REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 7891/2006
CASE NO: 58068/2011
10/4/18

In the ex parte applications for the appointment of curators ad litem:

CASE NO: 6199/2013

PA STOFFBERG Applicant

On behalf of:

CELIWE SEBENZILE EUNICE XABA Plaintiff
(ID No .: […])

and

ROAD ACCIDENT FUND Defendant

And

Case No.: 7891/2006

PULENG MAGDELINE KEETSE Applicant

On behalf of:

LAWRENCE JOE MATSHIDI Plaintiff
(ID No.: […])

and

ROAD ACCIDENT FUND Defendant

And

Case No.: 58068/2011

PULENG MAGDELINE KEETSE Applicant

On behalf of:

SHEILA MIAMBO
(Born on […] 2008)

In re:

F R MIAMBO obo SHEIL.A MIAMBO

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

INTRODUCTION:

1. The Gauteng Division, Pretoria is the largest in the Republic and its civil

trial roll is overburdened with claims against the RAF. On average, 150 matters per day are set down against the RAF alone. The present 3 applications all seek, in vary forms, the same relief and that is for the appointment of a curator ad !item in actions already instituted against the Road Accident Fund *("RAF;.* They served before me in the unopposed motion court on 28 March 2018 and in all 3, the respective attorneys were the applicants and the deponents to the applications.

2. Each application sought the appointment of a curator ad litem, to pursue and fulfil the already instituted actions including the authority to ratify any actions already taken on behalf of the plaintiff:
    2.1 in the Xaba-matter under case number 61991/2013, the matter was on the civil trial roll during November 2017;
    2.2 in the Matshidi-matter under case number 7891/2006; and
    2.3 the Miambo-matter under case number 58068/2011, settlement offers dated 22 March 2016 and 25 February 2015 respectively were attached to the founding affidavits.
3. Only the Matshidi and Miabmo matters sought an order that the curator ad litem report to the court with regards to the ability of the plaintiff to manage his/her own affairs and that the costs be reserved for determination by the court, seized with the action. The notice of motion in the Xaba-matter made no reference to the curator reporting to the court and requested that costs be cost in the cause.
4. The Miambo-matter involves relief pertaining to a 9-year old minor child. Nothing on the papers indicated whether her legal guardian was aware of the application.
5. The manner in which the applicants, who are both attorneys from well-established firms known as RAF-practitioners, approached this court, gave me the distinct impression that the court was expected to act as a mere rubber stamp and that I was expected to ignore the relevant judgments of this division, Rule 57 and the practice directives.
6. During January 2014 the Honourable Bertelsmann J delivered a comprehensive judgment dealing with the non-adherence to Rule 57 in the RAF matters in the unreported judgment of JM Modiba obo Sibusisiwe

Ruca (case numbers 12810/2013 and 73012/2013: North Gauteng Division)[1] (hereinafter referred to as the *"Ruca judgment).* The Ruca judgment meticulously evaluates the provisions of Rule 57, the importance of the independence of curators ad litem. the importance of timeously approaching the court in terms of Rule 57 to appoint a curator to investigate and report back to the court, the important function of the Office of the Master of the High Court and misgivings regarding certain proposed trusts and policies which seeks to circumvent the role of the curator bonis and the involvement of the Office of the Master.

7. The Ruca-.judgment highlighted the problems that this and other divisions experience with particularly RAF matters. A practice developed over the past few years which avoided, or which attempts to avoid or circumvent the provisions of Rule 57 and the common law relating to individuals who are or who p9ssibly may be unable to look after their own affairs. I refer to paragraph 1, 2 and 34 of the judgment:

"1. …

By avoiding or circumventing the provisions of the Rule and the common law principles established or decades, these matters are prevented from coming to the Master's attention, avoiding the latter's supervision and scrutiny whiff) the potential need to appoint (! *curator bonis or curator bonis et personae to the individual concern is not considered properly or at all.*

2. This practice might course irreparable harm to the road accident victims concerned and leaves the door open to other abuses of the Road Accident Fund litigation. It is therefore essential to examine its characteristics in some detail. While the facts of the present matter may in some instances be more extraordinary than in others, it must be underlined that there appear to be many cases *which present the same issues that are discussed infra* ...

34. Before giving directives in respect of further steps that n1peds to be

[1] [2014] ZAGPPHC 1071The judgment was brought to the at1ention of members of the Bar and attorneys as prayer 16 provides as follows: A copy of this judgment must be provided to the Law Societies of the Northern Provinces and upon the Bar Councel of the Pretoria and Johannesburg

taken in this application some comments upon the Implications of the practice that has apparently taken route In recent times are called for. They are so *grave and potentially or actually detrimental to the patients concerned that it is essential to restate the law and practice in* some *de4Ji/ to ensure that the face of the courts is set firmly against the disregard of the principle and practice that are designed* to *protect the most vulnerable of litigants."*[2]

