

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2010 /34001

<p>1. REPORTABLE: YES</p> <p>2. OF INTEREST TO OTHER JUDGES: YES</p> <p>3. REVISED: NO</p> <p>DATE: 14/02/2023</p> <p>SIGNATURE OF JUDGE:</p>

In the matter between:

ADV MICHAEL ALEX FISHER obo TS. M

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

In Re

TS. M

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

SUMMARY

Rescission and setting aside of order appointing curator ad litem acting for a mentally incapacitated patient in a claim against the Road Accident Fund.

Curator ad litem removed for compromised independence.

Conduct of attorney and the curator referred to the Legal Practice Council and the General Bar Council respectively for further investigation.

ORDER

1. The order granted on 20 October 2022 appointing Adv Michael Alex Fisher as curator ad litem is rescinded and set aside.
2. Adv Fisher is removed as curator ad litem acting on behalf of the plaintiff.
3. Adv Fisher may not charge any fees relating his role as curator ad litem.
4. Ms. Aarthi Thumbiran and her firm may not charge any fees relating to the application for curator ad litem on the 24th October 2022; and 14th December 2022 appearances.
5. The order granted on 7th December 2022 is void ab initio.
6. The Registrar of this Court is directed to refer this judgment to the General Bar Council to nominate curator ad litem fluent in the IsiZulu language within 30 days of receipt of this judgment.
7. The curator ad litem is hereby directed to:
 - i. Investigate and prepare a report about the steps and actions taken by the Plaintiff's attorneys, and in particular report on whether such

steps and actions should be ratified, which investigation should cover the reasonability of the fees charged to date;

- ii. Investigate and report on whether expert fees and costs of counsel were paid or not by the Fund in 2014; and if not, whether the Plaintiff's attorneys took any steps to recover their expert fees, disbursements, and costs of counsel from the Fund. This report is to include a determination whether any expert fees and disbursements should have been levied to the client and therefore deducted from the capital award.
 - iii. Investigate and report on the Plaintiff's mother ability to understand the implications of the Special Power of Attorneys' signed, fee agreements, and whether such implications, were in fact, explained to her in a language in which she is fluent in.
 - iv. Investigate and submit a report on the validity and enforcement of the Special Power of Attorneys' signed, fee agreements entered into by Plaintiff's attorneys and the client;
 - v. To prepare a report on the appropriate vehicle to house the award to be made to the client.
 - vi. To investigate and make any other recommendation which s/he may so deem fit in view of the facts and concerns raised in this judgment.
8. The curator ad litem's report must be delivered to the Master of the High Court, Johannesburg Division for his/her comment within 30 days of receipt of the curator's report.
 9. The Master' is to comment on any aspect of the curator's report which s/he may so deem fit to do so and also on the appropriate vehicle to house any funds to be awarded to the Plaintiff.

10. The curator ad litem is to take any such steps as s/he may deem fit to ensure the expeditious delivery of the Masters' report.
11. The curator's report, with that of the Master is to be delivered to this Court and the Plaintiff's attorneys within 10 days of both being available.
12. Upon receipt of the curator's and Masters' report, the Plaintiff's attorneys and counsel shall within 15 days file any further submissions or replies thereto if they so wish.
13. Costs of counsel are to be paid by the attorney.
14. The conduct of Ms. Aarthi Thumbiran is referred to the Legal Practice Council for further investigation.
15. The conduct of Adv. Michael Alex Fisher is referred to the Legal Practice Council and the General Bar Council for comment should they wish to do so.
16. A copy of the judgment should be provided to the Legal Practice Council, Bar Council of Pretoria, Johannesburg Society of Advocates, PABASA and the Independent Bar Association.
17. Pending receipt of the reports and submissions indicated herein, this matter is reserved before me.
18. Any party may approach this Court for further directives, if so, should the need arise.

JUDGMENT

FLATELA J

[1] This is an action for damages brought on behalf of the plaintiff against the Road Accident Fund. The Plaintiff is TS.M born on 9th April 2002. The Plaintiff was involved in an accident with an insured vehicle on 17th December 2007 at approximately 18H45. He

was only 5 years old at the time of the accident. As a result of the accident, he sustained diffuse brain injury, multiple scalp and facial lacerations, soft injury to the cervical spine. He developed headaches, upper back pain, post traumatic epilepsy but at the time of trial the epilepsy seizures had ceased. In the long and short of it, Mabaso suffered a traumatic brain injury (TBI) with consequent sequelae which is not, at present, relevant to this judgment.

[2] In 2008 the Plaintiff's mother BG. M instructed attorneys Raphael David Smith Attorneys to claim damages from the Road Accident Fund (the defendant). Ms. Aarthi Thumbiran was the attorney of record then and now.

[3] On 24 May 2011 merits were settled and the defendant was ordered to pay 100% of the Plaintiff's proven damages. On 29 May 2014 the general damages were awarded at R600 000. On 11 June 2014 the Fund made an offer in the amount of R600 000 for the settlement of general damages. The offer was accepted on behalf of the Plaintiff. A settlement amount was paid into the his attorney's trust account on 17 June 2014.

[4] On 26 October 2021, the plaintiff's mother was substituted as a Plaintiff with the patient as he had obtained the age of majority. A notice of substitution in terms of rule 15 was served.

[5] On the 20 October 2022 the matter was set down for hearing for determination of quantum in respect of loss of earnings only.

[6] On 24 October 2022 the matter was allocated to me in the default trial court. The matter was heard virtually. The Plaintiff was represented by Adv. Sewpersath and the Defendant was represented by Ms. Ameersing from the office of the State Attorney. The Plaintiff's counsel informed me that despite several attempts from their side to settle the matter, the matter remains unsettled and so it was to proceed on default judgement. I

was also informed by the Plaintiff's counsel that an ex parte application for the appointment of Adv. Michael Alex Fisher as curator ad litem on behalf of the Plaintiff had to be determined first.

[7] The applicant and the deponent to the affidavit in support of the application was the plaintiff's attorney, Ms. Aarthi Thumbiran. In support of Adv Fisher's appointment she stated that Adv Fischer was admitted as an advocate of this court and has been practicing for 33 years. The applicant sought an order in the following terms:

- 7.1. to grant Adv Fisher all the powers and authority to enable him to prosecute the said action to the final determination thereof and without limiting the generality of such powers and authority, directing he shall be entitled to:
 - i. Ratify the steps that have already been taken in respect of said action referred to above;
 - ii. File all documentation and to do all such acts and all things as may be required necessary, expedient, or desirable to recover the full and proper due amount to the Plaintiff;
 - iii. Negotiate all settlement of said action subject to the approval of the Judge in chambers or open court;
 - iv. Apply, if necessary, on behalf for a curator bonis in the event of said action being successful;
 - v. Directing the costs of this application be costs in the main proceedings.

[8] Ms. Thumbiran relied on the experts reports who examined the patient and recommended that curator ad litem be appointed for him.

[9] A statement of consent from Adv Fisher was attached wherein he accepted the appointment. He stated that:

- 9.1 He is aware of the duties and obligations of a curator ad litem;

9.2 He has acted as curator Ad litem before and are well versed with the duties and obligations expected of him;

9.3 He was familiar with the experts reports filed in the matter.

[10] In her affidavit the plaintiff's attorney contended that it was necessary for the curator ad litem to be appointed in order to institute legal proceedings on behalf of the plaintiff. I raised concerns about the application which was brought on the day of the trial when the appointment of curator ad litem was suggested as far back as 2009 by the Plaintiff's experts. I specifically asked why the Plaintiff was not represented by his mother. I was advised that the Plaintiff is no longer a minor and almost all the experts recommended that curator ad litem be appointed for him and curator ad litem should be someone who is legally qualified because of their duties and obligations. In addition, the Plaintiff's counsel stated that they do not want the funds of Plaintiff to be squandered.

[11] I granted an order and appointed Adv Fisher as curator ad litem. I considered the fact that the matter has been before the courts since 2010 and almost all the experts recommended that curator ad litem be appointed for the Plaintiff.

[12] The matter proceeded on default as the defendant's defense was struck from the roll.

Main Action

[13] Mr. Sewpersath proceeded to address me on loss of earnings and applicable contingencies thereof. After he concluded his argument on the loss of earnings, he proceeded to address me on general damages. He sought an award in the sum of R1 200 000 (one million, and two-hundred thousand rands) for general damages.

