REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: Yes
(2) OF INTEREST TO OTHER JUDGES: Yes
(3) REVISED

26/09/2014
DATE

SIGNATURE

26/9/14

CASE NO: 29003/2011

E BOTHA N.O. for E T MASHIQA **PLAINTIFF**

AND

THE ROAD ACCIDENT FUND **RESPONDENT**

JUDGMENT

THOBANE AJ,

INTRODUCTION

[1] This is an application for appointment of a *curator bonis to the* plaintiff Ms Mashiqa, whom I shall refer to as the plaintiff throughout these proceedings. She instituted an action for damages against the Road Accident Fund (RAF), for injuries sustained in a motor vehicle collision that occurred on the 18th May 2008 on the Virginia-Welkom public road in the Free State Province. She was a passenger in a minibus taxi that collided with a truck.

[2] The action was defended by the RAF however it was settled and the draft order was, after certain amendments had been effected thereon, made an order of court. The order provided, *inter alia,* for the appointment of Etienne Botha as curator *ad litem,* to the plaintiff. Further, that;

> *"....any actions taken by the curator ad litem prior to his appointment but following his consent to act as curator ad litem be ratified as if it had been done following his appointment.*
>
> *.....the curator ad litem can settle the action, after having reported to and having obtained the leave of this court.*
>
> *....the curator ad litem report to this Court in respect of the remainder of the issues that he is legally obliged to on a manner set out below.*
>
> *The defendant will pay to the plaintiff an amount of R2 497 597-00 (two four nine seven five nine seven Rand only).*
>
> *The amount will be paid into the trust account of the plaintiff's attorneys particulars of which are as follows:*

.....

....."

[3] The court order further directed the curator *ad litem,* to report to this court on;

"The question as to whether or not the award should be protected in any manner, which includes amongst others the questions as to whether or not Ms Mashiqa should be declared incapable of managing her own affairs and if it is found that the award has to be protected, the manner in which it should be protected.

.....

.....

The curator ad litem shall, through the plaintiff's attorney cause a copy of his report, together with a copy of this order to be delivered to each of the following persons, in the following manner:

1. *The master of the High Court, by serving a copy thereof;*
2. *The defendant's attorney, by serving a copy thereof;*
3. *Ms Mashiqa, by sending a copy via facsimile or electronic mail.*

After having complied with this order the plaintiff's attorneys shall set the matter down for determination of the remaining questions in the normal course, as if it is a motion and, thereafter the normal rules applying to motions, including any opposition thereof shall apply."

[4] That is how the matter came to be set down on the unopposed roll and came before me. The curator *ad litem's* report was part of the papers. But missing was the report by the Master of this Court. Subsequently I requested, through the clerk, that the Master file a report. Despite repeated requests to the Master's office by both myself as well as the attorneys of record together with the curator, the report has not been filed. At the hearing hereof, submissions were made in line with the curator's report, the thrust of which being that the plaintiff be declared incapable of managing her own affairs and that a trust with appropriate safeguards built into it, would be an ideal vehicle to protect the interests of the plaintiff.

[5] I have had regard to the history of the matter, the application for appointment of a curator *ad litem* as well as annexures thereto, the report by the curator *ad litem,* the fact that the Master's report has not been filed, the heads of argument as well as submissions made in court. Accompanying the heads of argument was a draft trust deed which I will very briefly deal with later in this judgment.

[6] The court order raises vexed questions. Should the award be protected? If so, can it be protected without declaring the plaintiff unable to manage her affairs. Should she be so declared? Is she unable to manage her own affairs? How best, if indeed she is unable to manage her affairs, can the award be protected? Is a trust the appropriate vehicle to protect the award? If a trust is the best vehicle available does it provide adequate safeguards to protect not only the award but the plaintiff as well? What about the rights of the plaintiff?

THE LAW

[7] As pointed out above, these proceedings did not follow the letter of the law prior to the court granting an order giving direction. This much was admitted to the Deputy Judge President before the order was granted and is also highlighted in the curator's report[1]. Declaration of a person as being of unsound mind and therefore unable to manage his/her own affairs is regulated by Rule 57 and is a serious matter. In this division the judgment of Bertelsmann J in ***Ex Parte Jacob Mantjitji Modiba obo Sibusisiwe Ruca in re Sibusisiwe Ruca and RAF*** [2], was inter alia aimed at restating the law in view of the fact that a practice had developed over time which impacted negatively on the administration of justice.

[8] It is apt, having appointed a curator *ad litem,* that the relevant portions of Rule 57, which I will deal with later in this judgment, read with the court order are restated briefly;

> **(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*

[1] Page 57 (page 12 of the report).

