

**IN THE HIGH COURT OF SOUTH AFRICA****NORTH GAUTENG DIVISION, PRETORIA****Case No: 12610/2013****and****Case No: 73012/13***In the ex parte* application of**JACOB MANTJITJI MODIBA****Applicant****obo SIBUSISIWE RUCA***In re***SIBUSISIWE RUCA****Plaintiff**

and

**ROAD ACCIDENT FUND****Defendant**

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**JUDGMENT**

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**INTRODUCTION**

1. This matter is one of a number of similar cases, all involving road accident victims who suffered significant head and brain injuries, which were heard by the court during the last weeks of the fourth term of 2013. They share most, or

all, of the features that will be addressed *infra*. These features represent a practice that appears to have developed over the past few years which avoids or circumvents the provisions of Rule 57 of the Uniform Rules of Court and the common law relating to individuals who are, or may be, unable to look after their own affairs. By avoiding or circumventing the provisions of the Rule and the common law principles established over decades, these matters are prevented from coming to the Master's attention, avoiding the latter's supervision and scrutiny while the potential need to appoint a *curator bonis* or *curator bonis et personae* to the individual concerned is not considered properly or at all.

2. This practice may cause 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*.

## THE FACTUAL BACKGROUND

3. The action was originally instituted in the name of the patient on whose behalf the *curator ad litem* is presently conducting the litigation against the defendant. The particulars of claim, signed by the then plaintiff's attorney of record on the 26<sup>th</sup> February 2013, assert that the plaintiff (henceforth referred to as '*the patient*') was a pedestrian who was involved in an accident with an

identified vehicle on the 28<sup>th</sup> November 2009 at approximately 20h00 in Solomon Drive, Asanda Village, Strand, Western Cape.

4. The patient suffered severe injuries, which are set out in the particulars of claim as follows:

'1     *Severe head injury with brain damage;*

.2     ....

.3     *Facial bruises;*

.4     *Right ear injury....*

.5     *Chest injury;*

.6     *Whiplash neck injury;*

.7     ...'

5. On the 6<sup>th</sup> November 2013, a few days before the trial date, the particulars of claim were amended to include an allegation that the patient, then still acting in his own name, had lost the function of his right ear and had suffered injuries to his neck and right shoulder.
6. The medical report forming part of the RAF 1 form, the third party claim form, was completed by dr. Peter Mitchell at the Groote Schuur hospital on the 11<sup>th</sup> May 2012. He recorded that the patient was admitted to this hospital the day after the accident, having been transferred to it by ambulance from the Strand. It was evident that the patient had suffered a severe head injury and upon admission recorded 3T/15 on the coma scale, a reading that is in itself indicative of severe traumatic effects upon the brain. A CT scan of the head demonstrated a large right temporo parietal extradural haematoma. The blood that had gathered in the skull had to be evacuated by way of a craniotomy.

The patient took more than a month to recover sufficiently to reach a coma scale of 14/15 on the 21<sup>st</sup> December 2012.

7. The assessment report prepared by dr Mokgokong, a neurosurgeon, dated the 13<sup>th</sup> July 2012 concludes that:

*'The head and brain injuries were severe. There were also severe long-term mental and behavioural changes that resulted from the accident...'*

8. In his expert report which was finalised on 10 July 2012, dr Mokgokong asserts that the patient's head and brain injury was so serious that he took a full year to recover sufficiently to recognise his family members and to communicate intelligibly with them. He also suffered prolonged post-traumatic amnesia. During the interview the patient presented with neuropsychological problems, suffered memory lapses, exhibited changes in behaviour and personality as well as features of mental depression.

9. Dr Mokgokong's report concludes with the following finding:

*'As a complication of the severe brain injury, he also (h)as long-term mental and behavioural changes.'*

10. The defendant instructed another neurosurgeon, dr L F Segwapa, who examined the patient on the 26<sup>th</sup> August 2013. Dr Segwapa recorded i.a. the following in respect of the patient's accident-related injuries:

***'Head injury***

*He sustained direct injury to the right side of the head and face causing an extradural hematoma. He had immediate loss of consciousness. His admission GCS was 5/15 and remained confused after 3 weeks. These are features of a severe brain injury.'*

11. As far as a potential curatorship was concerned, dr Segwapa commented in one sentence: *'He cannot manage his affairs.'*

12. Dr Gladys Maluleke, a consulting clinical psychologist, was requested by the patient's attorneys to examine him, which she did on the 18<sup>th</sup> September 2012. In her neuropsychological report she opines the following:

*'He is independent in self-care and can look after himself. He can distinguish coins from banknotes, but he is confused when he has to count a lump sum of money. He can manage his own budget. He relates well with the family. He needs assistance to manage, plan, think and run his life and he relies on his mother for that. He believes that he will not be able to live independently as he needs assistance in some aspects of house management and planning.... The severe deterioration in bilateral functions strongly implicates the severe diffuse axonal brain injury he sustained. Given a mental functioning of this level, Mr Ruca has been stripped of the mental capacity to participate effectively in the open labour market and to live independently.... There is sufficient evidence in the records that he sustained severe injuries to the head involving a large temporo parietal extradural haematoma, loss of consciousness with the admission GCS of 3/15 that improved gradually over a period of weeks, The dynamics demonstrate severe brain dysfunction..... Judging from the main complaints, cognitive, emotional and behavioural deficits, he seemed to retain serious complications of severe diffuse brain injury that compromised his employment prospects and ability to live independently.... His condition imposes a considerable burden to his relatives and renders him vulnerable to abuse and rejection. A caregiver need to be appointed..... All funds awarded to him must be protected.'*

