

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO:

- (1) REPORTABLE: /NO
(2) OF INTEREST TO OTHER JUDGES: /NO
(3) REVISED. NO

.....
SIGNATURE

DATE: 3 May 2022

11881/2021

In the matter between:

TSHALET; MANYEWE ELIZABETH

APPLICANT

(ID No: 750201 0489 084)

And

SYDWELL MOSUNGWA

RESPONDENT

GQWEDE ATTORNEYS

INTERVENING PARTY

In re:-

TSHEPO TSHALITE

THE PATIENT

(ID No: 940520 5653 084)

JUDGMENT

MANOIM J

- [1] In this matter the applicant seeks an order to remove the respondent as *curator ad litem* for her brother and to replace him with another.
- [2] The respondent, an attorney vigorously opposes his removal.
- [3] The person whose interests are central to this litigation is Tshepo Tshalite. I will refer to him from now on, as the patient - as the parties have done. It is common cause that due to mental incapacity; the patient, despite being a major - is incapable of managing his own affairs.
- [4] It is necessary to go back in time to explain the present litigation. The patient was born in 1994. The patient 's mother died when he was very young and his father abandoned him. He was first placed in a Children's Home at the age of four and then in 2002, he was placed in foster care with a married couple. The couple got divorced and he remained in the care of the wife, Ms Mmakgomo Jenivah Ramokgopa (his foster mother).¹
- [5] On 3 December 2002, the patient was a victim of a road accident. His foster mother instructed the firm of Mothuloe Attorneys to represent him in an action against the Road Accident Fund (RAF). The RAF settled the merits accepting 100% of the liability. The merits and quantum were duly separated in terms of Rule 33(4) of the Uniform rules.

¹ Note her married name was Nkosi but after her divorce she reverted to her maiden name. This explains why some of the documents referring to the case are in the name of Nkosi.

- [6] The foster mother then instructed a new firm to represent the patient, Gqwede Attorneys.
- [7] Two claims for damages were then made – for general damages and for loss of earnings.
- [8] On 7 June 2017 the RAF made an offer of R 600 000 to settle the general damages. This correspondence is attached to the founding affidavit. On it, is a manuscript note - apparently subtracting a 25% fee and VAT leaving a balance of R 427 500.
- [9] According to the applicant only this balance was paid out. It was paid to the foster mother and only in April 2018.
- [10] This is when the respondent becomes involved.
- [11] On 5 September 2017 the respondent was appointed as *curator ad litem* to the patient.
- In terms of clause 1.3 of the order the respondent was required: -
- To conduct such litigation on behalf of the minor child to its finalization and determination;*
- And then in clause 1.4 to:
- To negotiate, but not to settle the action without prior approval of Judges;*
- [12] This means, according to the applicant's version, the offer had been paid at time when the respondent had already been appointed. It is not clear from the record, when the offer was accepted.
- [13] On 31 May 2018, Gqwede received a further offer from the RAF to settle the future loss of earnings claim. This offer was for R 621 343.60 and appears to have been accepted by an employee of the Gqwede firm.
- [14] At this point in time the foster mother decided to terminate the mandate of Gqwede and instruct the firm of Bove attorneys, who now represent the applicant in this matter. (Bove had previously acted in this matter earlier on, having had it referred to them by

Muthuloe but apparently this mandate was terminated when the foster mother then instructed Gqwede)

[15] Various e-mail exchanges between Bove and the respondent and Gqwede followed, in which Bove attempted to find out if the respondent had accepted the offers of settlement and whether he had done a curator's report. Nothing came of this request. The respondent apparently took the view that he was not authorised to respond to Bove without a mandate from Gqwede.

[16] In July 2019, the applicant now enters the picture. The patient had become unhappy living with the foster mother and decided to move in with his sister where he now currently resides. By this stage he was already a major, having reached majority in 2012, thus 10 years after the accident.

[17] The applicant then consulted with Bove herself, indicating she was unhappy with the foster mother who had not kept her in the loop on the litigation and whether the money had been paid by the RAF.

