

SOUTH AFRICA / JUDGMENT

W.D v Road Accident Fund (12648/2014; 4082/2016; 20263/2013) [2019] ZAWCHC 151 (15 November 2019)

[2019] ZAWCHC 151

COURT

Western Cape High Court, Cape Town

BEFORE

K M Savage

CASE / FILE NUMBER

12648/2014; 4082/2016; 20263/2013

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case

No: 12648/2014

In

the matter between:

WD Applicant

and

THE

ROAD ACCIDENT

FUND Respondent

In

re: the appointment of a Trust to:

CD Patient

Case

No: 4082/2016

IJ Applicant

JJ Minor

Case

No: 20263/2013

OP Applicant

THE

ROAD ACCIDENT

FUND Respondent

MN Patient

JUDGMENT**SAVAGE J:****Introduction**

[1] On 16 August 2019 the above matters came before me in third division. Each matter had been settled by the respondent, the Road Accident Fund, with monies paid in settlement of each claim into the trust account of the applicants' attorneys of record, Boshoff Njokweni Attorneys. In all three matters, the appointed curator ad litem, Advocate Simon Mouton, recommended the appointment of a trust for the benefit of a person (referred to as 'the patient') who had been injured in a motor vehicle accident. In each matter the Master reported on 25 July 2019 that she did not support the creation of a trust and indicated support for the appointment of a curator bonis.

[2] The three matters were postponed to 8 October 2019 in order for the Master of this Court to file supplementary reports by 23 September

2019 and the curator ad litem to undertake "a comparative analysis between the Guardian's Fund, appointment of a curator bonis and creation of a trust" having regard to the costs involved in respect of each option; the requirement for security in respect of each option, including when such requirement may be dispensed with, relevant detail concerning the practical administration of each option and any other material issue.

[3] While the curator ad litem filed an extensive supplementary report in compliance with the order of this Court, the Master simply persisted in a report only made available on 8 October 2019 that the appointment of a curator bonis in each matter was supported given that such person "would be more accountable to her when managing the patient's affairs than a trustee". The detailed report received from the curator ad litem setting out the comparative advantages and disadvantages of the three options was consequently forwarded to the Master for comment. However, to date no response was received from the Master.

CD

[4] The amount paid in settlement of the Road Accident Fund claim instituted on behalf of CD is R880 193,75. Ms CD was born on 5 April 1970 and is unmarried with one child, a 28-year old son, who is the applicant. She suffered a severe traumatic brain injury as a consequence of which she has been diagnosed as suffering from severe neurocognitive dysfunction, visual and emotional difficulties. The curator ad litem reported that, "(a)ccording to Dr Kieck, the patient suffered a severe traumatic brain injury and will have major neurocognitive sequelae"; and Dr Truter stated that she suffered from "severe neurocognitive dysfunction, visual difficulties and emotional

difficulties”. It was reported that Dr Truter supported the appointment of a curator bonis for the patient. The curator ad litem consulted with the patient and her only child, who is the applicant. She has no assets or debts and receives a monthly grant of R1700. She lives with her son in a one-bedroom house together with other people. The applicant has completed grade 9 and operates a tuck shop from their house. Advocate Mouton explained the options of a curator bonis and a trust to them and that they reported that “they would prefer the creation of a trust”.

JJ

[5] R624 500.00 has been paid in settlement of the Road Accident Fund claim of JJ. He is a minor born on 1 February 2009, who lives with his parents. He suffered an injury to his foot and ankle in a motor vehicle accident on 25 September 2013 and no head injuries. His mother is unemployed and has a grade 10 qualification. His father, the applicant, receives a disability grant and his highest qualification is grade 8. The curator ad litem reported that family live in Pelican Park and have no assets nor liabilities. The minor’s parents were consulted, during the course of which the curator ad litem “informed his parents that I was of the opinion that it would be in the best interests of the minor if a professional person was appointed to administer the award. They agreed and I explained the options of a curator bonis or a trust to them. The father informed me...that they would prefer that a trust be formed for the benefit of the minor”.

