



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA**

CASE NO: 71510/16

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

14.12.2021

Electronic

DATE

SIGNATURE

In the matter between:

MTHOMBENI, BAFANA KLEINBOY

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

REASONS

CRUTCHFIELD AJ:

[1] The plaintiff, Bafana Kleinboy Mthombeni, claims damages from the defendant, the Road Accident Fund (the 'Fund'), pursuant to a motor vehicle collision ('collision') in which the plaintiff was involved.

[2] The collision occurred on 27 May 2015, at which time the plaintiff was 53 years of age. The plaintiff, as and when the matter came before me, was 59 years of age, having been born on 28 August 1962.

[3] I granted an order in this matter on 5 October 2021 but it is appropriate given the circumstances that will become apparent hereunder, for me to furnish reasons for the order.

[4] Pursuant to the injuries sustained by the plaintiff and the sequelae thereof, an award of R963 419.57 (nine hundred and sixty-three thousand four hundred and nineteen rand and fifty-seven cents) is payable by the Fund in full and final settlement of the plaintiff's claim subject to the terms recorded in the order.

[5] The issue before me that necessitates these reasons is the question of whether or not a Trust ought to be established for the protection of the funds.

[6] I determined that it was not appropriate for a trust to be established and that the funds should be paid to the plaintiff directly. My reasons for reaching that decision are set out hereunder.

[7] I heard the submissions of the plaintiff's counsel in respect of the establishment or otherwise of a trust for the benefit of the plaintiff and I heard from the plaintiff himself.

[8] A draft trust deed was placed before me and I heard the evidence of the proposed trustee to be appointed in the event that I determined that it was appropriate to grant an order that a trust be established.

[9] The plaintiff was not assisted by a curator *ad litem* for the purposes of the litigation during the course of the trial.

[10] Advocate J van der Merwe was appointed as the curatrix *ad litem* (the 'curatrix') to investigate the plaintiff's competence in terms of Rule 57 by way of a court order granted on 23 August 2021, shortly prior to the hearing before me. The curatrix, having consulted with the plaintiff, concluded that he is capable of managing his own affairs and that a curator *bonis* need not be appointed. The finding of the curatrix is supported by the various experts whose reports, according to the curatrix, do not indicate the necessity for the appointment of a curator *bonis*.

[11] The curatrix was appointed to investigate and report on the plaintiff's ability to manage his own affairs, including but not limited to the award from the Fund, and to make recommendations in respect of the appointment of a curator *bonis* and/or the establishment of a Trust in order to safeguard the plaintiff's financial and other interests, and if so advised, to make an application for such appointment.

[12] The Fund's liability for the injuries and sequelae thereof pursuant to the collision were resolved with the defendant being ordered to pay 100% of the plaintiff's proven or agreed damages.

[13] The plaintiff sustained the following injuries in the collision:

13.1 A mild concussive head injury;

13.2 Soft tissue injury to his neck;

13.3 An injury to his forehead; and

13.4 Psychiatric and psychological insult including chronic severe depressive mood disorder.

[14] The medico legal reports of the various experts included those of:

14.1 Dr D de Klerk (Neurosurgeon);

14.2 N van der Heyde (Occupational Therapist);

14.3 Dr M Mazabow (Neuropsychologist);

14.4 Dr W Pretorius (Industrial Psychologist);

14.5 Dr J A Smuts (Neurologist).

[15] The curatrix did not interview the medical experts but had regard to their reports delivered in the matter.

[16] The plaintiff is married in community of property to his wife. Five children were born of the marriage. The plaintiff's highest school qualification is Grade 3.

[17] My interview with plaintiff revealed that the entire family is dependent on the plaintiff's income earned from a taxi business operated by the plaintiff.

[18] The plaintiff's wife is 49 years of age, her highest school qualification is a Grade 10 pass and she is unemployed. The total household income averages between R4 000 to R6 0000 per month. The family utilises the entire monthly income every month. The youngest of the plaintiff's children is a minor. Two of the plaintiff's four major children hold down gainful employment, one at a petrol station in Johannesburg and the second as the driver of the plaintiff's minibus taxi.

[19] Three of the plaintiff's children hold a matric, one of them failed and elected not to redo his matric and the fifth child has not yet written matric.

[20] The plaintiff's mother receives a social grant. The plaintiff has three brothers and two sisters. Two of the plaintiff's brothers and one of his sisters are gainfully employed.

