IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, PRETORIA)

3/6/2016.

Case no: 64547/2013

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

03/06/2016 .....

In the *ex parte* application of:

DAISY BUSISIWE MAIMANE Applicant

JUDGMENT

MAGARDIE AJ:

1. This an *ex parte* application brought by the mother of one Priscilla Mamoletlane Maimane (Priscilla), for the setting aside of the appointment of a *curator bonis* allegedly appointed per court order to manage the affairs of Priscilla and thereby releasing her from curatorship. In the alternative, in the event that the court is not keen to grant the main prayer, the applicant wants the court to discharge the appointed *curator bonis* and to appoint her as the curator to manage the affairs of her daughter.

2. It is appossite to mention that the same applicant initiated an application before the Gauteng High Court, Johannesburg, under case nr 22106/2012, against the trustees appointed per court order to manage the financial affairs of Priscilla pursuant to the Road Accident Fund (RAF) payout in favour of Priscilla. It appears that the Johannesburg application is still pending. It was not explained why the applicant decided on forum shopping instead of making the current application in Johannesburg.

3. Although she did not cite the trustees in this matter, the application was served on the trustees. The trustees were represented during the argument of the matter before me.

4. From the perusal of the papers before me, the incident giving rise to the claim against the RAF was a motor vehicle accident which occurred on or about 19 February 2006, during which Priscilla was knocked down by a motor vehicle. Priscilla, who is currently 24 years of age, was a minor child at the time of the accident. She, *inter alia*, sustained severe brain damage.

5. Priscilla was assisted by her mother to lodge a claim against the RAF. Priscilla's mother contracted the services of J J S Manton Attorneys to institute a claim against the RAF. Since Priscilla was a minor and also unable to manage her own affairs, application was made for the appointment of Mr Irvin Smith, a practising advocate, as *curator ad litem.*

6. Summons against the RAF was issued under case no 18204/2007 in the Gauteng High Court, Johannesburg. On 18 July 2009, the parties concluded a settlement agreement after which Joffe J made the settlement an order of court.

7. The terms of the settlement agreement which was made an order of court, *inter alia*, contained the following:

7.1 That an amount of R1 600 579.00 should be paid as full and final settlement of the claim. Such amount to be paid into the trust account of J J S Manton Attorneys by 30 June 2009;

7.2 That the RAF shall pay the taxed or agreed party and party costs on the High Court scale as well as the reasonable costs of the *curator ad litem*;

7.3 That the firm J J S Manton Attorneys shall establish a trust for the sole benefit of Priscilla; and

7.4 That the net proceeds of the capital would be held in trust in terms of the provisions of section 78(2)(A) of the Attorneys Act until the establishment of the trust.

8. Joffe J did not make any order for the appointment of a *curator bonis*. Such is not surprising given the fact that there was an order for the establishment of the trust. The trustees appointed to the trust were supposed to act in Priscilla's best interest.

9. The amounts of R1 619 610.54 together with the party and party costs of R157 452.15 was paid into the trust account of J J S Manton Attorneys by the RAF on 05 August 2009 and 21 April 2010 respectively. A total amount of R1 777 062.69 was therefore paid by the RAF.

10. The Maimane Trust was established for the benefit of Priscilla in accordance with the court order. An amount of only R980 000.00 was paid into the Maimane Trust.

11. The applicant is aggrieved that, being Priscilla's mother, J J S Manton Attorneys failed to account for approximately R700 000.00 as well as legal costs, making the total amount of over R857 000.00 that apparently remains unaccounted for. She averred that there was no contingency fee agreement concluded between her and the attorney she instructed to institute the claim against the RAF, namely J J S Manton.

12. There was no contingency fee agreement presented before me to disprove the applicant's allegations. It is trite that for an attorney to claim contingency fees, there must be an agreement in writing in terms of which an attorney can retain an amount that does not exceed 25% of the payout. Absent a contingency fee agreement that complies with the provisions of the Contingency Fees Act, 66 of 1997 as amended, the attorney cannot claim the benefit of the contingency fee.

13. When regard is had to the total payout including the amount for legal fees, at best, the applicant's former attorneys could not legitimately retain the amount that they did as fees. The conduct of the applicant's former attorneys of retaining the amount of approximately R797 062.69 certainly appears to be unlawful and if so found, constitutes dishonourable and unprofessional conduct.

14. Against the forgoing backdrop, there can be little surprise, if any at all, when the applicant expresses her unhappiness with the manner in which the trustees conducted themselves in this regard. It was the duty of the trustees to act in the best interest of Priscilla. A duty was upon them to interrogate the amount paid into the Maimane Trust bank account when considered against the background of the total amount paid by the RAF. In this regard, the applicant also highlighted that, knowing that Priscilla is wheelchair bound, the trustees have falied to ensure that the house she lives in is made wheelchair

friendly. I must add that one of the trustees was in fact the applicant's attorney at the time of the litigation against the RAF.

