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

REPORTABLE

CASE NO: A 243/2016

In the matter between:

AXEL THEISSEN	First Appellant
ADAM VICTOR PITMAN N.O.	Second Appellant
and	
STEPHANUS JACOBUS BOTHA	First Respondent
MARIANNE HOLSCHER	Second Respondent

JUDGMENT DELIVERED ON 26 MAY 2016

GAMBLE, J:

INTRODUCTION

[1] On 20 March 2014 the first appellant, a Namibian businessman, approached this court as a matter of urgency for an order aimed, primarily, at securing the appointment of a curator *ad litem* to investigate the prospective appointment of a

curator *bonis* in respect of the estate of his wife's grandmother, Ms Catharina Anna Huijskamp, (hereinafter referred to as *"the patient"* where appropriate), who resides in a retirement village at Stellenbosch.

[2] Additional relief was sought interdicting the respondents herein, together with an elderly friend of the patient's then cited as the third respondent (Ms Munter-Weidner), from exercising any control in respect of the patient's finances. The first appellant also sought a *mandamus* obliging the first and second respondents to deliver certain movable items belonging to the patient to the curator *ad litem,* and asked that they further be ordered to deliver to the curator *ad litem* various of her financial documents, bank statements, cheque books and the like. The respondents were also requested to file reports with the curator *ad litem* explaining certain expenditure allegedly incurred by them on behalf of the patient. Finally, the first appellant asked that the respondents pay the costs of the application *de bonis propriis* on the scale as between attorney and client.

[3] When the matter came before court on 29 April 2014 the parties took an order by agreement. At that stage Ms Munter-Weidner had provided a written undertaking to the first appellant on terms acceptable to him and she fell out of the picture. The agreed order made provision for the appointment of Ms Michelle Baartman, a senior member of the Cape Bar, as curator *ad litem* to investigate the feasibility of appointing a certain Mr Andrew Calmeyer (an investment adviser) as curator *bonis* to the patient. The order further provided for the bulk of the ancillary relief sought.

[4] Ms Baartman filed her report at the end of July 2014 whereafter there was a further exchange of papers and, after heads of argument had been delivered, the matter came before Schippers J on the semi-urgent roll on 22 October 2014. Judgment was delivered on 3 June 2015 with the court appointing the second appellant (who is the first appellant's attorney of record), and not Mr. Calmeyer, as the curator *bonis.* The court *a quo* refused certain of the ancillary relief sought and made costs orders against the estate of the patient.

[5] The second appellant then sought leave to intervene as a party in the proceedings on the basis that he was then in control of the patient's estate, and together with the first appellant, applied for leave to appeal certain of the terms of the order of 3 June 2015. That application, which was opposed by both of the respondents, was dismissed by Schippers J on 15 December 2015 with costs. The first and second appellants then made application to the Supreme Court of Appeal and both were granted leave to appeal to the Full Bench of this Division on 15 February 2016. The Supreme Court of Appeal also set aside the costs order in the application for leave to appeal before Schippers J and directed that those costs, as well as the costs in the application before it, be costs in this appeal.

[6] During the hearing of this appeal the court enquired from Mr. Barnard, counsel for the appellants who also appeared in the court below, whom he represented, given that the notice of appeal filed by his attorney reflected himself (in his capacity as the curator *bonis)* as the second appellant herein, while the heads of argument reflected the first appellant as the only party to the appeal. Counsel informed the court that the second appellant's name had "*crept into the record in*

error" pursuant to an order unsuccessfully sought in the application for leave to appeal before the court *a quo* and that he was not a party to these proceedings. I shall revert to this explanation later but for the sake of convenience I shall henceforth refer to the erstwhile applicant, Mr. Axel Theissen, as *"the appellant*" and the appointed curator *bonis,* Mr. Pitman, as *"the curator bonis*" where appropriate. Counsel further informed this court that Mr. Pitman's presence in court for purposes of the hearing of the appeal was in his capacity as the instructing attorney on behalf of the appellant, that he did not attend court in his capacity as curator *bonis* and that he would not recover any fees in respect of such attendance from the estate of the patient.

BACKGROUND FACTS

[7] There is an old adage to the effect that "*where is will, there are relatives*." That situation would seem to apply here save that one is not dealing with a deceased estate. The estate of the patient which is under the curatorship of the second appellant is a sizeable one, consisting of assets held both locally and abroad. The patient's late husband was a wealthy businessman who died in 2001 leaving his entire estate to her. It would be fair to say that this estate, and in particular the administration and control thereof, has attracted the attention and interest of various of the patient's relatives, all of them ultimately concerned with the well-being of the patient. A little bit of family background is therefore necessary for a proper understanding of this matter. For the sake of convenience, I shall refer, where appropriate, to the parties by their first names for the avoidance of confusion. No disrespect is intended thereby.

