+NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
EAST LONDON CURCUIT LOCAL DIVISION

Case no. EL 785/2009
ECD 2685/2009

In the matter between:

NOKILIMUSI CHRISTINE SILO	**Applicant**
in re:	
the appointment of Advocate Charles Barry Wood	
as curator ad litem, and subsequently a curator *bonis*	
to administer the estate and affairs of	
SIYABULELA MANANGA	**Patient**

versus

NOMPOZOLO & GABELANA INCORPORATED	**1st Respondent**
LINDILE BRIAN NOMPOZOLO	**2nd Respondent**
MZINGAYE GQOMO	**3rd Respondent**
ROAD ACCIDENT FUND	**4th Respondent**

JUDGMENT

HARTLE J

[1] In an application for the appointment of a curator *ad litem* to an alleged patient, both for purposes of assisting him to conduct or ratify certain litigation, and with a view to the likely appointment of a curator bonis to his estate in due course, the parties argued before me the narrow issue of whether this court has jurisdiction to hear the matter, a point *in limine* raised by the 2nd and 3rd respondents in opposing the relief sought by the applicant. Indeed, counsel on behalf of these respondents insisted that this issue be dispensed with before any of the other numerous objections to the appointment of the proposed curator ad litem be entertained.

[2] It is necessary to traverse the history of this matter in some detail as it appears from the voluminous papers that were before me.

[3] The most uncomplicated fact is that the applicant resides in Mdantsane. The 35-year-old patient, who is alleged to be incapable of managing his own affairs and for whose day to day care and financial support the applicant claims to be responsible, resides with her.[1] It is for this reason that the 2nd and 3rd respondents claim that this court is not competent to adjudicate the matter because Mdtansane does not fall within the territorial jurisdiction of this court.

[4] It is well known that Mdantsane, an urban township situated 30 km away from East London and 40 km away from Bhisho, resorts under the territorial jurisdiction of the Bhisho High Court. It is just one of the curious features of the delayed rationalization of the jurisdiction of the high courts of this province that this is so and there is little than can be done about it save to resort to the ameliorating measure made provision for in terms of the provisions of section 27

[1] The 2nd and 3rd respondents refute that he does, but that dispute of fact is irrelevant for present purposes because the crux of the matter is that, on anyone's version, the patient is permanently resident in Mdantsane.

of the Superior Courts Act, No. 10 of 2013 to transfer a matter where the circumstances indicate that this is practicable to avoid nonsuiting a litigant who has commenced proceedings in the "wrong court".[2] The applicant was invited by the 2nd and 3rd respondent to so apply but insisted that this court can entertain the application based on the peculiar jurisdictional connecting factors at play in the matter.

[5] The objection to this court's jurisdiction is the principal basis upon which the 2nd and 3rd respondents seek the outright dismissal of the application, and a punitive costs award against the applicant *de bonis propriis* because, so they submit, despite being forewarned of the absence of this court's territorial jurisdiction, the applicant failed to make timeous application for the transfer of the matter to the Bhisho High Court.

[6] This lack, so their counsel asserted, should be enough to determine the matter in favour of their clients together with the austere costs order prayed for, but I agree that this ground is in my view not a standalone determinant of this court's jurisdiction to hear the matter in the peculiar fact set. The messy facts which make up the material background of this matter also call for the serious reproach of this court as I will shortly explain.

[7] The disability of the patient on which the applicant relies for present purposes, which is not seriously challenged, arises from a severe head injury sustained by him in a motor vehicle accident which occurred on the old King William's Town road on 11 March 1996 when he was 12 years old. The 1st respondent as an incorporated firm of attorneys employing the 3rd respondent *inter alia*, and the 2nd respondent as its then sole director, professionally

[2] See Thembani Wholesalers (Pty) Ltd v September and another [2014] 3 All SA 722 (ECG) and the unreported judgment of Stretch J in Livi v The Road Accident Fund, Bhisho case no 196/2015 in which the delayed rationalization in the Eastern Cape Province is criticized.

represented the patient, then still a minor, by lodging a claim for compensation with the Road accident Fund ("the Fund") and thereafter in instituting a personal injury action against the Fund to recover his damages.[3]

[8] The original action for compensation was issued out of this court against the 4th respondent under separate case number EL 295/2006 – ECD1195/2006 ("the claim action"). The jurisdiction of this court was never an issue in that action because the accident giving rise to the claim occurred within the area of jurisdiction of this court.

[9] The applicant was cited as the plaintiff in the claim action acting on behalf of the patient who had by then attained majority but was undisputedly under disability on everyone's account still at the time of the issue of the action,[4] and in the main action under the present case number also issued out of this court ("the damages action") presently purports in that same capacity to vindicate a situation arising from the 1st to 3rd respondents' failure to account to the patient for the compensation paid arising therefrom and their alleged mishandling of the litigation in the claim action by under settling the damages award.

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[3] The 2nd respondent asserts that the first respondent acted on the mandate of the patient's mother in her capacity as natural guardian of the patient rather than the applicant as the claimant in respect of the lodgement of the claim. It is not clear if the applicant was recognized by the Fund as the authorised representative of the patient up to the point when he attained majority (perhaps on the basis that she had been appointed as his guardian because she was the one rather than his parents who took care of him from early adolescence), but all the indications are that the applicant was regarded by the Fund as duly authorised to represent the patient's interests by the time of the issue of the claim action.

[4] In the summons and particulars of claim she is described as a person who is claiming "in her capacity as Curator-ad-Litem to (the patient) born on the 4th April, 1984" (Sic). The date of birth is incorrect. The patient was born on 24 April 1984. The summons was issued out of the East London Circuit Local Division on 12 June 2006. It is not clear under what authority the Fund believed her to be so authorised but it is apparent that just two months before the action was initiated the 1st respondent purported to issue out an application in the magistrate's court in Mdtansane for her appointment as curator ad litem "to continue with the further prosecution of the action" and on the further basis that should the action be prosecuted, that a curator bonis should be appointed in due course. With hindsight that court could not have the jurisdiction to entertain such an application given that the action was not to be instituted in that court (section 33of the Magistrates Court Act No.32 of 1944) and because it has no power to appoint a curator bonis (section 46 (2) (b)). The fact that the 1st to 3rd respondents forged ahead with the putative application however attests to their recognition that at the time of the issue of the claim action the applicant did not have the requisite legal capacity to litigate in his own right.

[10] It is common cause that the claim action was concluded on the basis of a consent order issued by this court on 12 February 2008, ostensibly in favour of the applicant acting on behalf of the patient, directing the 4th respondent to pay a capital sum of R1 018 720.80 to her as representing 80% of the damages suffered by him arising from the accident, plus the plaintiff's taxed costs of the action.[5] A customary undertaking in terms of section 17 (4) of the Road Accident Fund Act, No 56 of 1996, was also furnished for 80% of the costs of his future accommodation in a hospital or nursing home or his treatment or the rendering of any service or the supply of any goods to him arising out of the injuries sustained by him in the collision.