[14] I enquired from plaintiff's counsel if the general damages were not settled and paid in 2014. The plaintiff's counsel informed me that his instructions were that an offer of R600 000 was made by the defendant long time ago and that offer was rejected by the plaintiff's representative.

[15] I suggested that the general damages should be postponed sine die as it was not before me.

[16] Adv Fisher argued vigorously that I should hear the general damages as the postponement would cause much prejudice to the patient. He proceeded to address on his role as curator ad litem. Concerning the award, he said the award was under settlement and he rejects it. He urged me to take a robust approach and allow plaintiff's counsel to address me on general damages because even if the general damages are postponed *sine die*, the defendant will not participate still because their defense has been struck out.

[17] I proceeded to hear counsel on general damages and I reserved the judgement.

[18] Further investigations regarding this issue revealed that the offer was accepted and the amount of R600 000 was paid to attorney's trust account on 24 June 2014 and the award has been diminished. The attorney paid herself fees of about R129 157.13, she also paid the experts an amount of R231 493.91, repaid loans taken by the plaintiff's mother in the amount of R3 3000. In 2017 three years after the award was paid an amount of R236 048,96 was paid to the plaintiff's mother.

[19] There is also no contingency fee agreement in this matter.

[20] The plaintiff's mother lodged a complaint regarding the general damages award.

[21] On 7th December 2022 Adv Fisher informed me in chambers on that he is no longer pursuing the general damages claim on behalf of the plaintiff. At that time, it was too late as the information regarding the handling of the plaintiff's damages award was coming in bits and pieces. I had concerns that the attorney who is handling this matter was very careful in her responses to my directives. I needed to get more information and I figured out that I could get answers in open court.

[22] On 7 December 2022 I asked the plaintiff's attorney to show me the proof that the experts were indeed paid as she stated in her affidavit. Ms. Thumbiran gave me an email which was a response to the LPC's queries. In this email she listed the names of experts and the amounts that were paid to each. I kept the copy of that email to include in the judgement because the handling of the matter formed a bigger part in the judgement.

[23] On 7 December I granted an awarding the R2 131 32 .00 in respect of loss of earnings, the judgement to follow on 15 December 2022. However, this case, has since taken certain twists and turns.

[24] Upon consideration of the email from the plaintiff's attorneys, I noticed that there was one Fisher and Naidoo who were listed as one of the experts that were paid for their services. When I considered the matter there were no experts by the names of Fisher and Naidoo, I issued further directives calling upon expert notice and summary of evidence.

[25] Ms. Thumbiran confirmed under oath that that Fisher and Naidoo are not medical experts but are Advocates that were briefed on merits in 2014 and 2019 respectively. She also confirmed that Adv Michael Alex Fisher, the curator ad litem was briefed on merits in 2014.

[26] On 14 December 2022 I issued further directive to Mr. Fisher asking why he should not be removed as curator ad litem in light of the information that had come to my attention. In the light of the irregularities that I noticed in the handling of this matter, tentatively I was of view that this may compromise Adv. Fisher independence and execution of his duties as curator ad litem.

[27] The plaintiff's attorneys were given opportunity to address me on this issue.

[28] This judgment only proceeds on one issue, The appointment of Adv. Fisher as curator ad litem; and whether such appointment should be rescinded.

General Damages

[29] In addressing the issue of the appointment of Adv. Fisher, it serves to start from the beginning of the case.

[30] After an order was granted for Adv. Fisher to be appointed as curator ad litem, Adv. Sewpersath proceeded to address me on loss of earnings and applicable contingencies thereof. Thereafter, he sought an award in the sum of R1 200 000 (one million, and two-hundred thousand rands) for general damages.

[31] I enquired from the counsel if the general damages were not settled already because when I was reading the pleadings, I came across a statement that said general

damages had already been awarded in the sum of R600 000(six hundred thousand rands) in 2014.

[32] Adv Sewpersath was adamant that the damages claim was still in issue. He went on as far as to say, and confidently I must add, that he had spoken to his instructing attorney and her instructions were that the R600 000 settlement that I was referring to was a proposed settlement which was made long time ago. The offer was not accepted.

[33] Mr. Sewpersath further argued that even if the settlement proposal was accepted, Mr. Fisher, now as curator ad litem will have a say on the settlement that was accepted on behalf of the Plaintiff.

[34] The Plaintiff's practice note prepared by Mr. Sewpersath for trial of 20th October 2022 and uploaded on caselines on 14th October 2022 stated that the issue to be determined was loss of earnings ONLY. Not only did it state that quantum on the loss of earnings was the only issue remaining to be determined, it said so in capitalized bold letters.

[35] I enquired from the counsel why in his practice note he stated in bold and in capital letters that the issue for determination was loss of earnings ONLY. He submitted that it was a clerical error, a mistake on his part not to include the general damages. He apologized for the error. He submitted to demonstrate he made a mistake on his part; the pleadings and the joint settlement document sent to the offices of the Fund on 17 October 2022, as well as numerous emails prior, including proposed settlements for general damages. His heads of arguments also mention the general damages.

[36] I was not convinced by counsel's explanation as he had been seized with this matter for quite some time. There were two practice notes that were uploaded on caselines. The first one which he prepared referred to both merits and quantum as issues to be determined and the final practice note omitted the merits and general damages.

[37] A proper look on pleadings on how this matter was handled suggests irregularities. My suspicions are informed by the following activities:

Amendment of Pleadings

[38] On 6 October 2022, exactly two weeks before the trial, a notice of intention to amend was served by hand to the defendant's offices and electronically. The suggested amendment increased the claim from R1 650 000 to R3 673 100.

[39] The original particulars of claim dated 20 July 2010 claimed damages to the amount of R1 650 000.00 calculated as follows:

- i. Estimated future medical expenses R100 000.00
- ii. Costs of special schooling R100 000.00
- iii. Loss of earning capacity R1 000 000.00
- iv. General damages for pain and suffering, loss of amenities of life, disfigurement and disability R450 000.00

[40] According to this amendment, the general damages claim (which was settled and paid in 2014) was increased from R450 000 to R1 500 000 and loss of earning capacity from R1 000 000 to R2 173 100.

[41] On 14 October 2022 before the lapse of the period allowed for an objection of the proposed amendment, counsel for the Plaintiff served by email amended pages to the Fund's officials.

[42] The effect of the amendment is that the already settled general damages were increased by R1 500 000.00 whilst loss of income was increased by R1 173 100.

[43] On Monday 17 October 2022 counsel for the Plaintiff sent a document named “joint submissions and settlement proposal” to RAF claims handlers and officials and requested them to revert to him regarding a settlement prior to the trial set down for 20 October 2022. A proposed “Joint Submissions Document” in support of settlement drafted by the Plaintiff’s counsel and sent to defendant’s official suggested a settlement to an amount of R3 648 600 which would be deemed acceptable as final sum and settlement of the claim calculated as follows:

- i. Loss of earning capacity = R2 487 480.00
- ii. General damages = R1 200 000.00

[44] I raised concerns about the hurried amendment of pleadings just two weeks before trial. The amendments were affected before the lapse of the 10-day objection period provided for by the rules. Counsel for the Plaintiff and Mr. Fisher argued that since the defendant’s defense was struck out, it was not even necessary to serve them with the notice of intention to amend the pleadings. Serving them was a matter of courtesy. It was further submitted that the defendant did not object to their amended pleadings.

[45] These submissions are clearly wrong. The Plaintiff’s attorneys are required to comply with the rules relating to the amending of pleadings.¹ In this matter the counsel failed to comply with ordinary requisites to the amending of pleadings and suggested that serving amended pleadings amending the original claim by over R2 million rand was a matter of courtesy, this I rejected. It can never be said, or reasonably suggested that to serve the defendant with a notice to amend and giving them opportunity to object thereto as per the rules is a matter of courtesy.

¹ Rule 28(1) of the Uniform Rules

[46] I suggested that the general damages should be postponed as I was made to believe that only loss of earnings will be argued. This suggestion was opposed by counsel and by Mr. Fisher. It was argued that this would cause prejudice to the finalization of this claim on behalf of the minor child. (I should pause to highlight that the Plaintiff, was throughout referred to as “the minor child” although he had attained majority age on 26 October 2021.)