13. In his psychological report dated 25 September 2013 Mr H J Swanepoel, clinical psychologist, notes the patient's psychological complaints:

*'...nightmares of the accident and anxiety when he has to drive in traffic.*

*He is weary when he is a pedestrian.*

*He has poor memory as he will forget where he left objects.*

*He also suffers from poor concentration.*

*He is aggressive with constant irritation.*

*His mother notes that Mr Ruca requires assistance to manage his affairs. She believes that he will not be able to live independently.'*

*The neuropsychological evaluation indicates that Mr Ruca seem (sic) to be neuropsychologically impaired in the area of logical reasoning, problem solving, memory and learning. It can be concluded that he is neurologically impaired however, his pre morbid (sic) level speaks of a lowered level of functioning as he failed several academic years.*

*The results also suggest lowered cognitive pre morbid (sic) functioning. However, the accident background and his neuropsychological results suggest the probability of severe traumatic head injury....*

*11.1 The available information indicates that Mr Ruca is neurologically impaired which prevents independent functioning. It is therefore unlikely that psychotherapy will be of assistance for Mr Ruca due to his low level of functioning. The family members who care for him may benefit from psycho education...*

*11.2 If compensation is awarded the funds must be protected by a curator.'*

14. It is unnecessary to quote from other expert reports that were prepared for purposes of the trial, which was set down on the 21 November 2013, as they do not deal with aspects that are relevant to this judgment.
15. Against the background of the above comments upon the plaintiff's mental, neurological and psychological condition the parties made their final trial preparations, including the holding of two pre-trial conferences at which the usual issues, including the status of the expert reports and the possibility of a settlement of the patient's damages claim were discussed. The patient was still acting as plaintiff until the day of the trial. (In passing it may be noted that the patient swore to an affidavit as claimant, presumably when the claim was submitted to the defendant. In this affidavit the patient asserted that the facts recorded therein fell within his personal knowledge and were true and correct. He described the accident scene and the manner in which the collision occurred. He even provided the registration number of the vehicle that hit him after it '*...approached from East to West at a high speed and collided with me.*' All the relevant experts are in agreement that the patient suffered from severe retrograde amnesia and could remember nothing of the accident after regaining consciousness many weeks after the accident.)
16. The matter was enrolled for the 21<sup>st</sup> November 2013. On the day of the trial the patient, still acting as plaintiff, and the defendant purported to settle the claim, agreeing to the defendant paying a sum of R 2 320 540, 00 in respect of the patient's damages and a 100% undertaking in terms of section 17 (4) (a) of the Road Accident Fund Act, Act 56 of 1996, for the reasonable cost of any future accommodation of the plaintiff in a hospital or nursing home, or treatment or rendering of a service or supplying goods to him, arising from the

injuries sustained by the plaintiff in the accident. The defendant agreed to pay the costs on the High Court scale including the costs of the patient's experts. A draft order was prepared for presentation to the presiding judge at the roll call of the trial roll with the request to make the agreement an order of court.

17. When the matter was called, the patient was represented by his attorney and advocate who informed the court that she was acting on behalf of the 'plaintiff'. The court raised the question whether the patient was in a position to appreciate the nature and extent of the proposed settlement and whether he would be able to manage the funds about to be awarded to him. The matter stood down until the 25<sup>th</sup> November 2013 to allow the parties to consider the position. The matter had to be postponed again to the 29<sup>th</sup> November 2013 to allow a proper application for the appointment of a curator *ad litem* to be prepared. On that date, the patient's counsel, while the patient was still acting as plaintiff, intimated to the court that adv R had been '*instructed*' as curator *ad litem* and that the latter had already been briefed by the patient's attorney and herself on all relevant aspects of the matter and had already prepared a report which he intended to present to the court once his appointment as curator was confirmed by the court. Counsel for the defendant indicated that the defendant agreed to the proposed *modus operandi*. When the court enquired how it was possible to prepare a report as curator *ad litem* without having been appointed as such by the court, not one of the three advocates was able to supply the court with a satisfactory answer. Nor were the three able to deal with the court's question whether the proposed curator's independence had not been irrevocably compromised by his prior association with the patient's legal representatives. Not one of the three advocates had



considered the applicability of Rule 57 of the Uniform Rules of Court to the appointment of the proposed curator, and they did not seem to be aware of its provisions.