[11] It is further not in contention that the 4th respondent paid such amount into the trust account of the 1st respondent, held at East London, on 20 February 2008. A further amount representing taxed costs in the sum of R 119 500,28 was also so paid on 28 July 2008.

[12] Although the 1st to the 3rd respondents deny in the damages action that they failed to account to the applicant, claiming instead that the firm initially offered to pay her R 500 000,00 (the payment of which she allegedly refused to accept at that juncture), and thereupon formally tendered payment of the sum of R 526 856,13 under the pretext that this was the net amount remaining in their trust account (at the time of pleading) after deductions had been made for their fees and disbursements, it appears to be the position today, some twelve years later, that no capital has in fact been paid over to the applicant on behalf of and for the benefit of the patient. Whether the patient has enjoyed the benefit of the section 17 (4) undertaking in the meantime is also not clear to me but it is to my mind a

[5] The amount was intended to be in respect of both general damages and loss of income.

relevant factor in the exigency of the present situation for a curator to be appointed as soon as possible to vindicate his rights.

[13] On 3 September 2009 the 2nd respondent was interdicted by the Grahamstown High Court from practicing based on three complaints made to the then Law Society of the Cape of Good Hope against him. One of them was made by the applicant herself and concerned his failure to give account for the litigation being conducted by the 1st respondent on behalf of the patient. It transpires that the applicant had become dissatisfied with the firm's services and had instructed her present attorneys of record to take over the prosecution of the action claim. The attorney, Mr Niehaus, wrote to him more than once to inform him that his mandate had been terminated and to request that the applicant's file be handed over to him. These letters were ignored, and the 2nd respondent continued to be uncooperative even after the Law Society became involved. It then came to light that the Fund had already paid the two amounts over to the 1st respondent referred to above, in 2008. The conclusion was drawn by the court that even on the 2nd respondent's own version he had misappropriated R 605 000,00 from his trust account in respect of the applicant's complaint in the space of a few days after the Fund had paid over the capital sum to the 1st respondent's trust account.

[14] In a sequel to this, on 20 October 2010, I, together with Alkema J, struck the 2nd respondent off the roll of attorneys and issued the usual order that his practice as an attorney (obviously including whatever trust balance might then still have stood to the credit of the applicant on behalf of the patient) be handed over to a curator to administer and control the trust accounts which had hitherto been operated by him. In the judgment/reasons which I subsequently delivered on 25 January 2011, in Grahamstown case no. 3604/2009, the very complaint of the applicant in her representative capacity that the 1st respondent had plundered a significant portion of the patient's damages award featured large and I too found

that the 2nd respondent had misappropriated these funds from the 1st respondent's trust account for his personal use in circumstances amounting to theft.[6]

[15] The 3rd respondent was coincidentally also struck from the roll of attorneys by order of the Grahamstown High Court on 5 March 2009.

[16] It appears further that between the date of the issue of the interdict and the striking off order, on 18 September 2009, a claim predicated on the loss of trust funds by the patient himself as the claimant was also notified to the then Attorney's Fidelity Fund.[7] Sometime later, on 12 July 2012, the Fidelity Fund admitted a claim for an amount of R 960 258,17 but made only a part payment to Messrs. Niehaus McMahon Oosthuizen attorneys' trust account (also held at East London) acting on behalf of the patient in the sum of R 527 457,98 which

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[6] I indicated to the parties prior to the hearing of the application that I had been involved in the striking off application in which I had made serious findings against the second respondent. I invited the parties to seek my recusal from hearing the matter but after seeking the instructions of the first to third respondents counsel indicated that they had no objection to my hearing the matter.

[7] This claim was pursued on the basis provided for in terms of section 26 of the erstwhile Attorneys Act, no 53 of 1979. It is one of the anomalies of this matter that the patient himself signed off on the claim and purported to depose to an affidavit in which the report of theft was made against the 2nd respondent to the South African Police Services. The inference that he understood the nature or effect of these legal steps in respect of which he was legally assisted by his present attorneys of record flies in the face of the unequivocal expert reports that as a result of the cognitive impairment sustained by him pursuant to the collision he was (at the time of his first assessment shortly after attaining majority), and is presently still, unable to manage his affairs. Dr Derick van der Merwe, a psychiatrist who has deposed to an affidavit in the present application, says more specifically concerning his capacity to litigate, that the patient "will fail to participate fully in instructing counsel during litigation." He suggests that he may well understand the issue of compensation in general and that he would follow that an amount was due and that it has not been paid to him as yet, but that his deficits "would rather be in more complex arithmetical assessment of appropriate quantum" and its utilization. He adds that he "would also not demonstrate socially appropriate responses of anticipating issues, arranging appointments with advisors and implementing instructions timeously were he left with such responsibilities." In an application for the appointment of a curator ad litem to further and ratify the prosecution of the damages claim which has hitherto being unauthorised, the applicant would be well advised to amplify her application to clarify the status of the patient's mental capacity at the relevant time he signed the claim form and made a statement to the police as well as explaining the circumstances under which it happened so as to remove the taint that she is presently acting with improper motives or being disingenuous about his claimed incapacity. Since the validity of several legal transactions (including the mandate given to the 1st respondent to issue the action), the entire claim action proceedings, as well as the subsequent pending damages action have been called into question, the applicant would be well advised to focus on the capacity of the patient at all the crucial dates, supported by the relevant experts expressing their opinion as to the patient's mental capacity at these important junctures. (See in this regard Du Toit obo Mafanya v Road Accident Fund (A582/2015) [2016] ZAWCHC 128 (21 September 2016).

includes interest calculated from date of notification of the complaint to date of payment. (The 2nd respondent claims that the part payment made by the Fidelity Fund was sourced from monies standing to the credit of the 1st respondent's trust account in favour of the applicant at the time, which suggests that the monies in respect of which the patient's interests are asserted, or at least a portion thereof, have in effect remained in trust accounts held in East London.)

[17] The balance has been withheld by the Fidelity Fund which expects the patient to first excuss against the 2nd respondent.[8] The damages action no doubt purports to be the mechanism by which the applicant is pursuing the excussion process on his behalf, an action which both discredited attorneys are vigorously defending, ostensibly aided by professional indemnity insurers since the applicant's claim is premised on their alleged professional negligence committed before each of them were struck off the roll of attorneys.[9] As an aside it bears mentioning that this court has the necessary jurisdiction to hear that action since its cause clearly arises in East London both in respect of the patient's statutory claim for recovery of the stolen trust monies and in respect of the negligence component based on the alleged under settlement of his damages award by the 1st respondent and its practitioners who assisted him in prosecuting his claim for compensation against the Fund here in East London.[10]

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[8] This expectation arises from the provisions of section 49 (1) of the Attorneys Act. The corresponding section in the new Legal Practice Act, No. 28 of 2014, effective since 1 November 2018, is section 79(1).