[47] Adv. Fisher questioned the legal status of the practice note in the light of the amended pleadings which clearly show that general damages were an issue. He submitted that if the attorney agreed on the amount suggested, he would review it as on the face of it, it is an under settlement. Adv. Fisher did not mince his words in expressing his dissatisfaction about the purported under settlement of the general damages award. In fact, he went as far as to say that now he has been appointed curator ad litem, he rejects the award. Heward LCJ in *S v Sussex Justices, ex parte McCarthy*² suggests that he may very well be within his rights to do so. His dissatisfaction about this goes all to the more point as to why curators’ ad litem should be appointed timeously as soonest it becomes apparent that a Plaintiff would be incapacitated to act on their own behalf or give proper instructions to their attorneys.

[48] He submitted that if the general damages do not proceed, the defendant will still not participate as their defence has been struck off. Mr. Fisher submitted that I should apply a robust approach and allow counsel to address me on general damages.

[49] In our back-and-forth engagement with Adv. Sewpersath, Ms. Ameersing interjected and advised the Court that she sought clarity about this contentious issue from the Fund. She was then advised that the Fund had indeed settled and awarded to the Plaintiff’s attorneys general damages in the amount of R600 000. She undertook to give proof of this transaction in due course (and this was done).

² *S v Sussex Justices, ex parte McCarthy* [1923] ALL ER Rep 223

[50] I adjourned the proceedings to allow the defendant to provide the court and the Plaintiff proof that this amount was paid in full and final settlement of general damages. Counsel for the defendant submitted a document titled "Financial enquiry" with attachments. According to this document, the Fund paid to the Plaintiff's attorneys R600 000 in settlement amount of general damages on 17 June 2014. Amongst the attachments was an undated and unsigned draft order which, *inter alia*, suggested that the defendant shall be liable for 100% of the plaintiff's proven or agreed damages. This was also accompanied by an unsigned offer and acceptance of settlement which was prepared by one Siphon Muroa on behalf of the defendant on 10 June 2014. Interestingly, a request was made on 11 June 2014 for the payment of the settlement amount to applicant's attorney's account. On 17 June 2014 the settlement amount was paid by the Fund to the plaintiff attorney's trust.

[51] Responding to this information, Mr. Fisher submitted that there might be a practical problem with this; he must consider whether he should review the accepted general damages or not and suggested that there is nothing that suggest that he cannot.

[52] Ms. Ameersing took issue with Mr. Fisher's "practical problem". She submitted that the issue was more than a "practical problem" but an ethical issue as Plaintiff's counsel insisted on arguing general damages which were already settled and paid over in 2014. I agree.

[53] The documents that were submitted by defendant's attorney included an unsigned draft order. Adv Sewpersath contested the authenticity of the documents . I suggested that he must take instructions from his attorney regarding the matter. He submitted that he was not able to contact his instructing attorney because she was in hospital and has no access to her computer to confirm whether the damages were paid or not. He then suggested that the issue of damages should be postponed. I refused this suggestion as counsel had earlier strenuously been opposed to the suggestion that

general damages should be postponed citing prejudice to the “minor child” and in the light of Mr Fisher’s submissions that he was rejecting the award.

[54] Counsel for the plaintiff proceeded to address me on awarding the Plaintiff’s general damages to the amount of R1 200 000.00 as a fair and reasonable amount. Adv Fisher agreed.

[55] A draft order was presented to me that should I be with the plaintiff then:

By agreement between the parties, it is hereby ordered that:

1. The Defendant shall pay the Plaintiff the amount of R 3 648 600.00 (THREE MILLION SIX HUNDRED AND FORTY-EIGHT THOUSAND AND SIX HUNDRED RANDS ONLY), 180 days from 20 October 2022.
2. The Defendant shall provide the Plaintiff with a certificate of undertaking in terms of Section 17(4) (a) of Act 56 of 1996, for the costs of the Plaintiff’s future accommodation in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him arising out of the injuries sustained by him in the motor collision of 17 December 2007, after such costs have been incurred and upon proof thereof, such undertaking to include:
 - 2.1. the reasonable (taxed or agreed) costs incurred in the establishment of a TRUST as contemplated in paragraph 4 below and the appointment of trustee(s);
 - 2.2. the reasonable costs incurred in the protection, administration and/or management of the award and the statutory undertaking furnished in terms of Section 17(4) (a) of the Act, which costs shall be limited to the prescribed tariff applicable to curators as reflected in Government Notice R1602 of 1 July 1991, specifically paragraphs 3(a) and 3(b) of the Schedule thereof;

- 2.3. the reasonable costs incurred in providing security to the satisfaction of the Master of the High Court of South Africa for the administration of the award and the annual retention of such security to meet the requirements of the Master in terms of section 6(2)(a) of the Trust Property Control Act 57 of 1988 (as amended).
3. Payment of the amounts referred to in this draft order shall be made by the Defendant to the Plaintiff's attorneys, Raphael & David Smith Incorporated, which details are as follows...
4. The attorneys for the plaintiff, RAPHAEL & DAVID SMITH INC are ordered:
 - 4.1. to cause a trust ("the TRUST") to be established in accordance with the Trust Property Control Act NO 57 of 1988, stipulated in paragraph 3 above, within six months of date of granting of this order and shall approach the above Honourable Court for condonation and further should the trust not be established within the said period of six months; (my emphasis)
 - 4.2. To deposit all proceeds in terms hereof in an interest-bearing account, for the benefit of the injured, as contemplated in the Legal Practice Act, pending the establishment of the trust;
 - 4.3. To pay all monies held in trust by them for the benefit of the injured to the TRUST

[56] On the matter of the trust, a letter from Tshepo Mosimenge, a nominee of ABSA Trust Limited was uploaded on caselines on the 25th of October 2022, in which he consented to being trustee of the trust to be caused. In the letter, he disclosed that his administration fee of the trust is to be 1% of the capital amount to be held under administration of Trust plus VAT. This was prior to a subsequent draft order which incorporated being forwarded to my registrar after I already had in my possession the main draft order.

[57] Regarding general damages the Plaintiff's counsel confirmed that an amount of R600 000 as final settlement was paid to the attorney's trust account. In an email he sent to my Registrar on 25th October 2022, the day after strenuously arguing for general damages, he said, *'There was some confusion with this as my attorney has been in hospital for an operation and I was unable to confirm whether the fund paid the R 600 000.00 for General damages. Please alert the Learned Judge that there was in fact a payment of R 600 000 on the General damages so that the Learned Judge may take this into consideration in her judgment, which was reserved.'*

[58] I issued directives to Ms. Aarthi Thumbiran to confirm on affidavit whether the settlement amount was accepted and deposited to her firm's account in 2014, eight years ago before trial date or not. Ms. Thumbiran was also directed to account for this settlement money that was paid to her firm 8 years ago.

[59] Ms. Thumbiran filed an affidavit in which she confirmed that she is employed as a professional Assistant at Raphael and David Smith Inc and she is an attorney of record in this matter. She confirmed:

1. She is the attorney in charge of dealing with the claim of BG. M obo TS. M against the Fund
2. She confirms that an offer in the amount of R600 000 in respect of general damages was received and duly accepted by the Plaintiff, being the mother of the minor at the time.
3. This offer was fair at the time and its capitalized value adjusted for inflation would be in the region of R1 000 000 in 2022.
4. Loss of earnings was postponed.
5. The sum of R600 000 was paid to Raphael and David Smith Inc on the 17th of June 2014.
6. Disbursements were paid including but not limited to medical experts.

7. A portion of the money in the sum of R236 048-96c was paid to the Plaintiff on the 10 May 2017 by cheque bearing number 40068, with the balance to be paid upon finalization of the entire matter and the receipt of the costs.
8. On the date of the trial this detailed information was not available to counsel as she had no access to her computer.

[60] The attorney's explanation that this information was not available at the time of trial is untenable. Her attorney's affidavit conflicted with counsel's statement in court on 24th October 2022 when he addressed the issue of settlement of general damages. He said, and I quote, "*I've spoken to my attorney, she confirmed that an offer was made long time ago and was rejected*".

[61] I noticed that the handling of this matter is marred with irregularities. And so, I took a robust approach to uncover what really happened to the Plaintiff's award. The information came in drips and drabs.

