THE REPUBLIC OF SOUTH AFRICA

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

Case No: A582/2015

Before the Hon. Mr Justice Bozalek et Hon. Ms Justice Fortuin et Hon. Mr Justice Dolamo

Hearing: 28 July 2016
Judgment Delivered: 21 September 2016

In the matter between:

ADV A.J DU TOIT obo NTSIKELELO MAFANYA **Appellant**

and

ROAD ACCIDENT FUND **Respondent**

JUDGMENT

BOZALEK J

[1] The appellant, in his capacity as *curator ad litem,* unsuccessfully applied for the setting aside of a settlement agreement concluded by the patient in respect of the issue of liability (the merits) in a damages claim for bodily injuries instituted against the respondent, the Road Accident Fund. Leave to appeal was refused but on petition the Supreme Court of Appeal granted leave to appeal to the Full Bench.

[2] The patient, Mr Ntsikelelo Mafanya ('the patient' or 'Mr Mafanya') was involved in a motor vehicle collision on 19 November 2003 as a passenger in one of the two vehicles which collided. He sustained serious extensive injuries, including a head injury,

which led to him being hospitalised for some three weeks, followed by further hospitalisation for rehabilitation purposes.

[3] In October 2004 Mr Mafanya signed a power of attorney empowering a firm of attorneys, DSC Attorneys, to act on his behalf in connection with his claim for damages against the respondent arising out of the collision. The various statutorily prescribed steps for the lodging of his claim were taken and eventually a trial date for the determination of the issue of liability was set. Before the trial could commence on 15 October 2009, Mr Mafanya's attorney engaged in settlement negotiations with the respondent's attorney which led to an agreement that the respondent would be liable for 20% of such damages as Mr Mafanya was able to prove, together with his taxed costs. That agreement was incorporated in a draft order and made an order of court on 23 October 2009.

[4] Nearly five years passed until, in August 2014, Mr Mafanya's wife applied to court for the appointment of the present appellant, a practising advocate, as *curator ad litem* to assist her husband *'in the prosecution of his claim for damages against'* the respondent. The application appears to have been served upon, or at least delivered to, the respondent's attorneys but in the event was not opposed. It was supported by the affidavits of three specialists, namely a neurologist, Dr Johan Reid, a psychiatrist, Professor T Zabow and a neuro-clinical psychologist, Ms M Coetzee. All recommended the appointment of a *curator ad litem* and, in due course, that of a *curator bonis*. None of these three experts directly expressed an opinion on the patient's mental capacity as at October 2009, the time when the settlement agreement was concluded, nor pertinently dealt with that question in either their affidavits or reports.

[5] On 26 August 2014 the appellant was appointed as *curator ad litem* with *inter alia* the following powers:

1. *to prosecute the claim against the respondent to final determination;*
2. *to withdraw, compromise or settle the claim;*
3. *to ratify any decisions made and/or proceedings conducted by or on behalf of the patient relating to the claim prior to the curator's appointment.*

[6] In November 2014 the appellant launched the application which is the subject of this appeal and in which the principal relief sought was an order *'setting aside the settlement of the issue of liability as recorded in the court order dated 23 October 2009'*. The appellant was represented in those proceedings (and remains so represented) by DSC Attorneys, although now by a different attorney.

[7] Relying on the self-same affidavits and reports from Dr Reid, Professor Zabow and Ms Coetzee, the appellant averred that the patient's inability to manage his own affairs and give appropriate instructions in any legal proceedings had also existed at the time when the settlement agreement was concluded. For that reason, the appellant averred further, that the settlement was not in the best interests of the patient and should be set aside. He also dealt with the merits of the claim in some detail, concluding that there was no reason to apportion any negligence whatsoever against the patient whom, he stated, should have been entitled to an award in respect of his full damages. The appellant added that although the respondent had already paid the patient's attorneys the sum of R86 000.00 odd in respect of taxed costs pursuant to the settlement agreement, this issue could still be dealt with by any future trial court called upon to deal with the issue of liability.