[2] Ex Parte Jacob Mantjitji Modiba obo Sibusisiwe Ruca in re Sibusisiwe Ruca and RAF Case No. 12810/2013 and Case No.73012/13

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.*

[9] The court in its determination is duty bound to have regard to the Uniform Rules. Although the precepts of the law were ignored, what is to be highlighted is that the court set out the procedure to be followed. It is that procedure in my view that is of relevance in the circumstances of this case. Efforts that are aimed at streamlining or refining the procedure and in the process restating the law, should be supported at all costs. I am constrained to say courts should at all times be vigilant and not by silence condone unsavory practices. The judgment of Bertelsmann J, is therefore a welcome development.

[10] Rule 57 (2) provides as follows;

> *"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 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 opinion 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."*

SUMMARY OF INJURIES

[11] The plaintiff sustained serious bodily injuries in the collision which included a head injury. They were described in the MMF 1 form as follows;

- Severe upper and lower limb injury,
- Severe facial lacerations,
- Dislocation of the right hip,
- Dislocation of the left elbow,
- Dislocation of the right ankle,
- Fracture if the left femur,
- Fracture of the left humerus.

[12] With regard to the head injury, Professor Vivian Fritz, a neurologist appointed by the defendant opines that according to her the plaintiff;

> *"... probably did sustain a significant brain injury".*

The neurologist appointed by the plaintiff, Dr. Smuts, in her report opined that;

> *"Based on these facts this patient sustained a head injury of uncertain severity this could possibly have been a moderately severe head injury, the head injury also seem to have resulted in frontal brain injury".* She later concludes in her report that *"She sustained.... a significant head and brain injury.....".*

THE REPORT OF DR. SMUTS

[13] The report details the history taken from the plaintiff, the examination conducted by the doctor, her findings and her recommendations. Regarding the plaintiff's memory the doctor recorded the following;

- She forgets conversations and discussions,
- She has difficulty expressing herself and has problems with word finding,

- She sometimes misuses her money,
- Although she is registered with UNISA she has never passed.

The doctor concludes that memory impairment and personality change are well known problems on patients with head injury and often very disabling.

[14] Regarding the personality changes of the plaintiff, the report notes the following;

- The plaintiff is emotional and cries easily,
- When upset she throws things around,
- She wishes she was dead,
- She is self conscious about her body and the scarring and this has affected her sex life,
- She is scared of cars,
- She doesn't trust people and
- She has visual and auditory hallucinations.

THE REPORT OF PROFESSOR FRITZ

[15] The report contains details of the history of the plaintiff, the medical record relied upon by the Professor during consultation, his findings as well as his recommendations. The following complaints were noted;

- She is prone to headaches and they occur about once a week,
- Her memory is not as good as it was prior the collision,
- When she reads she loses concentration,
- She is now slower at work than before the collision but the employer is not complaining,
- She has developed behavioral problems in that she gets easily upset, loses patience and is easily provoked which results in aggression.

REPORT BY *CURATOR AD LITEM*

[16] The report is both detailed and informative. The curator has had the the opportunity to consult with the Master, the plaintiff, her husband Mr. Selesho and the plaintiff's past supervisor Ms. Medupe. The plaintiff is of the view that she will be able to handle her own affairs. According to the report, she is able to control her monthly salary. Her husband is non committal and defers to her for decision on the issue as to whether she will be able to handle the award or if it should be protected. The following is a summary of what the plaintiff and her husband think about protection of the award as it appears from the report;

- *Ms Mashiqa has little doubt that she will be able to manage the award, though she agrees that she will have to do so with the help of her husband and financial advisors,*
- *Mr Selesho told me he would be able to properly assist Ms Mashiqa in managing the award and that he is already assisting her with her finances,*
- *I explained to Mr Selesho that it would not necessarily be that he would always be there to assist Ms Mashiqa and, for this reason, it would probably be better to protect the award. He agreed, but told me that the decision remained Ms Mashiqa's.*
- *Ms Mashiqa does not want to have the award protected if it is going to mean that she will not have control over the money.*

[17] The vehicle for protection, should it be deemed necessary was also considered. In the end the recommendation is that a *curator bonis* be appointed and that a special trust be formed as a vehicle to protect the award. The trust deed was also attached and it was indicated that with special additions and/or alterations, it could be a model used to protect the award.

ANALYSIS

[18] It is clear that the plaintiff sustained a head injury that impacted on her personality. It affected her self esteem and caused her to contemplate her very existence. This is shown by the fact that she has contemplated suicide. How she relates to her husband intimately has equally been dealt a huge blow so much so that the sexual intimacy between them has been rendered nonexistent. Her job performance has also been affected.