[62] I issued further directive to Ms. Thumbiran on the 9th of December 2022 in these terms:

PLEASE BE ADVISED that I intend to refer the judgement to the LPC due to the manner in which the issue of general damages was pursued through amendment of pleadings despite the fact that they were settled and paid over 8 years ago.

You are given an opportunity to make submissions if you wish on the reasons why the general damages claim was pursued when it was already settled. Further submissions must reach me on or before Wednesday 14 December 2022.

Ms Thumbiran responded with an email to my Registrar on 12th December 2022 and said, "*With regard to general damages, the Notice to amend was purely an oversight*"

and not intended to mislead the Court... As soon as the error was noticed, Counsel did liaise with Defendant and confirmed that the only issue remaining for settlement was loss of earnings. If the Court so directs the Notice to amend can be withdrawn and rectified. We place ourselves in the Courts hands for guidance with regard to the oversight.'

[63] To give credence to this explanation that this was indeed an oversight, she attached the email which she sent to Defendant's former attorneys on 18th September 2019 wherein she was inviting them to a case management conference. The email states in no uncertain terms that general damages were settled on 29 May 2014 and the only issue remaining was quantum in loss of earnings. She also attached a signed pre-trial minute of a conference held on 11th October 2019 between herself, her then counsel, Adv. Naidoo and Mr. Chepape, the former attorney for the defendant. In these pre-trial minutes, it is recorded that the only issue remaining for determination is loss of earnings. As far back as 2014 this information was known to Ms. Thumbiran.

[64] Unfortunately for Ms. Thumbiran her explanations is farfetched and untenable. It is not the case that Adv. Sewpersath was hijacked with the brief on the day of trial. He had been corresponding directly with the Fund's representatives. He drafted the amendments, inflating the claim for general damages. His heads of argument, his joint settlement submissions proposal to the Fund, its representatives and the draft order handed tell a different tale. It is important to appreciate that counsel acts on the instructing's attorney's brief.

[65] The defense that the vigorous pursuit of general damages was a mistake is clearly a desperate and farfetched explanation which I do not accept.

[66] Ms. Thumbiran's affidavit was accompanied by a document headed Raphel & David Smith Inc History Transactions prepared by Davine Chetty on 12/06 /2022 at 1:44pm. The status of this document is not explained in Ms. Thumbiran's affidavit. It shows that a direct deposit to a trust account was deposited on 17 June 2014.

[67] On 10 May 2017 a trust cheque to the amount of R236 048.96 was deposited into B.G M on 10 May 2017. In the affidavit there was no explanation why the amount of R236 048.98 was only deposited to the plaintiff's mother only in 2017_three years after the Fund made its first deposit; nor was there any indication that *'the balance to be paid upon finalization of the entire matter'* is held in an interest-bearing account on behalf of the Plaintiff. This is required by law.

[68] With regards to experts, there was no accounting detail of which experts were paid and how much was paid. The same went for the purported disbursements. There was no accounting detail what these disbursements were, especially more so, if in their sum, they included more than just experts' remuneration.

[69] I was uncomfortable with the explanation provided by Ms. Thumbiran. I then directed her to state under oath how the award of plaintiff's general damages was spent. She was to provide more information to court as to which experts were paid and how much.

[70] On the on 7th December 2022 Ms. Thumbiran provided me with a copy of an email which was a response to the to the Legal Practice Council in a complaint lodged by the Plaintiff's mother regarding the award for general damages as far back as 19th November 2020.

The Complaint to the Legal Practice Council

[71] In 2019 the BG. M, the plaintiff's mother lodged a complaint against the plaintiff's attorney regarding the settlement amount. In response to the LPC's enquiry, Ms. Thumbiran stated that she paid the plaintiff's mother an amount of R 236 048.96. She also listed the number of experts that were paid R231 493.91 from the award and she paid herself fees to date R129 157.13, accordingly the award has been diminished.

[72] Ms. Thumbiran made glaring errors when accounting for the general damages award to me. She omitted the fact that she paid herself an amount of R129 157.13 from the award. In response to my directive she stated that there was a balance to be paid upon the finalisation of the entire matter. This could not be further from the truth. After deductions of her fees, disbursements and the R 236 048.96 given to the Plaintiff's mother, the account came to zero.

[73] It shall not do justice to the concerns I raise in this judgment and orders I make herein if I do not reproduce the contents of this email in full. I clarify, the email was a response from Plaintiff's attorney to the LPC. Her response read:

'RE: Compliant BG M – Our ref: AT/MF 1793'.

'Good day,

Unfortunately, we do not seem to have received your correspondence of 29th September 2019.

In the interim we advise as follows:

1. On the 24th of June 2019 we provided a detailed explanation regarding what had happened in the above matter (attached for ease of reference).
2. We advise that at present, only the merits and general damages of the claim are settled.
3. We are currently busy preparing the file for loss of earnings.
4. We have not charged the client a final fee but an interim fee, pending finalization of the entire matter and pending the drawing up and taxing of our attorney client bill.
5. The general damages were settled for an amount of R600 000. (Attached find Draft Order)
6. There is no final account as the matter has not been finalized in its entirety.

7. However, from the capital we paid the following experts, the following amounts

- a) Angela Fox – R6 935.
- b) Digby Brown – R24 100.
- c) Osman – R11 050.
- d) Fisher - R25 200
- e) Shevel – R22 572
- f) Trollip – R23 204
- g) Digby Brown – R23 830
- h) Schaid – R3 080.16c
- i) Schnaid – R8000
- j) Trollip – R15 000
- k) Peverette – R5 433.75c
- l) Peverette – R22 609
- m) Shevel – R20 240
- n) S. Naidoo – R20 240

Total paid to experts R231 493.91c

8. Total loans taken by client to date - R3 300

9. Total paid to client to date – R236 048.96c

10. Fees to date R129 157.13c

'Total paid to date – R600 000.00

[74] When I directed the plaintiff's attorney to account about the general damages she stated under oath that:

AD: para 6: ‘**Disbursements** were paid including but not limited to medical experts.’

AD: para 7: ‘A portion of the money in the sum of R236 048-96c was paid to the Plaintiff on the 5th October by cheque bearing number 40068, **with the balance to be paid upon finalization of the entire matter and the receipt of the costs.**

If one adds the sum of

- Total paid to experts R231 493.91c
- Total loans taken by client to date - R3 300
- Total paid to client to date – R236 048.96c
- Fees to date R129 157.13c
- Total is R600 000

The question which arises is which ‘**balance to be paid upon finalization of the entire matter**’ is she referring to as the amounts above equate to, and deplete to zero the R600 000 paid into her trust for general damages.

[75] Clearly, the balance referred to her must be the anticipated sum of loss of earnings claim and nothing of the general damages. Now two concerns immediately arise out of her. It is usual practice in RAF litigation that where merits have been conceded 100% in favour of the Plaintiff it is RAF that settles the expert fees, and these amounts do not come out of the Plaintiff’s award. If the experts had to be paid prior to RAF settling the award, then this would come out of the Plaintiff’s attorney especially considering that the victims of motor vehicle / pedestrian accident are usually indigent people.

[76] The second concern is whether the Plaintiff’s attorney, in the absence of a contingency fee agreement, submitted to the taxing master a bill of costs before she generously paid herself from the Plaintiff’s award. A dispute arose herein between herself and the plaintiff’s mother, eventually leading to the LPC complaint.

[77] AD: para 3 of her affidavit, she *'confirms that an offer in the amount of R600 000 in respect of general damages was received and duly accepted by the Plaintiff, being the mother of Themba, who was a minor at the time.'* This would have been in 2014.

[78] RAF effected payment into the Plaintiff's attorney trust account on 17th June 2014. But payment to the Plaintiff was only effected on 05 October 2017. The three-year delay raised some more questions than answers for me. But other than the most obvious question is why the payment was made only three years later. I recalled reading in the 2019 report of Dr Shevel, the Plaintiff's psychiatrist that on 2 June 2014, when he consulted with the plaintiff who was a minor child at the time, he was accompanied by his grandmother. His grandmother at the time reported that the plaintiff's mother was *'mentally disturbed'*.

[79] Also, Dr Ormand-Brown's 05 August 2013 report stated that the plaintiff was accompanied by his grandmother who reported to Dr Ormand-Brown that BG.M had a mental health challenge as far back as 2011. She was identified as having a traditional calling and went to Mpumalanga for traditional healing initiation. In 2013, she was back in the Johannesburg area but not living with the Plaintiff.