[8] The patient bore her late husband one child: a daughter, Carla von Bergmann, who lives a peripatetic lifestyle, residing at the time of the hearing of the application in Hamburg, Germany. Carla was previously married to Christoph von Bergmann, who after their separation moved to Namibia. Carla and Christoph had two daughters: Carina, who does not feature in the piece, and Alexia Theissen who is married to the appellant. The Theissens, who live in Windhoek, have children of their own but they do not feature in the matter either. Christoph, it seems, is well disposed to his daughter Alexia and the first appellant.

[9] At some stage after her father's death, Carla lived in Franschoek, a town near Stellenbosch. It is said that, notwithstanding the proximity of the two towns, the relationship between mother and daughter was strained. Indeed, the curator *ad litem* reports that there was no contact between them for more than a year during the period 2003 – 2005. Be that as it may, Carla seems to have moved to Germany to advance her career as a mature fashion model and while there was diagnosed with cancer and incurred substantial medical expenses. The patient was regularly called upon to provide financial support to Carla to enable her to pay her rent and receive medical treatment overseas. The evidence suggests that she did not always do so benevolently but rather out of a sense of maternal duty.

[10] The patient has three brothers - Dick, Piet and Johan Holscher, the latter having passed away. Dick has three daughters – Marianne Holscher (the second respondent), Dorette Vermeulen and Marlene Pienaar - and a son, Johan. Piet Holscher, it seems, has no children while the late Johan Holscher had a daughter, Cecile, who is married to Deon Dippenaar. Of all these descendants from

the Holscher line, only the second respondent, Marianne Holscher, resides in the Western Cape. Cecile, Dorette and Marlene live in Gauteng while Johan junior's whereabouts are not disclosed. In addition, Christoph has a sister-in-law, Ann-Mari, who is married to his brother Prof Hubertus von Bergmann and who resides in Somerset West. The second respondent resides in Stellenbosch where she conducts an interior design business.

[11] Mr. Calmeyer was the financial adviser of the patient's late husband. After the latter's demise, he continued to advise the patient and saw to it that the estate was beneficially invested, predominantly through a company controlled by him known as Personal Trust (Pty) Ltd. At some stage a financial consultant from Stellenbosch known as Ms. Anna Kotze also became involved in the management of the patient's financial affairs. All the while, the second respondent was an active presence in the patient's life. She says that she has been close to her aunt since childhood, that she assisted her with her move from her home in Stellenbosch to her current place of residence, and was latterly the only relative close enough to the patient to be able to see her on a regular basis and, importantly, to attend to any emergencies which might arise from time to time.

[12] When the application was launched the patient resided independently in a dwelling unit in a retirement village in Stellenbosch known as "*Le Bonheur*". It would appear that certain of the staff there were not well disposed to the second respondent whom they regarded as an unnecessary intrusion in the patient's day-to-day life. She, in turn, took umbrage at their interference in her relationship with the patient. Not

much turns on this save that it may go some way towards explaining the source of antipathy of the appellant towards the second respondent

[13] Carla, it appears, did not visit her mother regularly. The papers reflect that she saw her in July 2013, and then again a year later after the institution of the curatorship application. The second respondent says that during the July 2013 visit Carla expressed concern about her mother's mental health and took legal advice on the possibility of placing her under curatorship. She says that Carla took the patient to see her treating psychiatrist and in a report dated 2 August 2013, Dr Chris van den Berg of Stellenbosch expressed concerns about the patient's memory but did not consider it necessary for the immediate appointment of a curator at that time. In a short report placed before the court he indicated that the patient first experienced symptoms of dementia in about 2010. She was then treated with medication which seemed to stabilize her condition but the psychiatrist did indicate that curatorship or a general power of attorney over the patient's property might have had be considered in the near future. Be that as it may, some 8 months later two psychiatrists (Dr van den Berg himself and Prof Tuviah Zabow of Cape Town) both recommended the appointment of a curator in light of their diagnosis then that the patient was suffering from dementia, possibly of the Alzheimer's type.

