

SOUTH AFRICA / JUDGMENT

P W v A W and Others (2018/47013) [2019] ZAGPJHC 168 (7 February 2019) [2019] ZAGPJHC 168

COURT

South Gauteng High Court, Johannesburg

BEFORE

L R Adams

CASE / FILE NUMBER

2018/47013

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 2018/47013

DATE: 7TH
February 2019
In

the matter between:

W,
P
Applicant
and
W,
A
First Respondent
RITA
HENN & PARTNERS INC t/a R H P REHAB
Second Respondent
VERGANO,
ADV VIVIANA N
O
Third Respondent

JUDGMENT

ADAMS J:

[1]. This is an opposed urgent application by the applicant for an order granting her leave to intervene as a respondent in the ex parte application by the first respondent, who is the applicant in the ex parte application. On the 9th of January 2019 the third respondent was appointed as Curatrix ad Litem for and on behalf of M W ('the patient'), the 18 – year old daughter of the applicant and the first respondent, who reportedly is incapable of managing her own affairs due to severe physical and mental incapacity.

[2]. In terms of the Order of this Court (Moshidi J) of the 9th of January 2019, the third respondent was also directed to in due course provide the Court with a report relating to the following issues: the patient's mental capacity; her ability to manage her own affairs; and the appointment of a curator bonis and a curator ad personam for the patient. The Court also granted the third respondent, in her capacity as Curatrix ad Litem of the patient, certain powers and duties aimed at enabling her to do the necessary investigations with a view to compiling her report for the Court.

[3]. The application for the relief sought in Part B of the ex parte application, which deals in the main with the appointment of the curator bonis and the curator ad personam to the patient, the court postponed sine die on the 9th of January 2019. Part B of the notice of motion in the said ex parte application inter alia prays for the granting of an order appointing specifically the first respondent as the curator bonis and the curator ad personam to the patient. It goes without saying that, having regard to the applicable statutory framework, which governs this type of application, to which I shall revert shortly, the Court is not bound to grant the relief prayed for by the applicant in Part B. That decision resides squarely within the discretion of the Court after having considered the report by the Curator ad Litem.

[4]. Part B of the Notice of Motion is the portion of the application to which the applicant objects. She has no difficulty with the proceedings thus far. In particular, the applicant is in agreement with the appointment of the third respondent as the Curatrix ad Litem of the patient. She does however vehemently intends opposing the first respondent's application to have himself appointed as the curator bonis and the curator ad personam to the patient. And, in order to have her voice heard on that issue, which, needless to say, is of importance to her and understandably so, the applicant has launched this urgent application for leave to intervene in the proceedings.

[5]. The applicant simply asks for leave to intervene as a respondent in the ex parte application, which would then convert the said application into a full blown opposed motion. She would like to be heard in the matter in relation to the appointment of the curator bonis and the curator ad personam and the person or persons to be considered for these appointments, because, so it is contended on behalf of the applicant, she is after all the biological mother of the patient and has been for long periods of time the caregiver of the patient. She therefore has an interest in an application for the appointment of these curators.

[6]. On first principles, there can be little doubt that the applicant is entitled to intervene in the ex parte application. Her direct and substantial interest in that application is self – evident and lies therein that she surely must have a say in the appointment of curators to her biological daughter.

[7]. The difficulty, however, which the applicant has relates to the procedure which she followed. In my judgment, she was ill – advised to move this application for leave to intervene in the main ex parte application. I am of the view that the application for leave to intervene is un – procedural, and I say so for the following

reasons.

[8]. The ex parte application of the first respondent is in terms of the provisions of Uniform Rule of Court 57, which, in my view, sets up a cost and time effective procedure, which is aimed at expeditiously and efficiently having appointed to a person incapable of managing his or her own affairs curators to assist such an individual in running his or her affairs. The procedure envisaged by the Rule is, in my judgment, inquisitorial in nature and the spirit of the Rule discourages protracted and adversarial exchanges between interested parties.

[9]. The important portions of Uniform Rule 57, under the heading 'De lunatico inquirendo, appointment of curators in respect of persons under disability and release from curatorship', provides as follows:

'(1) Any person desirous of making application to the court for an order declaring another person (hereinafter referred to as 'the patient') to be of unsound mind and as such incapable of managing his affairs, and appointing a curator to the person or

property of such patient shall in the first instance apply to the court for the appointment of a curator ad litem to such patient.