[80] I questioned the delay of the three years before the payment could be made. To this question Ms Thumbiran stated that they could not find her up until such time they had to employ the services of tracers to locate her whereabouts, 3 years later.

[81] Perhaps I should reiterate the timeline:

- i. The grandmother advised Dr Ormand-Brown on 24 June 2013 that the plaintiff's mother has been unwell as far back as 2011. This report is dated 5th August 2013, by which I assume this is the time the Plaintiff's attorneys came to be in possession of it.
- ii. On 2nd June 2014 the plaintiff's grandmother tells to Dr Shevel that her daughter the Plaintiff's mother, and representative litigant in these proceeding

- is 'mentally disturbed'. During this time, the Plaintiff was staying with his grandmother and not his mother. (The Plaintiff's attorney claims not to have had this report).
- iii. On 10 June 2014 Sipho Muroa on behalf of the defendant makes an offer for settlement to the Plaintiff's attorneys.
 - iv. From the attorney's affidavit, the offer above must have been accepted on the same or the next day by the Plaintiff's attorneys.
 - v. On 11th June 2014 a request for payment is made.
 - vi. This payment is made on 17th June 2014.

[82] This Court is then led to believe that in between the 10th or 11th and the 17th of June 2014, the Plaintiff's mother, having accepted the offer of R600 000, and no doubt waiting for it to be deposited, then disappeared for a good three years and only could be located three years later with the help of tracers.

[83] Ms. Thumbiran also advised that the patient and his mother were not in good terms due to the manner in which the patient's mother used the part-payment of the patient's general damages . She informed me that the patient's mother used the money to renovate the house and she needed more money that is why she lodged the complaint to the Legal Practice Counsel.

[84] The plaintiff's mother was not in court even though I directed that she should be present in court. I was informed that the patient's mother could not be reached because she does not have a cellphone. The patient attended alone.

[85] I called the patient to the witness stand to verify some information. I was informed that he has diminished mental faculties so I should exercise caution about the information I might receive from him. The patient confirmed the following that:

- i. He denied that he was not in good terms with his mother.

- ii. His mother received the money, but she told him that she only received about R150 000.
- iii. She bought him clothes and a music system,
- iv. She bought housing furniture, couches, and a bed.
- v. He still wanted his mother to be involved in the administration of his monies.

[86] I asked the patient if he knew Mr. Fisher. He informed me that Adv Sewpersath told him about Mr. Fisher and what his role was going to be but Mr. Fisher has not spoken to him about his role.

[87] At this account, Adv Fischer could not have been more appalled. He argued that extension of the house and all else that Ms. Mabaso did with the money was not in the best interests of the Plaintiff. The money is supposed to be used to take care of his needs for life and not extend houses.

[88] Mr. Fisher objected to the suggestion that the patient's mother be involved in the administration of the patient's monies. He submitted that in his experience once the family member is involved in the administration of the patient's monies it will cause fights within the family . He argued vigorously that only professionals must deal with the administration of the patient's monies.

[89] Upon perusal of the Ms. Thumbiran's response to the LPC I also took notice of payments made to experts Fisher and Naidoo.

[90] In the court bundle, there is no rule 36(9)(B) notice of these experts nor reference of them in any expert report.

[91] On 9 December 2022 I issued another directive to the attorney in the following terms: -

...You provided a copy of an email to the LPC with the list of the experts that were paid in response to the complaint lodged by Ms. BG. M regarding the payment of general damages.

With reference to that email, I have noted payment to an expert Fisher and Naidoo. However, the Court has not come across their rule 36(9)(B) nor has it come across their expert report. And neither has it come across three other reports **(bolded below)** indicated in your experts' evidence bundle.

Therefore, the Court makes the further directives. Please furnish me with the following expert notices and summaries. You are to file on or before **Tuesday 13 December before 2022** the following:

1. The rule 36(9)(B) notice and summary of expert Fisher.
2. The rule 36(9)(B) notice of and summary of expert Naidoo.
3. The rule 36(9)(B) notice and summary of expert Dr Shevel **2nd of June 2014** report.

PLEASE BE ADVISED that I intend to refer the judgement to the LPC due to the manner in which the issue of general damages was pursued through amendment of pleadings despite the fact that they were settled and paid over 8 years ago.

You are given an opportunity to make submissions if you wish on the reasons why the general damages claim was pursued when it was already settled. Further submissions must reach me on or before Wednesday 14 December 2022.

Judgement will now be delivered on Thursday 15 December 2022.

[92] On 14 December 2022, the attorney filed an affidavit confirming that Fisher and Naidoo were not medical experts but advocates who were appointed in 2014 and 2019 to represent the plaintiff. An email dated 18 September 2018 to the Fund previous attorneys and to Adv Naidoo along with a signed Pre-Trial minute dated 11 October 2019 was attached. Both documents confirmed that the general damages were settled on 29 May 2014 in the sum the sum of R600 000 and that it is the loss of earnings that was an issue.

[93] The attorney confirmed that Adv Michael Fisher, the curator ad litem, was previously briefed in this matter on merits and he represented the plaintiff in court when the general damages were settled on 29 May 2014.

[94] In the light of this information, I did not deliver the judgement again on 15 December 2022. I enquired from Adv Fisher and the attorney why this information was not disclosed when the application for Adv Fisher to be appointed as curator ad litem was moved. Counsel for the plaintiff was not available, instead another counsel was briefed to note judgement. Adv Fisher explained that he was unaware and had no recollection that at the time of his appointment as curator ad litem he had acted as counsel for the plaintiff. He explained that he has been an advocate for the last 33 years and has been appointed as a curator in number of cases and he could not recall this matter. It only came to his attention that he acted as counsel in this matter very recently.

[95] He stated that there was no prejudice as he has always acted for the plaintiff and the award for damages was fair and reasonable at the time. He consulted with senior judges who confirmed that there was no prejudice.

[96] Both these submissions do not suffice. In his consent letter to be appointed as curator ad litem, Adv. Fisher indicated that he had read the full brief of the matter; was well versed with the duties of a curator ad litem and obligations expected of him. If that is the case, I find it untenable that in his reading of the brief, he would not have noticed that this is the same matter he had been previously briefed in before. And even if one were to be generous to his submission that he genuinely did not recall the 2014 brief of the matter, can the same be said of the attorney of record who had long been standing and acting on the matter? In no conversation or instruction did it ever come up between them that this is the same brief she had previously briefed him on? I think not.

[97] The attorney could not give any plausible answer but instead she stated that Adv Fisher has always represented the best interest of the patient and there was no bias shown.

[98] I issued further directives to Adv Fisher to state why he should not be removed as curator ad litem in the light of the judgements of this division on the role of the curator ad litem. Adv Fisher was specifically referred to the judgement of Bertelsman J in *JM Modiba obo Sibusiswe Ruca*³ and the judgement of Haupt AJ in *Stoffberg*⁴.

[99] Adv Fisher made submissions dated 17 January 2023 on why he should not be recalled as curator ad litem. His submission can be summarised as follows:

- 83.1. He explains that he was appointed as curator ad litem at the commencement of the trial on the recommendation of the medical experts and after it was established that the general damages were settled the matter proceeded only on future loss of earnings.
- 83.2. Counsel for the plaintiff led the evidence on the quantum followed by argument and the matter was postponed for judgement.
- 83.3. His appointment was to give locus standi in order for the matter to proceed to completion on the outstanding issue of loss of earnings. He had no recollection that he represented the plaintiff when the issue of general damages was settled in court.
- 83.4. He had no role in the determination of the loss of earnings award.
- 83.5. Should his appointment be recalled such recall would have an effect of being *ex tunc* and not *ex nunc*. This would render all the proceedings and successive event to be a nullity and be of no force and effect and the

³ *JM Modiba obo Sibusiswe Ruca*, dated January 2014 (case numbers 12810/2013 and 73012/2013 : North Gauteng Division)

⁴ *Stoffberg obo Xaba v Road Accident Fund; Keetse obo Matshidi v Road Accident Fund; Keetse obo Miambo In re Miambo v Road Accident Fund* (6199-2013; 7891-2006; 58068-2011) [2018] ZAGPPHC 514; [2018] 3 All SA 145 (GP) (10 April 2018)

patient would have no locus standi to proceed unaided. This would enquire a new date to be sought and the matter to be heard afresh would be extremely prejudicial to the patient and the patient would incur unnecessary costs.