[19] What is discernible from the reports of the two specialists is that, at some point in time, there needed to be further consideration of the situation of the plaintiff by a psychologist. Both of them defer to a psychologist for determination of particularly the impact of the plaintiff's injury on decision making. Prof. Fritz proposes a neuropsychologist whereas Dr. Smuts defers to a psychologist who would do more testing. Most importantly however is that Dr. Smuts, proposes, without advancing any reasons, that the plaintiff should be assisted by a *curator bonis* and that the funds should somehow be protected.

[20] Each case must be considered on its own merits. When one steps back to reflect as to how it has come about that the court be requested to consider whether or not a *curator bonis* should be appointed to manage the affairs of the plaintiff, a clearer picture emerges. The plaintiff is employed at the post office. It would appear she is handling her job well, not withstanding her injuries, however with increased supervision. With the help of her husband, she manages her personal finances well although occasionally she is said to misuse her money. The detail and extent of such misuse has not been indicated neither by Dr. Smuts nor the *curator ad litem*. The accident took place in 2008. It has been six years since then and for about five of those the plaintiff has been at work. It seems occasional misuse of money, given that no detail has been disclosed and most importantly whether

such misuse is in any way related to her injury, is far fetched and can not independently be relied upon as a reason to declare her incapable of managing her affairs.

[21] The curator *ad litem* refers in his report to an addenda that he requested and received from Prof. Fritz and Dr. Smuts dealing specifically with the question as to whether the plaintiff should be declared incapable of managing her own affairs. I have not had the benefit of reading those. The curator *ad litem's* report however states that the opinion of Dr. Smuts, as contained on her addendum, is to the effect that;

> *"I have viewed the facts in this case and I hereby advise that in my opinion it is in the best interest of the patient to appoint a curator ad litem as well as a curator bonus.*
>
> .....
>
> *Given the severity of the head injury as well as the impact this had on her cognitive ability and emotional status it is my opinion that she is not able to conduct herself unassisted in court and also regarding financial matters".*

[22] My attention has not been drawn to the fact that there was further consultation after the first report of Dr. Smuts. I must assume therefore that Dr. Smuts prepared her addendum based on the initial consultation. I have not been told of a reason nor could I find any in the curators report as to why Dr. Smuts, having deferred to a psychologist on the question of appointment of a curator *bonis* and the protection of the award, as contended in her initial report, would deviate from that position without the benefit of such report from a psychologist prepared after a thorough evaluation of the plaintiff. What would have been of assistance, are her views on the fact that the appellant has somehow been able to "cope" with her personal finances, albeit with her husband's help, since the collision for five years.

[23] Prof. Fritz is quoted to have said in her addendum;

"This lady sustained a significant concussive brain injury. The severity of the injury was difficult to ascertain.

She has cognitive and behavioral problems which are detailed in my report of the 16th July 2013. Despite this she is still working at the post office, apparently successfully.

I consider that she would probably have problems in coping with a large sum of money. She is, however, still coping with her day to day life."

[24] In her report dated 16th July 2013, Prof. Fritz was unable to draw any definitive conclusions about the severity of the injury sustained by the plaintiff, especially it's impact on her way of life and thinking. She stated in her report that it was difficult to assess the severity of the injury due to poor records. She inferred from the plaintiff's slowness at work, memory problems, concentration difficulties, impatience and irritability that she *"probably sustained a significant brain injury".* Significantly, she was of the view that *"the sequelae of the brain injury will need to be further evaluated by a neuropsychologist.....The severity of the brain injury will be re-evaluated once an assessment from a neuropsychologist has been made available."* In light of these findings by Prof. Fritz, it is difficult to understand the shift in her thinking as reflected in the addendum to the effect that the plaintiff will probably have problems coping with large sums of money. No reasons are advanced for such a conclusion. Admittedly, she does indicate that the plaintiff has somehow coped thus far. However, given that her "new" view was that she will not be able to cope going forwards, I expected her to advance reasons, founded on firm expert examination,

evaluation, testing and assessment. In view of the fact that she had opined in her initial report that her future earning capacity would be influenced by a report of *inter alia* a neuropsychologist.

[25] She is, in this regard, in the same position as Dr. Smuts. She has not had a further consultation nor has she been supplied with supplementary medical records to base her shift in thinking thereon. Relying on the opinions of the two experts, the curator *ad litem* is of the view that the court should declare the plaintiff incapable of managing her affairs so that the award can be protected. Naturally the opinions of both experts will attract criticism.