[21] The plaintiff's taxi business comprises one 22-seater minibus vehicle that is driven by one of his sons.

[22] The plaintiff expressed his views on the establishment of a trust and the appointment of a curator *bonis* unequivocally to me. He did not consent to the establishment of a trust and was adamant that he runs his own taxi business and is well capable of managing the proceeds of the award from the Fund.

[23] I asked the plaintiff what he intends to do with the proceeds of the award. His reply was that he will purchase a second minibus, a 22-seater, the cost of which is approximately R500 000.00, provide one of his children with a tertiary education, build a back room to rent out at a cost of approximately R400 000.00 to R500 000.00 and purchase a family car, a second-hand Mercedes Benz 200 for approximately R80 000.00 and invest the balance in a standard saving account.

[24] The plaintiff informed me that he would like to give his parents and unemployed siblings a donation but that none of them expect anything from him.

[25] Despite me informing the plaintiff that the amount of the award would be significantly less than the cost of his proposed intentions in respect of the proceeds, the plaintiff remained adamant that he would purchase a second minibus and erect a back room, both of which would bring in additional income for the family.

[26] The plaintiff insisted that he is not reckless with money and proffered the example of him terminating the insurance on his taxi as a result of financial hardship due to the Covid pandemic and various lockdowns.

[27] The proposed trustee gave evidence on how she would invest the funds in the event of a trust being established and she being appointed. At the close of the proposed trustee's evidence, I asked the plaintiff if he wished to reconsider his stance and consent to the establishment of a trust and the appointment of the trustee as that would ensure that the proceeds of the award lasted for the remainder of the plaintiff's lifetime or as close thereto as possible. The plaintiff remained adamant that he was equally able to ensure that the funds are invested so as to provide an income for the family for the foreseeable future.

[28] In *Van Rooyen obo N (...) v Road Accident Fund*¹ the court dealt with a minor. Notwithstanding the *obiter* nature of the court's comments in respect of major plaintiffs, those comments are of assistance in this matter. The court reaffirmed the distinction between rule 57(13) and rule 57(1) of the uniform rules of court, and referred to 'authority'² for the fact that a curator *bonis* (and by implication a trust) may be appointed even where a person is *compos mentis* under Rule 57(13)', if "facts establish an incapacity to manage (the patient's) affairs due to some defect of body or mind".³

[29] The court in *Van Rooyen* noted that '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'.⁴

¹ *Van Rooyen obo N (...) v Road Accident Fund* (77303/2018) [2021] ZAGPPHC 334 (17 May 2021) ('Van Rooyen').

² *Van Rooyen id* para 19; *Ex parte Wilson: in re Morison* 1991 (4) SA 774 (T).

³ *Van Rooyen id.*

⁴ *Van Rooyen id.*

[30] Furthermore, 'Absent a declaration of inability on the part of the plaintiff to manage the funds or all of his belongings, a trust can only be created with the patient's express prior consent validly given'.⁵

[31] There is no declaration of inability on the part of the plaintiff to manage the funds and the plaintiff opposes the establishment of a trust and the appointment of a curator *bonis*.

[32] The plaintiff, a major who does not consent to the establishment of a trust or the appointment of a curator *bonis* in order to protect the anticipated award from the Fund, cannot be deprived of the administration of his estate absent a finding of inability on his part to manage those funds. As stated in *Van Rooyen*, 'funds can only be protected with the express consent of the major in circumstances where the major is equipped to manage his affairs. This naturally assumes that the curator *ad litem* in those instances has properly discharged him/herself of their duties in investigating the competency of the patient'.⁶

[33] There is no reason to doubt that the curatrix in this matter acquitted herself adequately of her mandate in this matter.

[34] Given the plaintiff's refusal of consent to the establishment of a trust to assist in the management of the proceeds of the award, the question that arises is whether there is a need on the part of the plaintiff for the appointment of a curator *bonis*.

[35] Such a finding requires a determination of whether the plaintiff is unable to manage his funds. In the event that sufficient facts demonstrate an incapacity on the part

⁵ *Van Rooyen id* para 20 referring to *Modiba obo Ruca; in re: Ruca v Road Accident Fund* (1261/2013; 63012/13) [2014] ZAGPPHC 1071 (27 January 2014).

⁶ *Van Rooyen id* para 23.

of the plaintiff to manage his affairs due to some defect of body or mind. then the appointment of a curator bonis may be required.⁷

[36] Dr Mazabow, a registered clinical psychologist, opined that the information and collateral indicated that the plaintiff did not sustain a concussive injury in the accident. The plaintiff reported neck pain requiring the use of analgesics, headaches and fatigue during the day. The plaintiff denied difficulties with memory or concentration.