[9] In respect of the claim for recovery of the stolen trust funds, once the Fidelity Fund (which has evolved into the Legal Practitioner's Fidelity Fund under the new act), makes a payment out of its coffers of monies in settlement of any claim or portion thereof pursuant to its statutory obligation to a claimant, it is subrogated to the extent of such payment, in terms of the provisions of section 50 of the old Attorneys Act and section 80 of the new Legal Practice Act, to all the rights and legal remedies of the claimant against any practitioner in relation to whom the claim arises. It is ironic too that Fund's Board steps into the breach (underwritten by indemnity insurers) for claims arising from the professional conduct of legal practitioners. At another level of complexity, there is the fact that the 1st respondent's trust account (which was plundered) was placed under curatorship by the order of this Division striking the 2nd respondent off from the roll of attorneys, the Director of the then Cape Law Society being the nominal appointee.

[10] In the damages action the 2nd and 3rd respondents have not taken issue with this court's jurisdiction to hear that matter.

[18] In the damages action they admit that the nature and extent of the injuries sustained by the patient rendered him permanently disabled and unable to manage his affairs and that he will as a result require the services of a curator bonis to assist him for the rest of his lifetime. Although distancing themselves from any personal involvement in the professional handling of the patient's claim,[11] they did not at first take issue (at least at the time of pleading) with the applicant's authority to nominally represent the interests of the patient both in the extant damages action or in the prior claim action. Indeed, it only emerged during the pretrial processes in the damages action that the capacity of the applicant to have officially represented the patient's interests in the claim action was questionable once it became apparent that the 1st respondent had failed to follow through in respect of not one but several applications to appoint her or anyone else for that matter as curator ad litem in the claim action, and that she was similarly not authorised to represent his interests, *sans* any appointment either, in the damages action.[12]

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[11] This is even though the 3rd respondent self-evidently exchanged correspondence with the Fund concerning the matter and the 2nd respondent himself signed the summons and particulars of claim and was present when the final order was taken by consent. Perhaps what the 1st to 3rd respondents mean however is that they deny dealing with the applicant as opposed to the patient's mother who they considered as having been the authorised one to represent his interests.

[12] Although it is unclear on what basis the Fund had accepted during the lodgment process that the applicant stood in the position as guardian to the patient since she is a maternal aunt, the record reveals that the Fund warned the 1st respondent before the issue of the action and during settlement negotiations leading up thereto, that the patient himself would have to be substituted as the claimant since he had already attained majority on 24 April 2005 – the age of majority at the time was 21 years, or that a curator ad litem should instead be appointed to represent his interests going forward. Rather than asserting that such appointment was unnecessary, the 3rd respondent merely countered that the patient would only reach such a milestone in 2006, an obvious mistake having regard to his date of birth. However, the fact that the 1st respondent before the date of the issue of the summons in the claim action thereafter sought to obtain a putative order in the magistrate's court appointing the applicant as curator ad litem confirms to my mind two things: One, that they reconciled themselves to the fact the patient did not have the capacity to litigate except through a curator ad litem and, two, that the applicant was the person best placed to make such an application albeit to have herself appointed in that capacity. That application was doomed to failure as I indicate in footnote 4 above since the magistrate's court did not have jurisdiction to entertain such an application. The 1st to 3rd respondents appear to have been informed by the Master shortly thereafter in a letter dated 13 September 2006, however, in a second abortive application to appoint a curator ad litem in this court by way of an interlocutory application to the claim action, that Rule 57(5) requires the appointment of an advocate or attorney if practicable as a curator ad litem to a suit, advices which were obviously not heeded by them.

[19] In an ironic turnaround the 2nd respondent pleads in the present application, opportunistically in my view, that the applicant was incorrectly cited as the plaintiff in the claim action by a "mistake" on the firm's part.[13] They claim that the patient's mother was supposed to have been recognized in a representative capacity on behalf of the patient yet fail to account for a number of applications ostensibly pursued by them to get the applicant rather than the mother officially appointed as curator ad litem in the claim action. They also fail to explain why they dealt with the applicant over a lengthy passage of time as the person standing in the gap for the patient and from whom they obtained instructions throughout their representation of him.

[20] Be that as it may, this "mistake" means, so it is contended, that the applicant consequently had no *locus standi in judicio* to represent the patient's interests in the claim action, no authority thereafter to pursue the recovery of the funds stolen by the 2nd respondent via the Attorney's Fidelity Fund (or by implication even to complain to the Law Society as an aggrieved trust creditor in respect thereof), no authority to institute the damages action *inter alia* to excuss against the 2nd respondent, and no business bothering the court presently with an application to appoint, not herself, but an experienced advocate of this court and a chartered accountant as curators ad litem and bonis respectively to the patient to remedy the previous wrongs for which the 1st respondent is predominantly responsible.

[13] Self evidently the mistake is that they simply failed to bring the necessary application (to completion) to appoint any curator ad litem at all to conduct the litigation on the patient's behalf, in effect rendering the 1st respondent a *falsus procurator* from the moment the patient attained majority.(See Mort NO v Henry Shields-Chiat 2001 (1) SA 464 (C)) Whether the patient was under a disability or not at the time of his attaining majority, the mother's mandate to the 1st respondent to prosecute her son's personal injury claim would have terminated in any event at that juncture. It is unfortunate that the 2nd and 3rd respondents, despite owning their real mistake, have instead purported to cast aspersions on the applicant as a false claimant whose motives in bringing the present application are not to be trusted.

[21] Whist the applicant in my view *prima facie* establishes a reasonable interest in bringing the present application based on her relationship with the patient and the nuanced history of her involvement in the handling of his legal affairs over a lengthy period (endorsed by the 1st to 3rd respondents' unequivocal recognition of her as such since the firm first took on the claim),[14] it appears to be common cause presently that the litigation commenced and concluded in this court in the claim action was unauthorized for want of the patient being formally assisted by a curator ad litem. Consequently, the entire proceedings in that action might be rendered void.[15]

[22] The 2nd and 3rd respondents go further and assert that the claim action against the Road Accident Fund instituted by the 1st respondent on behalf of the applicant in her purported representative capacity is a "nullity", thus warranting the technical point presently taken by both of them that she automatically (sic) has no *locus standi* to bring the present application. Most surprisingly, whereas the corollary of this premise of nullity is rooted in the *prima facie* allegation that the patient has, by reason of the serious head injury sustained by him, been rendered incapable of managing his own affairs and thus requires the services of curators to assist him in this respect, the applicant is not given a free pass in

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[14] The patient's own mother purported to step into the breach only after the fact in 2016 by furnishing a power of attorney to another local firm of attorneys to "demand from whoever is in possession of the proceeds of the payment by the Road Accident Fund (the monies) paid to Nompozolo & Gabelana Inc in respect of (her) which …was as a result of compensation for injuries sustained by (the patient)". It is obviously a misconception that she would still have authorization as the original claimant to pursue recovery of the trust funds. By the time it was paid, the patient was an adult and a person under disability to boot. However she would have a right to seek the same relief which the applicant presently desires for the patient, which is to have curators ad litem and bonis respectively appointed to him, both with a view to assisting him with the pending litigation to vindicate his rights and to ensure that he is assisted ultimately in managing his damages award or estate generally if so advised. I was however not informed of any competing application for the appointment of a curator ad litem, although the 2nd and 3rd respondents seem to be of the view that it is somehow necessary that the plaintiff's mother be joined in the present application as an interested party, another string to their bow that she is somehow devious in making the present application in her own right.