[8] The application was opposed by the respondent. An affidavit by the attorney who represented it in the original litigation was filed but no further medical evidence relating to the patient's mental capacity was put up on behalf of the respondent.

[9] In dismissing the application the court a quo (Manca AJ) found that in order to succeed, the *curator ad litem* had to demonstrate that the patient had lacked the necessary contractual capacity to give his attorneys a mandate to settle the litigation in October 2004 i.e. when the order of court was taken. It found that the medical evidence relied upon by the appellant did not meet this requirement, particularly in the absence of any evidence from the patient's attorneys as to his ability, or lack thereof, to give them proper instructions either when he signed the power of attorney or when the question of liability was settled in 2009. The Court declined to follow an approach based on the decision in *Road Accident Fund v Myhill NO*[1], reasoning that that case was concerned with the interests of minors.

[10] The appellant's grounds of appeal contend that the court a quo erred and misdirected itself in assessing the various reports and affidavits by the medical experts in regard to the patient's mental capacity. In particular it was averred that the court a quo had not properly considered the reports of Dr Reid and that of Ms Coetzee and that it had misinterpreted the affidavit containing the opinion of Professor Zabow. It was further contended that the court a quo had not attached due weight to all the undisputed medical evidence and to the fact that the respondent itself had placed no medical evidence before the court.

THE ISSUE ON APPEAL

[11] On appeal, counsel for both parties were in agreement that the primary issue for determination was whether the patient was capable, in October 2009, of providing his legal representatives with valid instructions pertaining to the settlement. The parties made various submissions in argument regarding the questions of *res judicata* and

[1] 2013 (5) SA 426 (SCA).

issue estoppel. In my view, the primary question is as stated above and it is unnecessary to deal with these further issues.

[12] Dealing with the primary issue requires in the first place an evaluation of the expert medical evidence in some detail, and having regard to its chronological sequence. Before doing so, however, I should note that a significant part of the appellant's application to set aside the court order was devoted to his assessment of the merits of the patient's claim. In this regard, reliance was placed on the report of an accident reconstruction expert which was commissioned prior to the settlement agreement in October 2009. This report was presumably taken into account by DSC Attorneys when negotiating the settlement. Nonetheless, the appellant expressed the opinion that the terms of the settlement agreement were prejudicial to the patient and not in his best interest, and that should the question of liability be revisited the patient would be able to claim 100% of any damages which he was able to prove. Not only is this opinion open to debate but, in my view, the merits of the settlement agreement are, at best, of very limited relevance in the application and should not be allowed to cloud the determination of the primary issue. I turn now to the medical evidence.

DR JOHAN REID

[13] In his affidavit in support of the application for the appointment of a *curator ad litem* in July 2014, Dr Reid opined that Mr Mafanya was unable to manage his own affairs as a result of '*his cognitive impairment secondary to the head injury sustained in the collision'*. He furnished one report relating to the patient, dated 25 March 2014, whom he first examined at that time, and to which he added a brief addendum on 23 June of that year. In the report he described the patient's head injury as *'that of concussive head trauma with skull fracture, without evidence of a significant brain injury'*. He added that *'(n)o neurocognitive change is expected after such a degree of injury'* and that *'the reported subjective impairment of memory relates to on-going past*

traumatic depression as a result of his poly-trauma and residual orthopaedic deficits'. Amongst Dr Reid's recommendations were that a psychiatrist should conduct management of Mr Mafanya's *'post traumatic depression'*. Clearly, upon no basis could this report serve as proof of the patient's mental incapacity as at October 2009. Nor does it appear that Dr Reid was ever called upon to express an opinion on this issue.

[14] In his addendum Dr Reid indicated that he had now considered the June 2014 report of Ms Coetzee which, according to him, revealed the presence of a *'moderate cognitive impairment secondary to the head injury'* of November 2003. This, he indicated, required an adjustment to the patient's whole person impairment. Finally, he noted that a *curator ad litem* should be appointed, but without motivating this recommendation.