MN

[6] R843 872,50 was paid in settlement of the Road Accident Fund claim of MN, a 29 year old woman who has two minor children. Ms MN has completed grade 10 and worked as a domestic worker prior to her accident. She has not worked since and has no assets or liabilities. The curator ad litem reported that she had suffered a moderate traumatic brain injury and that a neuropsychologist, Dr Truter, had reported that she “gave the impression of a psychologically vulnerable person and had difficulty in sustaining attention over time (concentration). She further suffers from headaches, photophobia, irritability and short-temperedness”. Ms MN informed Advocate Mouton that “she suffers from memory loss and needs someone to manage her affairs”. Advocate Mouton reported that he explained the options of a curator bonis and a trust to her and that she reported that she “wants a trust to be created for her”.

Supplementary report of curator ad litem

[7] In the supplementary report of the curator ad litem a comparative analysis of the three options was presented, which, when considered

together with other documentary evidence placed before the Court by the applicants’ attorneys indicates the following:

Guardians Fund Curator bonis Trust Interest on investment 8.5% per annum Usually 7 to 8% per annum on unfixed investments; 6% on call investments Investments must be approved by Master, which only guaranteed risk-free investments Anticipated interest rate on investment 11% to 12%

per annum. Use bank appointed financial planner Administration and registration fees None 6% on annual income of estate; 2% on value of capital assets on termination of curatorship No registration fees Fees taxed annually by Master No acceptance fees; trustee fees of 1.21% per year on the value of the trust; 2.3% distribution on the capital released Drafting fee of R3 328.95 (VAT included) and R504.39 per tax return; Stanlib platform and advisor fees Fees not subject to taxation Powers As per Administration of Estates Act 66 of 1965 As determined by Court, on recommendation by Master Appointed over the whole estate of the person Defined in the trust deed, can be wide Trust assets may concern limited property Security None Required in terms of s 77 (1) of the Administration of Estates Act 66 of 1965, unless the court otherwise directs in terms of section 77 (2)(c). Normally exempted where fidelity fund certificate. Reviewed annually by Master Required in terms of s 6 (2)(a) of the Trust Property Control Act 57 of 1988 unless exempted by the Court in terms of section 6 (2)(b). Normally exempted where fidelity fund certificate. Security requirements not reviewed by Master, although asset value may decrease Payments Monthly maintenance payments if stipulated by court order, otherwise quarterly. Other payment requests on prescribed form with supporting documentation usually take 14 working days to process, if approved. On approval by Master with expenses incurred and paid after approval obtained. Monthly maintenance usually approved. All additional ad hoc payments subject to individual approval which takes not less than 3 to 4 weeks. Income and/or capital needs analysis presented to trustees to make provision for maintenance payments. Ad hoc payments dealt with usually on two quotations, with payment possible the same day Communication In writing usually take 14 days Administrative delays with Master's office Speedy and electronic communication possible Control measures Administration of Estates Act S 83(1)(a) Administration of Estates Act Trust deed; Trust Property Control Act; Master as provided Risks/ Disadvantages On majority can apply for payment of benefit. No interest payable after 18. Where 18 with a legal disability, application required for appointment of curator bonis Administrative delays in Master's office. Payment pre-approval takes long. Where curator is unfit or unable to continue, application to remove or substitute is costly (paid from the estate). Tax rate that of natural person No account to Master unless ordered by Court or requested by the Master in terms of s 16(1) of Trust Property Control Act. Wide powers not subject to control of Master Tax rate is higher unless qualifies as a special trust Costs charged to trust, including legal costs, costs in creation of trust not subject to the approval or scrutiny of Master Auditor's fees required to be paid Where dissatisfaction with trustee decisions, no Master oversight Benefits/ Advantages Assets remain in name of person under curatorship Auditor required only in exceptional circumstances Master comments on whether legal fees and disbursements fair and reasonable Curatorship estate can query if not satisfied Master involved when dissatisfaction with decisions of curator bonis

- [8] Advocate Mouton reported in relation to the establishment of a trust that Standard Executors and Trustees had informed him that one trustee from Standard Trust is appointed and that while with a family member or guardian may be appointed as co-trustee this is usually not encouraged. A financial advisor will undertake a needs analysis to establish the patient's long term needs, including a home visit, if necessary, to assist in determining a suitable

investment model via Stanlib. Each trust has a relationship officer and direct contact is available to the patient and his/her family. Given the delays in securing the approval of the Master for payments, the curator ad litem reported that Standard Trust recommended the appointment of a trust. He reported further that from his enquiries it was apparent to him that increasingly appointment as a curator bonis is not accepted by large financial institutions if the capital amount is less than R2.5 million. This appears to be given that the fees earned do not justify the amount of work required in terms of administration.

