

**SAFLII Note:** Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

## REPUBLIC OF SOUTH AFRICA



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

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

18 June 2020 \_\_\_\_\_

DATE

SIGNATURE

CASE

NUMBER: 21562/18

In the matter between

**ADV C VALLARO**

**Plaintiff**

*As Curatrix ad litem to*

**B V**

**Claimant**

and

**ROAD ACCIDENT FUND**

**Defendant**

**Summary:** Agreements entered into by persons who lack the juristic capacity to do so is void *ab initio*. No life can be breathed into an agreement that is void *ab initio* by a curator through ratification.

---

**JUDGMENT**

---

[1] In this matter the claimant is an adult male with severely impaired mental faculties. Even before the collision which gave rise to the claim against the defendant, the claimant had compromised mental faculties. I need not, however, explore the pre-existing condition of the claimant for the purposes of this judgment. What is clear from the expert reports filed on behalf of the claimant is that he has suffered a severe head injury as a result of the collision. The claimant's neuropsychologist describes the effect of the severe head injury as akin to "*the degree of mental impairment. . .to a patient with moderate to severe dementia.*"

[2] The neuropsychologist goes further to state that the claimant "*is incapable of understanding legal proceedings. His insight and ability to comprehend and conceptualise complex information has been impaired to such a degree by the brain damage that he is of unsound mind. He is unable to participate rationally and meaningfully in the management of his litigation, is incapable of appropriately instructing an attorney to conduct litigation on his behalf, and is unable to appreciate the legal and financial implications of such instructions. He requires a curator ad litem to be appointed with immediate effect.*"

[3] I add that a curatrix *ad litem* ("the curatrix") was appointed by this court for the claimant. As part of the powers given to the curator, the power to "*ratify any steps, if any, which have already been taken in respect of prosecuting the claim.*"

[4] When the matter was finally called before me I was satisfied as to the settlement of the claim with the defendant. What concerned me was the validity of the contingency fee agreement ("the agreement") presented to me. I hasten to add that I had no *prima facie*

difficulties with the contents of the agreement which I only cursory looked at for the reasons dealt with in this judgment. What struck me, however, was that the claimant had signed the agreement and was not represented by a curator of any sorts at the time that he signed the agreement. I enquired from counsel appearing on behalf of the claimant whether the claimant could be said to have had the necessary contractual capacity to enter into the agreement at the time when he entered into the agreement. Counsel conceded, rightly in my view, that the claimant had no such contractual capacity to enter into the agreement.

[5] My question which I then posed to counsel was whether the agreement, which had been ratified by the curatrix,<sup>1</sup> was valid or whether the agreement was void. Counsel for the claimant submitted the curatrix is, in terms of the power accorded to her as mentioned in paragraph 3 of this judgment, empowered to ratify the agreement. Although I take no issue that the curatrix may, in appropriate circumstances, ratify any steps already taken, the question remains whether she could ratify an agreement which, in my view, is void.

[6] Counsel submitted that it often happens in these courts that contingency fee agreements, entered into by persons who lack contractual capacity, are ratified by curators and accepted by the courts. I afforded counsel the opportunity to consider the matter and make either oral or written submissions to me on whether the curatrix could ratify a void agreement, thereby blowing life into the void agreement. After affording counsel the opportunity to consider his position and to take instructions from his attorney, the election

---

<sup>1</sup> The curatrix states in her report, at paragraph 50.1 thereof, that she ratified the agreement on 12 June 2020 after being appointed as curatrix in the matter.

was made by the legal practitioners on behalf of the claimant to accede to the agreement being declared invalid. I am of the view that something needs to be said about the practice counsel submitted exists.

[7] An essential element to a contract coming into force is the existence of the so-called meeting of the minds.<sup>2</sup> A sub-genre, to call it such, of the meeting of the minds is whether the minds seeking to meet had the legal ability to so meet. Otherwise stated, did either or both of the minds which were to meet in a contractual setting have the necessary capacity to perform juristic acts.<sup>3</sup>

[8] Trite in law is the fact that persons under the age of 7 and severely mentally disabled persons completely lack the capacity to perform juristic acts.<sup>4</sup> As a severely mentally disabled person is unable to participate in reaching a consensus, the latter which is the

---

<sup>2</sup> **SAR & H v National Bank of SA Ltd** 1924 AD 704 at 715

*"The law does not concern itself with the working of the minds of parties to a contract, but with the external manifestation of their minds. Even therefore if from a philosophical standpoint the minds of the parties do not meet, yet, if by their acts their minds seem to have met, the law will, where fraud is not alleged, look to their acts and assume that their minds did meet and that they contracted in accordance with what the parties purport to accept as a record of their agreement. This is the only practical way in which Courts of law can determine the terms of a contract."*

<sup>3</sup> Du Bois et al in **Wille's Principles of South African Law** (9<sup>th</sup> Ed) at p 146

*"The law of persons, stated briefly, is that part of private law that comprises the rules dealing with the legal status of various classes of persons. A person's status may be described as his or her legal position or 'standing' in relation to his or her fellow-person and the wider community: 'the aggregate of his or her various rights, duties and capacities'. The status of a person determines to what extent he or she has the ability to participate as a legal subject in the life of the law. This ability (legal capacity in the broad sense) embraces four main constituent capacities or competencies: the capacity to have rights and duties (passive legal capacity or legal capacity in its narrow sense, in Afrikaans "regsbevoegdheid"); the capacity to perform juristic acts, ie voluntary human acts to which the law attaches at least some of the legal consequences willed by the party or parties performing the act (active legal capacity, in Afrikaans "handelingsbevoegdheid"); the capacity to bring and defend an action at law (locus standi in judicio or capacity to litigate, in Afrikaans "verskyningsbevoegdheid"); and the capacity to incur delictual or criminal responsibility for wrongful acts (in Afrikaans "toerekeningsvatbaarheid")."*