PROFESSOR T ZABOW

[15] No medico-legal report was furnished by Professor Zabow. He stated in his affidavit that he had consulted with Mr Mafanya on 3 July 2014 and that on discharge from hospital (presumably in 2009) Mr Mafanya had exhibited '*changed behaviours with disinhibition, irritability, moodiness and impulsivity which behaviours, have persisted. His daily functional memory is defective and problematic in daily personal activities'*. Professor Zabow stated that Mr Mafanya's affect was *'blunted and his communication satisfactory'*. He added that the patient's memory function was defective and that he shows '*poor insight and lacks judgmental capacity'*. Professor Zabow stated further that the patient had suffered *'brain damage with cognitive and behavioural symptoms which changes were permanent and require management with medication and psychiatric care'*. He concluded that the patient was not able to manage his own affairs due to his defective functioning level, secondary to a head injury. Finally, he expressed the view that the patient was in need of the appointment of a *curator ad litem* and *curator bonis*.

[16] Although Mr Laubscher, for the appellant, contended that on a careful reading of this report Professor Zabow was expressing the opinion that the patient's condition and impairment dated back to his discharge from hospital, this opinion or statement is not expressly made by Professor Zabow. Furthermore, there is no indication in his affidavit on which material or information he based his conclusion, bearing in mind that the only occasion upon which he examined the patient was approximately ten and a half years after the collision.

MS M COETZEE

[17] Ms Coetzee, a neuro-clinical psychologist, deposed to an affidavit in the application for the appointment of a *curator ad litem* and furnished one medico-legal report dated 17 June 2014. In her affidavit she opined that the patient was unable to manage his own affairs as a result of his cognitive impairment secondary to the head injury. She explained that she had examined the patient on two occasions, namely 7 September 2009 and 19 September 2013. The former date is significant since it was a little less than two months before the settlement agreement was concluded and made an order of court, and nearly five years before her fellow specialists first examined the patient.

[18] In her lengthy report Ms Coetzee stated that the referring question related to the nature, extent and severity of any neuro-psychological sequelae suffered by Mr Mafanya arising from the relevant accident and injuries sustained therein. Her listing of her sources of information indicated, inter alia, that she had interviewed Mr Mafanya's wife in 2009 and 2013. She noted that in the 2009 interview Mrs Mafanya had expressed various concerns regarding her husband, one of which was that he was very forgetful. One notes, however, that this was the only concern expressed by Mrs Mafanya at that time which appears to impact on the patient's mental capacity.

[19] In 2013, by contrast, apart from reiterating the patient's struggles with regard to his short-term memory, Mrs Mafanya is reported by Ms Coetzee as expressing concern about a range of other symptoms which appear to relate to the patient's mental capacity. These were: a slowness in grasping what was communicated to him; getting confused, for example, calling the microwave a stove; watching television but seeming not to understand it or to follow the plot as he had previously; and that his *'mind was slow'*. It is instructive that, judging by Ms Coetzee's report, these symptoms appear not to have been mentioned by Mrs Mafanya in the 2009 interview.

[20] After a full range of tests and assessments Ms Coetzee noted that the patient was extremely slow in terms of processing which resulted in extremely low scores on these tests. She reviewed the details of his head injury and his recovery and noted that Dr Reid had concluded that the injury was that of a concussive head trauma with skull fracture, without evidence of a significant brain injury.

[21] Ms Coetzee found that on testing, the patient had presented a wide distribution of test scores but mostly performed in the extremely low range, and further that his verbal memory was an area of particular concern. In this section of her report she concluded that the list of deficits was in excess of what was typically associated with a minor head injury and also in excess of what can be expected from someone suffering from a moderate mood disorder. Ms Coetzee added:

> *'From the information obtained it is clear that there has been an unmistakeable drop in (the patient's) level of functioning, with immediate onset following the accident under review. In the absence of an alternative explanation, one simply cannot rule out the possibility that a more significant head injury or even a secondary brain insult associated with his multiple orthopaedic fractures, had occurred and has compromised his neuro-psychological function'.*

[22] Ms Coetzee also stated in her report that the patient was *'suffering from a Major Depressive Disorder of moderate degree that has persisted for several years…*

presented significant psychological distress on account of his injuries, as well as the change in his quality of life. He highlighted his physical injuries and the consequent functional impairment as a primary source of frustration…once he has been optimally treated for his mood disorder one can re-evaluate the situation and see whether there has been a degree of improved mental control'.

