Reportable

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE – PORT ELIZABETH

Case No: 2310/07
Date Heard: 18/10/10
Date Delivered: 01/02/11

In the matter between

LESLEY PATRICK PILLAY Plaintiff

and

LINDOOR & NOGCANTSI Defendant

JUDGMENT

REVELAS J

[1] This matter concerns a disputed application for a curator *ad litem* which fell to be determined in a hearing held in terms of the provisions of Rule 57(a) of the Uniform Rules of Court. The applicant is Mrs Ellie Pillay, the mother of the plaintiff, who instituted an action for damages against his erstwhile attorneys firm (the defendant) for alleged professional negligence in dealing with a claim for damages against the Road Accident Fund ("the Fund").

[2] On 27 July 1994 the plaintiff, as a pedestrian, sustained certain head injuries in a motor vehicle accident. The defendant thereafter issued summons against the Fund claiming damages on the plaintiff's behalf, and later represented him in settlement negotiations. On 24 April 1998, the plaintiff signed the discharge form forwarded by the Fund, accepting payment of the amount of R10 438.18 in full and final settlement of the matter.

[3] The plaintiff based his claim against the defendant in the present matter on the assertion that the amount paid in full and final settlement of his claim was paltry, compared to what he was actually entitled to by virtue of the nature of his injuries, which included permanent frontal lobe brain damage. The defendant pleaded prescription to the plaintiff's claim in a special plea.

[4] On 10 November 2009, Mr PAW Scott SC, a member of the Port Elizabeth Society of Advocates, was appointed a curator *ad litem* for purposes of interviewing the plaintiff and reporting on the plaintiff's capacity to conduct his own affairs and whether the plaintiff would need a curator *ad litem* to prosecute the present litigation. In his report filed on 13 August 2010, Mr Scott expressed the view that the plaintiff did not require such assistance, but qualified his opinion with the recommendation that in the event of the applicant persisting with her application, the court should hold a hearing in terms of Rule 57(9). In his report Mr Scott noted that the plaintiff himself had informed him that he did not require such assistance.

[5] On the day of the trial hearing, when the defendant's special plea of prescription would have been adjudicated, an application was brought by the plaintiff for the matter to be postponed *sine die*. The reason advanced for the postponement was to enable the applicant to invoke the provisions of Rule 57(9) of the Rules of Court so that the oral evidence of expert witnesses could be led with regard to the plaintiff's mental capacity. The plaintiff's attorney, who deposed to the founding affidavit in support of the application for postponement, stated that because the plaintiff's expert witnesses had expressed the opinion that the plaintiff was incapable of making the necessary decisions to conduct the litigation in question, the appointment of a curator *ad litem* was necessary.

Accordingly, he could not take instructions from the plaintiff until such time as the curatorship application was adjudicated. The applicant also sought a punitive costs order against the defendant for its alleged intransigence in not adhering to the plaintiff's written request (dated 29 September 2010) for a postponement.

[6] Before the hearing of the postponement application commenced, the plaintiff's legal representatives made a proposal that instead of postponing the matter, I should rather entertain the adjudication of the curatorship application since the application for postponement had been withdrawn.

[7] This proposition was opposed on the basis that the defendant had come to court prepared for defending a damages claim and not to oppose the curatorship application. I made a ruling in favour of the applicant and the plaintiff for the following reasons:

7.1 There was no basis upon which I could ignore the applicant's insistence on the appointment of a curator *ad litem*. Even though Mr Scott's report has strong persuasive value, his recommendations against the appointment of a curator are not cast in stone and besides, he himself advised that a Rule 57(9) hearing should be held in the event of the applicant persisting with her application.

7.2 It would certainly be in the interests of expediency if the remaining trial days were to be utilized to entertain the curatorship application which could obviously not be entertained on the Motion Court roll, because oral evidence had to be led. The application was not heard at a sooner date since the curator's report was only filed at court two months before the hearing. Also, both parties were in agreement (and

it is also a matter of practical logic), that the curatorship application be dealt with first.