8. None of the matters before me made any reference to the provisions of Rule 57 or the Ruca judgment until the applicability of the Rule and the judgment was raised by the court. It is trite law that it is the duty of every legal practitioner to acquaint him/herself with the Court's Rules.[3] By implication this also places a duty on legal practitioners to be acquainted with relevant case law and practice directives relating to the Rules.
9. Despite the Ruca judgment providing a comprehensive analysis of the blatant disregard by attorneys and counsel in RAF-matters in this Division for the provisions of Rule 57 and the checks and balances which the Rule provides in order to ensure that a party is not stripped of his/her basic and fundamental freedoms, liberty and dignity or vulnerable plaintiffs litigating without due process and this court not acting as a mere rubber stamp, it would seem that practitioners need to be reminded of their duties as officers of the Court.
10. When considering the costs of the applications, I am mindful of the fact that the RAF is funded by the public by way of fuel levies. Therefore, I am duty bound to ensure that there is not an unnecessary waste of precious public resources which should be earmarked for the injured victims of motor vehicle accidents and not for attorneys who Ignore the Rules and practice of this court. Costs rem in in the Court's discretion, irrespective of the fact that the costs of these type of applications are part of the costs the

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Society of Advocates for the attention and comment, should they wish to do so."

[2] Ruca judgment supra, Paragraph 1, 2 and 34, paragraph 19 also deals with the problematic issue of practitioners seemingly following a "practice,, when orders to create a trust with a financial institution for brain damaged plaintiffs who would be unable to administer a large amount of money were sought and the court raising the question whether such an order could be made without first declaring such a plaintiff unable to deal with all or some of his/her affairs.

[3] Kgobane v Minister of Justice 1969 (3) SA 36S (A) at 369; Waar v Louw 1977 (3) SA 297 (O)

RAF is liable for. Practitioners who approach this Court with a slap-dash attitude towards its Rule and practice, do so at their own peril.

11. Whether a client has the legal capacity to litigate is a basic and fundamental preliminary procedural question his/her attorney should consider before continuing with the judicial process. None of the matters before me provided an explanation why, where there were indications already at the early stages of the action that the plaintiffs may be significantly mentally impaired due to the seriousness of their head and/or brain injuries, their attorneys did not consider the provisions of Rule 57 and approach the court earlier. I am further mindful of the comments by the Constitutional Court in Road Accident Fund v Mdeyide 2008 (1) SA at 550, paragraph 44:

> *"[44] ..... The unhappy path that this litigation has taken should be* a *salutary reminder to courts and practitioners that they should be sensitive to the needs and circumstances of someone* as *vulnerable* as *the plaintiff.*"

12. Settlement offers were made and/or accepted in the Matshidi and Miambo-matters. The Xaba-matter settled on the allocated trial date during November 2017. It is Important that the court is placed in a position, especially in the action to ascertain whether the plaintiffs were able to make rational decisions regarding the litigation that he/she was about to embark on and that they understood the issues at hand at the time of instructing the attorney, including considering and accepting settlements. It would seem that the practice has re-emerged that attorneys simply approach the court for the appointment of a curator ad litem when the action is at its end and/or as a kneejerk reaction to accepting the RAF's conditional offer of settlement. The curator is then expected to rubber stamp all steps taken thereby in essence exonerating the attorney from his/her duty as an officer of court not to institute, finalise and/or settle an action where there is a concern that the client might not be in a position to make rational decisions, give rational instructions and/or understand the issues at hand.

IMPORTANCE OF RULE 57 AND RUCA-JUDGMENT:

13. The provisions of the Rule are clear and unambiguous. The Rule clearly sets out the procedure to be followed. The application as far as possible, should be supported by an affidavit of at least one person to whom the patient is well known as well as two medical practitioners who have conducted recent examinations on the patient.[4] In this regard Rule 57(2) and (3) provides as follows:

"(2) Such application shall be brought ex parte and shall set forth fully

(a) the grounds upon which the applicant claims locus standi to make such application;

(b) (b) the grounds upon which the court is alleged to have jurisdiction;

(c) the patients age and sex, full particulars of his means, and information c1s to his general state of physical health;

(d) the relationship (if any) between the patient and the applicant, and the duration and Intimacy of their association (if any);

(e) the facts and circumstances relied on to show that the patient is of unsound mind and incapable of managing his affairs;

(f) the name, occupation and address of the respective persons suggested for appointment by the court as curator ad litem, and subsequently as curator to the patient's person or property, and a statement that these persons have been approached and have intimated that, if appointed, they would be able and willing to act in these respective capacities.

(3) The application shall, as *far* as *possible, be supported by*

(a) an affidavit by at least one person to whom the patient is well known and containing such facts and information as are within the deponent's own knowledge concerning the patient's mental condition. If such person is related to the patient, or has any personal interest in the terms of any order sought, full details of

[4] Lawsa, Vol. 3(1) (LexisNexis) at 238 paragraph 417 and Vol. 17 at 312-313, paragraph 408; Herbstein & Van Winsen, The Civil Practice of the High Courts of South Africa (5th edition) (LexisNexis)Vol. 2 at 1553: Joffe et al High Court Motion Procedure: A Practical Guide

such relationship or interest, as *the case may be, shall be set forth in his affidavit; and*

(b) affidavits by at least two medical practitioners. one of whom shall. where practicable. be an alienist. who have conducted recent examination .,:; of the patient with a *view to ascertaining and reporting upon his mental condition and stating all such* facts *as were observed by them at such examinations in regard to such condition, the opinions found by them in regard to the nature, extent and probable duration of any mental disorder or defect observed and their reasons for the same and whether the patient is in their opinion incapable of managing his affairs. Such medical practitioners shall,* as *far as possible, be persons unrelated to the patient, and without personal interest in the terms of the order sought."* (own emphasis added)