[23] Finally, after recommending psycho-therapy as well as pharmacotherapy to assist the patient in coming to terms with his losses, Ms Coetzee stated that given *'his neuro-cognitive deficits on testing, and in particular his executive and memory difficulties, the patient required a curator ad litem to assist him in his current state'*.

[24] The statement that the drop in the patient's level of functioning *'with immediate onset following the accident'* represents the high watermark of the appellant's case. However, apart from this reference, Ms Coetzee expressed no clear opinion on Mr Mafanya's mental capacity as at October 2009.

[25] On the other side of the scale, as was pointed out in the respondent's attorney's opposing affidavit, there were a number of indications that as at the relevant time the patient was well able to furnish clear instructions to his legal representative.

[26] Firstly, on 24 October 2004 Mr Mafanya signed a power of attorney in favour of DSC Attorneys. No one from that firm has explained the circumstances in which it was taken or when it was regarded as no longer valid. Secondly, on 18 November 2005 a RAF1 Form was signed by or on behalf of Mr Mafanya complete with all his personal particulars and information concerning the collision. Thirdly, on 19 April 2006 Mr Mafanya signed an affidavit in compliance with sec 19(f) of the Road Accident Fund Act, 56 of 1996, presumably drawn by his legal representative, giving details of the collision.

Fourthly, on 17 October 2007 Mr Mafanya furnished an affidavit to the police giving a coherent account of the collision in which he was involved.

[27] Furthermore, between June 2009 and July 2013, Mr Mafanya was apparently able to give a coherent account of his injuries and disabilities to a range of experts for the purposes of the trial based on the question of liability. These included two orthopaedic surgeons, a plastic surgeon, two occupational therapists and an industrial psychologist. No head or brain injury was pleaded in the particulars of claim on behalf of Mr Mafanya. Finally, after the matter was enrolled for adjudication, Mr Mafanya's attorney negotiated and settled the claim (which included drawing a bill of costs and receiving payment in respect thereof), without at any stage indicating that she was not competent to accept the offer on behalf of Mr Mafanya or that he could not give proper instructions in regard to the offer.

[28] The application for the appointment of a curator in August 2014 was brought nearly five years after the order of court resolving the merits and nearly 11 years after the date of the collision. No explanation had ever been forthcoming, either in that application or in the *curator ad litem'*s application to set aside the court order, for these delays nor explaining why the settlement agreement was concluded before the appointment of a *curator ad litem* if (at the time), as is now contended, the patient lacked the requisite legal capacity to give instructions or to be represented on the strength of the power of attorney which he had signed.

[29] Other questions seemingly calling for an explanation were not addressed in the application. Considerable reliance was placed by the appellant on Ms Coetzee's report of 17 June 2014 and her statement that it was clear that there had been *'an unmistakeable drop'* in the patient's level of functioning, with immediate onset following the accident in which Mr Mafanya was involved. However, Ms Coetzee first examined

the patient on 7 September 2009, a month and a half before the settlement agreement was made an order of court. She does not indicate whether at that stage she had already formed the view that the patient needed a *curator ad litem* as a result of his head injury and, if so, whether she communicated this to his attorneys. In that instance one would expect, of course, that no settlement agreement would have been concluded without the prior intervention of a *curator ad litem*.

[30] Similarly, in March 2014 Dr Reid examined the patient and furnished a report but apart from what he described as *'reported subjective impairment in memory'* relating to on-going post traumatic depression, he expressed no doubt concerning the patient's mental capacity or recommended the appointment of a *curator ad litem*. When regard is had to the chronology it would appear that the spur to the application for the appointment of a *curator ad litem* was in fact Ms Coetzee's report of 17 June 2014.

[31] Professor Zabow deposed to an affidavit but furnished no report. His only consultation with the patient was on 3 July 2014, more than ten years after the date of the collision. There is no indication on what information or reports he based his conclusion, of which the high-water mark is that the patient exhibited *'changed behaviours with disinhibition, irritability, moodiness and impulsivity after his discharge from hospital'*.