[26] In the ***Ex Parte Jacob Mantjitji Modiba***[3] matter Bertelsmann J had the following to say about the duties of a curator as well as the implications of the order;

> *"It is clear that the curator fulfills 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 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***

[3]Ex Parte Jacob Mantjitji Modiba obo Sibusisiwe Ruca in re Sibusisiwe Ruca and RAF Case No. 12810/2013 and Case No.73012/13

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 instructions due to his or her mental impairment."*

[27] Bearing in mind that the purpose of the appointment is to protect the interests of the plaintiff, and that it amounts to serious encroachment on liberty, dignity and pursuit of life of an individual as indicated above, sufficient reasons must therefore be advanced for the

court to intervene. This court will not intervene and appoint a *curator bonis* in circumstances where there is no evidence that the plaintiff is of unsound mind. The argument however is not to the effect that the plaintiff is of unsound mind, nor is it that she is unable to manage her own affairs. The issue it seems is that she would not be able to mange the large award. The *curator ad litem* states in his report that:

> ***"However, except for the fact Ms Mashiqa's "...supervisor always double checked all her work, and she also every morning tells her what she is supposed to do for the day..." and Ms Mashiqa "...misuses her money sometimes..." there appears to be no evidence that Ms Mashiqa is not and will not be able to manage her normal, day to day financial affairs on her own."***
>
> ***"By referring to her normal, day to day financial affairs, I mean that it appears that as long as she is earning a salary and has to manage her income from that salary alone, she appears to be able to do so."***
>
> ***"Her husband agrees with this."***
>
> ***It has to be accepted that she, like many other people without injury, will sometimes make wrong decisions, act impulsively or overspend, but the question is whether this, combined with the fact that she is clearly unable to manage a large award, (my emphasis), would justify her being declared incapable of managing her own affairs."***

[28] The conclusion reached by the *curator ad litem* being; *"she is clearly unable to manage a large award"* is neither based on facts nor supported by the expert reports. In

Ex Parte Wilson: In re Morison[4] an application was launched by the respondent's daughter to have her declared incapable of managing her own affairs and for the appointment of a curator of the property and affairs of the respondent. She was 90 years of age and sole beneficiary in a trust that had substantial sums of money. It was further argued, in support of the application, that she appeared unable to distinguish between small and large sums of money. The application was opposed and in the end dismissed. The following comments by Esselen J in that matter are apposite;

> *"It can be accepted that although curator bonis are not usually appointed to persons who are compos mentis, yet a curator may be appointed to a person if he desires it, provided the facts establish an incapacity to manage his affairs due to some defect of body or mind. (See also* ***Ex parte Berman NO: In re Estate Dhlamini 1954 (2) SA 386 (W) at 387.*** *See also* ***Ex parte De Villiers 1943 WLD 56 at 58*** *and* ***Ex parte Bell 1953 (2) SA 702 (O) at 703-4,*** *where reference is made to various Roman-Dutch authorities pertaining to such a situation).*[5]
>
> *It is of course well known that each case must be decided on its own set of facts, but as a general proposition it can be accepted that the Court does not usually interfere to appoint a curator where the person concerned is compos mentis and furthermore actively opposes any such appointment as is the position in casu."*[6]

[4] Ex Parte Wilson: In re Morison 1991 (4) SA 744 (T)

[5] Ex parte Wilson pg 779 para G

[6] Ex parte Wilson pg 779 para J to pg 780 para A

[29] My attention has been drawn to the fact the there exists a practice in this Division of appointing *curatores bonis* and appointing trusts, without necessarily declaring plaintiffs incapable of managing their own affairs. Bertelsmann J refers to it in the matter below. This practice is to be discontinued for it falls foul of the prescripts of the law. I therefore agree with the views expressed by him in ***Ex parte Jacob Mantjitji Modiba*** *supra,* paragraphs 44 and 45 when he said:

> 44. *"..... 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 funds is the only reason the trust is being formed."*
>
> *45. The preferable practice must in light of the a 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 patients fundamental rights to dignity and freedom to decide how she or he would prefer to live his or her life are compromised by granting a curator the right to take decisions on behalf of the patient:* ***Ex parte Hartzenberg 1928 CPD 358, Ex parte Marais 1944 CPD 460, Ex parte Herzberg 1952 (2) SA 62 (C), Exparte Van der Merwe 1956 (2) SA 133 (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 on all instances in which the patient is able to consent to the appointment of a curator bonis as discussed above.)*

[30] An affidavit by a person to whom the plaintiff is known, detailing facts and information concerning the plaintiff's mental condition is absent. So are two affidavits from medical practitioners detailing the nature, extent, probable duration of the plaintiff's mental disorder or defects observed and reasons for same. Specifically missing is an averment that the plaintiff is incapable of managing her own affairs. There are no sufficient grounds to make a declaration that the plaintiff is incapable of managing her own affairs. In terms of Rule 57 (2) (a) and (b), the three affidavits are peremptory. In the circumstances I am not persuaded that the award should be protected.