15. On 10 March 2014, this application came before Kollapen J, who then made an order appointing Mr Alexander Politis, a practising advocate, as *curator ad litem* to investigate and report to the court on the ability of Priscilla to manage her own affairs. There was no order for the appointment of a *curator bonis*.

16. I have already mentioned that Priscilla suffered brain damage as a result of the motor vehicle accident. However, over a period of time, Priscilla made remarkable recovery. She was able to study and completed the NQF level II qualification. She is currently employed as a business administrator. When the application came before me, the *curator ad litem* had already filed various expert reports, to which I was referred, demonstrating Priscilla's recovery from her injuries as well as the fact that she is now of a sound mind and can manage her own affairs. I was shown Priscilla, who was sitting in her wheelchair during the hearing of the matter.

17. All the experts that examined Priscilla are in agreement that she is of a sound mind and able to manage her own affairs. Such can come as no surprise when considered against the fact that she completed the NQF level II qualification and is currently employed. Although Mr Politis did not take Priscilla to the original experts who examined her after the injuries and concluded that she suffered brain damage, nothing turns on the issue when considered against the background that there is no dispute that she was

indeed examined by experts. I am satisfied that she is indeed of a sound mind and able to manage her own affairs.

18. Returning to the order that the applicant seeks in the notice of motion, I have already mentioned that neither Joffe J nor Kollapen J ordered the appointment of a *curator bonis* to manage Priscilla's affairs consequent upon the injuries she sustained from the motor vehicle accident. This begs the question as to why the court was approached for this relief in the first place. Surely, the applicant's legal representatives knew or should have known that no *curator bonis* was ever appointed to manage Priscilla's affairs. There was Mr Smith who was the first *curator ad litem* appointed, followed by Mr Politis who was also appointed per the order of Kollapen J.

19. In a nutshell, the applicant has approached the court to set aside an appointment that does not exist. I was not referred to any court order in terms of which a *curator bonis* was appointed. Further, the applicant did not identify the *curator bonis* allegedly appointed per court order. To this end, the application is misconceived and defies logic. It is unpalatable that the applicant's legal representatives could pursue a matter like this which is of no assistance to the applicant.

20. I am however of the view that misconceived as it is, the application has managed to bring to the fore possible acts of misconduct on the part of the applicant's former attorneys who represented her in the litigation against the RAF. It is my view that this judgment must be furnished to the secretary of the

Law Society of the Northern Provinces to investigate possible acts of misconduct on the part of the applicant's former attorneys, J J S Manton Attorneys. There must be some investigation on what became of the other portion of Priscilla's payout from the RAF.

21. Having said the forgoing, the relief that the applicant seeks in the notice of motion is therefore incompetent and one that I cannot grant since it will be tantamount to setting aside an appointment that was never made. The alternative relief also falls away insofar as it is predicated on the existence of an appointment that does not exist as well; the applicant is seeking an order to appoint herself in the place of the *curator bonis* who does not exist.

22. If the intention of the applicant is to get appointed to manage her daughter's affairs, I fail to understand the basis thereof since the experts' reports presented to me are all in agreement that Priscilla is of a sound mind and can manage her own affairs. Moreover, Priscilla has grown up and is no longer a minor child she was at the time of the accident.

23. The applicant has a pending application at the Johannesburg High Court seeking the discharge of the trustee. If it is her intention to gain control of her daughter's affairs or to return her daughter's affairs to the daughter, perhaps the Johannesburg application is the one to pursue. However, insofar as the matter before me is concerned, the applicant was certainly ill-advised.

24. Considering the fact that this application was instituted on the advise of the applicant's legal representative, I am of the view that an order *de bonis propriis* is appropriate under the circumstances. As I mentioned herein above, I am of the view that it should have dawned upon the applicant's legal representatives that they were pursuing a relief that could not be granted insofar as they should have known that no *curator bonis* was ever appointed. This is evidenced by the fact that the applicant could not even identify the name of the *curator bonis* whose appointment was supposed to be set aside.

25. In the result, I make the following order:

25.1 The application is dismissed with costs *de bonis propriis*;

25.2 The registrar is directed to furnish a copy of this judgment to the Secretary of the Law Society of the Northern Provinces to investigate possible acts of misconduct on the part of the applicant's former attorneys, J J S Manton Attorneys, who represented the applicant in the initial litigation against the RAF.

S L MAGARDIE

ACTING JUDGE OF THE HIGH COURT, PRETORIA