<sup>4</sup> Wille's, *supra* at 146

*"The only capacity common to all persons is legal capacity in its narrow sense: every legal subject, irrespective of his or her personal attributes, has the capacity to have rights and duties, although the extent of this capacity and the particular rights and duties possessed at a certain time by virtue of this capacity may vary from one person to another. On the other hand, not all persons have any or all of the other capacities. So, for example, infants (children below the age of 7 years) and insane persons have no capacity to perform juristic acts or to litigate, while these capacities are subject to certain limitations in the case of minors above the age of 7 years."*

foundation for the forming of a contract,<sup>5</sup> it follows that a contract entered into by a mentally disabled person is void *ab initio* and not merely voidable. As the agreement is void due to the claimant's mental disability, the question of ratification does not (and cannot arise).<sup>6</sup>

[9] As counsel elected not to make submissions in this regard but merely acceded to the declaration of invalidity of the agreement, I conducted my own further research in this matter. During the course of such research I came upon the judgment of *Mort N.O. v Henry Shields-Chiat*<sup>7</sup> which seems to suggest, on an initial reading, that acts done in respect of a mentally disabled person can be ratified. On a closer scrutiny of the reasoning of my brother Davis J, it becomes clear that the *Mort*-decision is distinguishable on the facts.

[10] In the *Mort*-decision, the ratification that was done by the curator pertained to the ratification of acts done by a *falsus procurator* on behalf of the mentally disabled person. What occurred in that matter is that the mentally disabled person, prior to reaching the age of majority, was represented by his father in the litigation. The father, whilst his mentally disabled son was still a minor, appointed the attorney (the respondent in that matter) to act for his son. After the mentally disabled son reached the age of majority, the attorney continued to act for the mentally disabled son whilst he, in fact, lacked a valid mandate to do so and thereby acted *falsus procurator*.

---

<sup>5</sup> *Phil Morkel Bpk v Niemand* 1970 (3) SA 455 (C) at 456F

"Indien dit juis is dat die omvang van die handelingsbevoegdheid van 'n verkwister in alle opsigte dieselfde is as dié van 'n minderjarige, dan moet die appèl slaag, want 'n ooreenkoms deur 'n minderjarige aangegaan is vir bevestiging deur sy voog vatbaar. Voet, 27.8.1 en 3; Van Leeuwen, *Censura Forensis*, 1.1.17.10; Fouche v Battenhausen & Co., 1939 CPD 228 op bl. 235. Moet die verkwister, intendeel, wat sy handelingsbevoegdheid betref, in alle opsigte gelyk gestel word aan 'n kranksinnige, dan kan die appèl nie slaag nie, want laasgenoemde se skynbare toetrede tot 'n ooreenkoms besit geen regswerking nie, en daar word selfs nie 'n gebrekkige ooreenkoms, wat vir bevestiging vatbaar is, in die lewe geroep nie. Institutiones, 3.19.8; Dig., 44.7.1.12; de Groot, 3.1.19; Voet, 27.101.7."

<sup>6</sup> Christie *The Law of Contract in South Africa* 7<sup>th</sup> ed at page 288

<sup>7</sup> 2001 (1) SA 464 (C)

[11] In this matter it is the severely mentally disabled claimant himself who entered into the agreement. It is not someone else, on the principle of *falsus procurator*, who acted on behalf of the claimant in entering into the agreement. As the claimant, by virtue of his severe mental disability, could not enter into the agreement, the agreement is void *ab initio*. The agreement being void *ab initio*,<sup>8</sup> effectively never existed. As the agreement effectively never existed, no life could be breathed into it by the curatrix.

[12] Curators cannot ratify agreements which were entered into by severely mentally disabled persons if the agreement was entered into whilst the severely mentally person harboured under such severe mental disability as the agreement would be void *ab initio* in such circumstances. In so far the practice is concerned as submitted by counsel, I am of the view the submission is being confused with circumstances where curators ratify contingency fee agreements that were entered into by persons purporting to represent the severely mentally disabled person whilst such persons acted without being properly authorised to do so.

[12] As a result of the aforesaid, I granted the order acceded to by the counsel on behalf of the respondent relating to the declaration of invalidity pertaining to the agreement.

---

<sup>8</sup> "A Thing is void which was done against Law at the very Time of the doing it, and no Person is bound by such an Act; . . ." 5 MATHEW BACON, A NEW ABRIDGEMENT OF THE LAW 337 (His Majesty's Law- Printers) (1766), as quoted in Campbell Law Review Volume 33 Issue 1 Fall 2010 January 2010 Article 6 Beyond a Definition: Understanding the Nature of Void and Voidable Contracts by Jesse A. Schaefer at page 195

---

C E THOMPSON  
ACTING JUDGE OF THE HIGH COURT

Appearances:

On behalf of the Applicant  
Instructed by:  
Vermaak

Adv. H. Schouten  
Munro      Flowers      and

On behalf of the Respondent:  
Instructed by:

Heard on 17 June 2020

Order granted on 17 June 2020

Reasons relating to the striking down of the contingency fee agreement handed down on 18 June 2020

**\*\*\*JUDGMENT HANDED DOWN BY UPLOADING SAME ONTO CASELINES\*\*\***