

SOUTH AFRICA / JUDGMENT

Roos (20916/2016), Ex parte [2017] ZAGPPHC 183; 2017 (6) SA 491 (GJ) (22 May 2017) [2017] ZAGPPHC 183

COURT

North Gauteng High Court, Pretoria

BEFORE

Khumalo

CASE / FILE NUMBER

20916/2016

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REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
(GAUTENG
DIVISION, PRETORIA)
CASE
NO:20916/2016
22/5/2017

Reportable:

No
Of
interest to other judges: No
Revised.
JANET
ROOS
APPLICANT
and
CHARLES
DU PREEZE
ROOS
PATIENT

JUDGMENT**KHUMALO J****INTRODUCTION**

- [1] This is an Application in terms of Rule 57 of the High Court Rules for the appointment of a curator bonis, for Mr C Du Preez Roos (" the Patient"), launched by his wife, Ms Janet Roos to whom he is married in community of property on the basis that he is unable to manage his own affairs.
- [2] The main application was set down for hearing on 6 February 2017 duly served on the Master and sent electronically to the adult children of the patient. No opposing papers have been filed. The eldest daughter does not support the application on the reason that she wanted to be appointed as curator bonis. She however did not file opposing papers.
- [3] On 6 February 2017, the court requested that the curator ad litem and or the deponent to the Founding Affidavit clarify or address certain discrepancies that appeared in the documentation that have been filed in support of the Application, namely, inter alia, the the medico-legal reports and expert's affidavit and also concerns raised by the Master relating to the proposed curator bonis. The Application was stood down for hearing on the next date of the unopposed motion court. The specific concerns were pointed out to Counsel when he moved the Application.
- [4] The patient is a 47 year old explosive engineer. He has two major children from a previous marriage, a 21 year old daughter and an 18 year old son who lives with his ex-wife. There are no children born from his marriage to the Applicant. He stays with the Applicant at Randfontein.
- [5] According to the Applicant's founding affidavit on 8 January 2014, the patient fell and hit the back of his head on the tarmac whilst he was drunk. He suffered a serious head injury, subarachnoid bleeding and bio-frontal -temporal contusions. He was hospitalised until 11February 2014 when he was discharged and transferred to Netcare Rehabilitation Hospital in Auckland Park as an in -patient until 20 March
2014. Since the accident his physical and mental state has deteriorated. As a result he is currently unemployed suffering from a temporary disability. He has been attending at a rehabilitation centre as an out- patient from 7 May 2014.
- [6] The Applicant alleges that since the accident she has been managing their financial affairs. She also alleges that a practising neuro surgeon, Dr JA Azhar and a clinical psychologist Dr EJ Bloye have confirmed that the patient can no longer manage his own affairs. Their reports dated 30 May 2014 and 10 July 2015 are annexed to the Application together with their confirmatory affidavits, verifying the correctness of the contents of their reports and asserting that the patient is not in a position to manage his affairs. Two other expert reports

are attached.

- [7] Advocate Marie Riley, the curator ad litem appointed on 15 April 2016 by the court supports the appointment of a curator bonis. In his report he states that at the time of the mishap the patient was in the employ of BME as an explosive technician. Consequent from the fall he was diagnosed with a severe traumatic brain injury with systemic complications, specifically, a brain scan showed a left side extradural plus subdural haematoma. In substantiation of the diagnosis he attached Dr Azhar's report from Netcare Krugersdorp Hospital where the patient was admitted on 8 January 2014 supposedly the date when the accident occurred.
- [8] Dr Azhar's report significantly notes that the patient was admitted at the hospital through the hospital casualty as an emergency case. He wrote the history and noted that "not completely clear" and proceeded to state that "it appeared that he had been assaulted and suffered multiple injuries. There were multiple abrasions and bruises all over his body. "His chest was moist and he probably had aspiration leading to pneumonia. He was resuscitated with IVI fluids, incubated and ventilated for respiratory support. This appears to have been noted on the patient's admission soon after he had sustained his injuries. He was discharged from the hospital after a few days and referred for rehabilitation. He was lastly followed on 21 April 2014.
- [9] Dr Bloye's report on the contrary states that the Applicant reported to him that patient fell whilst under the influence of alcohol and struck his head on the tarmac. To her he appeared dizzy and confused following the injury but was able to get to the bedroom and sleep. She therefore did not seek any medical attention assuming that he was inebriated. The following morning on 8 January 2014, when he could not wake up she rushed him to the Emergency Unit at Netcare Krugersdorp Hospital where he was diagnosed with a subarachnoid bleed and bi-frontal temporal contusions.
- [10] Dr Bloye stated that on the date of assessment on 29 October 2013, (meant to be 2014) the patient displayed to him a typical loss of stimulus resistance and verbal disinhibition associated with frontal head injury (forehead). He also exhibited an executive dysfunction that normally occurs as a result of a frontal lobe brain damage.
- [11] It is therefore apparent from the facts that there is a likelihood of the patient having sustained the injuries on 7 January 2014 not 8 January 2014. Dr Azhar, who attended to the patient on his admission had cited assault as having been the cause of the patient's injuries than the fall that is alleged in the Curator ad litem's report and Applicant's founding affidavit. Dr Bloye refers to a frontal head injury and frontal lobe brain damage. Whilst Hilary Tiernay from the Rehabilitation Centre where the patient attends Occupational, Speech and Language Therapy stated in her report dated 30 September 2014 that the patient fell at home and hit the back of his head, compared to falling on a tarmac and sustaining a frontal head injury. According to Dr Azhar his body was full of bruises and multiple injuries.