14. The Court may appoint a curator ad lite for specific purposes such as an action for damages.[5] However a clear case has to be made out. The medical reports should support the relief sought. In all 3 applications the medical reports used in support of the applications were obtained for purposes of a RAF claim. The reports do not specifically address the question of whether the plaintiffs are able to manage their own affairs particularly pertaining to understanding the legal process and giving instructions. None of the applications fully comply with sub-Rules (2) and (3)
15. The authorities are clear that the provisions of Rule 57 are peremptory. Other than the circumstances provided for in sub Rule (4), failure to observe the provisions of the Rule result$ in the application being defective to the extent that such an application cannot and should not be entertained.[6]
16. It is also trite that an application for the appointment of a curator ad litem should be sought at the earliest moment after it has become clear that a

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(LexisNexis)at 1-95 to 1-96

[5] See Herbstein & Van Winsen The Civil Practice of the High Courts of South Africa, Vol 2 at 1558 and the authorities cited in footnote 47 and 48

party may be unable to manage his/her own affairs.[7]

17. The importance of appointing a curator ad litem as soon as it becomes clear that a person may not able to understand the proceedings or give rational instructions. is relevant to the question whether the person/plaintiff was able to give a proper instruction at the time of the commencement of the litigation. In this regard the comments in the Ruca judgment at paragraph 46 are relevant:

> *"46. It is indisputable that the appointment of* a *curator ad litem should be sought at the earliest moment after it* has *become clear that the patient may be unable to understand the proceedings* or *to give rational instructions to legal representatives. or may be unable to conduct his/her own affairs: Road Accident Fund v Ndeyide 2008(1)* SA *535 (CC). In the present instance there* were *early indications that the patient may be significantly impaired mentally as* a *result* of *the head and brain injuries suffered in the accident. It may have been advisable to consider the appointment of a curator bonis or curator bonis et personae before summons was issued. The patient's ability to give proper instruction to his attorney at the time litigation commenced will now have to be investigated."* (own emphasis added)

18. 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.[8] The report is there to draw the court's attention to any consideration which in view of the curator ad litem might influence the court with regards to the terms of the order sought.

19. 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

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[6] See: Erasmus, Superior Court Practice (2nd Edition), Vol. 2 (JUTA) at 01-720;
[7] Ruca judgment at paragraph 6 to 10 and 46; RAF v Mdeyde supra at 548, paragraph [35]-(37]
[8] Rule 57(5) and (6)

relevant facts before making an order.[9] 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.[10] 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.[11]

IMPARTIALITY OF PROPOSED CURATOR AD LITEM:

20. It is imperative that the curator ad litem must be impartial and fearless when reporting back to the court regarding all the relevant facts that may impact upon the question whether the plaintiff is able to manage his/her own affairs. This further entails addressing the uncomfortable question whether the plaintiff since the inception of the action, was in a position at all to provide the attorney and counsel with the necessary instructions. In the present applications I specifically enquired why the attorneys, knowing of the circumstances of the plaintiffs, did not take steps earlier to approach the court for the appointment of a curator ad litem, and who was giving the instructions in the interim for the matter to proceed. The papers did not assist me nor were counsel able to supply satisfactory answers. For example, in the Xaba-matter even after the filing of a further affidavit, the court is none the wiser.
21. In all three matters the question arises as to who gave the instructions from the time when it became clear to the attorneys, insofar as they were not able to apply their own common sense when consulting with their respective client and/or family members, that their client might not be able to understand the proceedings. Despite very early indications in the Xaba and Matshidl-matters, of clients struggling with memory loss and behavioural changes since the accident, the action proceedings continued.

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[9] Rule 57(10)
[10] 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
[11] Ruca judgment at paragraph 37

22. In particular, in the Xaba- and Matshidi-matters it is evident from the reading of the experts' reports that the family members of Ms. Xaba and Mr. Matshidi from the outset voiced their concerns on the change in behaviour and functioning of the plaintiffs. Attorneys cannot continue to act on behalf of clients if there is a concern that the client is not *compos mentis* and simply ignore the warning signs regarding the client's capacity to litigate. The applicants are both seasoned attorneys who have established practises in RAF matters. They cannot excuse their failure to timeously approach the court for the appointment of a curator ad litem merely because they hide behind the fact that they are not experts. The expert reports in all 3 applications paints a picture of plaintiffs (and their family members) who are from economically and socially vulnerable backgrounds. The plaintiffs and their families placed their trust in the attorneys. Sadly, it would appear that their attorneys were not sensitive to the needs and circumstances of persons as vulnerable as their clients.
23. A lot is to be said for applying a common-sense approach in matters involving victims of motor vehicle accidents. The court does not expect an attorney to act as an expert psychologist, psychiatrist and/or neurologist in these kinds of matters. However, given the history of the matters and the serious injuries sustained by the plaintiffs and the concerns raised by their family members, it was irresponsible of the attorneys not to have approached the court at an earlier stage.
24. It may appear after a proper investigation by the curator ad litem that the attorneys involved acted on behalf of the plaintiffs and accepted instructions from the plaintiffs whose capacity to understand the process were compromised. If this is the case this would cause a procedural domino effect. The enforceability of *inter alia* contingency fee agreements, the validity of the instructions already given by the plaintiffs in respect of the conduct of the litigation and the acceptance of settlement offers, becomes suspect. This may well have the effect of negating any agreement reached as any mandate may be null and void.
25. The Ruca judgment confirmed the non-negotiable requisite that the proposed curator ad litem should be independent:

"35. …

In the context of children who required representation by a *curator ad /item the Appelate division described the curator's duties as the*

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

See: Rein NO v Fleischer NO and others 1984(4) SA *863 A. Although the Appelate division was dealing with the protection of the interests of minors in that matter, it would never be argued that the same vigilance must not be displayed when a curator is appointed to a patient who may be unable to took aft.er his own affairs and to understand the forensic issues in respect of a claim. against the defendant Road Accident Fund*

…

The need for an independent approach the litigation is especially significant in cases such as t present, in which the attorney acting for the claimant accepted instructions from an individual whose capacity to understand the process of litigation and the implications of the mandate given to the attorney may subsequently be found to have been compromise. Vigorous vigilance and pronounce 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 ..." [12]*

36. ... *The curators independence must not only exist, it must manifestly be free of any semblance of pleas or association with any party having in 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 plaintiffs 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 tor his*

[12] Ruca judgment at paragraph 36

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/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 client who acted for the patient as plaintiff until the curator was substituted as nominal plaintiff. were reasonable, correct and in the patients best interest and therefore should be ratified ... 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 his lawyers prior to this appointment." (own emphasis added}

26. Furthermore chapter 15.9 of our Division's practice manual provides as follows:

> *" 1. Where the appointment of* a *curator ad /item is sought to assist* a *litigant in the institution or conduct of litigation, the applicant must establish the experience of the proposed curator ad /item in the type of litigation which the litigant wishes to institute or conduct and also of the curator bonis who is propose to attend to the patient's affairs and person."*

It is non-negotiable that the advocate, acting as the curator, must be indisputably independent to ensure the integrity of the professional service that must be rendered to the plaintiff/patient.[13]

27. The applications before me do not comply with the practice directive or the guidelines in the Ruca judgment. Given the concerns raised by me in how the matter was brought before the court, the long delay before approaching the court and the failure to adhere to the provisions of Rule 57. I intend that my order ensures transparency and independence of the proposed curator ad litem.

28. Given the factual bac ground to all 3 the applications as more fully dealt

[13] Ruca judgment at paragraph 35

with hereunder, I can come to no other conclusion than that the applications were ill-considered, ignored the provisions of Rule 57 and the guidelines as provided in Ruca judgment. This failure results in the applications being procedurally flawed due to the substantial non-compliance with practice and the law. Such conduct by officers of this court is inexcusable and the court has the duty to ensure that the abuse of its process is adequately addressed by making an appropriate costs order. Despite the procedurally flawed process, it would result in an injustice if the Court did not assist the plaintiffs, who are not party to their attorneys' conduct.

FACTUAL BACKGROUND TO THE MATSHIDI-MATTER (CASE NUMBER 7891/2006):

29. Ms. Keetse is the attorney of Mr. Matshidi and the applicant. The founding affidavit confirms that already from the outset when the claim was lodged with the RAF, instructions were not received from Mr. Mashidi but from his grandmother. In this regard paragraph 4 is relevant:

> *"Mr Lawrence Joe Mashidi was injured in a collision which occurred on 02nd August 1998. On instructions of Ms. Mashidi, a claim was lodged with the Road Accident Fund on behalf of her grandson Lawrence Joe Mashidi, born on the 16th of July 1986, An action was institute against the Road Accident Fund before this Honourable Court under case number 7891/2006."* (own emphasis added)

30. However, in paragraph e of the founding affidavit, it is contended that during the course of preparation for the quantum, the various medico-legal reports that were obtained indicated that Mr. Mashidi requires the assistance of a curator ad litem. Reference is made to the medico-legal report of the clinical psychologist, dated March 2015. The psychologist indicates in his report that his clinical impressions of Mr. Mashidi included that his demeanour was childlike, he smiled inappropriately, his speech was vague and unclear, and his responses were limited. At times he lost focus during testing and sometimes refused to do tests and had to be

convinced. The report states that Mr. Mashidi reported that he had no recollection of the accident but that he was able to state that he was in a coma for six months and had been admitted to the hospital. The reports concludes by merely recommending that it is important to protect Mr. Mashidi's funds and that a curator bonis might need to be appointed.

31. The report by the occupational therapist, dated June 2015, reports similar observations as the psychologist. The occupational therapist further indicates that she concurs with the opinion expressed by Mr. Mashid'is aunt that all monies awarded should be adequately protected and that a curator ad personam and a curator ad litem should probably be appointed for his benefit.