18. When pressed for an answer why the appointment of a curator *ad litem* was considered necessary the court was informed that the patient was not able to deal with the funds about to be awarded to him, as determined by the experts – so the argument ran – and that the creation of a trust to have the moneys administered by a trustee appointed by a financial institution was proposed in the report already prepared by the aspirant curator *ad litem*.
19. The court was not referred to any authority authorising the proposed course of conduct, which was clearly in conflict with the provisions of Rule 57 and with all relevant authorities. The matter was stood down for a few days to enable the patient's advisors to prepare a duly motivated application for the appointment of a curator *ad litem*, in spite of the three counsel's assurance that the *modus operandi* followed by them had been followed in this division's courts, as well as in the Gauteng South Division '*for years*'. Similar indications had been given by counsel practising at the Pretoria and Johannesburg Bars in the other matters dealt with by the court in the weeks preceding the hearing of this case, when similar orders to create a trust with a financial institution for a brain damaged plaintiff '*who would be unable to administer a large amount of money*' were sought. In all these matters the court raised the question whether such an order could be made without first declaring the plaintiff/patient unable to deal with all or some of his affairs – a question which appeared to take all the counsel involved in these matters by surprise. It certainly caught the three counsel involved in this matter on the wrong foot.

20. The 'application' for the appointment of advocate R as curator *ad litem* was dismissed and no fees were allowed for that day's appearance, on the 29<sup>th</sup> November 2013.
21. The application was renewed on the 2<sup>nd</sup> December 2013. It was now brought on behalf of the patient by the attorney who had acted as attorney of record for the patient plaintiff since the inception of the matter and had, purportedly on the instructions of the patient, engaged counsel and instructed experts to act as witnesses and had, finally, purported to settle the matter on behalf of his client.
22. In motivating the need to appoint a curator *ad litem*, the attorney now, for the first time, stated i.a. the following under oath in his affidavit sworn to and filed in support of the application to appoint a curator:
 

*'On the 26<sup>th</sup> November 2013 I consulted with Prof Mokgokong, our Neurosurgeon and he confirms that Curator (sic) be appointed as the claimant will not be able to manage his affairs.*

*... After perusing medico legal reports of the abovementioned experts and considering their recommendations, I am also of the opinion that the claimant is incapable of managing his affairs and therefore Curator ad Litem be appointed to assist him. The Curator will then decide on how his funds should be protected. I will recommend that trust should be established for him.'* (sic)
23. The attorney did not deal with the question whether the patient's apparent incapacity to deal with his own affairs extended to his ability to understand the

proceedings or not. He therefore did not address the patient's capacity to instruct the attorney to conduct the litigation on his behalf.

24. Mr R assured the court that, in spite of the fact that he had only practiced for about eighteen months, he had considerable experience of RAF matters and was able to assist the court independently in spite of his earlier exposure to the plaintiff's legal representatives and their view of the patient's case. The court was persuaded, not without difficulty, to appoint Mr R as curator *ad litem*. The court underlined the need to address, as part of the report, the question whether the patient would have to be declared incapable to manage all or part of his affairs if a recommendation was to be made that his funds should be administered by a trustee through a trust created by a financial institution or by a *curator bonis*. At the same time the court amended the original notice of motion by detailing some of the powers that should be granted to and exercised by the curator *ad litem*.
25. In a report dated the 8<sup>th</sup> December 2013 and presented to the court the next day Mr R reported that the experts he consulted, in particular the neurosurgeons quoted above, were of the view that the patient's funds needed to be protected as he was unable to deal with them on his own. Mr R proposed in the light thereof that a portion of the funds should be invested in certain policies as suggested by a financial adviser and that the balance remaining after the attorney had deducted his contingency fee of almost R 600 000, 00 should be invested in a trust with a financial institution. This suggestion was based upon the advice of the medical experts he had consulted that the patient was unable to deal with a large amount of money.

26. In spite of the court's express requests in this regard, Mr R did not address the provisions of Rule 57 in his report and did not investigate the question that had generated the most discussion during previous hearings, namely whether the creation of a trust needed to be preceded by a declaration that the patient was incapable of dealing with his own affairs, or with his assets, or not. The court was therefore not prepared to accept the report and instructed Mr R to prepare another report that dealt with all relevant issues. It is obvious that no fees can be allowed for the insufficient effort that Mr R presented as a report.
27. Mr R's next attempt was presented to the court on the 13<sup>th</sup> December 2013. It recorded the same interviews with the same experts as before, and as before avoided any reference to Rule 57 of the Uniform Rules. Surprisingly, however, the curator concluded now that the patient was *compos mentis* and should be placed in control of the funds that remained after the attorney had deducted his contingency fee – apparently over and above the costs to be paid by the defendant in terms of the draft order. No discussion of the potential creation of a trust decreed by the court was contained in the report.
28. The report recommended that the actions taken by the attorneys be approved without any reference to the contingency fee agreement that the patient apparently concluded with them. No attention was paid to the question whether the patient was able to make rational decisions regarding the litigation he was about to embark upon based upon his understanding of the issues at the time he instructed the attorney. Dr Swanepoel was not consulted at all, in spite of his recommendation that the patient would require the assistance of a curator if any award were to be made to him. The instructing attorney's comments regarding the patient's mental capacity, presented under

