

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO.:25631/2010

In the *ex parte* application of:

ROSS DEWAR

(Identity No:)

Applicant

For the appointment of a *curator bonis* and *curator ad personam* to manage the affairs and person of:

ELIZABETH ROSE ASHTON

(Identity No:)

The Patient

Appearance: 22, 24 February 2011

Reasons for judgment: 5 May 2011

Appearances: For the Applicant: Attorney Mr J N J Pieterse of
Bisset Boemke McBlain

Adv Ronee Robinson as *curator ad litem* for the
Patient

KATZ AJ

REASONS FOR JUDGMENT: 5 MAY 2011

1. On 24 February 2011, I granted orders, *inter alia*, declaring Mrs Elizabeth Rose Ashton incapable of managing her affairs, and appointed *curator bonii* to manage her property and a *curator ad personam* to her person. When making the orders, I indicated that reasons would follow. These are the reasons.

2. A *curator bonis* is concerned with the patrimonial affairs of the person. A *curator ad personam* is concerned with personal matters relating to the person, such as where she is to live, e.g. whether she needs to be consigned to an institution or to live at home, her health, e.g. whether she is to have a particular treatment such as an operation and by whom it is to be performed and generally the control over her

personal day to day living.

3. The appointment of a *curator* with general powers, both in respect of a person's property and of their person, will clearly affect the personal liberty and autonomy of such person and courts are to be guarded in the exercise of its jurisdiction to make such appointments.¹

4. The common law,² and the Uniform Rules of Court,³ provide this Court with the jurisdiction to appoint curators, both to the property of the person and to the person themselves.

5. The question arises that bearing in mind the serious inroads into the liberty interests of the person subject to such an order, what role, if any, does the Constitution of the Republic of South Africa 1996, play in the appointment of curators.

6. The Constitution, being the supreme law, enjoins courts in developing the common law, to promote the spirit, purport and objects of the rights in the Bill of Rights. A similar injunction applies in respect of interpreting any legislation, such as the Rules of the Court.⁴

7. That being so, the issue of the right to dignity must be considered when it comes to the individual liberty, autonomy and independence that is compromised when a curator is appointed either to the property of an individual or to the person. The right to dignity is one of the most important of all human rights, and the source of all other personal rights.⁵

¹ See *Ex parte: Hill* 1970 (3) SA 411 at 412G-413A and *Martinson v Brown* 1961 (4) SA 107 (C) and *Ex parte: Powrie* 1963 (1) SA 299 (W).

² See *Ex parte: Hill* at 412E-F.

³ See Rule 57.

⁴ Section 39(2) of the Constitution. *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) at paras [50] - [60].

⁵ *S v Makwanyane* 1995 (3) SA 391 (CC) at para [44].

8. Thus, in considering whether a curator should be appointed, the first and primary issue is whether and how the dignity of the subject of the application will be threatened or violated.⁶ Will the person's dignity be respected and protected if a curator is appointed?

9. Before turning to considerations relating to dignity and other rights, it is appropriate that the facts be set out.

10. Mr Ross Dewar is the Applicant. He is a director of a design company and a property development company in Cape Town. He is a long- standing family friend of Mrs Ashton. His late mother and Mrs Ashton were best friends for many years. He has been assisting Mrs Ashton for more than 10 years with the managing of her finances as well as general advice and assistance. After his mother passed away during 2001, he remained in regular contact with Mrs Ashton and he has been considered by her to be almost like her son. She telephones him up to 10 times a day.

11. Mrs Ashton was born on 24 April 1940 and was an only child. Both her parents passed away many years ago. During her childhood years, she attended Kings Road Primary School and matriculated at Ellersley Girls' High in Sea Point, whereafter she studied and completed a Bsc and ultimately MSC degrees in environmental science at the University of Cape Town, qualifying as a chemist. She had a successful career as a chemist in the private sector and subsequently worked for the Cape Town City Council as a botanist. During approximately 1990, Mrs Ashton retired and pursued her hobbies, botany and mountain climbing.

⁶ It is now trite that dignity is a judiciable concept. See *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) at para [35].

12. During 1972, she married Mr Brian Ashton, which marriage lasted for some 10 years. No children were born of the marriage and she did not work whilst they were married. After her divorce, she moved to Oranjezicht where she lived until about 2006, whereafter she moved to Lamierner in Vredehoek. Lamierner is a retirement village, but does not have frail care or one-on-one services for persons in need of such care.

13. Mr Dewar has become aware, through his interactions with Mrs Ashton and the personnel who run Lamierner retirement village, that Mrs Ashton's health has been steadily declining and more rapidly in the last 18 months.

