IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: 22730/2017

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

DATE: 15-06- 2021

In the matter between:

L M[…] [G…] **EXCIPIENT/DEFENDANT**

and

D J M[…] **RESPONDENT/PLAINTIFF**

JUDGMENT

KUBUSHI J

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on 15 June 2021.

INTRODUCTION

[1] The crux in this matter is whether a curator *bonis* has the *locus standi* to institute divorce proceedings on behalf of an incapacitated person whose financial affairs and assets she/he has been appointed to manage; and if so, whether in terms of the court order granting the curator *bonis* the power to institute such proceedings, the curator *bonis* should have obtained the approval of the Master of the High Court ("the Master") before instituting the proceedings.

[2] The application was heard virtually, and not in open court, as provided for in this Division's Consolidated Directives re Court Operations during the National State of Disaster issued by the Judge President on 18 September 2020.

FACTUAL MATRIX

[3] The matter comes before me in the form of an exception. The respondent/plaintiff, D J M[…], in his capacity as *curator bonis* to W F M[…] ("the patient"), has instituted divorce proceedings against the excipient/defendant, L M[…] nee G[…], who is the wife of the patient.

[4] The excipient/defendant has in turn excepted to the respondent/plaintiff's amended particulars of claim on the ground that they

lack the averments necessary to sustain a cause of action and are, bad in law in that:

4.1 the respondent/plaintiff lacks the necessary *locus standi* to institute the divorce proceedings on behalf of the patient, owing to the nature of the proceedings being too personal in nature;

4.2 the order which purportedly appointed the respondent/plaintiff as the patient's *curator bonis* has not been complied with as no averment is made in the amended particulars of claim that the respondent/plaintiff obtained the necessary approval from the Master to institute his action.

[5] The respondent/plaintiff submits, on the other hand, that the excipient/defendant's exception is irregular, baseless, and contrary to the prevailing Court Order as well as legislation in that when properly interpreted the Court Order firstly, grants the *curator bonis* the power to institute action on behalf of the patient even those actions that are patrimonial in nature; secondly, the *curator bonis* does not require the curator to seek the approval of the Master before instituting such proceedings.

THE RESPONDENT/PLAINTIFF'S CLAIMS

[6] In his amended particulars of claim the respondent/plaintiff, pleads three separate and alternative claims against the excipient/defendant, namely:

6.1 Claim 1 in terms of which the respondent/plaintiff seeks:

6.1.1 a decree of divorce of the marriage between the patient and the excipient/defendant, as well as, for the patient's unspecified contact of the minor child born of the marriage ("the minor child");

6.1.2 the rendering of accounts and the debatement thereof;

6.1.3 division of the excipient/defendant's and the patient's estates pursuant the ante-nuptial contract (out of community of property with accrual).

6.1.4 maintenance for the patient.

6.2 Claim 2 in terms of which the respondent/plaintiff seeks

6.2.1 an order for unspecified contact of the minor child and immediate division of the excipient/defendant's and the patient' estates;

6.2.2 the replacement of the matrimonial property system between the patient and the excipient/defendant with that of one being in community of property;

6.2.3 the rendering of statements and the debatement thereof;

6.2.4 forfeiture of benefits;

6.2.5 division of the estates as *per* the ante-nuptial contract.

6.3 Claim 3 in terms of which the respondent/plaintiff seeks:

6.3.1 an order for unspecified contact of the minor child;

6.3.2 an order compelling the excipient/defendant to contribute to the patient's maintenance in the sum of R 30 000.00 *per* month.

THE ISSUES FOR DETERMINATION

[7] The grounds raised in the exception present substantive questions of law which may have the effect of settling the dispute between the parties. It is a settled rule of law that where an exception is taken for the purpose of raising a substantive question of law which may have an effect of settling the dispute between the parties, an excipient should make out a very clear, strong case before he or she is allowed to succeed.[1]

[8] In the main, the issues that require determination is –

8.1 Whether the respondent/plaintiff has *locus standi* to act on behalf of the patient in these proceedings, and if so

8.2 Whether before instituting these proceeding the approval of the Master was required.

[9] I deal hereunder with the issues, in turn.