83.6. If his appointment remains in place, his curatorship would automatically come to an end with the finalization of the matter then resulting in him being functus officio.

83.7. No prejudice was suggested to him regarding his appointment and conduct as his role was short and confined to the actual hearing.

83.8. He was not required to do a report as a matter was heard in court and not settled between parties.

[100] In his response Mr. Fisher noted the judgement of Stoffberg and did not mention Ruca judgement.

Discussion

[101] One of the important role players in the administration of those who suffered from traumatic brain injuries is the curator ad litem. However contrary to the provisions of Rule 57 of the Uniform Rules and common law, many a times in this Court, the applications for the appointment of curators (both ad litem and bonis) would be brought by the plaintiffs' attorneys at the very last minute when monies are just about to be awarded to the patients.

[102] Bertelsman J in Ruca stated that:

“These features represent a practice that appears to have developed over the past few years which avoids or circumvents the provisions of Rule 57 of the Uniform Rules of Court and the common law relating to individuals who are, or may be, unable to look after their own affairs. By avoiding or circumventing the provisions of the Rule and the common law principles

established over decades, these matters are prevented from coming to the Master's attention, avoiding the latter's supervision and scrutiny while the potential need to appoint a *curator bonis* or *curator bonis et personae* to the individual concerned is not considered properly or at all.

[103] Fisher J in *Kedibone obo MK and another v Road Accident Fund (Centre for Child Law as Amicus Curiae) and a related matter*⁵ observed that although the Fund willy-nilly settles claim of general damages without judicial oversight, it stops short of doing so in claims of loss of earnings if curator ad litem is not appointed. It would therefore seem that the appointment of the curator is not to serve any other real reason but to facilitate the settlement of the claim. As better expressed by *Ruca*, this goes against everything and anything of a purpose of a curator ad litem to a Plaintiff.

[104] In South Africa this important responsibility is left to attorneys who chose their colleagues to be the curator ad litem. Mostly the curators are not able to communicate meaningfully with the injured plaintiffs because of one or more of the following reasons (1) the language, (2) class, and race barriers.

[105] Dealing with these challenges faced by the people with diminished capacity and their inherent right to be treated with dignity, The South African Law Reform Commission Report of December 2015, Project 122, noted that:

Making decisions is an important part of human life. By exercising choice through our decisions in matters relating to our personal welfare and financial affairs, we express our individuality and exert control over our own lives. Impaired decision-making ability can be the result of mental illness, intellectual disability, brain injury, stroke, dementia, a specific disease, or impairment related to ageing in general. A legitimate expectation for the law is that it should establish a structure within which autonomy and self-determination are recognised and protected, while also

⁵ *Kedibone obo MK and another v Road Accident Fund (Centre for Child Law as Amicus Curiae) and a related matter* [2021] JOL 50051 (GJ).

protecting persons with decision-making impairment from abuse, neglect and exploitation. South African law does not fulfil these requirements at present.⁶

The independence and impartiality of the proposed curator ad litem

[106] The independence of the curator ad litem has been thoroughly addressed by Bertelsmann J said in *JM Modiba obo Sibusiswe Ruca*⁷ . He said:

....

One non-negotiable quality of an advocate (or attorney) acting as curator must be indisputable independence to ensure the integrity of the professional service that must be rendered to the patient: see Harms, *Civil Procedure in the Supreme Court* at para. **B 57.9**; *Ex parte Mallach* 1921 TPD 514, in which Mason J in a concurring judgment said:

'...in ordinary applications for the appointment of a curator ad litem to the property of any person found to be of unsound mind the Court always requires that some independent person, acting as curator ad litem on behalf of the person supposed to be insane, should independently investigate the matter, ...' (p 516).

In the context of children who required representation by curator ad litem the Appellate Division described the curator's duty as the

' ... vigilant protection of the rights of minors which our system of law seeks to promote by the appointment, in an appropriate case, of a curator-ad-litem.'

See *Rein NO v Fleischer NO & Others* 1984 (4) SA 863 (A). Although the Appellate Division was dealing with the protection of the interests of

⁶ South African Law Commission Report, December 2015, Project 122, at 2-3.

⁷ *JM Modiba obo Sibusiswe Ruca*, dated January 2014 (case numbers 12810/2013 and 73012/2013 : North Gauteng Division)

minors in that matter, it could never be argued that the same vigilance must not be displayed when a curator is appointed to a patient who may be unable to look after his own affairs and to understand the forensic issues in respect of a claim against the defendant Road Accident Fund. See further *Kotze v Santam Insurance Co. Ltd.* 1994 (1) SA 237 (C) and authorities cited there at 244G to 245D; *Ex parte Phillipson and Wells, NN.O. and Another* 1954 (1) SA 245 (EDL).

[107] I put to Mr. Fisher the question that in view that he had been briefed by the Plaintiff's attorneys in 2014, does this then not compromise his independence as curator ad litem? In response, Mr. Fischer argued that because he acted for the plaintiff on merits, there was no prejudice shown, he should not be recalled as the curator ad litem. He always had been acting in the best interests of the Plaintiff.

[108] In his submissions he expanded on that. He stated that his role in this matter was short and confined to the actual hearing and he was not required to do a report as the matter was heard in court and not settled by the parties. He submitted further that I should not remove him as curator as his curatorship will come to an end upon the finalization of the matter rendering him *functus officio as curator ad litem*.

[109] This is not true, and it contradicts the draft order submitted by the Plaintiff's attorneys which this Court appointed him on the strength thereof. It negates the following paragraphs of the draft order which read:

'2. the said curator ad litem is granted all powers and authority to enable him to prosecute the said action to the final end and determination thereof and without limiting the generality of such powers and authority, directing that he shall be entitled to:

1.1. Ratify such steps as have already been taken in respect of the action referred to in paragraph 1 supra

1.5. *Apply for the appointment of a Curator Bonis on behalf of the Plaintiff if necessary, in the event of the said action being successful.*

[110] If he was appointed to just give locus standi for the award of loss of earnings and thereafter become *functus officio*, how else then is he to scrutinize the actions and steps of the attorney, or even apply for a curator bonis if necessary? If Mr. Fisher's submission were to be accepted it would therefore follow that the attorney's conduct in this matter, and especially the investigation into her fees would go unchecked.

[111] The need for unquestionable independence of the curator ad litem cannot be overstated. In paragraph 36 in *Ruca* the court held:

'The need for an independent approach to the litigation is especially significant in cases such as the present, in which the attorney acting for the claimant accepted instructions from an individual whose capacity to understand the processes of litigation and the implications of the mandate given to the attorney may subsequently be found to have been compromised. Vigorous vigilance and pronounced independence are essential when issues such as the enforceability of a contingency fee agreement and the validity of instructions allegedly given by the patient in respect of the conduct of the litigation must be examined to protect the patient's interests. Just as ' ... *it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.*'

(per Hewart LCJ in *S v Sussex Justices, ex parte McCarthy* [1923] All ER Rep 233), the curator's independence must not only exist, it must manifestly be free of any semblance of bias or association with any party having an interest in the outcome of the matter. It is therefore self-evidently unacceptable that a potential curator *ad litem* should have had any association with the plaintiff's or soon-to-be-patient's legal representatives, let alone to have been briefed by this team upon the merits and background of the application for his appointment in

preparation of his report. Whenever a curator *ad litem* is appointed under circumstances such as the present, he steps into the shoes of the former plaintiff and continues the litigation in his or her place. One of the aspects that must be considered by the curator appointed at a late stage is whether the steps taken by the attorney and counsel who acted for the patient as plaintiff until the curator was substituted as nominal plaintiff, were reasonable, correct and in the patient's best interest and should therefore be ratified: *Kotze v Santam Insurance Co Ltd.*⁷ *supra*, at 244F and further. This process must include an investigation into the fees charged by counsel and attorney up to that stage, as set out above. Such investigation is obviously compromised where the curator has been consulting with these lawyers prior to his appointment.