[14] Prior to this, those close to the patient became progressively concerned about her mental health and her ability to properly manage her financial affairs. For instance, in April 2013 the second respondent expressed concern in an email to Anna Kotze and Ann-Mari von Bergmann, saying that she was worried about the integrity of patient's memory and that there was the potential that she could "*sign away a lot of*

her money and not knowing (sic) exactly for what purpose!" Mr. Dippenaar describes how the patient visited his family in Krugersdorp in May 2013 to celebrate her birthday and how she complained to them about her daughter's indifference towards her. She is also said to have expressed concern to the Dippenaars about her ability to control her finances, particularly in light of the pressure that had been placed upon her by Carla to fund her living and medical expenses in Germany. Mr. Dippenaar goes on to say that certain of the family members (he, Cecile, Dorette, Piet and the second respondent) discussed the situation and decided that the patient needed an independent financial adviser.

[15] Mr. Dippenaar considered the first respondent, Mr. Fanie Botha, to be a suitable person to fulfill that role, having dealt with him personally in regard to his own financial planning, and in relation to the winding up of the estate of his late father-in-law, Johan Holscher. Mr. Dippenaar introduced the first respondent to the patient and at their first meeting during July 2013 (attended also by the second respondent) it became apparent that the first and second respondents knew each other from university days, although they had not had any contact in the intervening period.

[16] The first respondent thereafter set about restructuring the patient's financial affairs, which involved, *inter alia*, the withdrawal of existing general powers of attorney in favour of Mr. Calmeyer and Ms. Kotze and the replacement thereof with a power in his favour. He also arranged for the second respondent, Ann-Mari and Ms. Muenter-Weidner to have signing powers over the patient's bank account but intentionally did not secure those powers for himself. The first respondent moved certain of the patient's assets from Personal Trust into different investment

instruments controlled by local and off-shore entities under the aegis of Sanlam Ltd and recommended the establishment of an *inter vivos* trust to ultimately house the patient's assets. This was seen by him as a viable alternative to curatorship, it being contemplated that various family members would act as trustees to look after the patient's affairs.

[17] As these things go, the Theissens, while no doubt acting with the interests of the patient at heart, seem to have got the wrong end of the stick, believing that the first and second respondents were in cahoots and busy enriching themselves at the expense of the patient. That much is clear from some of the serious but unsubstantiated allegations made in the founding papers based largely on supposition, inference and half-truths. For example, the appellant said that he understood that the second respondent worked for the first respondent and that they were, in addition, close friends. He also alleged that Cecile was the second respondent's sister when in fact she was her niece. Further, reliance was placed on extensive hearsay allegations made by the staff at the retirement facility at which the patient resided regarding the second respondent's presence in the patient's daily life.

[18] It seems fair to infer, too, that the Theisens took their lead from Carla, who was no doubt concerned about any interference with the source of her own financial well-being in the future. In the result, the appellant took it upon himself to visit the patient in Stellenbosch and investigate the management of her financial affairs. He took this step because he says it was obvious to him that the patient was having memory lapses from time to time and was behaving inconsistently in relation to her financial affairs.

[19] The appellant had a meeting with the first respondent on 16 October 2013 at which the patient was present. The appellant directed queries at the first respondent as to whether any payments had been made from the patient's account to the second respondent or any others. The first respondent indicated to the appellant that he had knowledge of 6 cheques which had been drawn on the patient's Nedbank account, being –

- a donation to a church in the amount of R50 000;
- a donation to the Cancer Society in the amount of R50 000;
- a cheque made out in favour of the second respondent in the amount of R50 000;
- a cheque made out in favour of Dorette in the amount of R20 000;
- a cheque made out in favour of Cecile also in the amount of R20 000;
- a cheque (the beneficiary whereof was unknown) also in the amount of R 20 000.

[20] The appellant said that he sought details of these payments from the patient on that day and that she told him that she did not recall signing any such cheques or of having requested anybody to draw them. The appellant described the patient's response as "*perplexed"* and he stressed that her recollection was poor. That

notwithstanding he considered it appropriate to procure a general power of attorney from the patient in his favour the following day, claiming that he preferred "*to take control of her financial affairs to safeguard her estate against any maladministration or mismanagement."* He was at pains to point out that he had no ulterior motive other than safeguarding the patient's estate. The general power of attorney granted the appellant very wide powers and effectively placed him in control of the patient's estate.