7.3 Summons was issued on 16 October 2007, more than nine years after the claim against the Fund was settled. The plaintiff, in his replication to the defendant's special plea of prescription, denied that his claim had prescribed in terms of the provisions of the Prescription Act No 68 of 1969 ('the Act') and pleaded that prior to August 2007, he did not have knowledge of the identity of the defendant "and/or the facts from which his claim against the [d]efendant arises" and that accordingly, prescription did not commence to run until August 2007. In the alternative the plaintiff pleaded that, "by virtue of his mental incapacity at all relevant times the completion of prescription was delayed in terms of the provisions of Section 13(1) of the said Act", which provides (in sub-section 13(1)(a)), for the delay of prescription where *inter alia*, the creditor is insane or is a person under curatorship. Essentially the same issues would be canvassed in the Rule 57(9) hearing, as during the adjudication of the special plea. Therefore, the defendant would suffer no prejudice. The evidence of the witnesses who would also testify in respect the necessity or otherwise of a curator *ad litem*, would also testify in relation to the special plea and more importantly, these witnesses were all available to testify.

[8] Accordingly, I made a ruling that the trial be postponed and that the hearing on the necessity of a curator *ad litem* be proceeded with.

[9] The defendant, who vehemently opposed the application, contended that, not only did the plaintiff evidently not need the assistance of a curator *ad litem*, but the applicant's insistence on

such an appointment was primarily motivated by an intention to foil the defendant's special plea of prescription to the plaintiff's damages claim in the amount of R3 993 404.60.

[10] When the hearing was then proceeded with, the applicant, through her counsel, led the evidence of the following four witnesses: A neurosurgeon, Dr Edeling, a psychologist, Ms Coetzee, the applicant herself and a co-employee and supervisor of the plaintiff, Mr Harry. The defendant called two witnesses: A psychologist, Mr Eaton, and a Mrs Straton, the branch manageress in charge of the courier business in Port Elizabeth where the plaintiff is still employed.

[11] The primary enquiry envisaged in Rule 57, is one into the mental capacity of a person who is described as "the patient". Subrule (2)(e) requires an applicant to set forth facts and circumstances to show that "the patient is of unsound mind and incapable of managing his affairs". Subrule 5 requires a curator *ad litem* (such as Mr Scott in this case) to set out facts in respect of "the patients mental condition". Subrule 10 makes provision for a declarator that the "patient is of unsound mind".

[12] A "patient" as referred to in the rule need not be bereft of all reason. The mental capacity of a person may vary from time to time "but at all times it remains a question of fact" (Pienaar's v Curator 1930 OPD 171 at 174).

[13] Most of the authorities on curatorship deal with the necessity to appoint a curator *bonis*, and not a curator *ad litem* to assist in litigation. In *Jonathan v General Accident Insurance Co of South Africa* 1992(4) SA 618, the question of the *locus standi in iudicio* of a plaintiff who sustained brain damage in a motor vehicle collision was considered. The plaintiff's short term memory was severely

impaired and a clinical examination of the plaintiff by a clinical psychologist resulted in findings that she was unable to control impulsive behaviour, and that she had an IQ of only 54 and performed at the level of an eight year old child. The defendant in that case, contended by way of special defence that, because of the plaintiff's brain damage, which resulted in her being able to understand proceedings only at a basic level, she lacked *locus standi*. The defendant's special plea was upheld.

[14] The court in held that in order to have *locus standi in iudicio*, a party must be able to manage his litigation in the sense of being able to understand the proceedings at a level which is sufficient to enable him or her to play a useful and constructive role during the proceedings, by giving proper instructions to his legal representatives and to make rational decisions.

[15] The plaintiff's counsel in *Jonathan* submitted that if understanding at more than a basic and concrete level is required, many unsophisticated litigants and even quite a number of litigants who are not so unsophisticated, will not have *locus standi*. The point was made that many plaintiffs did not understand expert testimony, knew nothing of the apportionment of damages and often did not understand basic legal principles. This argument was also advanced in the present matter and featured in my own thinking when considering the matter. Brand AJ (as he then was) observed at 624 F-G that the answer lay in the "distinction between lack of *knowledge* and lack of *the mental capacity to understand*" and he observed as follows:

> "In my view, most litigants, sophisticated or otherwise, have the mental capacity to understand and to give meaningful instructions to their legal representatives . . . when these litigants have been provided with the necessary information

> by their legal and/or other advisers. The fact that many litigants will be unable to understand many aspects of litigation unless they are properly advised, therefore, does not in itself justify the acceptance of the principle that the capacity to understand litigation at a basic level is sufficient to establish the capacity to litigate".