- [9] Advocate Mouton persisted with his recommendation that the creation of a trust would be more beneficial to the patients. This was stated to be so since the respondent is in each case liable for the fees of a curator bonis or a trust in terms of the s 17(4)(a) undertaking provided; Standard Trust is in possession of a fidelity fund certificate and will normally therefore be exempted from furnishing security; the Court may order the trustee to account to the Master annually; there will be no delays in the payment of benefits to the patient, especially in relation to urgent needs such as medical expenses; and there is greater potential for growth in the value of investments available to trusts, without taking unnecessary risks, are in the best interest of each of the patients.

- [10] From the material placed before this Court by the curator ad litem and the applicants' attorneys it is apparent that in similar recent matters in this division orders have been made permitting the establishment of a trust in respect of funds received in similar

circumstances. In *Ex parte Hiti* (case number 9893/2014) on 6 June 2019 the Master did not object to the creation of a trust where a settlement amount of R470 600.00 had been paid in settlement of a similar claim and the creation of a trust was ordered by the Court; and on 16 July 2019 in *Ex parte Jevu* (case number 1196/2013), although the Master did not support the creation of a trust, the Court nevertheless ordered that R990 000.00 received in settlement be paid into a trust.

Evaluation

- [11] In *Ex parte Herzberg and another*[1] it was noted that before a court interferes with the right of an adult person to control his own affairs, it must be satisfied, on a proper enquiry that the mental condition of that person is such as to justify interference of this kind.
- [12] The position of a curator ad litem appointed by the court "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".[2] Faced with an application in terms of rule 57 of the Uniform Rules of this Court for an order declaring another person (the patient) "to

be of unsound mind and as such incapable of managing his affairs”, the Court will consider ordering the appointment of a suitably qualified curator bonis, following the receipt of reports from the curator ad litem and the Master, and if it is satisfied that the patient should to be protected against loss because of his or her inability to manage affairs.[3] As was made clear in *Ex parte Klopper*: In re Klopper,[4] “a Court will not appoint a curator bonis until it is absolutely satisfied that the patient has to be protected against loss which would be caused because the patient is unable to manage his affairs”.

[13] This required, in respect of the matters of CD and MN, that the existence and extent of their mental capacity be properly investigated by the curator ad litem. This must be done through making whatever enquiries are deemed necessary, to place the curator in a position to make a recommendation to the court regarding whether the patients should be declared incapable of managing their own affairs; and if so, provide recommendations as to how to ensure that the proprietary and other interests of the patient, if requiring protection, are adequately protected by the terms of any order made by the Court.[5]

[14] The first issue for the Court to determine is whether there is sufficient material before it to permit a finding that the patients are incapable of managing their own affairs. Advocate Mouton reports that Dr Kieck, supported by Dr Truter, indicate that CD has suffered a severe traumatic brain injury with “major neurocognitive sequelae” and the patient is incapable of managing her own affairs. From the material before this Court, this appears to be so.

[15] The curator ad litem reported that neuropsychologist Dr Truter indicated that MN had suffered a moderate traumatic brain injury and that “gave the impression of a psychologically vulnerable person” who suffers from headaches, photophobia and irritability. Photographs in the record indicate the extent of the head injury suffered by Ms MN, who informed Advocate Mouton that “she suffers from memory loss and needs someone to manage her affairs”. Whilst it would have been preferable to have further detail put up regarding the ability of Ms MN to manage her affairs and for the curator ad litem to have more carefully considered this aspect given that she is mother to two children, on her own version she accepts that she requires assistance to manage such affairs. I am therefore satisfied that both CD and MN have been shown incapable to manage their affairs.