oath less than three weeks earlier to motivate the curator *ad litem*'s appointment were neither referred to nor considered at all. Both the patient and his 68 year old mother were reported as having been of the view that the patient was unable to deal with his funds, but there was not a word of motivation in the report why their views were not taken into account and the patient's own wishes were disregarded. No concern was expressed about the obvious risk the patient appeared to run if he was left in control of his money awarded to him and no suggestions were made in this regard at the final hearing of the matter, even after the court questioned Mr R repeatedly in this respect. The report merely concluded that there was no evidence suggesting that the claimant was '*mentally retarded*' and that there was therefore no '*.... need to declare the claimant of unsound mind and incapable of managing his own affairs*'. In the alternative the court was invited to decide how the claimant's funds should be protected since the court had a wide discretion to make an appropriate order.

29. It should be added that counsel who acted for the plaintiff prior to the appointment of the curator *ad litem* continued to appear on the instructions of the patient's attorney '*for the plaintiff*' after the curator's appointment. She was unable to enlighten the court of the nature of her role and function at that stage.
30. Before dealing with the curator's report itself, it is necessary to examine the law and procedure that applies to cases in which the assistance of a curator *ad litem* is required.

## **RULE 57**

31. Uniform Rule of Court 57 reads as follows:

'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.'*



32. Whenever there is a credible allegation that a patient is in need of a curator to his person or property (the onus to establish this circumstance rests upon the applicant), the provisions of Rule 57 cannot be ignored and may only be dispensed with under the circumstances envisaged in sub-rule (4) thereof: *Judin v Wedgewood & Another* 2003 (5) SA 472 (W) at para [13]; see further the comprehensive discussion by D van Zyl, J in *Ex parte Futter, in re Walter v Road Accident Fund & Another* [2012] ZAECPHC 52 (17 August 2012) (not reported). No argument was advanced in any of the matters the court dealt with as set out above, or in this case, to justify any departure from the Rule. In fact, any reference to Rule 57 was absent in all cases until its applicability was raised by the court. (There are instances in which a curator *bonis* may be appointed to a person of sound mind but unsound habits, (such as a prodigal), or to someone suffering from severe physical defects, without the prior appointment of a curator *ad litem*. In these matters the person concerned is as a rule able to understand the proceedings and can consent to the appointment of a curator *bonis*: *Delius v Delius* 1960 (1) SA 270 (N), *Ex parte Horwood* 1960 (4) SA 757 (T). The Rule envisages that a Master's report should ordinarily be obtained in these instances as well.)
33. Other than in these exceptional cases and unless circumstances are proven to exist which entitle the court in terms of sub-rule (4) to dispense with some requirements of Rule 57, the failure to observe the Rule renders an application defective to the extent that such application cannot and should not be entertained at all.
34. Before giving directives in respect of further steps that need to be taken in this application some comments upon the implications of the practice that has

apparently taken root 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 detail to ensure that the face of the courts is set firmly against the disregard of the principles and practice that are designed to protect the most vulnerable of litigants.

### **THE INDEPENDENCE OF THE CURATOR *AD LITEM*.**

35. The curator *ad litem* is usually appointed to conduct the litigation on behalf of the patient who is unable to appreciate the nature of the legal issues and procedural steps required to ensure that she or he is adequately compensated for injuries that are almost invariably so serious in those matters that justify the appointment of such a curator that they attract large awards. It follows that a curator *ad litem* must be (ordinarily) an advocate of sufficient experience, proven expertise and good standing to ensure that the patient receives optimal forensic advice and service; see *Soller NO v G & Another* 2003 (5) SA 430 (W) at 436B – 437A. Advocates are – as members of a referral profession practising individually - generally regarded as being professionally independent as they are not beholden to clients other than in respect of the particular brief that has been entrusted to them. One non-negotiable quality of an advocate (or attorney) acting as curator must be indisputable independence to ensure the integrity of the professional service that must be rendered to the patient: see Harms, *Civil Procedure in the*

Supreme Court at para. **B 57.9**; *Ex parte Mallach* 1921 TPD 514, in which Mason J in a concurring judgment said:

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

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

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

See *Rein NO v Fleischer NO & Others* 1984 (4) SA 863 (A). Although the Appellate Division was dealing with the protection of the interests of minors in that matter, it could never be argued that the same vigilance must not be displayed when a curator is appointed to a patient who may be unable to look after his own affairs and to understand the forensic issues in respect of a claim against the defendant Road Accident Fund. See further *Kotze v Santam Insurance Co. Ltd.* 1994 (1) SA 237 (C) and authorities cited there at 244G to 245D; *Ex parte Phillipson and Wells, NN.O. and Another* 1954 (1) SA 245 (EDL).