- (2) Such application shall be brought ex parte and shall set forth fully—
 - (a) the grounds upon which the applicant claims locus standi to make such application;
 - (b) to (e)
 - (f) the name, occupation and address of the respective persons suggested for appointment by the court as curator ad litem, and subsequently as curator to the patient's person or property, and a statement that these persons have been approached and have intimated that, if appointed, they would be able and willing to act in these respective capacities.
- (3)
- (4) Upon the hearing of the application referred to in subrule (1), the court may appoint the person suggested or any other suitable person as curator ad litem, or may dismiss the application or make such further or other order thereon as to it may seem meet and in particular on cause shown, and by reason of urgency, special circumstances or otherwise, dispense with any of the requirements of this rule.
- (5) Upon his appointment the curator ad litem (who shall if practicable be an advocate, or failing such, an attorney), shall without delay interview the patient, and shall also inform him of the purpose and nature of the application unless after consulting a medical practitioner referred to in paragraph
 - (b) of subrule (3) he is satisfied that this would be detrimental to the patient's health. He shall further make such inquiries as the case appears to require and thereafter prepare and file with the registrar his report on the matter to the court, at the same time furnishing the applicant with a copy thereof. In his report the curator ad litem shall set forth such further facts (if any) as he has ascertained in regard to the patient's mental condition, means and circumstances and he shall draw attention to any consideration which in his view might influence the court in regard to the terms of any order sought.
- (6)
- (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)

- (9) At such hearing the court may require the attendance of the applicant, the patient, and such other persons as it may think fit,

to give such evidence viva voce or furnish such information as the court may require.

- (10) Upon consideration of the application, the reports of the curator ad litem and of the Master and such further information or evidence (if any) as has been adduced viva voce, or otherwise, the court may direct service of the application on the patient or may declare the patient to be of unsound mind and incapable of managing his own affairs and appoint a suitable person as curator to his person or property or both on such terms as to it may seem meet, or it may dismiss the application or generally make such order (including an order that the costs of such proceedings be defrayed from the assets of the patient) as to it may seem meet.

- (11) Different persons may, subject to due compliance with the requirements of this rule in regard to each, be suggested and separately appointed as curator to the person and curator to the property of any person found to be of unsound mind and incapable of managing his own affairs.

- (12)'

[10]. I have cited the provisions of this rule extensively in order to demonstrate the point made supra that the first respondent's ex parte application is of an inquisitorial nature. This rule provides for the various steps that must be taken in an application for the appointment of a curator to the person or property of a person.

[11]. The provisions of the rule are peremptory and, other than in the circumstances provided for in subrule (4), the failure to observe the provisions of the rule renders an application defective to the extent that such application cannot and should not be entertained at all.

[12]. A curator ad litem must be of sufficient experience, proven expertise and good standing to ensure that the interests of the patient are best served. It is important that the curator ad litem is professionally independent. In that regard, section 57 specifically provides that he or she should, if practicable, be an advocate, as is the case in casu. Advocates are as members of a referral profession practising individually – generally regarded as being professionally independent as they are not beholden to clients other than in respect of the particular brief that has been entrusted to them.

[13]. The position of a curator ad litem 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. It is the duty of the curator ad litem, by making such enquiries as he deems necessary, to see that the existence and extent of the patient's mental illness are

properly investigated, and to ensure that the proprietary and other interests of the patient are adequately protected by the terms of the order made by the court.

[14]. From the foregoing it is clear that the applicant's application for leave to intervene is not sanctioned by the letter and the spirit of Rule 57, which is designed as an expeditious mechanism for the appointment of curators to the person and property of individuals incapable of managing their affairs. The correct approach by the applicant would have been for her to approach the Curatrix ad Litem, and to advise the Curatrix of her desire to be appointed as a curator bonis and curator ad personam of the patient. The Curatrix would then have been under a duty to consider and to have regard to such a request and to the motivation by the applicant.

[15]. This does not however mean that the applicant, whilst she acted un – procedurally, did so mala fide or in total disregard of the interest of the patient. I have no doubt that in bringing this application for leave to intervene, the applicant intended acted in the interest of the patient. That is commendable and is an issue which, in my judgment, affects the cost order which should be granted. Additionally, the applicant's intention was only to have her voice heard in relation to issues involving the wellbeing of her daughter.

[16]. Therefore, whilst her urgent application stands to be dismissed, I intend, in the spirit of the provisions of Uniform Rule 57 and in the interest of justice, to order that her submissions in this application be considered by the Curatrix ad Litem when compiling her report, and to specifically have regard to her desire to be appointed as a curator to the property and person of the patient.

Costs

[17]. The general rule is that cost should follow the suit.

[18]. In the circumstances of this matter, I am of the view that each party should bear his / her own cost of this urgent application. That, in my judgment, would be just and equitable.

Order

In the result, I make the following order:-

1. The applicant's urgent application for leave to intervene in the ex parte application of the first respondent be and is hereby dismissed.
2. The applicant's application for leave to intervene, including the founding affidavit and the annexures thereto, as well as the first respondent's opposing affidavit and the annexures thereto shall form part of and remain part of the record of the ex parte application.
3. In compiling her report in terms of Rule 57(5), the third respondent (the Curatrix Ad Litem) shall have regard to, take cognisance of and consider the contents of the applicant's application for leave to intervene, including the founding affidavit and the annexures thereto, as well as the first respondent's opposing affidavit and the annexures thereto.

4. Each party shall bear her / his cost of this urgent application for leave to intervene.

L R ADAMS

Judge of the High Court

Gauteng Local Division, Johannesburg

HEARD ON: 5th February 2019

JUDGMENT

DATE: FOR THE APPLICANT: 7th February 2019 Adv L Grobler INSTRUCTED BY: Bose Attorneys Incorporated FOR THE FIRST RESPONDENT: Adv Sandra Freese INSTRUCTED BY: Alan José Incorporated

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