32. The application for appointment of a curator ad litem was issued out of this court on the 22n d of March 2018, five and a half years after the first assessment by the occupational therapist in 2012. Ms. Keetse makes no attempt in her affidavit to explain why she did not approach the court earlier for the appointment of a curator ad litem as she had at best for her, a report at hand in March 2015. No explanation is provided from whom she actually received instructions since instituting the claim against the RAF during 2006. It is evident from the reports annexed, in particular the report by the occupational therapist, that the first assessment was already during September 2012. According to the applicant, in paragraph 6.2, she refers to the medico-legal report of the occupational therapist dated 12 December 2012, and quotes the following from the report:

> *"Inability to engage in selfcare, work and play/leisure <u>as a result om impairment (mental/physical)</u> or an alteration to an individual's capacity to meet personal, social or occupational demands because of impairment."* (own emphasis added).

33. An offer in acceptance of settlement, dated 22 March 2016, is attached as Annexure "PMK2" to the founding affidavit. On the offer, handwritten notes appear that indicate that the offer is subject to an amendment and appointment of a curator ad litem. Ms. Keetse merely refers to the offer of settlement conceding t'1e merits by stating that the liability has been resolved on the basis that the RAF is liable for 100% of the proved or

agreed loss suffered by Mr. Mashidi. No indication is given, or explanation provided, on whose instruction the offer was considered and/or accepted.

34. The matter stood down to the 29th of March 2018 for the filing of a further affidavit to address the concerns raised by the court. No further affidavit was received from the applicant.

FACTUAL BAC GROUND TO THE MIAMBO-MATTER (CASE NUMBER 58068/2011):

35. Ms. Keetse, who represents Mr. Mashidi also approached the court in the Miambo-matter The application was issued on the 18th of January 2018.
36. The prayers in the notice of motion are confusing. Prayer 1 requests that the same advocate as requested in the Mashidi-matter be appointed as curator ad litem for Sheila Miambo and on the next page from prayer 2 to 5 another advocate is named, who is to be authorised to ratify all steps taken on behalf of the plaintiff.
37. The papers indicate that on instruction received from a Mr. Miambo, a claim was lodged with the RAF on behalf of his daughter Sheila who was born on 11th December 2008. It would appear that Sheila was injured in an accident which occurred on22nd December 2009. It also appears at the time of the application, Sheila was 9 years old. It bears mentioning that other than this particular reference to Mr. Miambo, no further mention is made of him in the entire application. In fact, I am not even sure that he is aware that this application Is being brought. Reference is made to a copy of an offer of settlement attached as Annexure "PMK2" to the founding affidavit and from the offer dated 25 February 2015, it appears that the offer is subject to *"proof of locus standi".*
38. In paragraph 5 of the founding affidavit there is a general averrnent that indicates during the course of preparing for the quantum, various medico-legal reports were obtained and according to the experts, Sheila requires the assistance of a curator ad litem and presumably also in due course a curator bonis. Again, brief reference is made to a report by the clinical psychologist dated *"1 February 2013",* Indicating that Sheila is not capable

of managing her own financial affairs and that It is recommended that any funds awarded to *"him"* be appropriately protected. The relevant report is actually dated 1 June 2015 not 1 February 2013. A report by a clinical- and educational psychologist dated February 2015, *inter alia,* comments that ***"she** is probably not able to follow up or fully understand* the *legal* process *even as an adult it recommended that a curator bonis and curator ad /item* are *appointed."* From the reading of both experts' reports It Is evident that Sheila was accompanied by her parents, Mr. Afouso Miambo and Ms. Monica Naintobu to the evaluation sessions and that they are her caregivers and guardians. Nothing is mentioned to the effect that they are not competent guardians in the reports or affidavit.

39. Section 18(3) of the **Children's Act**, 38 of 2005 stipulates that the guardians of a minor child have the responsibility to represent the child in legal proceedings. Section 18(3)(b) provides that a parent or person acting as a guardian must:

> "..
> *(b) assist or represent the child in administrative, contractual and other*
> *legal matters;*
> *…"*

40. DA curator ad litem will usually only be appointed where the minor has no legal guardian.[14] I raised concerns pertaining to the confusion of the notice of motion of which counsel is to be appointed to act on behalf of the minor child. I further enquired why the minor child's biological father and/or parents are not fit and proper to represent her in the action. From the papers in the court file I gathered that Mr. Miambo in his capacity as the minor child's father and natural guardian instituted the proceedings during "*June 2012'* on her behalf although the case number reflects 2011. The involvement of the minor child's natural guardians also directly affects the question regarding any funds as this forms part of the duties of a guardian as referred to in section 18(3) of the **Children's Act.** Section 18(3)(a)

[14] LAWSA Vol. 3(1) at 241, paragraph 425 to 426; Harms, Civil Procedure in the Superior Courts, at A-60, paragraph A6.5

provides that the guardian is responsible for administering and safeguarding the child's property and property interests.

41. The application is silent regarding the involvement of Sheila's guardians. No confirmatory affidavit by any of her guardians is attached. Nowhere in the application is there an indication why Mr. Miambo, who was the guardian who instructed the institution of the proceedings, is *no* longer fit and proper to take the matter to its finality or that the minor child's guardians are not able to administer and safeguard any payments received on behalf of the minor child. It is not clear from the papers if the guardians are aware and/or support the application.
42. The attorney was provided with the opportunity of providing the co rt with a supplementary affidavit to address the concerns raised if she wished to do so. It is unfortunate that no further affidavit was filed.