36. The need for an independent approach to the litigation is especially significant in cases such as the present, in which the attorney acting for the claimant accepted instructions from an individual whose capacity to understand the processes of litigation and the implications of the mandate given to the attorney may subsequently be found to have been compromised. Vigorous vigilance and pronounced independence are essential when issues such as the enforceability of a contingency fee agreement and the validity of

instructions allegedly given by the patient in respect of the conduct of the litigation must be examined to protect the patient's interests. Just as

*' ... it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done..'*

(per Hewart LCJ in *S v Sussex Justices, ex parte McCarthy* [1923] All ER Rep 233), the curator's independence must not only exist, it must manifestly be free of any semblance of bias or association with any party having an interest in the outcome of the matter. It is therefore self-evidently unacceptable that a potential curator *ad litem* should have had any association with the plaintiff's or soon-to-be-patient's legal representatives, let alone to have been briefed by this team upon the merits and background of the application for his appointment in preparation of his report. Whenever a curator *ad litem* is appointed under circumstances such as the present, he steps into the shoes of the former plaintiff and continues the litigation in his or her place. One of the aspects that must be considered by the curator appointed at a late stage is whether the steps taken by the attorney and counsel who acted for the patient as plaintiff until the curator was substituted as nominal plaintiff, were reasonable, correct and in the patient's best interest and should therefore be ratified: *Kotze v Santam Insurance Co Ltd.*' *supra*, at 244F and further. This process must include an investigation into the fees charged by counsel and attorney up to that stage, as set out above. Such investigation is obviously compromised where the curator has been consulting with these lawyers prior to his appointment.

## THE CURATOR AD LITEM'S DUTIES AND FUNCTIONS

37. It is clear that the curator fulfils a very important function. A curator is usually appointed when the patient's circumstances indicate that the appointment of a curator *bonis* or a curator *bonis et personae* may be found to be necessary. The appointment of a curator to a patient represents a very serious invasion of the patient's liberty, dignity and control of his destiny. It is therefore essential that the conditions set out in sub-rules (1), (2) and (3) of the Rule are met before a curator may be appointed: see *Ex parte Futter, supra*. As Galgut J said in *Ex parte Klopper: In re Klopper* 1961 (3) SA 803 (T) at 805 E to H:

*' ... a Court will not appoint a curator bonis until it is absolutely satisfied that the patient has to be protected against loss which would be caused because the patient is unable to manage his affairs.... in Ex parte Kotze, 1955 (1) SA 665 (C) ... (t)he learned Judge came to the conclusion that before the Court could interfere with the right of an adult to control his own affairs the Court had to be satisfied after a proper enquiry into the mental condition of the alleged patient that interference by the Court was justified.'*

The curator's report must deal with all relevant facts that may impact upon the question whether the patient is of unsound mind or not and is therefore of great importance to the court faced with the question whether the patient should be declared to be incapable of managing all or part of his affairs and be placed under curatorship, see *Niekus v Niekus* 1947 (1) SA 309 (C) – in which the court emphasized that a curator *ad litem* would be appointed in circumstances where the failure to do so might cause an injustice to the

patient - ; *Mitchell v Mitchell & Others* 1930 AD 217 at 224; *Ex parte Campher* 1951 (3) SA 248 (C). If the patient is unable to participate rationally in the management of his or her litigation against the RAF and is incapable of giving appropriate instructions to his or her legal representatives, the patient lacks *locus standi in iudicio* and the appointment of both a curator *ad litem* and a curator *bonis* is indicated: *Jonathan v General Accident Insurance Company of South Africa Ltd* 1992 (4) SA 618 (C). In circumstances such as the present the curator must include a recommendation in his report whether the steps taken by the patient's legal representatives prior to the curator's appointment should be ratified, if he has come to the conclusion that the patient was at all relevant times incapable of giving valid instructions due to his or her mental impairment.

38. Once the curator has consulted all relevant persons as required by the Rule and the exigencies of the case, and has obtained and/or studied each and every expert opinion that may be relevant, he must prepare his own report and provide a copy thereof to the applicant. The latter must make a copy thereof available to the Master having jurisdiction. This is a requirement of the Rule the court must ensure is complied with. (In practice the curator *ad litem* should normally supply a copy of his report to the Master at the same time the report is presented to the applicant.)
39. The Master's jurisdiction is determined not by the jurisdiction of the court, but by the provisions of the Administration of Estates Act 66 of 1965: *Ex parte Beukes* [2011] ZAWCHC 267 (15 June 2011). The referral of the curator's report to the Master is obligatory as decreed by sub-rule 57 (6), as is the subsequent Master's report as determined by sub-rule (7) of that Rule. As

Leeuw JP said in *Molatudi v Molatudi, In re Molatudi v Road Accident Fund* [2010] ZANWHC 6 (20 May 2010):

*'[27] Rule 57 (6) prescribes that, the report of the **curator ad litem** as well as the documents filed in terms of 57 (2) and (3), shall be submitted to the Master of the High Court for consideration and report to the Court. Rule 57 (7) provides that the Master, in his report, "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. ...*

*[28] This application was not submitted to the Master in accordance with Rule 57 (7) and this Court did not have the benefit of the Master's report for the purpose of determining the suitability of Mr Moolman Wessels to be appointed as a **curator bonis** to the patient. This Rule must be complied with.*

*[29] Furthermore, in considering whether or not it is suitable for a **curator bonis** to be appointed for the patient, it will be important for the Master to consider the possibility of depositing the money in the Guardian's Fund and have it administered from the Master's Office in accordance with section 90 of the Administration of Estates Act No 66 of 1965.'*