[15] RAF v Mdeyide 2008 (1) SA 535 (CC) paras 35-9; Modiba obo Ruca; In Re: Ruca v Road Accident Fund (12610/2013; 73012/13) [2014] ZAGPPHC 1071 (27 January 2014) at par 36; Road Accident Fund v Myhill NO [2013] 4 All SA 9 (SCA).

respect of this allegation in the present application that he should be so declared either, but is put to the proof thereof.

[23] This is all rather unfortunate given that the 2nd and 3rd respondents, who even as discredited attorneys still owe their fealty to upholding the law, clearly conducted the litigation in the claim action on the unequivocal recognition that the patient is a person under a disability by virtue of the serious head injury suffered by him 24 years ago and that he would likely require the services of a curator bonis for this same reason as well. Indeed, they have not refuted the reports of the experts filed in the present application in which a *prima facie* case is made out that the patient is not capable of looking after his own affairs as a result of the injury sustained by him and that this disability must have presented itself from an early stage after the collision and, more critically, at the time he attained majority which is the date by when it became necessary to review his capacity to litigate as a major and give instructions to his attorneys. Certainly, by the time it was necessary to institute the claim action on his behalf, a year after he had in fact attained majority, all of the respondents (in the damages action) were aware that there was an issue with his capacity to litigate.

[24] It is a trite principle that if a person does not have the capacity to litigate, the law requires the assistance of a curator ad litem. In RAF v Mdeyide the Constitutional Court observed that where a practitioner seeking to extract information and obtain instructions from a client, especially where the medical records and documentary evidence concerning that person's mental capacity and his ability to manage his own affairs raises doubt about such capacity, notices that something is "amiss" in this respect, he ought to follow the procedure indicated by Rule 57 so as to initiate an enquiry by the court:

> "If the plaintiff does not have the capacity to litigate, the law requires the assistance of a curator ad litem. In a useful discussion of instances where the appointment of a curator is called for, and of how proceedings in terms of Uniform Rule 57 should be initiated, it is pointed out that:
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> "If it is suspected that a person is of unsound mind and as such incapable of managing his affairs, proceedings can be instituted for a declaration by the court to that effect and for the appointment of curators to his person and his property."[17]
>
> It is clear that, the very least that was called for in the court below, was an inquiry in terms of Uniform Rule 57." [16]

[25] Where this is not done timeously in the litigation it retrospectively calls into question the validly of the trial proceedings or settlement discussions already undertaken, as well as the client's instructions given to the practitioner from the outset. In order to remedy such situations, a curator appointed later on in the proceedings would have to investigate whether it might be necessary to persuade the court to permit him or her to ratify such steps as have already been taken in the action in contention including the terms of the attorney and client mandate.[17] Where the action has already been concluded a different recovery strategy may suggest itself to remedy the situation in the best interests of the patient.[18]

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[16] RAF v Mdeyide, Supra, at par 38. Van Winsen et al, The Civil Practice of the Supreme Court of South Africa, 4 ed at 1126. See also Adv Du Toit obo Mafanya v RAF, Supra, at par [44] and [46]. The principle is that where there is doubt concerning the capacity of a litigant to give proper instructions to his or her attorneys, the need to appoint a curator ad litem must be investigated "at the earliest possible stage" and indication of such a necessity, and steps taken to avoid a situation where it transpires later only that the proceedings were unauthorised for want of the appointment of a curator ad litem to a suit. The possible consequence of missing such a critical indication is that the entire trial proceedings might be rendered void and the patient's instructions to his attorneys called into question after the fact. This is obviously to the prejudice of the plaintiff who though most in need of compensation by the road Accident Fund because of a cognitive impairment caused by the accident resulting in him being unable to earn an income is compromised in the expeditious resolution of his claim. It may also mean that his award is diminished by unnecessary costs of litigation to remedy the omission of appointing curator ad litem timeously. Also see Mort NO v Henry Shields Chiat 2001 (1) SA 464 (C) at 467 and Modiba obo Ruca, Supra, at paragraphs 36 and 46.

[17] RAF v Mdeyide, Supra, at par 37; Modiba obo Ruca, Supra, at paragraph 46; Kotze NO v Santam Insurance Ltd 1994 (1) SA 237 (C) at 248 F-J.

[18] Santam Insurance Ltd v Booi [1995] 2 All SA 537 (A)

[26] Whatever the scenario applicable, the moment when it occurs to those involved in legally assisting a litigant that he or she lacked, or lacks, *locus standi* to litigate, it is obvious that the proper procedure must be embarked upon to determine his capacity and the position rectified in the manner best indicated in the professional view of the curator ad litem appointed to the proceedings after the fact.[19] Indeed, I would go so far as to say that the same duty, to be sensitive to the needs of a litigant ostensibly unable to understand the proceedings, to give rational instructions to his legal representatives and or who is unable to conduct his affairs, falls to the practitioner's opponents in such proceedings as well who should properly call attention to the deficit.[20] A person suspected to be of unsound mind or for some other reason incapable of managing his affairs is one of the most vulnerable kinds of litigants, akin to being in the position of a minor, whose interests must be jealously guarded and protected.[21]

[27] A "mistake" concerning whether such a person has or had the capacity to litigate, or where the required procedure to have a curator appointed was not followed through and the action continued unauthorized as it were, is not an opportunity for technical point scoring by practitioners. Rather, the "preferable practice" must surely be that a person who suffers from a mental disability resulting in the inability to manage all or some of his affairs should be declared unable to do so because such an order "protects the patient and those who interact with him."[22] Indeed, I am appalled that the 2nd and 3rd respondents in this application seek to gain a technical advantage by relying on their own failure to have protected the interests of the patient in the claim action as a means presently to discredit the applicant (insofar as her standing is concerned) and to frustrate the granting of the relief sought by her by all means possible whereas it is to my

[19] Modiba obo Ruca, *Supra*, at paragraph 46.
[20] In personal injury claims such an indication should became reasonably apparent from medical reports filed in the litigation.
[21] RAF v Mdeyide, *Supra*, at par 44.
[22] Modiba obo Ruca, Supra, at paragraph 45.

mind abundantly plain that they were well aware that an enquiry in terms of Rule 57 was necessarily indicated since 2005 and that such appointment is long overdue.