[31] The next issue for determination is the appropriate method of protecting the award should the Court find that such protection is warranted. In view of my finding above and the order I propose to make, I do not deem it necessary to make any determination in that regard, save to say that the Master is an integral and necessary player in the process without whose input the court is left disempowered.

LOCUS STANDI

[32] The applicant in this matter is IZAK JOHANNES CROUKAMP, an attorney who represented the plaintiff in an action against the RAF. In his affidavit dated the 12th February 2014, he concedes that he is aware of the ***Ex parte Jacob Mantjitji Modiba*** judgment. He further concedes that the provisions of Rule 57 were not adhere to. Significantly, he submits in the affidavit that the reason why he brings the application is so that he would not attract a civil suit for having failed to inform the court that the award is vulnerable in the hands of the plaintiff.

[33] The above reason, being the only basis upon which the applicant purports to have *locus standi,* must be tested against what the law provides. The applicant being the

attorney who handled the claim on behalf of the plaintiff against the Road Accident Fund, must immediately be discounted as being a next-of-kin as envisaged in Rule 57. The question therefore is whether a legal representative is a person with sufficient interest in the person of the plaintiff, therefore, has the requisite legal standing to bring the application. It is trite that the onus to establish *locus standi* rests on the applicant. Exposure to litigation as a ground establishing *locus standi* was dealt with in the ***Ex parte Futter: in re Walter v Road Accident Fund & Another***[7]. The view of Van Zyl J, in relation to the matter before him, with which view I agree, is that:

> [10] *"....At the hearing of the matter Counsel for the Applicant sought to place reliance on the fact that the applicant acted as the second respondent's attorney in the action against the Fund and that he may potentially be exposed to litigation in the future should he allow the second respondent to squander the monies awarded to him in the damages action as a result of his inability to manage his financial affairs. There is in my view no merit in this argument. Formulated in this manner, the applicant's interest in the relief claimed is not current but rather hypothetical."*
>
> *[13] An attorney – client relationship cannot, as contended on behalf of the applicant in argument, per se create a sufficiently close relationship to confer locus standi on the attorney concerned. It is subject to the circumstances of the particular case, and factors such as the unavailability or unwillingness of the patient's next of kin to act, the nature and extent of his relationship with the patient, and its duration, that are determinative of the issue of locus standi. These aspects must be fully dealt with in the founding affidavit, particularly where, as in the instant matter, it is evident*

[7]Ex parte Futter: in re Walter v Road Accident Fund & Another [2012] ZAECHC pg 9 para 10

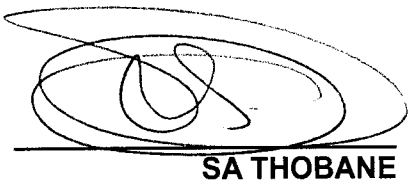
from the documentation which the applicant incorporated by reference thereto into his application, that the second respondent is married and has next of kin.

[34] It is clear that the person who should seek the courts' intervention must be a person with a direct or real interest in the relief sought. In *casu* the plaintiff has a partner. The partner does not hold the view that the plaintiff will not be in a position to handle the large award. His view is simply that the plaintiff must decide. Considering that he is better placed to proffer a view about the the ability or otherwise of the plaintiff to manage her own affairs, it is bizarre that he defers to the plaintiff. One can discern therefrom, that he trusts the plaintiff's ability to handle the award.

[35] In my view the applicant has failed to show that there are valid grounds for appointment of a *curator bonis,* or that the award ought to be protected. Given what the the order of Ledwaba DJP provides i.e. "*After having complied with this order the Plaintiff's attorney shall set the matter down for determination of the remaining questions in the normal course, as if it is a motion and, thereafter the normal rules applying to motions, including any opposition thereof shall apply",* I am also of the view that the applicant, on the facts of this case, does not have *locus standi* to bring an application for the appointment of a *curator bonis.* The application therefore stands to be dismissed. With regard to costs, I hold the view that costs must follow the event.

[36] I therefore make the following order:

1. Application for appointment of a *curator bonis* is dismissed with costs.



SA THOBANE

ACTING JUDGE OF THE HIGH COURT