[18] Then things took a strange turn. The foster mother, now the party instructing Bove, made a dramatic confession. She had received payment of the R 427 500 from Gqwede but had spent some of that money on her own needs. Bove explained this was illegal. The money was not hers to spend. The foster mother became very distressed and then withdrew Bove's mandate to act and instructed Gqwede again.

[19] The applicant was then advised by Bove to get more information from Gqwede before she decided what further steps to take. She did not receive any satisfaction from these enquiries and in 2020, instructed Bove to represent her hence the present action.

[20] In a further twist to this tale, the foster mother now provides a supporting affidavit to the applicant's founding affidavit.

[21] The reason why the patient requires *curator ad litem* is because he is cognitively impaired.

It is less clear whether he always was or whether this was as a result of the accident on which his claim against the RAF is based. I return to this issue later.

- [22] The respondent opposes the application. In his affidavit he largely relies on disputing the applicant's *locus standi* to bring this application. He went as far as to challenge her claim to be the elder sister of the patient. (In her replying affidavit the applicant gives details to confirm her status as the sister).
- [23] He was brief on the merits claiming that most of the information was not within his knowledge. He was not involved in the settlement of the general damages as he had not yet been appointed. As for the loss of earnings he says this is something he is still working on and that it is nearly finalised, although no detail is given.
- [24] But he then enters the debate around the plaintiffs' impaired mental capacity. He denies that this was as a result of the accident. This is a significant fact which will influence the extent of the quantum.
- [25] The attorney Gqwede, filed an application to intervene in the matter. However, when the matter came before me he neither appeared or was represented by anyone else. He also raises a *locus standi* point.
- [26] In his affidavit in the intervention application, Gqwede admits having received the payment for general damages from the RAF. He states that the offer was received on the instructions of the respondent and the foster mother. He states that the respondent had concluded a curator's report. He attaches this to his affidavit.
- [27] As to the loss of earnings claim, he states that the offer was accepted by him on the instructions of the respondent and the foster mother but that the payment had yet to be paid by the RAF.
- [28] He again asserts that the plaintiff's cognitive impairment was not a result of the accident but emanates from birth.
- [29] I now consider briefly what is stated in the purported curators report.

Curators purported report

- [30] What purports to be the report is both undated and unsigned. Moreover, in his answering affidavit the respondent makes no mention of it.
- [31] Its content is an evaluation of the expert reports then extant (both done on behalf of the patient and the RAF). It recommends the acceptance of both offers (general damages and loss of earnings) and the creation of a Trust for the benefit of the patient.
- [32] In the report he (if he is the true author) the respondent states the following:
- "I authorised Gqwede attorneys to effect payment into the account of [the foster mother] for the renovation of the house and bettering of the patient's living conditions. An amount of R 427 500 was transferred into the banking details of [the foster mother on 10 April 2018]*
- [33] The report goes on to state that to the best of his knowledge the remainder of the amount
- is still kept in the Gqwede Trust account pending receipt of the Bill as a result of the termination of the mandate that was made to the previous attorneys during May 2017.
- [34] Most curiously, the report recommends that the offer for future loss of earnings be accepted – an amount of R 621 343.60 despite the fact that he was in possession of an actuarial report estimating the claim at R 3 492 664,00.

Legal Practice Council(LPC)

- [35] A complaint was made by Bove attorneys against the respondent and Gqwede attorneys. In a letter dated 3 December 2020, the LPC Senior Legal Officer confirms that an investigating Committee had recommended that Gqwede be charged with misconduct. A similar letter was written in respect of the respondent.
- [36] As at date of this hearing there is no further indication of what has come of these charges.