[28] In situations such as the present scenario I believe it would be appropriate (and the natural legal effect) for the present damages action to be stayed until the present application for the appointment of curators ad litem and bonis respectively is disposed of and a properly mandated officer of this court is allowed the opportunity to make his investigations and to seek to redress the obvious anomaly that is at play here.

[29] The matter has already been delayed so substantially and the proper administration of justice to my mind so perversely obfuscated, to warrant the censure of the 2nd and 3rd respondents for their egregious exploitation of the patient. Reading between the lines this saga has been complicated by the involvement of insurers with subrogated rights to the point of forgetting that the interests of the vulnerable patient is at the heart of it all.[23] I would therefore earnestly caution the practitioners advising the parties to bear this in mind in the further conduct of this application which must go back to the motion court roll for the hearing of their remaining objections. In my view the present matter is not, as the 2nd respondent pleads it is, to resuscitate the damages action which suffers from the latent defect of the applicant lacking locus standi in that action, but to come to the assistance of the patient who must be afforded the means by which to vindicate his rights, properly assisted by a curator ad litem to that suit, and if necessary and advisable to revisit the status of the litigation in the prior claim action which is its prequel.

[23] Ironically the Fidelity Fund is subrogated to the interests of the claimant, whose claim in the damages action is pitted against the very same Fund or its professional indemnity insurers who seek to defend the professional integrity of the 2nd and 3rd respondents.

[30] I return to the issue of this court's jurisdiction to hear the matter.

[31] The purpose of the present application is twofold although the premise, namely that the patient is by reason of a mental defect incapable of managing his own affairs, is common to both. Firstly, it is for the appointment of a curator ad litem to assist the patient in the damages action suit so that someone can lawfully act on his behalf to further that claim and or to ratify those proceedings and in the meantime to preserve the monies paid by the Fidelity Fund to reimburse him for the monies stolen from the 1st respondent's trust account by the 2nd respondent. The prayers as they presently stand insofar as the curator ad litem's powers are concerned are perhaps not as comprehensively framed as they could be,[24] but the applicant is clear that the "primary source" of the present existing litigation is the prior claim action, the validity of which the 2nd and 3rd respondents have themselves called into question by virtue of the fact that no application for the appointment of a curator ad litem was prosecuted to finality during the course of those proceedings, rendering them unauthorized.[25] The interconnectedness between the claim action and the damages action (also unauthorized for want of the appointment of a curator ad litem to that suit) is to my mind quite obvious, the latter action flowing from the first as a natural progression of it and being incidental to it.

[32] Secondly, it is for the very likely appointment ultimately of a curator bonis to the property of the patient ostensibly in terms of the provisions of Rule 57 (13)

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[24] The applicant has also not prayed for the standard order required by this Division in terms of paragraph 14 (c) of the Joint Rule of Practice.

[25] In my view the application should be suitably amplified to deal with the prospect that the proposed curator ad litem is authorised to revisit whether those proceedings are in order and or what remedy may be necessary to ameliorate the unfortunate situation, which may in turn have consequences for the damages action. It is also earnestly suggested that the 4th respondent's views be specifically canvassed as there was no appearance on behalf of the Fund in the present application whereas there may be far reaching consequences for it should it not demur in all of this. The probable mental status of the patient at the critical date of him attaining majority, the issue of the claim action and when the professional mandate was given to the 1st respondent to proceed with the action ought also to be clarified to ensure that the provisions of Rule 57 (2) (e) are adequately met.

on the basis that, because of the cognitive impairment suffered by him in the collision (i.e. a mental disability), he is incapable of managing his own affairs. The applicant contends that based on the reports of the medical experts who examined him, a curator bonis ought ultimately to be appointed to manage his estate, and more particularly to protect the damages awarded to him by this court more than 12 years ago. As a pre layer, the applicant necessarily seeks the appointment of a curator ad litem who has specific duties to report to the court as to the patient's mental condition and the desirability of the appointment of a curator bonis to his property (or part thereof) as prayed for.

[33] The functions of a curator are not always the same and applications differ according to the reasons for his or her appointment. The nature of the proceedings, and the relief claimed, assist one with the enquiry whether a court has jurisdiction in a matter. A straightforward application for the appointment of a curator ad litem to a suit already underway has as the most important connecting factor or *rationes jurisdictionis* the court where the litigation commenced, which court would in my view have the necessary authority to make the appointment. This is because a court which has jurisdiction in respect of the main relief that is being sought (that is in the damages action in the present instance) has jurisdiction to grant the incidental relief applied for (which in this instance is for the appointment of a curator ad litem to assist the patient in that litigation). In a stand-alone application for the appointment of a curator ad litem in lunacy proceedings (not connected to a pending action in which the question of the patient's mental capacity is in doubt) in order to advise the court as to a patient's mental condition and desirability for the appointment of a curator bonis to his person or property, the connecting factors may well be different, but in this instance the connection to the pending and prior litigation, which justifies the application in the first place, cannot be ignored.

[34] The parties are for present purposes *ad idem* that the prescripts of Rule 57 of the Uniform Rules of Court apply in any event, as they must do in such applications.

[35] This Rule, which governs the appointment of curators in respect of persons under disability as contemplated in the Rule, provides as follows also in respect of the antecedent application for the appointment of a curator ad litem to such patient:

> "57 **De Lunatico Inquirendo, Appointment of Curators in Respect of Persons under Disability and Release from Curatorship**
>
> (1) Any person desirous of making application to the court for an order declaring another person (hereinafter referred to as 'the patient') to be of unsound mind and as such incapable of managing his affairs, and appointing a curator to the person or property of such patient shall in the first instance apply to the court for the appointment of a curator ad litem to such patient.
>
> (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) the grounds upon which the court is alleged to have jurisdiction;
>
> (c) the patient's age and sex, full particulars of his means, and information as 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 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 examinations 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.

(4) Upon the hearing of the application referred to in subrule (1), the court may appoint the person suggested or any other suitable person as curator ad litem, or may dismiss the application or make such further or other order thereon as to it may seem meet and in particular on cause shown, and by reason of urgency, special circumstances or otherwise, dispense with any of the requirements of this rule.

(5) Upon his appointment the curator ad litem (who shall if practicable be an advocate, or failing such, an attorney), shall without delay interview the patient, and shall also inform him of the purpose and nature of the application unless after consulting a medical practitioner referred to in paragraph (b) of subrule (3) he is satisfied that this would be detrimental to the patient's health. He shall further make such inquiries as the case appears to require and thereafter prepare and file with the registrar his report on the matter to the court, at the same time furnishing the applicant with a copy thereof. In his report the curator ad litem shall set forth such further facts (if any) as he has ascertained in regard to the patient's mental condition, means and circumstances and he shall draw attention to any consideration which in his view might influence the court in regard to the terms of any order sought.