[112] During the hearing Mr. Fisher understood his role as curator ad litem very well especially the role of rectifying the steps that had already been taken by the attorney before a curator was nominated. As it came to the attention of this court, and by sheer luck and rigorous investigation I should add, there are glaring irregularities in how this matter has been conducted. The concerns expressed above, including but not limited to the amendment of pleadings to include the award that had already been paid, the attorneys' inconsistencies when accounting for the general damages claim, the absence of contingency fee agreement are but some of the issues that require an investigation by the curator ad litem.

[113] In Stoffberg⁸, Haupt AJ summarised the role of curator ad litem as follows:

“Therefore, the role of the curator ad litem becomes even more important. The curator ad litem is the eyes and ears of the court. This is achieved by the curator investigating and reporting back to the Court and the Master.⁹ The report is there to draw the court's attention to any consideration which

⁸ Stoffberg obo Xaba v Road Accident Fund; Keetse obo Matshidi v Road Accident Fund; Keetse obo Miambo In re Miambo v Road Accident Fund (6199-2013; 7891-2006; 58068-2011) [2018] ZAGPPHC 514; [2018] 3 All SA 145 (GP) (10 April 2018)

in view of the curator ad litem might influence the court with regards to the terms of the order sought.

The provisions of the Rule therefore ensure a procedure with the necessary checks and balances in place to protect the interests of the patient affected by the order, as well as the court's duty to consider all the relevant facts before making an order.¹⁰ The provisions of the Rule may only be dispensed with under the circumstances envisaged in sub-Rule (4), which include by reason of urgency or certain special circumstances.¹¹ As the appointment of a curator has the practical effect of interfering with the person's right to make his/her own decisions, such interference can only be justified if the Rule is adhered to.¹²

[114] For an advocate who prides himself of being in practice for well over thirty-three years and '*aware of the duties and obligations of a curator ad litem*'¹³ it is clear from this submission that Mr. Fisher clearly does not understand his role as curator ad litem. The Ruca judgement which Adv Fisher failed to refer to as directed provides a comprehensive judgement on the interpretation of the provisions of Rule 57, the independent role of the curator and, the curator ad litem's duties and functions, the Masters' role, and of the early appointment of curator ad litem.

Absence of a contingency fee's agreement

[115] When I pressed for answers about why there was no contingency fee agreement, it was Mr Fisher who explained that most attorneys' firms are no longer inclined to enter into contingency agreements as they not do not reflect the actual work done by the

⁹ Rule 57(5) and (6)

¹⁰ Rule 57(10)

¹¹ Erasmus, Superior Court Practice, Vol. 2 at 01-72Z and the reference to applicable authorities as referred to in footnote 2-6; Harms, Civil Procedure in the Superior Court at B-385, paragraph 857.7; Ruca judgement at paragraph 32-33

¹² Ruca judgment at paragraph 37

¹³ Paragraph 3 of Adv. Fischer consent affidavit to be appointed as curator ad litem

attorneys as the attorneys are allowed to charge up to 25% of the award plus vat plus costs.

[116] However, disturbingly noted is that the fees that the attorney paid herself were not taxed or agreed upon between the parties – hence the plaintiff’s mother filing a complaint with the LPC.

[117] Realizing that the applicant’s attorneys failed to account fully on how the plaintiff’s award was utilized, I issued a directive to the plaintiff’s attorney to state under oath why her law firm and herself did not enter into contingency fee agreement. From her affidavit, these are her pertinent claims:

‘Ad 5: there is nothing in the contingency fees act which obliges attorneys to use it and attorneys have the discretion to charge on one of three options [agreed fee; contingency fee; itemized bill].

Ad 6: in this case the client signed a special fees power of attorney. **In these instances an itemized bill is done, which is taxed by the taxing master...** The fees charged are a true reflection of the actual work done and **the taxing master is there to scrutinize the Bill to ensure that the fees charged are fair and reasonable.**

AD 7: with the contingency fee, we have found that it is not an accurate reflection of the amounts being charged for the actual work done and it may occur that the attorney receives more with a fee of 25% than the actual value of the work performed. This we feel is highly prejudicial and unfair to clients.

AD 8: Furthermore, the Contingency Fee Act is not as simple to understand, if one were to have a proper understanding of same and it is for these reasons mentioned below that we opt not to use it:

- a. If the matter is not successful, the attorney will not be paid... “the client usually pays for expenses”. As a majority our clients are indigent there would be no prospect of obtaining any form of payment from the expenses

- b. Therefore, instead of sending a statement, the attorney will receive a fixed amount determined by the amount awarded. This can have the result that the attorney can get higher fees than she is entitled to...'

The Special power of attorney

[118] Ms. Thumbiran also submitted the Special Power of Attorney referred to in her affidavit. There were three of these annexed A to C, all signed on the 10th of January 2008 between her firm and the client. From this annexed powers of attorneys, I became more concerned

Special Power of Attorney A

[119] In the first annexure, the Plaintiff authorizes and grants special power of attorney to Ms. Thumbiran's firm, Raphael & David Smith Incorporated (the Firm) to recover and receive on her behalf the capital and "party and party costs" from the defendant in respect of the claim; and deduct the fees and disbursements from the capital amount of the claim before payment of the balance to her.

Special Power of Attorney B

[120] She shall at all times be liable for the payment of the attorney fees and disbursements, including VAT, unless otherwise agreed.

[121] In the event of an order of costs being granted in her favour, the attorneys shall proceed in order to recover such costs: provided however that the client shall in any event remain liable for the payment of such an account in the event of the costs for any reason not being recovered from the defendant.

[122] All disputes and difficulties arising between the parties, whether in connection with the mandate given or an ethical issue shall be referred for arbitration to be resolved

by an arbitrator agreed between the parties and/or alternatively, appointed by the Arbitration Federation of South Africa.

[123] Costs of the arbitration shall be borne by the losing party.

[124] In the event that it becomes the attorney's view that there are no reasonable prospects of them recovering their costs in respect of the arbitration should the client be unsuccessful therein, then the attorneys are empowered to demand security of costs from the client, and such matter shall not proceed to arbitration till such security is provided

[125] The client understands and accepts that any dispute arising shall not be referred to the LPC; and she shall not in any way have recourse to make a complaint against the attorneys to the relevant law society; and will be precluded from doing so.

[126] She warrants that she fully understands the nature, contents, meaning and purports of the agreement which have been fully explained and translated to her in a language she is fluent in.

Special Power of Attorney C

[127] The Plaintiff confirms that the difference between "party and party" and "attorney and own client costs" have been explained to her. Such explanation says that in "party and party", should she be successful in her case a bill of costs will be drawn up and settled or taxed against the defendant who will be liable for the payment. Furthermore, "party and party" bill only represents part of the fees and disbursements of an attorney.

[128] The agreed client and attorney fee is R350 per quarter of an hour on a time basis for all work done in connection with her case. This is exclusive of disbursements and VAT.

[129] In view of the fact that the attorneys will incur certain disbursements and fees in connection with her case, she irrevocably and in *rem suam* authorize the attorneys to recover and receive on her behalf the capital and “party and party” costs from the defendant and to deduct all fees and disbursements from the capital amount before payment of the balance to her.

[130] The attorney fees for services rendered and disbursements incurred in connection therewith will not be based on the applicable high court or magistrate court tariffs, or on the tariff applicable in any other court, but will be higher and will be calculated on the basis set out in this Special Power of Attorney.

[131] All disputes and difficulties arising between the parties, whether in connection with the mandate given or an ethical issue shall be referred for arbitration to be resolved by an arbitrator agreed between the parties and/or alternatively, appointed by the Arbitration Federation of South Africa.

[132] She warrants that she fully understands the nature, contents, meaning and purports of the agreement which have been fully explained and translated to her in a language she is fluent in.

[133] Concerning to me in these special powers of attorney is that the Client is precluded from bringing disputes to the Law Society, which are to be referred to arbitration – which may itself be denied by the attorney if their view is that there are no reasonable prospects of recovering their fees should the client lose in any arbitration proceedings. This demand of security based on an own self-assessment of the client’s prospects of success in any arbitration proceedings makes them judge in their own case.

[134] The affidavit explaining why there is no contingency fees agreement submitted by Ms. Thumbiran explicitly says, '*Ad 6: in this case the client signed a special fees power of attorney. In these instances an itemized bill is done, which is taxed by the taxing master... The fees charged are a true reflection of the actual work done and the taxing master is there to scrutinize the Bill to ensure that the fees charged are fair and reasonable.*' Not only has this not been done, but these special powers of attorney submitted to me say nothing about the taxing master; and in fact substitute the taxing master with an arbitrator – which they may very well deny to the client if she cannot provide the pre-requisite security.