Analysis

- [37] The applicant seeks the removal of the respondent as *curator ad litem* and his replacement with Advocate Johannes Prinsloo.
- [38] The application to intervene which was opposed by the applicant, was not pursued by Gqwede and there was no appearance by him or on his behalf at the hearing despite the fact that it appears from the record that he was served with the notice of set down and that he had access to the Case lines system. I need not consider this application any further.
- [39] I turn now to the case for setting aside the appointment of the respondent as the patient's *curator ad litem*.
- [40] The chronology of this matter shows that the respondent was appointed on 5 September 2017. This was after the first settlement offer for the general damages had been made in June 2017. It is not clear when it was accepted and whether acceptance pre-dated the respondent's appointment. His answering affidavit on this point does not elucidate on when he became involved in relation to the second claim.
- [41] However, payment was made only in 2018 after his appointment, a fact he does not dispute.
- [42] The second offer for future loss of earnings was made after his appointment. He provides no information on what his role, if any, in this regard has been.
- [43] Serious allegations are made about the respondent's performance in a court application. He was duty bound to disclose to this court what his conduct had been, despite being clearly resentful that he was being made to account.
- [44] This is not the sort of conduct that a court expects of a curator.
- [45] During argument Mr Mathebula, who appeared on his behalf, argued that he was not in office when the first offer was made. That is correct. But his duty as the curator does not just extend to what may still happen in the case but also what has happened to ensure that the patient's legal interests are protected. The curator is responsible once appointed for history as well, not just the future.

- [46] Serious questions about his conduct remain in relation to the first offer. Did he, once appointed, enquire if this compensation was adequate? Had all the necessary information been collected regarding the patient's health to make a proper assessment of the quantum offered? It is known from the papers that a serious dispute of fact existed about whether the patient's current mental condition had been caused by the accident or pre-existed since birth. Did the curator apply his mind to this and if so what did he do? He is silent on this point.
- [47] Nor is it clear what involvement he had once the money was paid. Why was the money paid directly to the foster mother? Why was no trust set up to manage this money? Did the patient require the appointment of a *curator ad personam*?
- [48] When it comes to the second payment, he had been appointed, yet there is no indication of what steps he took as opposed to that of attorney Gqwede. It appears that in this regard he was either absent or willingly went on with the approach taken by the attorney.
- [49] The draft report attached by Gqwede in his intervention affidavit may or may not have been drafted by him. He says nothing about it. It is unsigned and undated.
- [50] Finally and most importantly the court order specifically required of him that any settlement required the approval of a judge in chambers. This was never done in relation to the first offer and appears not to have been done in relation to the second, despite his avowal in the answering affidavit that he was still finalising it.
- [51] The importance of getting judicial oversight of settlement was set out recently in a matter by **Fisher J**, where she held that:

“One of the duties of Mr B --- as set out in the order which appointed him to his position as curator ad litem was personally to negotiate a settlement on behalf of the children. It was specifically provided in the order that in the context of his negotiations, he was to obtain the approval of a judge in chambers before accepting any offer. This is in keeping with the practice in this Division. The aim of this judicial oversight is obvious – it protects the children and the public purse. But Mr B--- never negotiated the settlement. It appears that it was never, in truth, anticipated that he would do anything more than

lend the appearance of approval to a settlement which was actually negotiated and entered into by Ms M---.”²

- [52] This appears to be exactly what has happened in this matter. The curator has failed in his duties.
- [53] The patient is highly vulnerable. Although now a major, he has been ill-served by his erstwhile foster mother. It appears now she has regrets about past conduct as she has at least added her support to the application by the applicant.
- [54] The patient himself has indicated where he wishes to live. He went to live with his sister of his own volition. I have no evidence before me that this is untrue. She remains therefore at the moment the only person taking responsibility for his interests. It is her wish to have a new curator appointed because of her disquiet with the way the claim has been handled thus far.
- [55] Then there is the matter of the LPC investigation into both the respondent and Gqwede. This adds to the disquiet of how the matter has been handled.
- [56] The court’s power to remove a trustee has been set out in a full court decision of this division in the matter of **McNair v Crossman** where it was held:

“The court's power to remove a trustee though is not restricted to the statutory grounds. Its powers to remove a trustee is derived from its inherent power which has been recognised in our law for over a century and has now been entrenched in the law by s173 of the Constitution of the Republic of SA, 1996 (the Constitution). Exercising this inherent power, courts have traditionally removed a trustee for misconduct, incapacity or incompetence. Though it must be said that each of these three grounds may also be a basis for an application for removal in terms of s 20(1) of the Act if it can be proved that the alleged misconduct, incapacity or incompetence imperils the trust property or the administration of the trust and courts have often found this to be the case.”³

² *K[...]* Jobo MK and Another v Road Accident Fund and Another; *M[...]* Jobo CM and Another Road Accident Fund and Another (1677/2019; 1928/2019) [2021] ZAGPJHC 40 (7 April 2021). I have omitted the names of the parties concerned.