14. To this end, he had arranged for her general practitioner and a psychiatrist to consider her general health, and more particularly, her mental health. Dr Barbara Kemp, Mrs Ashton's general practitioner examined her on 6 September 2010. She filed a report in which she diagnosed Mrs Ashton with dementia. The report suggests that although Mrs Ashton was orientated in place and person, her relationship to time was disorientated with her short-term memory being severely impaired and she concluded that Mrs Ashton was not capable of managing her own affairs. Dr Kemp is not related to Mrs Ashton and she has no direct interest in her being placed under curators hip.

15. On 21 September 2010 and on 27 September 2010, Dr Pieter Cilliers, a psychiatrist, attended to Mrs Ashton and filed a report on 15 November 2010 concerning this application. He stated that Mrs Ashton suffers from dementia, probably of a mixed type, both Alzheimer's and vascular. The nature of the illness is

such that any improvement in her condition is extremely unlikely. Progressive deterioration is what is to be expected. He also concluded that she is unable to conduct her own affairs or care for herself and he recommended that a *curator bonis* and a *curator ad personam* should be appointed. He also had no relationship to Mrs Ashton and has no personal interest in terms of any order sought for the appointment of a curator.

16. Mrs Ashton's financial position is secure. Although she is the registered owner of a 15-year old Toyota Corolla, she is the owner of a substantial share portfolio currently invested with Investec Private Client Securities. The portfolio is suggested to be worth approximately R30 million.

17. Mr Dewar applied to this Court for the appointment of Adv Ronee Robinson, a member of the Cape Bar, to assist Mrs Ashton in the application to have *curator bonii* and a *curator ad personam* appointed to her. On 26 November 2010, this Court (per Van Zyl AJ), made an order appointing Adv Robinson as *curator ad litem* for the purpose of interviewing Mrs Ashton, making such further enquiries for purposes of the application to declare her incapable of managing her own affairs, and compiling a report in respect of her findings.

18. Adv Robinson produced a most helpful, detailed and comprehensive report in which she set out the content of her interviews with 15 different persons and in which she drew certain conclusions. Her report is thorough, well-researched and was indeed helpful to this Court. Not only did Adv Robinson produce the report just mentioned, but she filed a supplementary report as well as heads of argument which this Court also found useful in determining the application. At the hearing, Mr Kobus Pieterse, an experienced attorney of this Court, appeared on behalf of Mr Dewar and associated himself with the submissions made by Adv Robinson.

19. The Master of the Supreme Court also filed a report. He had no objection to the

proposed *curator bonii* and recommended that various powers listed in annexure "A" to his report be granted to them and be exercised subject to his approval. The Master also had no objection to the *curator bonii* not giving security in terms of section 77 of the Administration of Estates Act 66 of 1965 for as long as one of the appointed *curator bonii* remain a practising attorney who holds a valid fidelity fund certificate.⁷

20. The Master, in considering whether a *curator ad personam* ought to be ordered, referred to the *Hill*, *Martinson* and *Powrey* cases and commented that it was only when a real need is proved for the appointment of a *curator ad personam*, that such should be ordered. He went on: "*I am of the opinion that a real need has been proved in this instance*".

21. Adv Robinson interviewed Mrs Ashton for the first time on 12 January 2011 at Lamierner. She spent almost 3 hours with her on that day. Although Mr Dewar had indicated that he wished to attend the meeting, for reasons of objectivity and neutrality, Adv Robinson decided that it was better for her to meet Mrs Ashton, at least initially, on her own.

22. Mrs Ashton appeared well-kept. She came across as healthy, attractive, intelligent and alert. Although she was not immediately willing to speak to Adv Robinson because she claimed she had a full programme and that she had no need for her in her life, it was explained to her that it was necessary to conduct the investigation because of this Court's order.

23. Mrs Ashton insisted that she was capable of looking after her own affairs and that her condition might not be due to Alzheimer's, but simply part of a normal ageing process. She had said that she had paid a visit to a professor at the University of Cape Town who had told her that as long as she remained on a drug called Ebixa, she would be alright. Mrs Ashton insisted that she had not lost her independence and

⁷ *Ex parte Davidson* 1981 (3) SA 575 (D); *Ex parte Smit In re Estate Smit* 1983 (3) SA 438 (T) and *Ex parte Bell* 1991 (2) SA 109 (T).

that she would not. That was the theme of her conversation with Adv Robinson. Mrs Ashton acknowledged that Mr Dewar had always been around, that he played a supportive role and that she speaks to him often. She claimed that Mr Dewar was used to her going to the bank on her own and managing by herself. She claimed that she managed this quite well although she does not use the auto-teller.

24. An important aspect of Adv Robinson's interaction with Mrs Ashton, is her living space. Mrs Ashton at first refused to allow Adv Robinson to have sight of or inspect her accommodation because she claimed that she had recently unpacked lots of papers and that her flat was, as a consequence, unusually untidy. She wanted to clean it up first before she would let anybody see it. After some time, Adv Robinson was allowed to inspect her apartment.