[37] Dr Mazabow administered a range of tests. The results indicated slow comprehension, variable concentration, fluctuation in the plaintiff's motivation and fatigue.

[38] The outcome of the tests was 'likely due to his limited education, but his qualitative and quantitative patterns of test performances, and his clinical presentation, are not in keeping with malingering/symptom-exaggeration'.⁸

[39] The plaintiff's main difficulty pursuant to the collision is the chronic pain that he suffers and associated limitations. The plaintiff's neck pain impacts on his cognitive functioning, particularly his concentration attention.

[40] Dr Mazabow indicated that the plaintiff has 'several areas of preserved cognitive functioning, within the average/low-average range, but he also has a number of very marked difficulties'.⁹ Many of the difficulties are attributable to the plaintiff's limited education and illiteracy whilst others are attributable to variability in his concentration and motivation.

⁷ *Van Rooyen* note 1 above.

⁸ 014-64.

⁹ 014-73.

[41] Dr Mazabow concluded that any award made should be protected and that the plaintiff requires provision for a curator *ad litem* in the light of his functional illiteracy, poor concentration, stimulus resistance, auditory-verbal memory and planning skills.

[42] Dr J A Smuts, a neurologist, reported that there might be a difficulty with the plaintiff's memory but that the psychological problems were more significant than the neurological problems. Furthermore, the plaintiff is significantly impaired due to his cognitive and emotional changes, most likely a combination of a mild concussive brain injury and chronic severe pain.

[43] Dr Smuts did not furnish an opinion in respect of the plaintiff requiring the appointment of a curator *bonis* or the establishment of a trust with which to protect the proceeds of the award.

[44] Dr D de Klerk, a neurosurgeon, opined that the plaintiff is 'mentally sound enough to oversee the litigation with his lawyer, ratify a fee agreement and issue legally valid instructions and requests. It is not necessary to appoint a curator *ad litem*'.¹⁰

[45] The plaintiff 'is able to attend to his own affairs. He can agree on the contents of contracts such as that between him and individuals that he employ(s) and he has planning ability. Money awarded will not have to be protected'.¹¹

[46] The weight of the expert evidence before me is against the necessity of appointing a curator *bonis* given the view of the majority of the relevant experts that it will not be necessary to protect the funds to be awarded to the plaintiff.

¹⁰ 014-37.

¹¹ 014-38 para b.

[47] In the light of the opinion of the majority of the relevant medical experts that the plaintiff is *compos mentis* and sufficiently able to manage his affairs, together with the plaintiff's management of his taxi currently, there are not 'sufficient facts (before me), that demonstrate an incapacity on the part of the plaintiff to manage his affairs due to some defect of body or mind'.¹²

[48] The rights of freedom and dignity, of which self-autonomy is an integral component,¹³ are critical aspects of the rights aforementioned. They are at the heart of the right of dignity, even if the exercise thereof results in a poor management by the plaintiff of the proceeds of the award.

[49] As a result of there being no mental or bodily defect such as to render the plaintiff incapable of managing his affairs in terms of Rule 57(1) and Rule 57(13), together with the plaintiff's insistence that he does not consent to the appointment of a curator *bonis* or the establishment of a trust, there was no basis for me to grant an order in such terms. This is notwithstanding that entrusting the funds to the plaintiff might result in 'poor management' of the funds.

[50] In the circumstances above-mentioned, I granted the order marked "QQ" dated 5 October 2021 in terms whereof the plaintiff's attorneys of record account to the plaintiff directly in respect of the proceeds of the award.

A A CRUTCHFIELD SC
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
PRETORIA

¹² *Van Rooyen* note 1 above.

¹³ *Van Rooyen id* para 21 quoting *Ruca & Barkhuizen v Napier* 2007 (5) SA 323 (CC).

Electronically submitted therefore unsigned

COUNSEL FOR THE PLAINTIFF: Mr L Visser.

INSTRUCTED BY: Salomé le Roux.

DEFENDANT: No appearance.

DEFENDANT'S CLAIMS HANDLERS: Karishma Bungwandin &
Jonah Choshane.

DATE OF THE HEARING: 1 September 2021.

DATE OF JUDGMENT: 14 December 2021.

DATE OF REASONS: 25 October 2021