[16] At 625 A-B of his judgment, the learned judge also accepted that there was a close correlation between the criminal law requirement for an accused to understand proceedings so as to be able to make a proper defence, and the test for a capacity to litigate. Support for this proposition he found in *Persone en Familiereg* at 334 and 378 and Joubert (ed) *The Law of South Africa* volume 20, paragraph 194. Ultimately, the mental ability to make rational decisions and give proper instructions to the legal representative concerned, were held by the learned judge to be the primary considerations in determining the *locus standi* of a patient with a brain injury (at 626 D-E of the judgment. See also: *Theron VAA Life Assurance Association Limited* 1993(1) SA 735(C)).

[17] In this matter it was common cause that as a result of the accident the plaintiff had sustained multiple cranio-facial fractures, a primary diffuse brain injury with a Glasgow Coma Scale of 9/15. There was a recorded impairment of consciousness for days after his accident and persistence of post-traumatic amnesia for more than eight days, a multifocal brain injury with initial cerebral swelling and eventual cerebral atrophy and gliosis (scarring).

[18] All of the aforesaid resulted in permanent frontal lobe brain damage and the plaintiff consequently suffers from epileptic seizures, recurrent and severe headaches, and dizziness when experiencing these headaches. The seizures and headaches often cause the plaintiff to be absent from work despite treatment.

[19] Dr Edeling, the neurosurgeon who assessed the plaintiff, testified that the plaintiff's situation was getting worse since there was permanent neurological damage, and over time gradual neurological deterioration would occur. In addition he anticipated that the plaintiff's ability to apply his retained intellectual capacity will be jeopardised by less readily quantifiable executive mental impairment and fatigue, as well as by mood and personality factors. He further said that the plaintiff was not capable of properly instructing his legal representatives and was not capable of giving reliable evidence in court. Dr Edeling recommended the appointment of a curator *ad litem* for the plaintiff.

[20] Ms Coetzee, on neuro-cognitive testing, found the plaintiff to have an impaired memory, fine motor slowing, a significant drop in verbal productivity, executive dysfunction and mood changes commonly associated with frontal lobe dysfunction. Persons suffering from the latter condition was often described as "the walking wounded". Despite appearing to others as though they are functioning relatively normally, persons with frontal lobe dysfunction, she told the court, are in reality functioning at a far lower level. Ms Coetzee also consulted with the branch manager two co-workers of the plaintiff (Mrs Straton, Mr Harry and Mr Dlamini). They informed Ms Coetzee that the plaintiff often suffered from headaches and epileptic seizures which caused him to be absent from work.

[21] Ms Coetzee testified that a stressful environment such as a Court room would render the plaintiff unable to make rational decisions and would cause him to drop into passivity. Consequently she recommended that a curator *ad litem* be appointed.

[22] Mr Eaton, the clinical psychologist who testified on behalf of the defendant, gave the opinion that the plaintiff presented as a "well functioning adult", able to manage his affairs. According to his report there was clinical evidence which suggested a severe underlying reactive depression or affective mood disorder. On a form completed by the plaintiff and his employer, the answers suggested that the plaintiff was able to manage his personal affairs but required assistance when he experienced epilepsy and severe headaches. Mr Eaton also consulted with the plaintiff's uncles and an aunt. According to them he slept a lot, was stubborn, slowed down in his mental reactions, forgetful and he sometimes confused the days of the week.

[23] Variability in the plaintiff's performances across different subtests suggested an acquired neurophysiological functioning deficit. Mr Eaton also agreed with the description of persons with frontal lobe syndrome as being "the walking wounded" and identified a number of symptoms and deficits usually associated with frontal lobe syndrome in respect of the plaintiff.

[24] It was also common cause in this case that the plaintiff could conclude contracts. He purchased a car, albeit with the advice and assistance of his uncle. He also got engaged to a girl almost on impulse, but broke off the engagement when his mother became upset about it. He also entered into negotiations with the jewellers in question to return the engagement ring. He managed his own salary and he still advances money to his mother, the applicant, who is dependant on his financial contribution towards the household. The plaintiff lives with her.