[12] He also last saw the patient in May 2014. Neither the Curator ad litem nor Dr Bloye, verified or investigated the history of the injuries when they were presented with the contradictory information. Bloye had indicated the need for the information to be verified after his consultation with the patient eight months after the injuries.

However he had not indicated if that was done or how he hoped it was going to be done.

[13] The Curator ad litem was privy to all the documentation and indicated that he consulted with the patient, his family members and medical practitioners. Since Dr Azhar and Dr Bloye are referred to in the application I assumed that the medical practitioners he met or consulted with included both experts. It however is apparent that he has referred to both Dr's reports without having met with either of them. He instead met with the clinical psychologist Dr Pieter Kitshoff whom he said is in charge of the psychological care of the patient. Dr Kitshoff has not filed a report or an affidavit but said to be of the view that the patient is incapable of managing his own

affairs. He also met with Aileen Thompson the speech and Language Therapist on 18 July 2016 who is the co-signatory of the report on the patient's rehabilitation prepared as long ago as 12 September

2014. He says she expressed the same sentiments. He has not met with the Occupational Therapists (OT") to determine progress or to hear her opinion. I would have expected the OT to be the one who is qualified to express that view than to be dependent only on the speech and language therapist's opinion. Especially because it is indicated that the treatment by the OT was geared towards productive activity with a potential to return to work. Having envisaged in 2014 that he has the potential to return to work after 2015. He indicates in his report that the patient fell on 7 January 2014.

[14] It is as a result of the seriousness of the discrepancies that I requested the Applicant and the curator ad litem to supplement their papers and get clarification on the neurosurgeons' discrepant information whilst also attending to the other issues raised by the Master of the High Court that related to security, capacity and standing of the person nominated for the appointment of a curator bonis.

[15] The court is still non- the wiser about the state of the patient's disability or if he has made any significant progress since 2014. There is no updated report nor is it enlightened on the questions raised regarding the contradictory information. The Applicant's

supplementary affidavit that supposedly addresses the issues raised deals rather with the curator bonis capability to fulfill the requirements as per master's query. The curator ad litem has not responded to the court's enquiry regarding the discrepant information in Dr Azhar and Bloye's and the reports rehabilitation

center.

- [16] In the supplementary affidavit the Applicant mentions the full names of the proposed curator bonis, her possession of a Fidelity Fund Certificate as well as her familiarity with Chapter IV and Regulation 7 of the Administration of Estates Act, Act 66 of 1965, as amended and that she will and can comply therewith. Also that she is of good standing. The proposed curator bonis confirms the allegations under oath.
- [17] In respect of the information in the report, the Applicant alleged that the patient fell as stated in her founding affidavit and does not know why Dr Azhar had stated that the patient appeared to have been assaulted. No further enquires were made. Clearly the response is not sufficient or satisfactory and therefore not helpful to the court. A lot of questions are still left unanswered. Did the Applicant witness the fall? Where did it happen at home or on the tarmac? What injuries did the patient sustain? Where there bruises on his body. Dr Azhar did not only refer to the assault but also confirmed what is in his report under oath, that patient had multiple injuries. The matter has also not have been dealt with fully and responsibly by the curator ad litem to the satisfaction of the court. He failed to deal with the discrepancies even after they have been pointed out by the court. He still did not interview or consult with Dr Azhar or the hospital and Dr Bloye to get clarification, or further information from Dr Azhar that being indispensable. The Applicant has not explained why she made reference to 8 January 2014 instead of 7 January 2014 as the date the patient sustained his injuries.
- [18] The importance of accurate and truthful information that should be encompassed in an Applicant's founding affidavit in matters brought by Application especially ex parte, cannot be emphasized enough. The court cannot make a finding decision or ruling based on speculation or on the trust that there might be no prejudice to the affected party flowing from the confusing, incongruent or open-ended assertions or omissions. No matter how necessary it might seem the relief sought is. The main foundation of the application being the allegation of facts stated therein; see *Pountas Trustee v Lahanas* 1924 WLD 67 at 68. It is the prerogative of the court to make sure that a party complies with such a responsibility by demanding clarity, notwithstanding whether the application is opposed or not.
- [19] The requirement extends to even circumstances or authorities that might be adverse to the Applicant's case. The litigant must be able to convince the court that such circumstances not detrimental to the granting of the relief sought. It being clear that an Application not only takes the place of a declaration in an action but also essential evidence to be led at trial. It must therefore in ex parte include facts that are necessary for a just and fair determination of the issue in the Applicant's favour. In ex parte *Brand* 1933 (1) PH F49 (C) it was made clear that when bringing an ex parte application in which relief is claimed against another party full disclosure of all the material facts that might affect the granting