FACTUAL BACKGROUND TO XABA-MATTER:

43. In the Xaba-matter, the accident In which Ms. Xaba was involved occurred during July 2004.· The earliest reports were already available during February 2015, if regard is had to the report by the occupational therapist. From the occupational therapist's report, it is evident that a RAF4 report, dated June 2013 was filed. The occupational therapist also indicates that Ms. Xaba had no recollection or memory.
44. From the occupational therapist's report, it is clear that the information gained for purposes of the report was obtained from Ms. Xaba's daughter and other family members as she cannot remember the accident. This aspect raises the issue of how Me. Xaba was able to give instructions to her attorney, Mr. Stoffberg, *if* she had no recollection or memory of the accident. Furthermore, the occupational therapist indicates that her cognitive functioning is impaired as she has memory difficulties. Ms. Xaba was unable to comprehend English and the assessment had to be conducted with the aid of a translator. Throughout the report of the occupational therapist, it is indicated that Ms. Xaba herself was not in a position to supply much information and that most of the information was

obtained from her daughter, who accompanied her. Throughout the report it is indicated, according to Ms. Xaba's daughter, there has been a decline in her mother's memory and ability to manage money after the accident.

45. The report by the clinical psychologist, dated April 2016, makes similar comments and observations to those reported by the occupational therapist. With reference to the RAF4 report dated June 2013, the psychologist indicates that the physician reported that Ms. Xaba could not recall specific events leading up to the accident, she was unconscious from the accident until she ended up in hospital, and was unable to recognise people whilst in hospital for three days after the accident. She expresses the opinion that Ms. Xaba's ability to manage her own affairs has been significantly compromised on cognitive grounds due to the accident. It is recommended that any funds awarded to Ms. Xaba in future, should be protected in a trust.

46. The report from the neurologist dated May 2016 makes similar comments and observations. He Indicates that her daughter explained that her mother is forgetful and is unable at times to recall conversations or recognise family members. His neurological examination established that Ms. Xaba did not know the month or year, she was unable to recall a story and that there was cognitive impairment in that there was a difficulty with judgement and abstract thinking. His assessment indicates that she has cognitive and neuropsychiatric deficits, currently on the background of underlying Alzheimer's. He concludes that she will not pe able to manage her finances and any money allocated by the court should be under the care of a curator.

47. Ms. Xaba's attorney filed cryptic 4-page founding affidavit in support of the application. His states the following in paragraph 3 of his founding affidavit deposed to on 26 January 2018:

> *"Our firm has been instructed by the plaintiff to institute a claim against the respondent to claim damages resulting from her injuries suffered in a motor vehicle accident on 10/0712004. It has subsequently transpired that the plaintiff suffered a tra1,1matic brain injury, as set out more fully hereunder. In this circumstances,*

where the plaintiff is incapable of bringing the application on her own behalf due to the traumatic brain injury, it is with respect contended that I, as attorney of record of the plaintiff, is the appropriate person to bring the application on behalf of the plaintiff." (my emphasis)

48. The consent from the proposed advocate to be appointed as curator ad litem attached to the founding affidavit also confirms that she was approached to be appointed a curator ad litem for Ms, Xaba for*" purposes* of prosecution/prosecution and finalisation of the claim, following the *affidavit from Mr. PA Stoffberg."*
49. Ms. Xaba's attorneys briefly deals with the medlco-legr;1I reports from the neurologist, clinical psychologist and occupational therapists in paragraph 4 of his founding affidavit. No attempt is made to explain why he waited nearly two years from receiving the first reports before approaching the court. On the court file it is recorded that on the 23rd of November 2017. the Honourable Ledwaba DJP removed the action from the civil roll for an application for a curator ad litem to be filed. This aspect was, however, not addressed in the founding affidavit. The application was issued on 1 March 2018.
50. Upon enquiry from this court pertaining to the explanation for the delay in bringing the application and the non-compliance with the Rule and the Ruca judgment, the matter was stood down for the applicant to tile a supplementary affidavit.
51. During argument on 28 March 2018, I raised the issue pertaining to the request that a curator ad litem be appointed who is an advocate practising in KJerksdorp. From the experts· reports attached to the founding affidavit it is clear that the plaintiff is not only a person who has very limited education (she cannot write), but she only communicates in Zulu. I raised the concern of whether the curator ad Iitem should. at the very least when doing her investigation, be able to communicate in the plaintiff's own language and whether it is not more appropriate that counsel be appointed who is fluent in Zulu, and so that the plaintiff is more comfortable and able to communicate with someone of her own culture and background.