CRITICISMS OF THE COURT A QUO'S JUDGMENT

[32] The appellant contended that the court a quo had erred in not having regard to the addendum by Dr Reid dated 23 June 2014, in which he referred to Ms Coetzee's report dated 17 June 2014 and appeared to accept her neurocognitive assessment which *'revealed the presence of moderate cognitive impairment secondary to the head injury of 19/11/2003'*. Dr Reid then too expressed the opinion that a *curator ad litem* should be appointed. However, as the court a quo observed in its judgment refusing

leave to appeal, Dr Reid's addendum does not indicate that he changed his initial conclusion. Nor does it suggest that he was now driven to the conclusion that Mr Mafanya's *'moderate cognitive impairment'* was such as to render the patient lacking in mental capacity as at the date of the agreement. That addendum was in fact, no more than a brief letter of which the main purpose appears to have been for Dr Reid to motivate for a greater *'whole person impairment'* for the patient.

[33] A further ground of appeal was that in the court a quo's references to Ms Coetzee's affidavit and her report dated 17 June 2014, it did not refer, nor have regard, to the collateral information provided by the patient's wife to her on 7 September 2009 (a few weeks before the settlement agreement of 23 October 2009) and again on 19 September 2013.

[34] That collateral information, however, does not support the conclusion that as at October 2009 the patient was incapable of giving instructions to his attorneys. At best for the appellant, it recorded that the patient was forgetful and had undergone a personality change for the worse. As previously mentioned that conclusion is, moreover, belied by the specific collateral reports which Ms Coetzee recorded in her report indicating more particularly, that, it was only in 2013 that manifestations of reduced cognitive functioning on the part of the patient were reported and recorded.

[35] As a final makeweight the appellant also relied on the report of Dr JP Driver-Jowitt, an orthopaedic surgeon, who noted in February 2009, when referring to the patient's head injury, that he had lost significant capacity for memory and now found it necessary to write notes for himself. He added that the opinion of a neuro-psychologist was recommended *'since this memory loss may have significant bearing on future employment'*. This report was only filed by the appellant in the petition for leave to appeal. However, apart from its questionable admissibility the report takes the matter no

further since such memory loss does not equate to an inability to give proper instructions to attorneys and, furthermore, was only mentioned by the expert in the context of it possibly affecting the patient's ability to obtain employment.

[36] For the sake of completeness, I will deal with certain points raised by the appellant in the heads of argument filed on its behalf although not pursued in argument.

[37] Reliance was placed by the appellant on the decision and approach taken in *Myhill*[2]), the submission being that it should be applicable to persons under curatorship and that the court a quo had incorrectly decided that the decision was of no assistance in the present matter. In *Myhill,* the SCA set aside agreements concluded ten years previously between the mother of two minor children and the RAF awarding damages for injuries sustained by them following a motor vehicle collision. It held that the settlement amounts were wholly inadequate and that the agreements were so substantially prejudicial that the High Court had correctly set them aside. At para [12] it was stated:

> *'[12] The principles relating to the rescission of a contract concluded on behalf of a minor are well established and do not need to be dealt with in any detail. Suffice it to say that the parties were correctly agreed that a contract may be set aside under the restitutio in integrum if it is shown that it was prejudicial to the minor at the time it was concluded. […]'*

[38] The argument made on behalf of the appellant in the present matter is that a person under curatorship is a statutory minor under the protection of the High Court and as such deserves the same protection as that enjoyed by a minor. Further, it was submitted, that if this was not the case there was an inequality before the law between a

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[2] *Ibid* n 1 above.

minor and a person under curatorship, and in terms of the Constitution,[3] the common law should be developed to remove such inequality and provide such protection.

[39] The flaw in this argument is that it begs the question of whether the patient was under a disability at the time the settlement agreement was concluded which is the very question in respect of which the appellant bears the onus of proof. The ratio in *Myhill* was not based on the fact that the minors were eventually represented by a *curator ad litem* when the prejudicial settlement agreements were challenged but on the fact that they were minors at the time when they were concluded. I accept, for the purposes of the present case that, if the appellant is able to prove on a balance of probabilities that the patient lacked legal capacity as a result of his mental condition at the time that the settlement agreement was concluded then, all things being equal, he is entitled to have the order of court rescinded.