[25] The plaintiff's current employer attempted to have him boarded on the basis that due to his head injuries his work

performance was impaired. The claim was rejected by the insurance company concerned.

[26] Mrs Straton, the branch manager of the courier firm where the plaintiff is employed as a data capturer, testified that the plaintiff's work is of a routine nature and that he works under the supervision of two immediate supervisors. She testified that the plaintiff is required to attend certain tasks within time frames and that the quality and speed of his tasks are inconsistent. She also testified that the plaintiff was at some stage interested in being transferred to East London and sought her advice in the matter. This fact must be assessed in the light of the fact that the plaintiff used to live with his uncle in East London (the one who assisted him in buying a car) when he was employed by Walton's, a company that sells stationary. Mrs Straton advised him against the transfer.

[27] Mr Harry, the plaintiff's immediate supervisor corroborated the evidence that the plaintiff's work performance was variable and that he would take a few days off work from time to time, when he had headaches and seizures. The plaintiff's regular absence was a problem in his work place and the subject of several disciplinary measures taken against him. Mr Harry testified that the plaintiff was aggressive and defensive when he was confronted with criticism of his work performance.

[28] The applicant's testimony of the plaintiff's mood swings, obstinacy, excessive sleeping and depression, was borne out by the expert witnesses of both parties. She disputed Mr Scott's report insofar as he noted that he had a consultation with her. I do not accept her evidence in that regard. However, her evidence insofar as her testimony corresponds with other evidence led, should not be rejected for that reason alone. I also bear in mind that the applicant has a considerable interest in the appointment of a curator *ad litem*,

based on the plaintiff's inability to make rational decisions. Her evidence on his mental capacity must be evaluated in that context.

[29] The fact that the plaintiff is gainfully employed and able to manage his day to day affairs and evidently does not need a curator *bonis* renders my decision in this matter a difficult one.

[30] In the *Jonathan* matter, where the plaintiff had the mental capacity of an eight year old with an IQ of below 60, the plaintiff quite understandably required the assistance of a curator *ad litem*. She could not take rational decisions in prosecuting litigation. In the present matter, the nature of the plaintiff's brain injury is common cause. He suffers (as did the plaintiff in *Jonathan*) from frontal lobe damage. The two psychologists who testified at the hearing agree that persons such as the plaintiff are generally referred to as "the walking wounded". Their clinical observations are largely the same. Yet they could not agree on whether the plaintiff needed the assistance of a curator *ad litem* in prosecuting litigation. The fact that the plaintiff is gainfully employed seemed to be the primary consideration in the argument against appointing a curator *ad litem*. That factor indeed renders this matter somewhat complicated. However, it is not unprecedented. In *Harcourt NO* v *Road Accident Fund*, reported in *The Quantum and Damages in Bodily and Fatal Injury Cases*, Corbett and Honey, Vol V (2000) (NC) p B 4 – 29, the plaintiff, with similar brain injuries as in the present matter, was employed, carrying on routine tasks under supervision. The Court had nonetheless appointed a curator *ad litem* for him to assist him in prosecuting his claim against the Fund.

[31] The appointment and services of a curator *ad litem* are costly. The appointment of one is not a mere matter of applying to court for an appointment. An applicant seeking such an appointment must demonstrate the necessity therefore, based on the "patient's"

ability to give proper instructions to his legal representatives and make rational decisions.

[32] The curator *ad litem* appointed to report on this question (Mr Scott) did not unequivocally advise against the appointment. He recommended a hearing if the application was persisted with. Mr Scott's recommendation was largely based on considerations of the plaintiff's management, of his day to day life, and financial affairs.

[33] The plaintiff's relatively undemanding position as a data capturer at a fixed salary with an understanding employer, is significant in assessing his capabilities as a litigant. In my view, the nature and content of his work do not present great challenges for the plaintiff in making day to day financial decisions. Living with a protective mother who supervises his personal life is also significant in this assessment. The plaintiff leads a very protected life. His mother intervened in almost all of his disputes with his employer and in his engagement. Given the plaintiff's structured work and home environment, it is not difficult to understand why he does not need a curator *bonis*, notwithstanding his frontal lobe damage and its particular consequences.