[16] Turning to whether a trust should be created or a curator bonis appointed to manage the affairs of the two adult patients, it is an important consideration that the Master has repeatedly not supported the creation of a trust on the basis that she has supervision over curatorships in terms of the Administration of Estates Act 66 of 1965 and that the powers granted to the curator bonis are “usually subject to the approval of the Master”. The Master states that she holds no objection to the nominee of Standard Trust being appointed as curator bonis, nor an objection to security being

dispensed with for such curator bonis. The Master expresses concern that she does not have direct and constant supervision over trusts.

[17] Whilst the respondent has granted an undertaking, which will apparently cover the fees and costs in respect of the capital and the

administration costs and charges incidental to the formation of the trust, it is matter of concern that these fees are not subject to not subject to taxation by the Master. I am not persuaded that the provision of an annual account to the Master is sufficient protection against the risk of inflated costs and whilst the provisions of the trust deed and the Trust Property Control Act provide constraints, it appears to me that the Master is able to exercise greater controls over the performance of the functions of a curator bonis. I accept Advocate Mouton's reported concerns regarding delays in the Master's office, concerns which have been evidenced even in the current matter, but I am not satisfied that these delays provide sufficient reason to do away with the closer oversight role which the Master is able to perform where a curator bonis is appointed. It is material that where there is dissatisfaction with the conduct of a curator bonis, the Master provides oversight. No such similar protection exists in the circumstances of a trust. I am aware that recently orders have been made in this division permitting the creation of trusts in circumstances in which the settlement amounts paid are also under R1 million. However, it is my view that careful regard should be had by the Court to the quantum of the settlement paid and in the current circumstances, I am not persuaded that, considered together with the issues set out above, the costs of establishment of a trust, which are not subject to the Master's close scrutiny, is an appropriate mechanism for ensuring the proper management of such funds when a curator bonis may undertake such role. An annual account to the Master does not solve this difficulty and the fact that the respondent has undertaken to pay costs is not a sufficient basis for approving the formation of trust in circumstances in which the result may well be to saddle the Road Accident Fund with higher costs when less may have been possible.

[18] For all of these reasons I consider is appropriate to appoint a curator bonis to manage the affairs of both CD and MN. The application before this Court is for the appointment of a trust. Having determined that both patients are incapable of managing their affairs, it appears to me that this Court is empowered to consider the nature of the appropriate mechanism to be put in place to manage the patients' affairs in such circumstances. This is so even where the on the application before me it is only the formation of a trust which is sought if the patients' incapacity is determined. For these reasons, and in order to limit costs, I sought from the applicants' attorneys in the CD and MN matters that the necessary steps were taken to identify an appropriate curator bonis and obtain from such curator the necessary consent to act. This was provided on 14 November 2019. In both matters, there appears no reason why the proposed curator bonis should not be appointed subject to the powers and functions ordinarily specified by the Master.

[19] Turning to JJ, a minor, the appointment of a curator bonis to the property of a minor who has a guardian creates an overlap and sometimes tension with guardianship given that generally the management of the minor's property is the preserve of his

guardian.[6]. It has previously been cautioned that given “the nature of inroads the curatorship makes to the relationship between the minor and the guardian the court should not lightly grant this application unless satisfied that the guardian is not capable of looking after the minor’s estate. As to when the court will be so satisfied depends on each case. Generally this will be a factual enquiry”.[7]

[20] Advocate Mouton reported that he informed the minor’s parents that he was of the opinion that it would be in the best interests of their son that a professional person be appointed to administer the settlement amount. He reported further that he explained some options to them and the father informed him that they would prefer that a trust be formed for the benefit of the minor. There is no indication in the report of the curator ad litem that the J family was informed what the long term consequences of the establishment of a trust would be or that the Guardian’s Fund may provide a route which secured the settlement amount until their son reached the age of majority. Having regard to the settlement amount of R624 500.00, the nature of the minor’s injuries, the absence of mental incapacity and the interests of the minor, it is in my view appropriate for the settlement sum to be paid into the Guardian’s Fund in order that the minor may have access to the funds on reaching

majority. In this regard, I have taken note of the interest rate that will be earned on such funds and manner in which the Fund approaches monthly and other payments. I remain unpersuaded that it is necessary for the funds to be locked up in a trust or made subject to the costs and administrative constraints of a curator bonis in the circumstances of this matter.