(6) Upon receipt of the said report the applicant shall submit the same, together with copies of the documents referred to in subrules (2) and (3) to the Master of the Supreme Court having jurisdiction for consideration and report to the court.

(7) In his report the Master shall, as far as he is able, comment upon the patient's means and general circumstances, and the suitability or otherwise of the person suggested for appointment as curator to the person or property of the patient, and he shall further make such recommendations as to the furnishing of security and rendering of accounts by, and the powers to be conferred on, such curator as the facts of the case appear to him to require. The curator ad litem shall be furnished with a copy of the said report.

(8) After the receipt of the report of the Master, the applicant may, on notice to the curator ad litem (who shall if he thinks fit inform the patient thereof), place the matter on the roll for hearing on the same papers for an order declaring the patient to be of unsound mind and as such incapable of managing his affairs and for the appointment of the person suggested as curator to the person or property of the patient or to both.

(9) At such hearing the court may require the attendance of the applicant, the patient, and such other persons as it may think fit, to give such evidence viva voce or furnish such information as the court may require.

(10) Upon consideration of the application, the reports of the curator ad litem and of the Master and such further information or evidence (if any) as has been adduced viva voce, or otherwise,

the court may direct service of the application on the patient or may declare the patient to be of unsound mind and incapable of managing his own affairs and appoint a suitable person as curator to his person or property or both on such terms as to it may seem meet, or it may dismiss the application or generally make such order (including an order that the costs of such proceedings be defrayed from the assets of the patient) as to it may seem meet.

(11) Different persons may, subject to due compliance with the requirements of this rule in regard to each, be suggested and separately appointed as curator to the person and curator to the property of any person found to be of unsound mind and incapable of managing his own affairs.

(12) The provisions of subrules (1), (2) and (4) to (10) inclusive shall in so far as the same are applicable thereto, also apply mutatis mutandis to any application for the appointment by the court of a curator under the provisions of section 56 of the Mental Health Act, 1973 (Act 18 of 1973), to the property of a person detained as or declared mentally disordered or defective, or detained as a mentally disordered or defective prisoner or as a State President's decision patient and who is incapable of managing his affairs.

(13) Save to such extent as the court may on application otherwise direct, the provisions of subrules (1) to (11) shall, mutatis mutandis, apply to every application for the appointment of a curator bonis to any person on the ground that he is by reason of some disability, mental or physical, incapable of managing his own affairs.

(14) Every person who has been declared by a court to be of unsound mind and incapable of managing his affairs, and to whose person or property a curator has been appointed, and who intends applying to court for a declaration that he is no longer of unsound mind and incapable of managing his affairs or for release from such curatorship, as the case may be, shall give 15 days' notice of such application to such curator and to the Master.

(15) Upon receipt of such notice and after due consideration of the application and such information as is available to him, the Master shall, without delay, report thereon to the court, at the same time commenting upon any aspect of the matter to which, in his view, its attention should be drawn.

(16) The provisions of subrules (14) and (15) hereof shall also apply to any application for release from curatorship by a person who has been discharged under section 53 of the Mental Health Act, 1973 (Act 18 of 1973), from detention in an institution, but in respect of whom a curator bonis has been appointed by the court under section 56 of the said Act.

(17) Upon the hearing of any application referred to in subrules (14) and (16) hereof the court may declare the applicant as being no longer of unsound mind and as being capable of managing his affairs, order his release from such curatorship, or dismiss the application, or mero motu appoint a curator ad litem to make such inquiries as it considers desirable and to report to it, or call for such further evidence as it considers desirable and postpone the further hearing of the matter to permit of the production of such report, affidavit or evidence, as the case may be, or postpone the matter sine die and make such order as to costs or otherwise as to it may seem meet."

[36] Mr Louw who appeared for the applicant conceded that the applicant has not pertinently stated in her founding affidavit the grounds upon which this court is alleged to have jurisdiction but invited me to infer as much from the facts of the matter.

[37] The provisions of sub rules 2 (b), (6) and (7) are of relevance for present purposes and must be read together with the provisions of section 4 (2) of the Administration of Estate's Act, No 66 of 1965 which focuses on the jurisdiction of the masters of the High Courts, especially since Rule 57 requires a report from the Master "having jurisdiction" for consideration and report to the court before making a declarator as to the incapacity of the alleged patient and the appropriate orders which it is recommended to it should ensue. This subsection provides that:

> "(2) In respect of the property belonging to a minor, including property of a minor governed by the principles of customary law, or property belonging to a person under curatorship or to be placed under curatorship, jurisdiction shall lie-
>
> (a) in the case of any such person who is ordinarily resident within the area of jurisdiction of a High Court, with the Master appointed in respect of that area; and
> (b) in the case of any such person who is not so resident, with the Master appointed in respect of any such area in which is situate the greater or greatest portion of the property of that person:
>
> Provided that-
>
> > (i) a Master who has exercised jurisdiction under paragraph (a) or (b) shall continue to have jurisdiction notwithstanding any change in the ordinary residence of the person concerned or in the situation of the greater or greatest portion of his or her property; and
> >
> > (ii) …."

[38] This provision must in turn be read together with the definition in section 1 of the Administration of Estates Act of the concept of "property" as follows:

> ""**property"** includes any contingent interest in property;"

[39] Masters are appointed in terms of section 2 (1) (ii) of the Administration of Estates Act to areas of jurisdiction that are aligned with the same areas of jurisdiction of each corresponding high court and have offices at the seats of such courts.[26] For present purposes there exists a Master of the High Court for Bhisho and a separate one for Grahamstown who assumes responsibility for persons (in this instance to be placed under curatorship) residing in East London or having the greater or greatest portion of their property in the area of jurisdiction of the permanent circuit court. It appears from the provisions of section 2 (2A) of the Administration of Estates Act that the East London office is a "service point" where the powers are exercised, and the duties are performed, on behalf of the Grahamstown Master.