25. The apartment is a complete mess and not fit for human habitation. Heaps of papers are strewn everywhere, including in the bathroom, and it appeared that it had been thus for much longer than the short time claimed by Mrs Ashton. There was virtually no food, the fridge was locked and could not be opened. A spare room was entirely stacked with items of absolutely no use. Dust lay heavily on all surfaces. It was clear that the washing machine was not being used and Mrs Ashton in response claimed that she washed her clothes by hand. There was nowhere for any person to sit down. Mrs Ashton claimed that she had not done much about cleaning the apartment because of the intolerable heat.

26. Mrs Ashton suggested that she might be able to clear out her apartment and make it habitable in about a week and pointed to a paper shredder which she claimed was used to shred her papers. She was not willing to throw them out because they may contain confidential information. Adv Robinson informed Mrs Ashton that she would return in approximately a week's time and that the status of her apartment would form an important part of her assessment for purposes of reporting back to this

Court. Mrs Ashton acknowledged that the apartment was not what it should be which was why, according to Adv Robinson, she declined to allow people to visit.

27. Mrs Ashton appeared to be intelligent, aware of what was happening around her and fairly strong.

28. When Adv Robinson left, Mrs Ashton informed her that she would be available at any time during the following week and that a meeting should be scheduled when it would be suitable for Mr Dewar as she knew he was busy.

29. When Mrs Ashton was contacted the following week to confirm Adv Robinson's meeting, she was hostile and appeared to have no recollection of the basis on which they had parted the previous week. At first she claimed that her schedule would not permit such a meeting as she had an appointment to meet with Investec the following day. She then stated that she did not wish her independence to be taken away, that she did not wish to have people interfering in her life and that she was not willing to attend the meeting.

30. She appeared to be under the impression that if she pushed hard enough, the problem presented by this application, would disappear. When Adv Robinson phoned Mrs Ashton the next day to meet with her, she refused to do so. She refused to allow Adv Robinson into her apartment. According to Mr Dewar, there is a long history of procrastination around the cleaning out of the apartment. Mrs Ashton insisted that there was no need for anybody to interfere in her affairs and as far as she was concerned, Mr Dewar was in effect her assistant and that she had no need for any court intervention. According to Adv Robinson, Mrs Ashton's responses had now become irrational.

31. The staff at the Lamierner village were extensively consulted by Adv Robinson. What was apparent was that Mrs Ashton may be drinking more alcohol than necessary, there are dangers that she may over-medicate or under-medicate herself, that Mrs Ashton goes through bad patches when, for example, she may walk around aimlessly and appears unduly anxious and worried for no apparent reason. The consensus was that she seemed to have improved with the medication that she was given.

32. Mrs Mahdia Allie is the portfolio manager of Mrs Ashton's portfolio at Investec Bank. She opined that Mrs Ashton was extremely conservative with her money. She met with Mrs Ashton quarterly to discuss the portfolio. Although Mrs Ashton went through a brief bad patch during October 2010 when she contacted Mrs Allie up to 5 times a day, she appeared to have stabilised. Mrs Allie described Mrs Ashton as a very private person and had always indicated that Mr Dewar was the executor of her estate.

33. Mrs Allie was strongly opposed to the idea of appointing a curator to manage the affairs of Mrs Ashton. It would be, according to Mrs Allie, "*bad*" for her to lose control of her affairs and she was quite capable of managing her own affairs.

34. Mr Roald Besselaar is an attorney of this Court and a partner at Bisset Boemke McBlain. He has some experience as a *curator bonis* and is willing to act as a *co-curator bonis* with Mr Dewar with his decision prevailing in the event of a dispute between him and Mr Dewar. Mr Besselaar accepted that he would seek advice from suitably qualified and reputable advisers as to the optimal method of investment of Mrs Ashton's portfolio.

35. Professor Wilcox, the person whom Mrs Ashton had consulted at the University of Cape Town, said that he had only seen Mrs Ashton once and only had a brief "*snapshot*" of her. When Mrs Ashton consulted him, she acknowledged that

everybody at Lamierner was concerned about her memory. She placed great emphasis on the spider bite that she had sustained and tried to steer him away from memory issues to the issue of the spider bite. Professor Wilcox thought her personal hygiene to be lacking and thought her to be unkempt. Professor Wilcox thought that her memory test was not incompatible with Alzheimer's in the early stages.

36. Adv Robinson concluded that Mrs Ashton's case was not an easy one.

37. She stated that the answer did not immediately suggest itself to her as, on her first encounter, Mrs Ashton struck as entirely in charge of herself.

38. It was only during the further course of her acquaintance with Mrs Ashton and upon listening to details of her conduct at Lamierner and having spoken to the Dewar family and other health professionals that she became convinced that the medical opinion was supported by the facts, despite the medical evidence.