Order

[21] In the result, the following orders are made:

1. In case number 12648/14:
 - (a) The patient, Ms CD, is declared incapable of managing her affairs.
 - (b) Ms Beverley Lynn Jackson, an employee of ABSA Trust Ltd and as such a nominee of ABSA Trust is appointed curator bonis over the affairs of the Ms CD, subject to the powers and functions set out in Annexure “A”.
 - (c) ABSA Trust is exempted from providing security to the Master of this Court.
 - (d) The respondent, the Road Accident Fund, is to pay the costs of this application and the application for the appointment of curator ad litem on the scale as between party and party, as taxed or agreed, plus VAT, including the qualifying expenses of any expert witness used in such application as assessed and allowed by the taxing master.
 - (e) The respondent is to pay the costs of the curator ad litem on the High Court scale as between party and party, as taxed or agreed, plus VAT.
2. In case number 4082/2016:

- (a) The funds paid out in settlement of the Road Accident Fund claim of the minor, Mr JJ, are to be paid into and administered by the Guardian's Fund.
 - (b) The respondent, the Road Accident Fund, is to pay the costs of this application and the application for the appointment of curator ad litem, on the scale as between party and party, as taxed or agreed, plus VAT, including the qualifying expenses of any expert witness used in such application as assessed and allowed by the taxing master.
 - (c) The respondent is to pay the costs of the curator ad litem on the High Court scale as between party and party, as taxed or agreed, plus VAT.
3. In case number 20263/13:
- (a) The patient, MN, is declared incapable of managing her affairs.
 - (b) Ms Beverley Lynn Jackson, an employee of ABSA Trust Ltd and as such a nominee of ABSA Trust, is appointed curator bonis over the affairs of Ms MN, subject to the powers and functions set out in Annexure "B".
 - (c) ABSA Trust is exempted from providing security to the Master of this Court.

K M SAVAGE

Judge of the High Court

Date of hearing: 16 August 2019 and 8 October 2019

Date of judgment: 15 November 2019

Appearances:

Applicants: Mr P McKenzie

Instructed by Boshoff Njokweni Attorneys

ANNEXURE "A"

- a) To sell any property belonging to the patient;
- b) To make exchange or partition of any property belonging to the patient or in which he/she is interested, and give or receive any money for equality of exchange or partition;
- c) To carry on or discontinue any trade, business or undertaking of the patient;
- d) To grant leases of any property of the patient;
- e) To perform any contract relating to the property of the patient entered into by the patient before he become mentally disordered or defective;

f) To exercise any power or give any consent required for the exercise of any power where the power is vested in the patient for his own benefit, or the power is in the nature of a beneficial interest in the patient;

g) To raise money on mortgage of the patient's property for payment of her/his debts or expenditure incurred for the patient's

maintenance or otherwise for his benefit, or for payment of, or provision for, the expenses of his future maintenance.

h) To apply any money for or towards the maintenance or the benefit of the patient;

i) To expend money in the improvement of any property of the patient by way of building or otherwise;

j) To expend any moneys belonging to the patient in the maintenance, education, or advancement of the husband/wife of the patient or of any relative of the patient or of any person wholly or partially dependant on the patient or continue such other acts of bounty or charity exercised or promised to be exercised by the patient as the Court or the Master having regard to the circumstances and the amount or value of the estate of the patient considers proper and reasonable;

k) To invest moneys of the patient which may be available for investment;

l) To take any proceedings which may be necessary in the interest of the patient or the due and proper administration of his property;

m) To make such report concerning the patient's estate to the Court or to the Master as the Court or Master deems fit.

The above powers are subject to the approval of the Master of the High Court.

ANNEXURE "B"

[1] 1950 (2) SA 62 (C).

[2] Ex parte Glendale Sugar Millers (Pty) Ltd 1973 (2) SA 653 (N) at 659N.

[3] Ex parte Klopper: in re Klopper 1961 4 All SA 140 (T); 1961 3 SA 803 (T) 805.

[4] 1961 (3) SA 803 (T) at 805E.

[5] See Ex parte Campher 1951

(3) SA 248 (C) at 252C.

[6] Ex parte Oppel and another in re: appointment of curator ad litem and curator bonis [2002] 2 All SA 8 (C) at 12.

[7] Supra.

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