³ *McNair v Crossman and Another* 2020(1) SA 192 (GJ) paragraph 29.

- [57] The same principles apply to the removal of a *curator ad litem*.⁴
- [58] I am satisfied that on these papers a case has been made out for removal on two of the grounds mentioned – incompetence and misconduct - for the appointment of the respondent to be set aside. In so doing a new *curator ad litem* must be appointed to fill the gap and I am satisfied to appoint Mr Prinsloo, an advocate with experience in acting in this capacity, to fulfil this function.
- [59] A final point raised by Mr Mathebula was that the applicant should first have had a curator appointed for the patient in order to conduct this litigation. Even if this point is good, and I take no view on it, there is case law that this action can still be ratified by the curator. In ***Santam v Boo*** the court held that it was legally competent for a curator to ratify prior steps taken - where there is no other way to vindicate rights.⁵

Costs

- [60] Although costs have been sought by the applicant I consider that this aspect should be reserved for the new curator to consider acting upon.

ORDER

1. The appointment of Sydwell Mosungwa, an Attorney of the High Court of South Africa Gauteng Division Pretoria, as *curator ad litem* to Tshepo Tshalite (“the patient”) (Identity Number: 940520 5653 08 4) is set aside.
2. Johannes Christiaan Prinsloo, an Advocate of the High Court of South Africa, is hereby appointed as *curator ad litem* to the patient.
3. The *curator ad litem* shall perform the following duties:

⁴ See Jones and Buckle page 235 The Civil Practice of the Magistrates Courts in South Africa.

⁵ Santam Insurance Ltd v Boo 1995 (3) SA 301 (A) at 313.

- 3.1. To take all necessary steps and to perform all necessary actions to institute / pursue an action on behalf of the patient in terms of the Road Accident Fund Act, No 56 of 1996 (as amended) for the damages arising out of a collision which occurred on the 3rd day of September 2012;
- 3.2. To ratify / dismiss all steps and acts already taken on behalf of the patient in regard to the institution of an action on behalf of the patient in terms of the aforesaid act.
- 3.3. To take all necessary steps and perform all necessary actions to recover previous awards of damage from whoever received same *indebiti* or caused the *indebiti* payment thereof to the detriment and at the loss of the patient;
- 3.4. To recover insofar as it is necessary any under settlement of damages and/or overreached fees/disbursements which was unduly retained/charged at the costs and expense of the patient;
- 3.5. To file all documents, take all the necessary steps and perform all necessary actions that may be necessary, expedient or desirable in order to recover the full and proper amounts due to the patient in terms of the aforesaid act or otherwise;
- 3.6. To obtain legal advice and instruct attorneys and counsel in order to ensure that the claim's described in paragraph 3.1 to 3.4 above is properly

prosecuted/finalized;

3.7. To incur all reasonable and necessary expenses which may become necessary in order to properly prosecute the said claims and to pay such expenses as and when these are incurred;

3.8. To investigate the necessity for and apply for the appointment of a *curator bonis* alternatively the setting up of a trust instrument envisaged in the Trust Property Control Act 57 of 1988 in order to protect any award of damages;

3.9. To investigate the necessity and apply for the appointment of a *curator personae* should this become necessary;

3.10. To conduct such/any litigation on behalf of the patient to its finalisation and determination;

3.11. To negotiate, but not settle the action/s without prior approval of a judge.

4. The costs of the application are reserved. The *curator ad litem* may re-enrol this matter on the same papers, duly supplemented, to recover the costs of this application.

N MANOIM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 3 May 2022.

Date of Hearing: 8 March 2021

Date of Judgment: 3 May 2022

Appearances:

Counsel for the Applicant: Adv Uys

Instructed by: Bove Attorneys Inc
011- 485 0429
process@boveattorneys.co.za

Counsel for the Respondent: Adv Mathebula

Instructed by: Mr Mosungwa Inc
011-3310058
info@mosungwa.co.za