[34] Mr Eaton's opinion on the desirability of appointing a curator *ad litem* for the plaintiff must be evaluated against the background that he was instructed to asses whether a curator *bonis* had to be appointed for the plaintiff. The distinction between a curator *bonis* and a curator *ad litem* is not a negligible one. Whereas the plaintiff evidently does not need the former, the same cannot be said with any confidence about the latter in this matter. Ms Coetzee was very clear about her prediction that outside of his structured work and home environment, the plaintiff will not be able to cope in a stressful court environment.

[35] On all the evidence presented by the witnesses for both sides, I must accept that the plaintiff will, at least from time to time, suffer headaches, epileptic seizures, and fall into long bouts of sleeping in the aftermath of the seizures, during which he would be unable to make rational decisions. That these episodes will occur in future is a certainty. Should they occur at very crucial stages of the litigation embarked upon by the plaintiff, he will be prejudiced. Dr Edeling opined that this position will deteriorate and this evidence was not disputed in this regard. The fact that the plaintiff may on good days be capable of acting unassisted, is not an indication of automatic *locus standi in iudico*. He might require protection for those days when he will be afflicted by the effects of his frontal lobe injury.

[36] Even though the plaintiff experiences more normal days than ones when he is afflicted by headaches, seizures or their debilitating aftermath, no expert can predict with certainty how the plaintiff will fare during litigation and on how many days he will be completely unable to give meaningful instructions to his legal representatives. If his seizures occur in the middle of a trial or at a crucial point in the litigation, his ability to make a meaningful contribution to the litigation in question would definitely be impaired in the sense envisaged in the *Jonathan* and *Theron* cases. Even though there is uncertainty, I would rather err on the side of caution and rule that a curator *ad litem* be appointed to assist the plaintiff in the current litigation.

[37] The defendant raised an objection of a procedural nature to the appointment of a curator *ad litem*. It was argued that the application is defective in that it was not supported by affidavits from two practioners. Rule 57 is not peremptory, but couched in permissible terms as the words “if possible” clearly demonstrate. Since a full hearing was held any of the procedural requirements in Rule 57(4) could be dispended with. In any event, the *sequelae* of

brain injuries are very often, if not routinely, investigated by psychologists. If the absence of one more affidavit is indeed a defect, in that I misinterpreted the rule, then that defect is condoned.

Costs

[38] The application for postponement was withdrawn and the applicant then proceeded with her application for the appointment of a curator *ad litem*. Even though the court day was not wasted in the sense that the curatorship hearing was dealt with instead of the defendant's special plea, the defendant nonetheless incurred costs in opposing the application for postponement. The drafting and filing of an answering affidavit and preparing to oppose the application all bear certain costs. If the plaintiff had indicated sooner that it was going to apply for a postponement and then for a ruling that a curatorship hearing take place, the defendant might have dealt with the matter differently. Accordingly, the defendant is entitled to its wasted costs of the application for postponement. Insofar as the opposed curatorship application and hearing is concerned, costs should follow the result.

[39] Having found that a curator *ad litem* should be appointed to assist the plaintiff in his action for damages against the defendant, I am nonetheless not in a position to appoint one, since no curator has been nominated. This ought to be done soon and the nominee's powers should be formulated before approaching the court for his or her appointment.

[40] In the event, I make the following order:

1. A curator *ad litem* is to be appointed to assist the plaintiff in his action against the defendant.

2. The applicant shall forthwith nominate a person to act as curator *ad litem* for the plaintiff and formulate the powers of such a nominee in the court application for the appointment of her nominee, who shall indicate his or her willingness to act as curator *ad litem* on affidavit.

3. The defendant is to pay the costs of this application for the appointment of a curator *ad litem.*

4. Dr Edeling and Ms Coetzee are declared necessary witnesses.

5. The plaintiff is to pay the defendant's costs of his application for the postponement which was subsequently withdrawn.

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E REVELAS
Judge of the High Court

Appearance for Plaintiff:	Adv Corbett
Instructed by:	Malcolm Lyons & Brivik Inc c/o Kaplan Blumberg
Appearance for Defendant:	Adv Beyleveld
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