[40] in *Ex Parte* Beukes[27] the Master of Cape Town declined to make a report in terms of Rule 57 in respect of an application brought in the Cape Town court for the appointment of a curator bonis to a patient, asserting that the Master at the seat of the High Court in Cape Town did not have jurisdiction in the matter because the patient lived in Kakamas. Kakamas falls within the territorial jurisdiction of the Master having his office at the seat of the Northern Cape High Court, in Kimberley. The latter Master himself had enquired in a letter why the application for the appointment of a curator bonis was brought in the Cape Town Court rather than in the Northern Cape High Court. In an interlocutory application for an order compelling the Master of the High Court, Cape Town, to furnish the requisite report in terms of Rule 57, applicant's counsel and the curator ad litem submitted that the Master in Cape Town had jurisdiction because by far the greater portion of the patient's property, being the proceeds of the settlement of an MVA action for compensation which had been concluded in the patient's

[26] See section 3 (1) of the Act.
[27] (3016/2009) [2011] ZAWCHC 267 (15 June 2011)

favour, issued out of the Northern Cape High court, were held within the court's area of territorial jurisdiction in the trust account of the Cape Town attorneys who were appointed to represent him in those proceedings.[28] Counsel and the curator ad litem called in aid the provisions of section 4 (2) (b) of the Administration of Estates Act in support of their argument that the Cape Town court, and therefore the Master of that court, were vested with the necessary jurisdiction but the court was not satisfied that those provisions sustained the contention for the reasoning demonstrated in the extract below:

> "[8] The relevant provisions of s 4(2)(b) apply only respect of the property of a person under curatorship or to be placed under curatorship if such person is not ordinarily resident within the area of jurisdiction of a High Court. The patient plainly does not qualify as such. As mentioned, he resides within in the jurisdiction of the Northern Cape High Court. The provisions of s 4(2)(b) are of application in respect of the local property of an affected person who is not ordinarily resident in the country, but who owns property that is held or situated here.[29] They might also apply in respect of a person who has no fixed place of residence in South Africa, but constantly moves about the country staying at different places from time to time, consequently not being 'ordinarily resident' anywhere in the country. Thus the only Master 'having jurisdiction' in this case is the Master at the seat of the High Court in Kimberley.
>
> [9] The curator *ad litem* stoutly resisted that conclusion. He argued, with reference to the provisions of the proviso to s 4(2) and to sub-secs 4(3) and (4) of the **Administration of Estates Act,** that the legislation is intended to operate flexibly and pragmatically and that a territorial *causa* for a master's jurisdiction is not imperative. There is some merit in those contentions, but in the abstract they do not afford a reason to depart from the limits of the instances expressly specified in the Act in which the flexibility and pragmatism referred to by counsel is afforded scope for application. Those instances occur (i) in situations in which the

[28] It appears that the initial action against the Road Accident Fund had been issued out of the Northern Cape High Court (on the basis that the accident had occurred within that court's territorial jurisdiction) and concluded there. It is not clear on what basis the patient's funds came to be held in the trust account of Cape Town attorneys.

[29] This construction of the provision, as is indicated by the court's footnote in this respect, accords with that given in *Meyerowitz on Administration of Estates and Estate Duty* (2004 edition) at §14. See also ibid at §1.6.

person whose property is concerned changes residence in South Africa to a place within the territorial jurisdiction of different High Court after a master having original jurisdiction has exercised it: the master having originally exercised jurisdiction continues to have jurisdiction in such a case: (ii) similarly, in a case in which the greater part of the property of a minor of other person referred to in s 4(2) is moved from, or ceases to be in, the territorial jurisdiction of the High Court in which the master originally exercised jurisdiction, the master who originally exercised jurisdiction retains jurisdiction over the estate wherever its property subsequently might be moved to in South Africa; and (iii) in a case where a master not having jurisdiction in terms of s 4(2)(a) or (b) *bona fide* purports to exercise jurisdiction before the master actually having original jurisdiction in respect of the property does so. the actions of the first actor are not rendered invalid by reason of his lack of jurisdiction. The provisions on which the curator *ad litem* relies for his arguments that the Act allows a flexible and pragmatic approach also determine which master shall continue to exercise jurisdiction when two or more masters have purported to exercise jurisdiction in respect of the property. In such a case the *bona fide* acts of the masters not having original jurisdiction are not rendered invalid, and the master first purporting to exercise jurisdiction is constituted as the master with continuing and overriding jurisdiction in the matter.

[10] The flexible and pragmatic operational framework provided in terms of the provisions relied upon by counsel do not afford any warrant to the court to vest the Master at Cape Town with a jurisdiction she does not have in terms of the Act. Nor does it empower the court to impose upon the Master at the seat of this court an obligation to assume jurisdiction.

[41] In my own view, a logical reading of the section in its proper context is that it is the property belonging to a minor or a person to be placed under curatorship that fixes the Master with jurisdiction. In other words the Master is concerned in subparagraphs (a) and (b) with "any such person (who has property belonging to him) who" is, either ordinarily resident within the area of jurisdiction of a High Court (in which case there is a conflation of the person having property and ordinary residence within the area of jurisdiction of a High Court), or not so resident, but the property belonging to him (at least the greater or greatest portion thereof) is in the area of jurisdiction of another High Court even if different from the one in which he ordinarily resides. In other words, there are in my opinion two bases for conferring original jurisdiction on the Master. The effect of the

proviso in subparagraph (i) is that the first of the two possible courts that exercises jurisdiction continues to have jurisdiction even though the there are subsequent changes in the ordinary residence of the person concerned who has property belonging to him, or in the situation of the greater or greatest portion of such person's property.

[42] In any event the court pointed out that the jurisdiction of the Master, as determined by the provisions of the Administration of Estates Act, is something that is quite distinguishable from the court's own jurisdiction, which was (at the time of hearing that application) to be determined with reference to the Supreme Court Act, No. 59 of 1959, the predecessor to the Superior Courts Act, No. 10. of 2013, and the common law. That being the case the court observed as follows:

> "If this court has sole or concurrent jurisdiction to appoint a curator to the patient's property, the incidence of the provisions of the **Administration of Estates Act,** discussed above, might entail that a Master with an office at the seat of another High Court is the Master 'having jurisdiction'. The effect of the jurisdictional provisions in s 4 of Act No 66 of 1965, read with the provisions of rule 57(6)-(8). is that such Master (in this case, the Master at Kimberley). and not the local Master (the Master at Cape Town), is responsible for making the required report. The applicant would therefore be well advised to bring this judgment to the attention of the Master of High Court, Kimberley." [30]

[43] Despite not having to decide this issue, the court appeared to be of the view that there might be a cogent basis to contend for the Cape Town Court's concurrent jurisdiction with the Northern Cape High Court to appoint a curator bonis for the patient based on common law jurisdiction. Its reasoning in this respect is instructive and commends itself to me:

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[30] At par [11]