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[1] See Letivan v Newhaven Hiliday Enterprises CC 1991 (2) Sa 297 at 298B – C.

Lack of *Locus Standi*

[10] It is the excipient/ defendant's submission that the respondent/plaintiff lacks the necessary *locus standi* to institute proceedings against the defendant which are of a matrimonial nature as such proceedings are too personal to the patient. In support of this argument the excipient/defendant referred to the decisions in two cases, namely, *Ex Parte AB*[2] and *Spangenberg NO and Another v De Waal*.[3]

The issue for determination

[11] The question is whether a *curator bonis* has *locus standi* to institute divorce proceedings on behalf of the incapacitated person whose financial affairs and assets she/he has been appointed to manage.

Discussion

[12] Our common law position has always been that a *curator bonis*, being no more than a superintending guardian who looks after the patient's property, has no capacity to institute divorce proceedings on behalf of the patient. This has been the position since *Voet*,[4] who stated the common law to be as follows

[2] 1910 TPD 1332.
[3] [2008] 1 All SA 162 (T].
[4] (27.10.10).

"Husband's curator has no power over wife or children — However that may be, it has been remarked in the same passage above that the wife or children of one who is a madman or a prodigal are certainly not subject to the power of a curator assigned to the mad or prodigal husband or father."

[13] The position is confirmed in LAWSA,[5] where it is stated that certain acts considered to be of too personal a nature cannot be performed by a curator. A curator, for example, is said to have no *locus standi* to institute an action for divorce on behalf of an insane person.

[14] The common law position was applied with approval in *Ex parte AB*, and confirmed with approval, in *Spangenberg and Another v De Waal*.

[15] In *Ex parte AB,* the court rejected the argument of a *curator bonis* that he could not administer the patient's property properly if he were compelled to pay maintenance to a spouse guilty of adultery. When rejecting the *curator bonis'* argument, the court applied the common law espoused in *Voet* above, and held that since the marriage tie is an intensely personal relationship with which no outsider has any right to interfere, it is the question for the husband alone to say whether the marriage should or should not be broken, and no curator can determine this for him."[6]

[16] In that case, the applicant had been appointed as curator of a so-called lunatic by virtue of section 42 of Proclamation 36 of 1902. The lunatic, who

[5] Cronje' and Carnelley 'Persons" LAWSA 2ed (Lexis Nexis Durban 2009) Vol 20 (1) (1984) at 487.
[6] at 1340.

possessed considerable property, was married in community of property. It appeared that since the lunacy of the husband, the wife had committed adultery and was pregnant as a result of the adultery. An application was made for an order authorising the applicant (the curator) to institute action against the wife for divorce and for an order declaring her to have forfeited all benefits derived from the marriage in community of property. According to the argument of the applicant in that matter he, the curator, could not properly administer the estate of the lunatic if he were compelled to pay the lunatic's money in order to maintain a spouse guilty of adultery.

[17] In dismissing the curator's application, the court held, amongst others, that -

> "The curator of a lunatic does not completely represent the lunatic in our law, for where the relationship was of a peculiarly personal nature he ceased to have any power. He had no authority over the wife or the children of the lunatic (Voet, 27, 10, 10). The curator's interference in the home of the wife and children is confined entirely to the property of the lunatic husband.
>
> It appears to me that it is a question for the husband alone to say whether the marriage tie should or should not be broken, and no curator can determine this for him. Just as our law regards it inexpedient to allow the curator to interfere in the

> relationship of the lunatic's wife towards her children, so in my opinion it regards it as intolerable that a curator should come between husband and wife in order to determine whether the relationship should cease or not. It is a significant fact that no single Roman Dutch authority that I have come across suggests that such a power exists... the marriage tie appears to me to be recognised by our Law as an intensely personal relationship with which no outsider has any right to interfere."