## THE MASTER

40. Apart from the functions the Master must fulfil in insolvencies and liquidations, the Master's Office has been specifically created and empowered to protect minors, deceased estates, heirs, trust beneficiaries and persons declared unable to conduct their own affairs. The Master also appoints administrators to mentally ill persons whose fate is dealt with in terms of the Mental Health Act 17 of 2002. The Master exercises control over curators, executors and trustees, the powers to do so having been conferred by the Administration of Estates Act 66 of 1965 and the Trust Property Control Act 57 of 1988. The Master is obliged by the Rule to consider the recommendations made in the curator *ad litem*'s report and must in turn report to the court whether these proposals could be regarded as in the patient's best interest or whether

alternatives should be considered to ensure the protection of the patient's funds. The Master's interest in the proceedings, and the court's duty to consider the Master's advice and obtain the benefit of his insight, were completely ignored by the legal teams involved in the matters under discussion. The effect of bypassing the Master's office by the practice followed in these matters is, of course, the avoidance of a potential recommendation by the Master that the funds awarded to the patient should be invested in the Guardian's Fund rather than with a financial institution. The creation of a trust with a financial institution avoids the conditions that accompany the appointment of a curator *bonis*, with resultant potential detriment to, and diminishing of the effective protection of vulnerable victims. Other than provided for specifically in the trust deed, trustees of a financial institution's trust are not required to report to the Master annually on the performance of their duties. The Master does not comment upon the suitability of the individuals administering the trusts with financial institutions. The court is denied the benefit of the Master's comment upon the suitability of the person who might be appointed as curator *bonis*, as no such appointment is envisaged by the practice under discussion. When a trust is created, the fees charged by the patient's legal representatives are not subject to the Master's scrutiny, as they are when a curator *bonis* is appointed. The potential harm to the patient concerned is self-evident.



## THE PROPOSED TRUST WITH A FINANCIAL INSTITUTION AND THE PROPOSED POLICIES

41. There are other worrisome features that may impact negatively upon the patient whose funds are dealt with as suggested by the financial adviser, according to Mr R's report. No particularity is provided of the terms and conditions of the policies it is suggested the patient should invest in. In particular there is no investigation of any commission or introductory fee that the financial adviser, who remains unidentified, or the financial institution may earn or demand. There is no explanation whether the policies are to be taken out by the trustee(s) of the trust with the financial institution, or prior to the appointment of the trustees. There is no investigation what monthly, quarterly or annual charges the financial institution may raise, nor are the fees of the trustees investigated and compared with the charges that might be allowed by the Master in respect of the curator *bonis*' remuneration. There is no analysis of the patient's monthly expenses and no explanation of the income that the proposed financial arrangements might render for the patient.
42. The Master has had occasion in the past to express his misgivings about an arrangement similar to the one that is proposed now. In *A N Granova N.O. v The Road Accident Fund* Case No 23167/2007 NGHC, Pretoria the Master filed a report in which he stated i.a. the following:

'4.

*According to the evidence it appears that Mr Khumalo is incapable of managing his financial affairs. The Curatrix-ad-Litem came to the same conclusion in paragraph 4 of her report.*

5.

*The assets of the patient appears to be the offer of settlement in the amount of R 1,150,000.00 made by the Defendant .I have no further information in this regard and I am of the opinion that the assets of Mr Khumalo justify the appointment of a Curator Bonis.*

6.

*The Curatrix-ad-Litem indicated in paragraph 3.5 of her report that the purpose of this report is to advise the Honourable Court on the issue of whether a Trust should be created and if so, who should be the Trustee thereof.*

*It appears from paragraph 4.1. of her report that the Curatrix-ad-Litem contradicted herself by indicating that it would be in the best interest of Mr Khumalo if a Curator Bonis be appointed.*

*In paragraph 8 of her report the Curatrix-ad-Litem is opined that the creation of a trust and the appointment of a trustee is essential in securing the financial future of Mr Khumalo.*

7.

*It is my humble opinion that it would **not** be in the best interest of Mr Khumalo if a Trust should be established instead of appointing a Curator Bonis to administer the assets of Mr Khumalo.*

7.1.

*My opinion is based on the following reasons:*

7.1.1

*Trusts are taxed at a higher scale than Curatorship estates unless a special Trust is registered which is taxed on an individual scale.*

7.1.2

*A Trust is usually made subject to an annual audit in terms of the court order which is a cost against the estate. Estates under Curatorship are not subject to an audit but a Curator Bonis must in terms of section 83(1) and (2) of the Administration of Estates Act 1965 (Act no 65 of 1965) draw an annual account which is examined by the Master to ensure compliance with regulation 7 of the Administration of Estates Act.*

### 7.1.3

*In a Curatorship estate a patient can make a will were he has the mental capacity to do so because he is the owner of the Curatorship property.*

#### 7.1.3.1.

*In a Trust a beneficiary does not own the property and he consequently cannot bequeath the property by way of a will.*