[40] A further argument advanced on behalf of the appellant was that the settlement could only be valid and binding if ratified by the appellant who, it is common cause, has declined to do. In this regard reliance was placed on amongst others *Mort NO v Henry Shields-Chiat*[4] and *Road Accident Fund v Mdeyide*[5].

[41] *Mort's* case concerned the unauthorised acts of a legal representative of *non compos mentis* litigant and whether these could be ratified by a *curator ad litem*. It was held that a curator was permitted to ratify unauthorised acts to the same extent that the litigant would have been able to do, had he been *compos mentis*. But again, this is a different situation to the present matter where the central issue is whether the *'litigant'* was *compos mentis* at the time of the conclusion of the settlement agreement or, put differently, whether that settlement agreement constituted an unauthorised act.

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[3] The Constitution of the Republic of South Africa, 108 of 1996.
[4] 2001 (1) SA 464 (C) at 469B-471D.
[5] 2008 (1) SA 535 (CC) at 548-549.

[42] In essence, the appellant's argument in this regard is that since he was granted the power to ratify certain decisions taken previously by or on behalf of the patient it follows that he has the converse power, namely, to decline to ratify. This approach also begs the question as to whether the patient had the requisite legal capacity to conclude the settlement agreement in October 2009, either by way of furnishing a valid power of attorney or by giving direct instructions to his attorney.

[43] It is to be noted that the power of attorney executed by the patient on 24 October 2004, in favour of his attorneys expressly empowered them to '*take part in settlement negotiations, to settle the matter and to make any payments or receive any compensation on my behalf*'. The attorney settled the matter, if not on the basis of the patient's direct instructions, then at least on the basis of the authority contained in the power of attorney which prima facie is binding on the patient. If there was any abuse of this authority or negligence on the part of the attorneys then recourse lies against them[6]. On this subject, it is of some concern that the appellant's attorneys of record are the self-same attorneys who represented the patient from the inception of his claim. At the least, this raises a potential conflict of interest given the dilemma facing the attorneys as to which I referred to earlier and it would have been preferable had independent legal representatives been appointed for the present application.

[44] In *Mdeyide's* case it was held that if a plaintiff in a claim against the RAF had been of unsound mind and had been without the assistance of a *curator ad litem*, he would have lacked locus standi in the litigation, with the possible consequences that the entire trial court proceedings might be rendered void, and the plaintiff's instructions to his attorneys would be called into question. In that case, however, the fundamental problem was the lack of proper inquiry into the plaintiff's capacity before and during the

[6] See in this regard *MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga and Another* 2010 (4) SA 122 (SCA).

trial. It was held that the plaintiff's conduct in court and the documentary evidence ought to have suggested to all involved that something was badly amiss and it was clear that what was called for in the court below was an inquiry in terms of Uniform Rule 57, at the very least. The above findings reinforce, indirectly, the importance of a full inquiry, where appropriate, into a litigant's mental capacity and certainly before a settlement agreement is concluded. The judgment in *Mdeyide* thus takes the appellant's case no further.

[45] What is relevant are the considerations relating to the status of an order of court. In this regard the practice of, and requirements for, making a settlement an order of court are long standing as was set out in *PL v YL*[7]:

> *'[15] An overview of the reported decisions on the subject shows that there are two basic requirements that are to be met when the court considers a request to grant a judgment in accordance with the terms of a settlement agreement. The first is that the court must be satisfied that the parties to the agreement have freely and voluntarily concluded the agreement and that they are ad idem with regard to the terms thereof […] To the first requirement must accordingly be added that the court must satisfy itself that the parties are in agreement that the terms of their settlement be made part of the order of the court. The second requirement is that the order sought must be a competent and proper one to make in the circumstances.[…]*
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> *[17] The practice of making an agreement between the parties to litigation in civil matters an order of the court has a long history and has its origins in our common law. A similar practice exists in the English law on which our own rules of civil procedure are primarily based […]'*