[18] In *Spangenberg*, the court had to consider whether the abolition of fault as a requirement for a divorce in terms of the Divorce Act and the introduction of the requirement of prove of the irretrievable breakdown of a marriage, justified a deviation from the common law as stated in *ex parte AB*. The court refused to deviate from the common law as it then existed and stated that even though marriage is now much more secular in nature and divorce more prevalent and more socially acceptable, 'the deep personal nature of marriage has not changed'. The court held that there was no reason to deviate from *ex parte AB* given that, more often than not, evidence of the irretrievable breakdown of a marriage was emotional rather than factual in nature. The court stated further that, when a spouse states that his or her marriage has irretrievably broken down, he or she is making a statement of the heart rather than a statement of fact; and that, while there are facts such as adultery and violence which can be proved as evidence demonstrating the irretrievable breakdown of a marriage, it is very difficult for an outsider, such

as the curator, to prove that an individual no longer loves or respects his or her spouse. It is, therefore, not possible for an outsider to be able to gauge whether a spouse is prepared to forgive his marriage partner despite whatever offence his or her partner has committed against him. What appears to be unforgivable for one person, the court found, is tolerable for another, given his particular personal circumstances and given that the fabric that keeps a marriage from breaking down is indeed unique to every marriage. Therefore, given the intimate nature of marriage and divorce, only the parties to the marriage can institute divorce proceedings against one another as only they would be privy to the intimate details of their marriage warranting the initiation of such proceedings.

[19] The respondent/plaintiff, whilst conceding that the common law provides that the institution of matrimonial proceedings by a curator on behalf of a patient of unsound mind should not normally be allowed, argued for the development of the common law in accordance with the Bill of Rights. The contention being that the Court Order authorising and empowering the respondent/plaintiff to *inter alia* "institute...any legal proceedings on behalf of the patient whether matrimonial of nature or otherwise..." was in compliance with section 173 of the Constitution, in that, the Court Order granted, developed the common law in accordance with the interests of justice.

[20] Section 173 of the Constitution provides that the Constitutional Court, Supreme Court of Appeal and the High Courts have the inherent power to

protect and regulate their own processes, and to develop the common law, taking into account the interest of justice.

[21] What ought to be determined is whether it would be in the interest of justice to authorise and empower a curator to institute legal proceedings of a matrimonial nature on behalf on an incapacitated person.

[22] In Spangenberg, the court concluded that given the intimate nature of the marriage and divorce, only the parties involved would be privy to the intimate details of their marriage warranting the initiation of such proceedings and that outsiders, like a curator, would not be able to prove such intimacy.

[23] The question that comes to mind is what about the incapacitated persons who are unable to take decisions on their own. For example, in the matter *in casu* the patient suffered a stroke and was subsequent thereto diagnosed with dementia from which he is not going to recover. Can it be said that such a person will be able to consider the pros and cons of whether or not to stay in marriage with his wife or divorce her. It is obvious that in such circumstances the incapacitated person or patient will not be able to decide whether he has lost all love and affection for the wife because of his condition.

[24] In my view, it would be in the interest of justice to develop the common law to allow for exception to the general in circumstances like those prevailing in the current matter. The court exercising its inherent power should authorise and empower a curator to institute legal proceedings of a matrimonial nature

on behalf of an incapacitated person who is unable to make a decision as to whether she/he should remain in the marriage or not.

[25] In such circumstances, the court must allow some other evidence such as adultery and violence which can be proved as evidence demonstrating the irretrievable breakdown of the marriage. For example, in this instance, the patient was admitted as a live-in patient at Alzheimer and Dementia Care Centre in Boschkop, Pretoria, Gauteng during January 2013 where he is to date hereof still resident. It is thus evident that the patient and the defendant will never stay together as husband and wife. A normal marriage relationship does not exist, nor will same ever exist owing to the fact that the patient's condition is not one from which he can recover; and that there are no reasonable prospects for the restoration of a normal marriage relationship, which might be a reasonable inference.

[26] Even if I am wrong in my above findings, the further argument by the respondent/plaintiff that the Court Order that authorises him to institute the said proceedings on behalf of the patient for as long as it has not been set aside should be obeyed, puts this ground of exception to bed.