[21] In that capacity the appellant interrogated all and sundry regarding the patient's financial affairs. In particular he wanted details of the first respondent's conduct in establishing various offshore investment accounts from which payments had been made to Carla. Early in November 2013 the first respondent informed the appellant that the patient had revoked the general power of attorney in his favour and wished to entrust her brother Piet with the management of her estate. When the appellant made enquiries of the patient in this regard, he was once again alerted to her state of confusion and memory loss. The appellant says that, in light of what had occurred over the previous couple of months , he –

> ".. *was constrained to conclude that each of the respondents had persistently and on an ongoing basis sought to take control of the financial affairs of Ms Huijskamp, for their own personal benefit, and for unlawful purposes."*

[22] It would be fair to say therefore that late in 2013 and in the first quarter of 2014 mistrust as opposed to familial co-operation and joint problem-solving aimed at addressing the patient's predicament became the order of the day. Rather than

confront the first and second respondents and other family members of the older generation with his expressed concerns that they were busy "*plundering*" [1] her estate, the appellant decided to take the litigation route. Importantly, those close to the patient were not advised of the reports of Dr Van den Berg or Prof Zabow and asked to co-operate in the appointment of a suitable curator. Rather, they were confronted, on short notice, with an application comprising some 100 pages which included prayers that all 3 erstwhile respondents should personally pay the costs of the application on the punitive scale. The notice of motion made provision for Part A and Part B relief and in light of the issues on appeal, it is necessary to set out that relief in some detail.

RELIEF SOUGHT IN THE NOTICE OF MOTION

[23] Aside from the customary prayers for urgency and alternative relief the appellant claimed the following relief in the notice of motion:

> *"**PART A***
>
> *2. Interdicting and restraining, with immediate effect, first, second and third[2] respondent from performing any action or duty in relation to the affairs and/or estate of Catharina Anna Huijskamp* ["the patient"]*;*

[1] This was the term employed by counsel for the appellant in argument.

[2] At that stage Ms Munter-Weidner was cited as the third respondent.

3. *Directing each of the respondents to, within 14 days of the date of this order, hand over to the applicant's attorneys, at the address provided in this notice of motion, the following items and documents, pending the appointment of the curator <u>bonis</u> contemplated by prayer 10 below, at which stage the applicant's attorneys shall deliver all such items and documents to the appointed curator:*

3.1 All documents, of whatsoever nature, relating to the affairs of [the patient], and any such other documents that may relate to the estate held by, under the control of or in the possession of any of the respondents;

3.2 Without derogating from the generality of the above order, directing that all financial statements, bank statements and all other documents relating to the financial investments and banking affairs of [the patient], be so handed over to applicant;

3.3 All bank cards, credit cards, debit cards, petrocards, and pin codes of such cards, of [the patient] held by, under the control of or in the position of any of the respondents;

3.4 Any movable assets, of whatsoever nature, that any of the respondents claim to have received from [the

patient], or that they took from the latter, for the period of 1 July 2013 to date hereof.

4. *Directing and ordering first, second and third respondents to submit to the Court and the applicant, within 14 business days of the date of this order, a written report reflecting the following:*

4.1 Full particulars of every cheque drawn on the account of [the patient] held at Nedbank, Stellenbosch with account number 1071324969, from 1 July 2013 to date hereof;

4.2 Full particulars of every electronic transfer made on the above account of [the patient] to any other account, from 1 July 2013 to date hereof;

4.3 Without derogating from the orders in paragraphs 4.1 and 4.2 above, full particulars of the amount of such cheque/transfer, the beneficiary of the cheque/transfer, the causa for the payment of the cheque or the transfer made, and in what manner [the patient] authorised payment thereof, or the transfer;

4.4 Full particulars of every payment, of whatsoever nature, whether in cash or otherwise, other than the cheque payments and transfers contemplated by

paragraph 4.1 and 4.2 above, made by any of the respondents on behalf of [the patient], from 1 July 2013 to date hereof.

5. *Directing and ordering first respondent to, within 14 business days of the date of this order, submit to the court and the applicant a written report, setting out the particulars below:*

5.1 A description and identification of each and every investment and/or financial account of [the patient] that first respondent purportedly managed and/or administered on her behalf, for the period of 1 July 2015 to date hereof;

5.2 A description and identification of each and every investment and/or financial account of [the patient] in respect of which the first respondent, during the period from 1 July 2013 to date hereof, recommended, and/or caused to be effected, any changes or modifications;

5.3 Full particulars of any payment made, or any transfer made, from any investment account and/or other financial account of [the patient] under the control, management and/or supervision of the first respondent, during the period from 1 July 2013 to date hereof;

5.4 A full account of all fees, disbursements and all/or any other payments to the first respondent, made by [the patient] or debited to any of her accounts during the period from 1 July 2013 to date hereof;

5.5 Full particulars of the registration and authorisation of the first respondent to act as financial advisor including, where such particulars appear from a written document, a copy of any such document reflecting such particulars;

5.6 Copies of any written mandate, or power of attorney, whether for ad hoc purposes or for a specific period of time, held by the first respondent during the period from 1 July 2013 to date hereof, to perform any act or service for and/or (sic) behalf of [the patient].