"[12] It is not necessary to determine the question at this stage of the proceedings, but it seems to me *prima facie* that this court may have concurrent jurisdiction with the Northern Cape High Court to appoint a curator *bonis* for the patient. The jurisdiction of this court to do so might be founded by reason that the greatest part of the patient's assets is held within the territorial jurisdiction of this court. An assumption of concurrent jurisdiction in such cases seems to have originated in matters in which a court with territorial jurisdiction over the place where the party subject to curatorship or guardianship owned fixed property *(forum rei sitae)* would exercise the power to make appointments; such power vesting concurrently in the different court of the place where the patient was domiciled *[forum domicilii)*. See Voet *Commentarius ad Pandectas* 26.5.2.5. [31] In modern times, the courts have also had regard to the location of moveable assets in determining upon the assumption of jurisdiction to appoint a curator *bonis. Ex parte Gardiner and Another* **1934 CPD 304** was a matter in which this court exercised jurisdiction to appoint a curator *bonis* in a case where the patient was committed in a mental hospital in the Transvaal. It did so on the -grounds that she had been domiciled here before falling ill while on a visit to the Transvaal, and that she had all her property here - there is no indication in the judgment that the property concerned was fixed property. In *Ex parte Isakow* **1944 CPD 331**, Fagan J (as he then was) referred to *Gardiner's* case as having decided that *'the court in which the property is situated may have jurisdiction** to appoint a curator *bonis* when the patient was living outside the area of jurisdiction. The effect of the decision in *Gardiner's* case was referred to in similar terms by Lucas J, Bresler AJ concurring, in *Ex parte Aserman* **1951 (2) SA 561** (T). See also the most helpful discussion by CaneyJ in *Ex parte Berry: in re Berry* **1961 (4) SA 79(D).** Caney J concluded (in *Berry* at 84E) *'in my judgment, any Division of the Supreme Court has jurisdiction to declare incapable of managing his affairs and place under curatorship any person who is domiciled within its area of jurisdiction or whose assets are within the area, notwithstanding that he is not himself within the* area'."

[44] Mr. Louw who appeared on behalf of the applicant in the present application, accepts the territorial limitation in *casu* in that the patient resides within the area of jurisdiction of the Bhisho High Court, but similarly urged upon me to have regard to the fact that the patient has moveable property in East London which would in my view fix this court with concurrent jurisdiction and

[31] According to the Court's footnote, this is cited in Joubert *el at.* The *Law of South Africa* {Second Edition) vol. 11 at para 560. fn. 7: sv *Civil Jurisdiction* (Mervyn Dendy). The court also had reference to Percival Gane's translation in *The Selective Voet being the Commentary on the Pandects* vol. 4 {Butterworth & Co) 1956.

the Master with original jurisdiction as envisaged by the provisions of section 4 (2) (b) of the Administration of Estates Act as one of the options postulated there.

[45] It was not suggested to me by counsel for the 2nd and 3rd respondents that the funds held in the trust account of Messrs. Niehaus do not constitute property belonging to the patient within the area of jurisdiction of this court even though his ordinary place of residence is in Mdantsane, which resorts under the territorial jurisdiction of the Bhisho High Court. Notwithstanding the 2nd and 3rd respondents' claims that the proceedings in the founding action are a nullity for want of the appointment of a curator ad litem who ought to have assisted him, the damages award was as a matter of fact paid to the trust account of the 1st Respondent, held in East London at the time, in terms of an order of court that remains valid in the meantime until it is set aside (if it is reversed at all depending on the direction that the curator ad litem will take in due course). Thereafter, even though a portion of these funds were misappropriated, they were in effect substituted pursuant to the patient's statutory claim for reimbursement under the provisions of section 26 of the Attorneys Act and paid to the trust account of the applicant/ patient's present attorneys of record, also held at East London and where they remained at the time of the launch of the present application. I do not have to apply my mind to the whereabouts of the balance of the award or follow the trajectory of the monies (some of which may be held under curatorship by virtue of the striking off order which Alkema J and I issued), the fact being that a substantial amount of money paid for the benefit of the patient and arising from the injuries sustained by him in the motor vehicle collision is situate within the area of jurisdiction of this court. In my view even if there had not been the reimbursement, the patient would still have had a right to enforce payment of an order granted by this court or to seek the recovery of the capital stolen in this court's area of jurisdiction where it was lost on the basis of a contingent interest

in such property, which is enough for present purposes to fix the jurisdiction of this court.

[46] As for that part of the relief sought by the applicant for the appointment of a curator ad litem to further the prosecution of the damages action and to revisit the trial proceedings in the claim action, it follows by virtue of the fact that those proceedings are before this court and that it would be the appropriate court to issue an order making such an appointment on appropriate terms.

[47] That being said, mindful of the concerns which I have raised above (and in footnotes below) and the exigency of the necessary appointment of a curator ad litem, I intend to give the applicant a reasonable opportunity to supplement her papers where necessary[32] and to request the registrar to allocate a preferent date on the opposed roll as soon as possible after the National Lockdown so that the remaining objections and or the 2nd and 3rd respondents defences can be properly ventilated if they are so advised to persist with their opposition. I would however again urge upon the parties to try and resolve their differences and if possible, to craft and present a consent order to be moved on the unopposed motion court roll as soon as possible.

[48] Although the 2nd and 3rd respondents can hardly hold a brief on behalf of the patient's mother or sister, nothing stops either of them or any of the patient's other close relatives from moving a separate application for the appointment of a curator litem and thereafter a curator bonis to his property to manage his illusory damages award once there has ultimately been an accounting to his estate. At the end of the day it is the patient's interests that are at stake and the curator ad litem

[32] Case law is replete with examples of orders in applications for the appointment of curators litem et bonis reflecting a reluctance to dismiss applications of this nature out of hand, instead allowing applicants to amplify and amend their papers where necessary to deal with any concerns that stand in the way of seeking justice for the patient.

is after all an independent and objective party so it matters not who advances such an application provided that that party establishes the necessary requirements in terms of Rule 57 (2).

[49] In the result, I issue the following order:

1. It is declared that this court has jurisdiction to hear the present application for the appointment of curators' *litem et bonis* to the patient.
2. The 2nd and 3rd respondents are directed to pay the costs of the failed objection jointly and severally, the one paying the other to be absolved.
3. The applicant is invited within a period of one month, if so advised, to supplement the application papers in respect of any deficiencies and or to amend the relief sought in the Notice of Motion to clarify the specific powers of the curator at litem in the suits in contention.
4. The registrar is requested, after such amplification and further exchange of papers between the parties, to enroll the matter on the opposed motion court roll on a preferent and expedited basis in order permit the parties to ventilate whatever issues may then still be in contention between them.
5. The 4th respondent is requested to advise its views on the amplified relief sought.

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B HARTLE

JUDGE OF THE HIGH COURT

DATE OF HEARING: 3 March 2020

DATE OF JUDGMENT: 30 April 2020*

*(by electronic transmission of the judgment and order on this date to the legal representatives and the Road Accident Fund at their respective email addresses.)

APPEARANCES:

For the applicant & patient: Advocate F Louw instructed by Niehaus McMahon Inc., East London. Ref Mr. B Niehaus (nm@niehausmcmahon.co.za)

For the second respondent: Mr. Poswa instructed by Enzo Meyers Attorneys, East London. Ref Mr. Meyers (enzo1@telkomsa.net)

For the third respondent: Mr. Metu instructed by M P Ncame Attorneys Inc., East London. Ref Mr. M Ncame (mncame@mpna.co.za/ mpncameattorneys@gmail.com)

For the fourth respondent: The Regional Manager, Road Accident Fund, East London. Ref 92/111116/09/0 Link no: 514390 (EastLondonCourtOrders@raf.co.za)