#### 7.1.3.2.

*In a Trust the principle of freedom of testation and the provisions of the Intestate Succession Act ,1987 (Act no 81 of 1987) could be violated because the patient's (trust property) will devolve in terms of the Trust deed and not in terms of a will or intestate succession.*

#### 7.1.4.

*Should a court order that a Road Accident Fund payment should be paid into a Trust, it usually makes no order in respect of the patient's other assets which should then fall into his/her Curatorship estate.*

##### 7.1.4.1.

*This would make the administration of the patient's assets cumbersome and costly because there will then be two entities dealing with the patient's estate.*

#### 7.1.5.

*SARS could interpret a Road Accident Fund payment to a Trust as a donation which could be subject to donations tax.*

##### 7.1.5.1.

*The Honourable Court did make an order on 14 October 2008 that the Defendant pays the Plaintiff, Mr N G Khumalo the amount of R 1,150,000.00. It is my submission that to establish a Trust will conduct a donatio.*

#### 7.1.6

*The remuneration of a Curator Bonis is taxed annually by the Master whereas in Trusts the Master only adjudicates on a Trustee's remuneration in the event of a complaint.*

#### 7.1.7

*Legal costs in curatorship estates (ie the costs of the applicant attorney) are carefully monitored by the Master, while the Master only looks at these costs in the event of a complaint in a trust.*

#### 7.1.8

*The powers of a Curator Bonis are circumscribed by the court whereas the powers of a Trustee in a trust deed and are often vague and difficult to interpret. ....*

#### 9.

*It is my humble submission that security must be furnished by the Curator Bonis/ Trustee which ever appointment will be made, for the full value of the assets of Mr Khumalo which will be placed under her control.'*

43. The *Granova* matter was only finalised some two years after the Master had presented his comments to the Court. An order was eventually made that authorised the creation of a trust with a financial institution. The trust was expressly placed under the control of the Master. (Unfortunately the pleadings and other documents filed of record are not contained in the court file, which also relates to an application for a voluntary surrender with the same case number as the *Granola* matter.) It is unclear why the Master's views have been disregarded over the years and why they were not addressed in any of the reports that were presented to the court in this or other matters.

## THE DECLARATION OF INABILITY TO DEAL WITH SOME OR ALL OF THE PATIENT'S AFFAIRS

44. Another potentially grave problem that may raise its head if the proposal presently under discussion were to be accepted, is the express disavowal of any intention to seek a declaration that the patient is unable to deal with his personal affairs, or is unable to deal with the funds that are about to be awarded to him. The proposed trust is paraded as the answer to the problems the patient is alleged to experience in dealing with large sums of money. The patient must clearly be a beneficiary of the trust, usually the only one. The trust is to be created with the patient's own funds. Whether such trust will become liable for donation's tax or not, and whether the trustees are instructed to deal with the funds in a particular fashion or for particular purposes only or not, without a declaration of inability to manage these funds or all of his belongings, a trust can only be created with the patient's express prior consent validly given. Should this consent later be held to have been of no force and effect because of the patient's mental impairment, the consequences may be dire. It is difficult to discern what benefit the failure to issue a declaration of inability may render to the patient, whose incapacity to deal with the funds is the only reason the trust is being created.
45. The preferable practice must in the light of the foregoing considerations surely be that a patient who suffers from a mental disability resulting in the inability to manage all or some of his own affairs should be declared to be unable to do so. Such an order protects the patient and those who interact with him. It forms the basis upon which the appointment of a curator *bonis* or

*bonis et personae* is justified in law, as the patient's fundamental rights to dignity and freedom to decide how she or he would prefer to live his or her life are compromised by granting to a curator the right to take decisions on behalf of the patient: *Ex parte Hartzenberg* 1928 CPD 385; *Ex parte Marais* 1944 CPD 460; *Ex parte Herzberg* 1950 (2) SA 62 (C); *Ex parte Van der Merwe* 1956 (2) SA 113 (C); *Ex parte Van der Linde* 1970 (2) SA 718 (O) and *Ex parte Thomson: In re Hope v Hope* 1979 (3) SA 483 (W). (These considerations do not necessarily apply in all instances in which the patient is able to consent to the appointment of a curator *bonis* as discussed above).

#### **EARLY APPOINTMENT OF THE CURATOR *AD LITEM***

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 or 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 instructions to his attorney at the time litigation commenced will now have to be investigated.

## THE PRESENT APPLICATION

47. It is obvious that the present application is plagued by procedural errors and substantial non-compliance with practice and law. According to *Futter's* case, *supra*, the applicant for the appointment of the curator *ad litem* lacked *locus standi* because he had no sufficient interest in the matter. The court was nonetheless persuaded to appoint Mr R as curator *ad litem* in the light of the fact that the patient and his mother agreed with the conclusion that the former is in need of assistance, at least in regard to the management of his financial affairs, if not in all his affairs.
48. It is evident from the chronology recorded above, however, that the court rendered both the patient and Mr R a disservice by burdening him with the responsibility to act as curator *ad litem* on his own. He clearly is in need of assistance to ensure that the patient's circumstances are properly investigated. The court will therefore call upon the Chairperson of the Bar Council of the Pretoria Society of Advocates to nominate another junior counsel of sufficient seniority and experience to lead Mr R in the preparation of a supplementary and sufficiently comprehensive report dealing with the desirability of declaring the patient to be unable to conduct his own affairs and other issues related thereto. Such nomination should be made in writing within three weeks from date hereof and should be submitted to the court and delivered to the defendant's attorney of record together with such nominee's written acceptance. The defendant may object to the proposed nominee, if so

advised, within one week of receipt of such nomination, failing which the court will confirm the nomination in Chambers.