[135] Of further concern is the exclusion of the LPC's authority to assist the client should she have any complaint against the attorneys.

[136] The plaintiff's mother then filed a complaint with the LPC with regards to the award given to her. I do not have before me what was the outcome of that complaint, but however it be, this provides for the very duty for the curator ad litem to be independent from the attorneys on brief.

[137] Mr. Fisher's argument in the face of glaring irregularities on the handling of the award of the general damages by the attorneys; the attorneys' fees; and his support to the attorneys' position on the no contingency fees agreement being contracted with them and the client; more so without him having regard to the actual fees charged onto the client, the validity of the special power of attorney herein, and now, the complaint of the plaintiff's mother which has come to light, renders his independence, if put in modest terms, doubtful.

[138] Mr. Fisher argument not to be recalled is that it would be extremely prejudicial to the plaintiff because it would render the orders granted a nullity as the plaintiff would not have the locus standi to proceed unaided is untenable. As said by Hewart LCJ in *S v Sussex Justices, ex parte McCarthy* [1923] All ER Rep 233 (quoted in Ruca)

It is therefore self-evidently unacceptable that a potential curator *ad litem* should have had any association with the plaintiff's or soon-to-be-patient's legal representatives, let alone to have been briefed by this team upon the merits and background of the application for his appointment in preparation of his report. Whenever a curator *ad litem* is appointed under circumstances such as the present, he steps into the shoes of the former plaintiff and continues the litigation in his or her place. **One of the aspects that must be considered by the curator appointed at a late stage is whether the steps taken by the attorney and counsel who acted for the patient as plaintiff until the curator was substituted as nominal plaintiff, were reasonable, correct and in the patient's best interest and should therefore be ratified: *Kotze v Santam Insurance Co Ltd.*' *supra*, at 244F and further. This process must include an investigation into the fees charged by counsel and attorney up to that stage, as set out above.** Such investigation is obviously compromised where the curator has been consulting with these lawyers prior to his appointment. **(my emphasis)**

[139] Under no stretch of the imagination can it be said, nor suggested, that Adv. Fischer can bear an independent mind in the interests of the Plaintiff, especially in scrutiny of the steps taken by the attorney, her fees and that of counsel, in a matter in which he has already materially benefited from. Nor does he seem to have any interest in undertaking such scrutiny because in his own words, "[his] appointment as *curator ad litem* was to give the Patient *locus standi* in order for the matter to proceed to completion on the outstanding issue of loss. I would respectfully submit that on final Judgment if my appointment as *curator ad litem* remains in place would result in any event in me becoming *functus officio* and my curatorship to automatically come to an end with the finalisation of the matter."

[140] On the matter of prejudice to the Plaintiff should his curatorship be recalled; I am of the view that indeed manifest prejudice and injustice would result to the Plaintiff if his curatorship were not to be withdrawn. As aforesaid in the case law cited above, '*One of*

the aspects that must be considered by the curator appointed at a late stage is whether the steps taken by the attorney and counsel who acted for the patient as plaintiff until the curator was substituted as nominal plaintiff, were reasonable, correct and in the patient's best interest and should therefore be ratified..' On Mr. Fischer's own affidavit, this is not intended by him.

[141] The facts of this case and the developments arising thereto give much cause for concern and bring into doubt the ethical conduct of the attorneys. Whether they at all times acted in the best interest of the Plaintiff questionable. Hence then the need for unquestionable integrity on the part of the curator ad litem to make sure that at all material times, nothing but his best interests were core centered in the litigation rather than the self-enrichment of his legal representatives.

[142] In rescinding my previous order appointing Adv. Fisher I fortunately find myself in good company, *Tshaleti v Mosungwa and Another*¹⁴ and *McNair v Crossman and Another*¹⁵. In the first matter, *Tshaleti*, the curator ad litem was removed by Manoim J on grounds of incompetence and misconduct. In the second matter, *McNair*, the Court said at paragraph 29:

"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..."

¹⁴ *Tshalet v Mosungwa and Another* (118881/2021) [2022] ZAGPJHC 278 (3 May 2022)

¹⁵ *McNair v Crossman and Another* 2020(1) SA 192 (GJ).

Manoim J in *Tshalet* assures that the same principles apply in the removal of a curator ad litem. In this case, the ground of removal is compromised independence.

[143] Fortunately for the plaintiff the role played by Mr. Fisher in these proceedings was very short. It was confined to trial and *'to give the Patient locus standi in order for the matter to proceed to completion on the outstanding issue of loss'*.

[144] In the circumstances the following order is made.

1. The order granted on 20 October 2022 appointing Adv Michael Fisher as curator ad litem is rescinded and set aside.
2. Adv Fisher is removed as curator ad litem acting on behalf of the plaintiff.
3. Adv Fisher may not charge any fees relating his role as curator ad litem.
4. Ms. Aarthi Thumbiran and her firm may not charge any fees relating to the application for curator ad litem on the 24th October 2022; 7th and 14th December 2022 appearances.
5. The order granted on 7th December 2022 is void ab initio.
6. The Registrar of this Court is directed to refer this judgment to the General Bar Council to nominate curator ad litem fluent in the IsiZulu language within 30 days of receipt of this judgment.
7. The curator ad litem is hereby directed to:
 - i. Investigate and prepare a report about the steps and actions taken by the Plaintiff's attorneys, and in particular report on whether such steps and

actions should be ratified, which investigation should cover the reasonability of the fees charged to date;

- ii. Investigate and report on whether expert fees and costs of counsel were paid or not by the Fund in 2014; and if not, whether the Plaintiff's attorneys took any steps to recover their expert fees, disbursements, and costs of counsel from the Fund. This report is to include a determination whether any expert fees and disbursements should have been levied to the client and therefore deducted from the capital award.
 - iii. Investigate and report on the Plaintiff's mother's ability to understand the implications of the Special Power of Attorney signed, fee agreements, and whether such implications, were in fact, explained to her in a language in which she is fluent in.
 - iv. Investigate and submit a report on the validity and enforcement of the Special Power of Attorneys' signed, fee agreements entered into by Plaintiff's attorneys and the client;
 - v. To prepare a report on the appropriate vehicle to house the award to be made to the client.
 - vi. To investigate and make any other recommendation which s/he may so deem fit in view of the facts and concerns raised in this judgment.
8. The curator ad litem's report must be delivered to the Master of the High Court, Johannesburg Division for his/her comment within 30 days of receipt of the curator's report.
 9. The Master is to comment on any aspect of the curator's report which s/he may so deem fit to do so and also on the appropriate vehicle to house any funds to be awarded to the Plaintiff.
 10. The curator ad litem is to take any such steps as s/he may deem fit to ensure the expeditious delivery of the Masters' report.

11. The curator's report, with that of the Master is to be delivered to this Court and the Plaintiff's attorneys within 10 days of both being available.
12. Upon receipt of the curator's and Masters' report, the Plaintiff's attorneys and counsel shall within 15 days file any further submissions or replies thereto if they so wish.
13. Costs of counsel are to be paid by the attorney.
14. The conduct of Ms. Aarthi Thumbiran is referred to the Legal Practice Council for further investigation.
15. The conduct of Adv. Michael Alex Fisher is referred to the Legal Practice Council and the General Bar Council for comment should they wish to do so.
16. A copy of the judgment should be provided to the Legal Practice Council, Bar Council of Pretoria, Johannesburg Society of Advocates, PABASA and the Independent Bar Association.
17. Pending receipt of the reports and submissions indicated herein, this matter is reserved before me.
18. Any party may approach this Court for further directives, if so, should the need arise.

L FLATELA
JUDGE OF THE HIGH COURT

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 the hand down is deemed to be 10h00 on 14 February 2023

Appearances

Counsel for the Plaintiff : Adv A Sewpersath
Adv MA Fisher (Curator ad Litem)

Instructed by : Raphael David Smith Inc
Ref: A Thumbiran

Attorney for the
Defendant : State Attorney
Ms Shamine Ameersingh

Date of hearing : 24 October, 7 December and 14 December 2022
Date of judgment :14 February 2023