[27] The respondent/plaintiff’s argument is that even though in terms of our law, he may not have the capacity to institute divorce proceedings on behalf of the patient, in this instance, he has been authorised to do so by an order of court.

[28] It was argued on behalf of the excipient/defendant that the order of court in question, does not validate the institution of matrimonial action, meaning that the Court Order does not authorise the curator to do that which is against the law. Put differently, the contention is that the court order can never legitimise the institution of proceedings which are bad in law.

[29] The excipient/defendant's argument was contradicted by the respondent/plaintiff in contending that an order of court, even when invalid, must be obeyed until set aside by a court of law. The submission being that to date, the court order, in this instance, has not been set aside, varied or rescinded and as such it supersedes the excipient/defendant's contentions until varied or set aside.

[30] In support of his argument, the respondent/plaintiff referred to the judgments in *Culverwell v Beira*,[7] wherein the court enunciated that:

> "All orders of this Court, whether correctly or incorrectly granted, have to be obeyed until they are properly set aside."

[31] And, in *Samancor Manganese (Pty) Ltd v Azam Fabrication CC*,[8] where the above principle was confirmed as follows:

> "As the Court held in *Bezuidenhout v Patensie Sitrus Beherend Bpk*: A court order stands and must be strictly obeyed until set aside by a higher court, and the same court which granted the

[7] 1992 (4) SA 490 (W) at p494.
[8] 2019 JDR 0972 (GP) para 20.

original order does not have the right to nullify its effect or interfere with that order except in very limited circumstances in the context of variation"

[32] It is trite that an invalid order must be obeyed until set aside by a court of law. The Constitutional Court in *Merafong*,[9] when confirming that principle as was enunciated in *Oudekraal*[10] and *Kirkland*,[11] expressed itself as follows:

> "[41] The import of *Oudekraal* and *Kirkland* was that government cannot simply ignore an apparently binding ruling or decision on the basis that it is invalid. The validity of the decision has to be tested in appropriate proceedings. And the sole power to pronounce that the decision is defective, and therefore invalid, lies with the courts. Government itself has no authority to invalidate or ignore the decision. It remains legally effective until properly set aside.
>
> [42] The underlying principles are that the courts' role in determining legality is pre-eminent and exclusive; government officials, or anyone else for that matter, may not usurp that role by themselves pronouncing on whether decisions are unlawful, and then ignoring them;

[9] Merafong City Local Municipality v AngloGold Ashanti Limited 2017 (2) SA 211 (CC).
[10] Oudekraal Estates (Pty) Ltd v City of Cape Town [2004] ZASCA 48; 2004 (6) SA 222 (SCA).
[11] MEC for Health, Eastern Cape v Kirkland Investments (Pty) Ltd 2014 (3) SA 481 (CC).

and, unless set aside, a decision erroneously taken may well continue to have lawful consequences. Mogoeng CJ explained this forcefully, referring to *Kirkland*, in *Economic Freedom Fighters*.[12] He pointed out that our constitutional order hinges on the rule of law:

> "No decision grounded [in] the Constitution or law may be disregarded without recourse to a court of law. To do otherwise would 'amount to a licence to self-help'. Whether the Public Protector's decisions amount to administrative action or not, the disregard for remedial action by those adversely affected by it, amounts to taking the law into their own hands and is illegal. No binding and constitutionally or statutorily sourced decision may be disregarded willy-nilly. It has legal consequences and must be complied with or acted upon. To achieve the opposite outcome lawfully, an order of court would have to be obtained."

[12] Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly 2016 (3) SA 580 (CC) para 74.

[33] This has further been confirmed by the Constitutional Court in the matter of *Department of Transport and Others v Tasima (Pty) Ltd,*[13] wherein it was provided that:

> "Only an order of constitutional invalidity requires confirmation by the Constitutional Court to take force. The general rule is that orders that do not concern constitutional invalidity do have force from the moment they are issued. And in light of s 165 (5) of the Constitution the order is binding irrespective of whether or not it is valid until set aside."