39. Mrs Ashton has a strong resistance to being declared to be incapable of managing her affairs and for curators to be appointed to her property and to herself.

40. Adv Robinson concluded that overall, Mrs Ashton cannot cope on her own and that in effect, a curator is already in place as regards certain aspects of her affairs. In the circumstances, she advised that both curators to Mrs Ashton's property and to her person are required.

41. In considering the issue, I was guided by the right to dignity and I was enjoined to respect and protect Mrs Ashton's dignity in deciding whether to make any order and indeed, if so, what type of order.

42. I had regard to the issue of dignity and came to the conclusion that, bearing in mind the totality of Mrs Ashton's circumstances, I would not be respecting and

protecting her dignity were I not to grant the orders I made.

43. Thus, if Mrs Ashton were to continue living in what Adv Robinson called a "*pigsty*" without any regard to the dangers and inherent risks that somebody in her circumstances could find themselves, I would be failing in my constitutional duty to respect and protect Mrs Ashton's right to dignity. To respect and protect Mrs Ashton's dignity curators to both her persona! property were called for.

44. In the circumstances, I made the following orders:

(1) The Patient is declared incapable of managing her own affairs.

(2) Roald Besselaar and Ross Dewar be appointed as *co-curators bonis* to the property of the Patient to manage her affairs with the powers and duties set out in annexure "A" hereto.

(a) The *curators bonis* be given the power to entrust the funds of Mrs Ashton to such financial advisor/s or such financial institution/s as the *curators bonii* may deem suitable, for the purpose of investing, and, from time to time reinvesting, such sum or any portion thereof in suitable trustee investments, fixed property and/or securities quoted on any licensed Stock Exchange and/or in licensed Unit Trusts as the *curators bonii* or the relevant financial institution/s or alternative advisor/s may deem appropriate.

(3) The said *curator bonis* in their capacities as such be exempted for so long as Mr Besselaar is a *curator bonis*, practises as an attorney of this Honourable Court and is in possession of a valid fidelity fund certificate, demonstrating that he enjoys professional indemnity cover, from the duty of furnishing security in terms of section 77 of the Administration of Estates Act,

1965 (Act 66 of 1965).

(4) In the event of a dispute or difference of opinion between the *curator bonis*, the decision of Mr Besselaar shall prevail.

(5) As long as the *curator bonis* deem fit, Mrs Ashton shall be allowed a small banking account of such nature and with such limited facility as the *curators bonis* deem fit.

(6) Mrs Ashton be declared incapable of managing her own personal affairs.

(7) Mr Ross Dewar be appointed as *curator ad personae* to the Patient with the powers and duties set out in annexure "**B**" thereto.

(8) The costs of the application (inclusive of the costs of the *curator ad iitem* and any professional fees incurred) be paid out of the Patient's estate.

ANNEXURE"A"

45. To sell any property belonging to the patient;
46. To make exchange or partition of any property belonging to the patient or in which she/he is interested, and give or receive any money for equality of exchange or partition;
47. To carry on or discontinue any trade, business or undertaking of the patient;
48. To grant leases of any property of the patient;
49. To perform any contract relating to the property of the patient entered into by the patient before she/he became mentally disordered or defective;
50. To exercise any power or give any consent required for the exercise of any power where the power is vested in the patient for her/his own benefit, or the power is in the nature of a beneficial interest in the patient;
51. To raise money on mortgage of the patient's property for payment of her/his debts or expenditure incurred for the patient's maintenance or otherwise for her/his benefit, or for payment of, or provision for, the expenses of her/his future maintenance;
52. To apply any money for or towards the maintenance or the benefit of the patient;
53. To expend money in the improvement of any property of the patient by way of building or otherwise;
54. To expend any moneys belonging to the patient in the maintenance, education, or advancement of the husband/wife of the patient or of any relative of the patient or of any person wholly or partially dependant on the patient or continue such other acts of bounty or charity exercised or promised to be exercised by the patient as the Court or the Master having regard to the circumstances and the amount or value of the estate of the patient considers proper and reasonable;
55. To invest moneys of the patient which may be available for investment;
56. To take any proceedings which may be necessary in the interests of the patient or the due and proper administration of her/his property;
57. To make such reports concerning the patient's estate to the Court or to the Master as the Court or Master deems fit.

The above powers are subject to the approval of the Master of the High Court.

ANNEXURE"B

58. To exercise parental powers in regard to matters relating to the patient's person, and physical and mental well-being;
59. To determine where the patient is to live;

60. Whether the patient has to have any particular medical, surgical or dental treatment, and by whom;

61. The right to engage the services of someone to look after the said patient should he/she consider it necessary to do so;

62. All such other powers as may be necessary to ensure the well-being and safety of the patient.