[46] There are sound policy reasons why orders of court made by agreement are, all things being equal, not lightly overturned. It is common practice for parties in RAF matters (and other types of action for personal damages) to reach an agreement on the issue of liability and to proceed later with the determination or settlement of the quantum of damages suffered. Where there is any doubt concerning the mental capacity of a

[7] 2013 (6) SA 28 (ECG) at paras [15] and [17].

litigant to give proper instructions to his/her attorneys it is obviously necessary to be alert to this issue and to investigate the need to appoint a *curator ad litem* at the earliest possible stage. Clearly, if agreements are reached or court orders taken on liability, only for these to be repudiated or challenged later on the basis that the litigant did not have full legal capacity to settle his/her claim or to give proper instructions, the expeditious resolution of such claims is compromised.

CONCLUSION

[47] In the present matter the onus of proving that the patient lacked the necessary mental capacity to either give instructions on the acceptance of the settlement agreement or to furnish a valid power of attorney to his legal representatives at the relevant time clearly lies on the appellant. In summary, however, although a *curator ad litem* has been appointed to the patient by reason of his lack of mental capacity none of the expert reports focussed on the patient's mental (and hence legal) capacity as at the crucial date, namely, when the settlement agreement was concluded.

[48] At best this issue can only be addressed using these medical reports by way of inferential reasoning. Even on this basis there is no room to conclude that the most probable inference to be drawn from them and from the affidavits of the experts is that at the relevant time the patient lacked legal capacity by reason of the sequelae to his head injury. There are a range of factors which indicate that the appellant did in fact have the necessary capacity at the relevant time, ranging from his signing of a power of attorney to his ability to furnish instructions to his legal representatives and to communicate without difficulty with various specialists. No explanation has been forthcoming from DSC Attorneys as to why, if the patient in fact lacked legal capacity, they nonetheless concluded the settlement agreement, had it made an order of court and proceeded to act upon that agreement. Finally, there is the question of the elapse

of time and the lack of any explanation for the delay of five years between conclusion of the agreement and the application for the appointment of a *curator ad litem*.

[49] Notwithstanding that Mr Mafanya's attorneys held a power of attorney to settle the matter, it is very probable that they conveyed the terms of the proposed settlement to him and obtained his instructions to settle on that basis. It seems equally probable that the attorney experienced no difficulties in obtaining instructions from Mr Mafanya and had no reservations about his mental state since no other explanation has been forthcoming. If that was not the case it is difficult to understand how the attorneys could have concluded the settlement without at least making it subject to approval by a *curator ad litem* on his appointment.

[50] It is possible that the failure by DSC Attorneys to file an explanatory affidavit in this application may well have been due to the fact that they found themselves on the horns of a dilemma: namely, either admitting that they settled a claim on behalf of a client without disclosing that he lacked legal capacity or that they negligently failed to realise that he lacked such capacity. Whatever the true position may be, the failure by the attorneys to depose to an affidavit inevitably has adverse implications for the appellant's case.

[51] Having regard to the grounds of appeal, I consider that the court a quo properly evaluated the evidence before it and did not err in any regard. For all these reasons, I am driven to the conclusion that the appellant has failed to prove, on a balance of probabilities, that the patient lacked the necessary mental capacity at the relevant time.

COSTS

[52] Counsel for the respondent conceded that an order for costs against the appellant himself would be inappropriate and that in the circumstances of this matter

any order against the patient would be nugatory. Accordingly, he did not press for a costs order but left it in the hands of the Court. In my view, nothing will be served by granting the respondent its costs on appeal and it would be equitable to make no order as to costs.

[53] In the result the appeal is dismissed but with no order as to costs.

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BOZALEK J

I agree

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FORTUIN J

I agree

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DOLAMO J

APPEARANCES

For the Appellants:	Mr A Laubscher Mr S Dzakwa Instructed by: DSC Attorneys
For the Respondent:	Mr D Potgieter (SC) Instructed by: Z Abdurahman Attorneys