[34] In this instance, the salient provisions of the Court Order in issue read as follows:

> "1.
>
> 1.11 To apply any money for or towards the maintenance of or the benefit of the patient;
>
> 1.12 To incur expenditure in respect of the improvement of any property of the Patient by means of building, repairs or otherwise:
>
> 1.13. To expend any monies belonging to the patient on the maintenance of any other person wholly or partially dependent on him;

[13] **2017 (2) SA 622 (CC) para 180.**

I.14 To invest or re-invest any monies which become available to the patient from time to time for investment and which are not immediately required for the purpose of supporting the patient;

1.15 To institute and or to defend any legal proceedings on behalf of the patient whether matrimonial of nature or otherwise and to appoint counsel and or attorneys and or experts for this purpose and to do all such things and to sign all affidavits in connection with same as if the patient acted himself

2. The powers conferred upon the said curator bonis in sub Paragraph 1.11 to 1.15 shall be exercised subject to the approval of the Master.

3. The cost of this application as between attorney and client including the costs of the application for the appointment and the fees of the curator ad litem appointed to represent the patient; shall be paid out of the patient's estate.

4. The curator bonis is exempted from providing security to the Master as provided for in Section 77(1) of the Administration of Estates Act 66 of 1966."

[35] It is manifest from the provisions of paragraph 1.15 that the order authorises the curator to institute proceedings that are matrimonial in nature or any other proceedings.

[36] On the basis of the decision in *Merafong* and the other cases quoted by the respondent/plaintiff above, I have to rule that the court order in question, even if it is invalid, should stand until set aside by a court of law. It follows that for as long as the court order has not been rescinded, it is binding and it authorises the respondent/plaintiff to institute the divorce proceedings.

[37] I hold, as a result, that the ground of exception falls to be dismissed.

Failure to Obtain Approval of the Master

[38] The excipient/defendant's proposition in this regard is that the respondent/plaintiff has failed to comply with the order which purportedly entitled him to institute proceedings against the excipient/defendant in that, he has failed to obtain prior approval from the Master to institute any proceedings against the excipient/defendant. To this end, the excipient/defendant argues that, it is manifest that the respondent/plaintiff's amended particulars of claim lack the necessary averments to sustain any cause of action.

[39] The respondent/plaintiff's contrary view is that the Master cannot overrule a court order that has authorised him to institute proceedings on behalf of the patient. The contention is that the word 'subject' in paragraph 2 of the Court Order is not to be read to mean approval and, as such, the

Master's approval is not a prerequisite. The word only means for the *curator bonis* to report to the Master as administrative authority in order to overseer the process.

The Issue for Determination

[40] The question, therefore, is whether the Court Order requires the approval of the Master to be obtained pre or post *facto*.

Discussion

[41] In summation, the dispute in this regard as is evident from the excipient/defendant's argument is that in terms of the order of the court the respondent/plaintiff should have obtained the approval of the Master before he can institute the proceedings. Whereas, it is the respondent/plaintiff's contention that the court order authorises him to institute action and, thereafter, to report to the Master what he has done.

[42] In terms of paragraph 1.15 of the Court Order dated 29 June 2016, the respondent/plaintiff is specifically authorised:

> "To institute and or to defend any legal proceedings on behalf of the Patient whether matrimonial of nature or otherwise and to appoint counsel end/or attorneys and or experts for his (sic) purpose and to do all such things and to sign all affidavits in connection with same as if the Patient acted himself."

[43] The said paragraph must be read in conjunction with paragraph 2 of the Court Order which stipulates that:

> "The powers conferred upon the said *curator bonis* in sub Paragraph 1.1to 1.16 shall be exercised subject to the approval of the Master."

[44] When interpreting the Court Order or the provisions of the Court Order that are in contention, it is worthy to take note of the decision of the Supreme Court of Appeal in *Firestone South Africa (Pty) Ltd v Genticuro*,[14] where it was held that"':

> "First, some general observations about the relevant rules of interpreting a court's judgment or order. The basic principles applicable to construing documents also apply to the construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules. See *Garlick v Smartt and Another*, 1928 AD 82 at p. 87; *West Rand Estates Ltd. v New Zealand Insurance Co. Ltd.*, 1926 AD 173 at p. 188. Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it".