52. A further *"founding affidavit',* deposed to on 28 March 2018 was handed up on 29 March 2018. Th attorney's explanation pertaining to the concerns raised by the court can be summarised as follows:

52.1 the plaintiff Is an *"elderly pensioner"* who first attended his offices, assisted by one of her children and communication was done via a Zulu interpreter. [The plaintiff at the time of issuing summons was 44/45 years old and at the time of instituting the application, 49 years old];

52.2 as her attorney neither Mr. Stoffberg nor his staff are qualified to assess psychological deficiencies and therefore it was not originally clear to them that the plaintiff needed to be assisted by a curator ad litem in the trial. However, in view of the reports already referred to in his founding affidavit, it was clear that it would be prudent to appoint a curator ad litem;

52.3 as attorney he will ensure that a Zulu interpreter is available for communications between the curator ad litem and the plaintiff. [lt is disappointing that the attorney does not consider the convenience of the plaintiff nor the fact that unnecessary costs need not be incurred when appropriately experienced Zulu speaking counsel are practising at the various Bars];

52.4 the matter was originally enrolled for trial on the 23rd of November 2017. The matter has become settled between the parties but was postponed for the appointment of a curator ad !item, especially to advise regarding the protection of funds as recommended by the experts' reports;

52.5 it was an oversight in the notice of motion not to include a prayer that the curator ad litem be specifically requested to investigate and report to the Honourable Court In respect of the protection of funds awarded to the plaintiff and therefore it is respectfully requested that the prayers in the notice of motion be amended accordingly;

52.6 the appointment of a curator ad litem and the subsequent protection of funds stems from the *de facto* physical condition of the

plaintiff for which the RAF as *"respondent* will be liable in the normal course of events.

ORDER IN THE XABA-MATTER (CASE NUMBER 61991/2013):

53. I find that there has been substantial non-compliance with the provisions of Rule 57, the practise directives and the Ruca judgment. The applicant seeks and order that the costs of the application be costs in the cause. The court is not satisfied with the explanation provided in the further founding affidavit. I am not prepared to grant an order that costs should be costs in the cause.
54. Therefore the order pertaining to the costs reflects the court's displeasure in the manner in which the attorney on behalf of **Ms. Xaba** has handled the matter.
55. I therefore make the following order in matter number 19 on the unopposed motion roll of 28 March 2018 under case number 61991/2013:
    1. The chairperson of the Bar Council of the Pretoria Society of Advocates is requested to nominate counsel of sufficient expertise who is fluent in Zulu and has no CQnnection with PAS Attorneys (in particular Mr. Stoffberg) to be appointed as curator ad litem on behalf of CELIWE SEBENZILE EUNICE XABA;
    2. The nomination of the said counsel by the said Chairperson should be made in writing and should be accompanied by the said counsel's written acceptance and confirmation of independency. The nomination is to be delivered to the court and to the offices of the plaintiff's and defendant's attorneys of record;
    3. The curator ad litem is requested to prepare a comprehensive report dealing with all the aspects that may impact on the issue whether Ms. Xaba should be declared incapable of dealing with all or some of her affairs. The need to issue a declaration to the effect that Ms. Xaba is unable to conduct her own affairs, the legal principles underlying such a declaration and the effect thereof should be specifically discussed in the report.

4. If there appears to be a need to provide assistance to Ms. Xaba, the curator ad litem is requested to investigate the proposed appointment of a curator bonis, alternatively the creation of a trust with a financial institution and the likely benefits and challenges that Ms. Xaba may face if such a route is to be followed.
5. The curator ad litem is authorised to pursue the action under case number 61991/2013 to finality including to settle the action, subject thereto that such settlement should be approved by this Honourable Court.
6. The curator ad !item is requested to specifically deal in his/her report regarding whether it is necessary that the curator ad litem be authorised to ratify steps t ken by or on behalf of Ms. Xaba with regards to the lodging of her claim against the Road Accident Fund for damages arising out of injuries sustained from the collision which occurred during July 2004.
7. The curator ad !item is requested to compare Ms. Xaba's position if a curator bonis or curator et personae is appointed with her position having regard to the recommendation pertaining to the appointment of a curator bonis to protect the funds, alternatively the creation of a trust.
8. The curator ad litem is further requested to:
    8.1 investigate Ms. Xaba's ability to understand the implications of the litigation instituted on her behalf against the Road Accident Fund and whether she was able to give rational instructions to her attorneys in respect thereof, including considering and/or accepting the Fund's offer to settlement. The investigation must also cover the enforceability of the contingency fee agreement;
    8.2 to advise the court whether the steps taken on behalf of Ms. Xaba by her attorneys concerned should be ratified or not, should Ms. Xaba be found to have been unable to understand the implications thereof and further whether the attorney should be allowed to charge fees, alternatively

repay such fees for the period wherein Ms. Xaba was not able to give proper instructions to her attorney.

9. The curator ad !item's report must be delivered to the Master for his/her comment and report as soon as possible.
10. The Master is requested to deal in his/her report not only with the curator's recommendation but also with:
    10.1 the need or otherwise to declare a person in Ms. Xaba's position incapable in dealing with some or all of her affairs;
    10.2 the merits or demerits of the appointment of a curator bonis, alternatively the creation of a trust if applicable when compared with the appointment of a curator bonis.
11. Pertaining to the costs of the application it is ordered that:
    11.1 Ms. Xaba's attorney Is not allowed to charge any fees for the preparation of the application for the appointment; and
    11.2 Counsel's fees should be paid by PAS Attorneys *de bonis propriis.*
12. A copy of this judgment and the judgment of Bertelsmann J in JM Modiba obo Slbusiswe Ruca, dated January 2014 (case numbers 12810/2013 and 73012/2013 : North Gauteng Division) must be provided to the Law Societies of the Northern Provinces and the Bar Councils of the Pretoria and Johannesburg Society of Advocates and the Independent Bar Associations for their attention.