or otherwise of an order ex parte must be made. The proviso being that if, however the facts are not material, then the omission to disclose them does not constitute suppression of facts to mislead the court. In *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 349 it was pointed out that the following principles are applicable, extracted from relevant authorities:

"(1) In ex parte applications all material facts must be disclosed which might influence a Court in coming to a decision;

(2) the non-disclosure or suppression of facts need not be willful or mala fide to incur the penalty rescission [ie of the order obtained ex parte];

(3) the Court apprised of the true facts, has a discretion to set aside the former order or to preserve it."

[20] On the curator ad litem, according to r 57 (5) provides:

"Upon his appointment the curator ad litem must without delay interview the patient to inform him of the purpose and nature of the application, unless after consulting a medical practitioner as in r 57 (3) (b), he is satisfied that this would be detrimental to the patient's health. He shall further make such enquiries 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.' (my emphasis)

[21] It is evident that the duties of the curator ad litem have not been fully satisfied. It is the duty of the curator-ad-litem to see that the existence and extent of the prospective defendant's inability to manage his affairs are properly investigated and to do his best to ensure that proprietary and other incidental interests of the patient are adequately protected by the terms of the order made by the court. It may also then make such special order, if any, as the circumstances may warrant in regard to leave for evidence to be given on affidavit, or for the curator to report in writing at the trial, or in regard to any other special question which the particular case may present. *S v Compher* 1951 (3) 248 (CPD) at 252 A-Band G. The court is greatly dependent on the proper exercise of a curator's duties in arriving at a just decision in any particular case. Therefore before such special order is granted the petitioner must satisfy the court that the patient will not be prejudiced.

[22] So it is understood that the curator ad litem's position is a very responsible one as recognized by Watermeyer J in *re Bathgate*

(1858) 3 Searle 1878 that:

""The duty of a curator ad litem (lunacy proceedings) is this, to ascertain, as far as he can, whether what is alleged respecting the individual to whom he is appointed is true or not true, and to endeavor to prove in contradiction to what is alleged by the person stating it as a case of lunacy, that the alleged lunatic is sane and of sound mind. If he finds, he cannot do that, then his duty is to state that in court at all events."

The Applicant and curator ad litem have not succeeded in satisfying the court that the patient will not be prejudiced. What exacerbates the situation is that there are no updated reports to support that the patient or the temporal disability still persists, specifically because the rehabilitation was intended to show results after 2015.

[23] I understand the purpose of this application that it is intended to enable the release of monies in a policy that the patient has got with Momentum which if paid out will settle all their debts which are a mortgage bond on the primary residence, vehicle, credit card and cellphones. It is alleged that Momentum refuses to pay on the basis that the patient will not be able to handle or manage the funds. Neither a letter from Momentum nor a confirmatory affidavit has been attached. The court cannot make out why Momentum would insist on such an allegation being made.

[24] The order to be made is to make sure that all the information the court requires to fulfill its duty in considering the matter properly is before court. More so the duties of the curator ad litem require to be fulfilled to ensure that the patient will not be prejudiced and any of his incidental interest are protected. The real

circumstances of the Appellant must be ascertained, specifically the full financial circumstances of the couple including what has been their source of income since 2015.

[25] Under the circumstances I make the following order:

[1] The matter is referred for oral evidence, specifically for the evidence of Drs Azhar and Boyle and Hilary TiInay to be led viva voce.

N V KHUMALO J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION: PRETORIA

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