[14] 1977 (4) SA 298 (A) at 304D – G.

[45] And, as further confirmed in *Endumeni*,[15] where the Supreme Court of Appeal set out the principles concerning interpretation which entails *inter alia* having regard to the "ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production".

[46] In considering the abovementioned judgments, the court order appears to me clear and unambiguous. The powers in paragraphs 1.1 to 1.5 when read with paragraph 2 of the Court Order are subject to the approval of the Master. Paragraph 2 clearly puts a condition that the respondent/plaintiff must fulfil before instituting the proceedings, that is, the Master must approve the institution of any of the legal proceeding contained in paragraph 1.15 of the Court Order. The approval is to be procured at the outset and not after the proceedings have been instituted, as the respondent/plaintiff wants to argue. The meaning of the phrase ‘subject to’ is clear and requires no extrinsic evidence to interpret it. It simply means that the institution of legal proceeding is conditional upon the approval by the Master. The wording of paragraph 2 read with sub-paragraph 1.15 is clearly conditional upon the approval of the Master before instituting action.

[47] Even if the claims the respondent/plaintiff contends are not matrimonial in nature but patrimonial, and ought to be entertained, were competent by a *curator bonis*, the respondent/plaintiff still lacks the necessary approval by the

[15] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA).

Master to institute such proceedings in accordance with the Court Order. As such, all the claims, in that regard, remain excepiable.

[48] The court that granted that order appears to have been aware that the powers granted to the *curator bonis,* in this instance, were not powers that would naturally have been granted in terms of Uniform Rule 57, hence the court saw it fit that the institution of the legal proceedings be made subject to the Master's approval.

[49] I have to conclude, therefore, that the absence of the allegation of this essential element, that is, the allegation that the Master's written approval has been obtained, renders the particulars of claim excepiable.

CONCLUSION

[50] Normally the rules require that the respondent/plaintiff be given an opportunity to amend the particulars of claim but in this instance, the excipient/defendants submits that under the circumstances of this case it would be a futile exercise to grant the respondent/plaintiff leave to amend his particulars of claim as he would require the approval of the Master or the Master to rectify the *curator bonis'* actions. Apparently the said rectification has been sought and refused. This argument by the excipient/defendant has not been controverted by the respondent/plaintiff. In that sense I am also of the view that it will take the matter no further to grant leave to amend the particulars of claim. There appears to be no indication that the Master will rectify the action already taken by the respondent/plaintiff. As such the

exception ought to be upheld and the respondent/plaintiff's claim be dismissed.

COSTS

[51] As regards costs, the excipient/defendant argues that as the claim specified the amended particulars of claim are bad in law and have not been authorised by the Master (and will not be ratified by the Master), the patient's estate ought not to be mulcted with the costs of the exception and/or the costs associated with the dismissal of the claims. The plaintiff ought to be ordered to pay such costs *de bonis propriis* for the institution of such reckless and unauthorised proceedings against the defendant.

[52] Nevertheless, the respondent/plaintiff has been partly successful in the matter as the first part of the exception has been found in his favour. Ordinarily in such circumstances, the costs would be shared between the two parties. What is a challenge in this matter is that the costs must be covered by the estate of both parties. I intend therefore not to make any order as to costs.

ORDER

[53] I, in the circumstances, make the following order:

1. The exception is upheld.

2. The respondent/plaintiff's claim is dismissed.

3. No cost order is made.

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E.M KUBUSHI

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Appearance:

Excipient/Defendant's Counsel	: **ADV** D BLOCK
Excipient/Defendant's Attorneys	: STRAUSS DALY INC
Respondent/Plaintiff's Counsel	: **ADV. RIANI FERREIRA**
Respondent/Plaintiff's Attorneys	: LOOTS BASSON ATTORNEYS INC.
Date of hearing	: 22 April 2021
Date of judgment	: 15 June 2021