ORDER IN THE MASHIDI MA TER (CASE NUMBER 7891/2006):

56. The application constitutes an abuse of the process. It is procedurally flawed due to the substantial non-compliance with the provisions of Rule 57, the applicable law and practice of this division.
57. I therefore make the following order in matter 20 on the unopposed roll of 28 March 2018 under case number 7891/2006:
    1. The chairperson of the Bar Council of the Pretoria Society of

Advocates is requested to nominate a counsel of sufficient expertise and has no connection with Maluleke Msimang & Associate Attorneys (in particular Ms. Keetse) to be appointed as curator ad litem on behalf of Lawrence Joe Mashidi;

2. The nomination of the said counsel by the said Chairperson should be made in writing and should be accompanied by the said counsel's written acceptance and confirmation of independency. The nomination is to be delivered to the court and to the offices of the plaintiff's and defendant's attorneys of record;
3. The curator ad litem is requested to prepare a comprehensive report dealing with all the aspects that may impact on the issue whether Mr. Mashidi should be declared incapable of dealing with all or some of his affairs. The need to issue a declaration to the effect that Mr. Mashidi is unable to conduct his own affajrs, the legal principles underlying such a declaration and the effect thereof should be specifically discussed in the report.
4. If there appears to be a need to provide assistance to Mr. Mashidi, the curator ad litem is requested to investigate the proposed appointment of a curator bonis, alternatively the creation of a trust and the likely benefits and challenges that Mr. Mashldi may face if such a route is to be followed.
5. The curator ad litem Is authorised to pursue the action under case number 7891/2006 to finality including to settle the action, subject thereto that such settlement should be approved by this Court.
6. The curator ad litem is requested to specifically deal in his/her report regarding whether it is necessary that the curator ad litem be authorised to ratify steps taken by or on behalf of Mr. Mashidi with regards to the lodging of his claim against the Road Accident Fund for damages arising out of injuries sustained from the accident which occurred during August 1998.
7. The curator ad litem is requested to compare Mr. Mashidi position rf a curator bonis and/or personae la appointed with his position having regard to the recommendation pertaining to the appointment

of a curator bonis to protect the funds, alternatively the creation of a trust.

8. The curator ad litem is further requested to:
    8.1 investigate and report on Mr. Mashidi's ability to understand the implications of the litigation instituted on his behalf against the Road Accident Fund and to give rational Instructions to his attorneys in respect thereof. including considering and/or accepting the Fund's offer to settlement. The investigation must also cover the enforceability of the contingency fee agreement;
    8.2 to advise the court whether the steps taken on behalf of Mr. Mashidl by his attorneys concerned should be ratified or not, should Mr. Mashidi be found to have been unable to understand the implications thereof and further whether the attorney should be allowed to charge fees, alternatively repay such fees for the period wherein Mr. Mashidi was not able to give proper instructions to his attorney.
9. The curator ad litem's report must be delivered to the Master for his/her comment and report as soon as possible.
10. The Master is requested to deal in his/her report not only with the curator's recommendation but also with:
    10.1 the need or otherwise to declare a person in Mr. Mashidi position incapable in dealing with some or all of his affairs;
    10.2 the merits or demerits of the appointment of a curator bonis, alternativelv the creation of a trust if applicable when compared with the appointment of a curator bonis.
11. Pertaining to the costs of the application it is ordered that:
    11.1 Mr. Mashidi's attorney is not allowed to charge any fees for the preparation of the application; and
    11.2 the fees payable to counsel is to be paid by Maluleke Msimang & Associate Attorneys de *bonis propriis.*
12. A copy of this judgment and the judgment of Bertelsmann J in JM

Modipa obo Sibusiswe Ruca, dated January 2014 (case numbers 12810/2013 and 73012/2013 : North Gauteng Division) must be provided to the Law Societies of the Northern Provinces and upon the Bar Councils of the Pretoria and Johannesburg Society of Advocates and the Independent Bar Associations for their attention.

ORDER IN THE MIAMBO MATTER (CASE NUMBER 58068/2011):

58. No case has been made out why the minor child's natural guardian is not fit and proper to further protect her interests as envisaged by the provisions of section 18(3)(b) of the Children's Act 38 of 2005.
59. The application is ill-considered and procedurally flawed. It does not comply with the practice, applicable law and provisions of Rule 57.
60. I therefore ma e the following order in matter number 21 on the unopposed motion roll of 28 March 2018 under case number 58068/2011:
    1. The application is dismissed.
    2. The attorney, Ms PM Keetse of Maluleke Msimang & Associates nor the firm she represents, may charge any fees for the preparation of the application for the appointment of curator ad litem. Insofar as the attorney has received any fees pertaining to this application such fees are to be refunded;
    3. Counsel's costs are to be paid by the attorney *de bonis propriis.*

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HAUPT LC
ACTING MADAM JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Attorneys in case number
58068/2011 and 6891/2006 — Maluleke Msimang & Associate
1st Floor , Bank Towers Building

	Cnr Church/Andries Streets, Pretoria Ref: Ms Keetse/je/M4055 Ms Keetse/je/M4814
Attorney in case number 61991/2013	PAS Attorneys, Pretoria 187 Parker Street, Riviera Pretoria REF: PA Stoffberg/2538.