as prescribed by Rule 57 (13) of the Uniform Rules of Court (“The Rules) or whether or not he is to be declared of being of” unsound mind and as such incapable of managing his affairs, and appointing a curator to the person or property of such patient.”
- [19] It is trite law that an application under Rule 57 (1) would require the Court to declare the patient to be of unsound mind and therefore incapable of managing his own affairs, whereas in respect of Rule 57
- (13) a declaration that the patient is of unsound mind is not required. See *Ex parte Oppel and Another* 2002 (5) SA 125 (CPD) and the cases therein referred to.
- [20] In the present case, from the report of Advocate Zwiegelaar, this Court is not required to declare the patient to be of unsound mind but rather to appoint a curator bonis because he is not capable of managing his own affairs. This I assume, is informed by the fact that the patient had indicated that
- he would like to improve his and his family’s living conditions. Advocate Zwiegelaar remarks as follows with regard to the patient’s inability to manage his affairs, which conclusion she gathered from her interview with the patient: “It was, however, clear to me that the patient did not have any inclination of the costs aspect thereof and the legal implications thereof.
- [21] This is a case where the patient and his wife, or probably his children, lack the necessary skill and knowledge of how to handle their finances especially a huge amount of R308 450-51. But this does not mean that the patient and his wife, who are married, should be deprived of the right to handle their property and funds as they wish by appointing someone to do that on their behalf.
- [22] Mrs Molatudi has been assisting the patient with his pension money and has been responsible for handling his affairs and taking care of his personal needs from the R1 010-00 received every month from his social pension. I share the sentiments expressed in *Ex parte Oppel and Another* supra at 130, C – H, Ngwenya J, in an application for a curator bonis for a minor child whose guardian was alive but illiterate, said the following: “Mere fear that they might take ignorant decisions

is insufficient to warrant the relief they seek. Of course it is not expected of the applicants as parents to be possessed of a specialised knowledge of financial and investment affairs. What is at least expected of them is the acknowledgement of their shortcomings and to get proper professional advice.”

[23] The Court must appoint a curator bonis only after satisfying itself that the patient has to be protected against loss which may be occasioned by the fact that the patient

will not be able to manage his affairs. See Ex parte Kotze 1955

(1) SA 665 (C), Ex parte Klopper: In re Klopper 1961 (3) SA 803 (T), Ex parte Oppel and Another supra and Francescutti v Francescutti Ex parte Francesescutti 2005 (2) SA 442 (WLD) at 447 par [15].

[24] The suitability of a person to be appointed as a curator bonis must be determined in consideration of the patient’s personal circumstances. It is an issue that has to be determined from the facts of each case. There is no hard and fast rule which prescribes that a curator bonis must be an attorney. Compare Ex parte Powree 1963 (1) SA 299 (WLD).

[25] In the present application, Advocate Zwiegelaar in terms of the order appointing her as curator ad litem, she was to “investigate the question of whether Mr Moolman Wessels should be appointed as curator bonis to the patient.” In her report, she does not explain why Mr Moolman Wessels is a suitable person to be appointed as such as against any member of the patient’s family.

[26] The R400 000-00 paid from the RAF has already been diminished to R312 450-51 because of costs related to the patient’s claim against the RAF. Normally, a curator bonis, as well as a curator ad litem, would be entitled to a fee if the person appointed is a professional person like an attorney, but where the curator is a relative, no such fee may be claimed

[27] Rule 57 (6) prescribes that, the report of the curator ad litem as well as the documents filed in terms of 57 (2) and (3), shall be submitted to the Master of the High Court for consideration and report to the Court. Rule 57 (7) provides that the Master, in his report, “shall as far as he is able, comment upon the patient’s means and general circumstances, and the suitability or otherwise of the person suggested for appointment as curator to the person or property of the patient. See Rule 57 (7) and (8) which provide:-

Rule 57 (7) and 57 (8)

“(7) In his report the Master shall, as far as he is able, comment upon the patient’s means and general circumstances, and the suitability or otherwise of the person suggested for appointment as curator to the person or property of the patient, and he shall further make such recommendations as to the furnishing of security and rendering of accounts by, and the powers to be conferred on, such curator as the facts of the case appear to him to require. The curator ad litem shall be furnished with a copy of the said report.

- (8) After the receipt of the report of the Master, the applicant may, on notice to the curator ad litem (who shall if he thinks fit inform the patient thereof), place the matter on the roll for hearing on the same papers for an order

declaring the patient to be of unsound mind and as such incapable of managing his affairs and for the appointment of the person suggested as curator to the person or property of the patient or to both.”

[28] This application was not submitted to the Master in accordance with Rule 57 (7) and this Court did not have the benefit of the Master’s report for the purpose of determining the suitability of Mr Moolman Wessels to be appointed as a curator bonis to the patient. This Rule must be complied with.

[29] Furthermore, in considering whether or not it is suitable for a curator bonis to be appointed for the patient, it will be important for the Master to consider the possibility of depositing the money in the Guardian’s Fund and have it administered from the Master’s Office in accordance with section 90 of the Administration of Estates Act No 66 of 1965. This judgment must be brought to the attention of the Master.

[30] I accordingly make the following order:

1. This application is postponed sine die.
2. The curator ad litem is ordered to comply with Rule 57 (1), taking into account the concerns raised in this judgment, and submit her report to the Master as prescribed by Rule 57 (6).

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3. Costs are reserved.

M M LEEUW

JUDGE PRESIDENT OF THE HIGH COURT

For the applicant : Adv Maree

For the respondent : No appearance

Date of hearing : 22 April 2010

Date of judgment : 20 May 2010

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