49. It is clear that the Master has a substantial interest in the matters raised in this judgment. He must obviously receive a copy of the envisaged supplementary report of the curators *ad litem* and must comment upon the latter's contents as intended by the Rule. In addition, however, the Master will be requested to advise the court in general upon the implications of the recommendations made by Mr R to date, and upon the practice that the court has addressed in this judgment.
50. The application may be set down for hearing once all interested parties have had the opportunity to consider the curators' and the Master's reports and are ready to submit argument to the court upon the best option to protect the patient's interests.
51. The defendant's legal advisors supported Mr R and the patient's legal representatives in all their submissions since the matter was purportedly settled, or at the very least did not offer any objection thereto. It is therefore only fair that the defendant be ordered to pay the costs to date, subject to the defendant's right to argue at the next hearing that this order should be revised.



## ORDER

The following orders are made:

1. The matter is postponed *sine die*.
2. The Chairperson of the Bar Council of the Pretoria Society of Advocates is requested to nominate a junior counsel of sufficient expertise and seniority to lead Mr R in the preparation of a supplementary report concerning the ability of the patient to handle his own affairs and make appropriate recommendations to the court in the light of their findings.
3. 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 of the nomination. The nomination is to be delivered to the court and to the offices of the defendant's attorneys of record.
4. Should the defendant have any objection to the counsel so nominated by the Chairperson of the Bar Council, such objection should be made in writing within one week of the nomination having been delivered to the defendant's attorneys and be delivered to the proposed curator *ad litem* and the court as well as the applicant's attorneys.
5. If no objection is made to the appointment of the curator *ad litem* proposed by the said Chairperson, the court will appoint the nominee as such in Chambers unless any interested party requests a hearing in open court to effect the appointment of the counsel nominated.
6. The curators *ad litem* are requested to prepare a comprehensive report dealing with all aspects that may impact upon the issue whether the patient

should be declared incapable of dealing with all or some of his affairs. The need to issue a declaration to the effect that a patient is unable to conduct his or her own affairs, the legal principles underlying such a declaration and the effect thereof should be specifically discussed.

7. If there appears to be a need to provide assistance to the patient, the curators *ad litem* are requested to investigate the proposed creation of a trust with a financial institution and the likely benefits and challenges that the patient may face if such route is to be followed. The curators are requested to obtain full comments upon the court's misgivings in this respect from the financial advisor and/or the financial institution(s) concerned. The curators should inform the financial institution(s) or financial advisor that they may request to be allowed to make direct submissions to the court, should they wish to be admitted as *amici curiae*.
8. The curators *ad litem* are requested to compare the patient's position if a curator *bonis* or *bonis et personae* is appointed with his position if a the proposed trust with a financial institution is created, and the position if all the patient's funds are paid into the Guardian's Fund.
9. The curators *ad litem* are further requested to investigate the patient'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. This investigation must also cover the enforceability of the contingency fees agreement. The curators *ad litem* are requested to advise the court whether the steps taken on behalf of the patient by the attorneys concerned should be ratified or not, should the patient be found to have been unable to understand the implications thereof.

10. The curators' report must be delivered to the Master for his or her comment and report.
11. The Master is requested to deal in his or her report not only with the curators' recommendations, but also with:
  - (i) The practice that has been described in this judgment, with particular reference to the need or otherwise to declare a person in the patient's position incapable of dealing with some or all of his or her affairs; and
  - (ii) with the merits or demerits of the creation of a trust with a financial institution when compared with the appointment of a *curator bonis*.
12. The costs of the proceedings to date must be paid by the defendant, with the exception of the appearances on the 29<sup>th</sup> November 2013 and the 9<sup>th</sup> December 2013, for which appearances no fees are allowed to any of the parties. This order may be revised at the next hearing upon the specific request by any interested party.
13. Once the curators' and the Master's reports have been received, any interested party may file comments thereupon within twenty days of the Master's report having been received.
14. Once the period of twenty days has expired, any interested party may enrol the matter upon notice to all other parties.
15. All parties should file heads of argument not later than fifteen days before the hearing referred to in 12. above.
16. A copy of this judgment must be provided to the Law Societies of the Northern Provinces and upon the Bar Councils of the Pretoria and Johannesburg Society of Advocates for their attention and comment, should they wish to do so.

17. Pending the finalisation of this matter, the court file is to be retained in the Judge's Chambers

Signed at Pretoria on this 27<sup>th</sup> day of January 2014.

E Bertelsmann

Judge of the High Court.