6. *Directing and ordering the respondents to show cause, on the date as contemplated by prayer 8 below, why it should not be declared that the respondents shall not have any right or entitlement to be in possession, or to be the owner of the items as contemplated by prayer 3 above;*

7. *Directing and ordering that advocate Michelle Baartman, practicing as advocate in Cape Town, be appointed on behalf of [the patient] as curator <u>ad litem</u> to report upon the feasibility of the*

appointment of Andrew Daniel Calmeyer as curator bonis for [the patient], as contemplated by rule 57 (5) and (6).

8. *Directing and ordering that, the above relief having been granted to applicant, the matter shall be postponed to a date to be determined by this Honourable Court, for the purposes as contemplated under* ***Part B*** *hereof;*

PART B

BE PLEASE TO TAKE FURTHER NOTICE THAT *the applicant shall apply, upon the date as determined under prayer 7 in* ***PART A*** *above, for an order in the following terms:*

9. *Declaring [the patient] to be of unsound mind and as such incapable of managing her own affairs;*

10. *Directing and ordering that Andrew Daniel Calmeyer be appointed as curator bonis for [the patient];*

11. *Directing and ordering that respondents, jointly and severally, pay the costs of this application de bonis propriis on the scale as between attorney and client;"*

THE ORDER OF 29 APRIL 2104

[23] The matter was postponed at the first hearing for a fortnight and on 29 April 2014 the parties took an order by agreement before Weinkove AJ (hereinafter "*the Weinkove order*") in terms whereof –

23.1 Ms Baartman would be appointed curator *ad litem* and would file her report by no later than Wednesday, 25 June 2014*;*

23.2 The matter would be postponed for hearing on the semi-urgent roll on 18 August 2014 with a timetable fixed for the filing of further affidavits and heads of argument;

23.3 The first and second respondents undertook not to perform any action or duty in relation to the affairs and/or the estate of the patient, other than as authorised and/or directed by such order, pending the finalisation of the proceedings;

23.4 There would be further orders in accordance with the terms of paragraphs 3, 4 and 5 of the notice of motion, as set out above;

23.5 The first respondent undertook not to proceed with any steps relating to, or aimed at giving effect to, the transfer of any assets of the patient to the HCH Trust;

23.6 The second respondent undertook, in terms of the provisions of the parties' agreed timetable referred to in para 23.2 above,

"*to hand over any movable assets claimed to have been received from [the patient] during the period of 1 July 2013 to the date of this order, including any motor vehicle and/or keys to such motor vehicle, unless she deposes to an affidavit setting out the grounds upon which she claims not to be under any obligation to retain such asset(s), which affidavit should be filed as contemplated"*

23.7 All issues of costs were reserved for later determination.

Although the order does not reflect a reservation of the respondents' rights, this seems to have been intended if regard be had to the structure of the order read in the context of the preliminary affidavit filed by the second respondent and the correspondence which was exchanged in anticipation of the agreement to the order.[3]

FIRST AND SECOND RESPONDENT'S COMPLIANCE WITH THE WEINKOVE ORDER

[24] On 13 May 2014 the first respondent filed a detailed report with the curator *ad litem* in compliance with his obligation under the Weinkove order: the document with annexures runs to almost 100 pages. He described the various steps taken in re-investing the patient's assets and, *inter alia*, in effecting payments to Carla in Germany. He also gave details of commissions which he earned when placing off-shore investments with Sanlam SPI (UK) and BNP Paribas Wealth Management on

[3] Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd [2014] 1 All SA 375 (SCA) at [10] – [17]; Betterbridge (Pty) Ltd v Masilo and others NNO 2015 (2) SA 396 (GNP) at [8].

behalf of the patient, and referred to two invoices rendered in respect of "*services rendered"*. The amounts involved were R 3500 and R5750 respectively.

[25] On 12 May 2015 the attorneys acting for the second respondent delivered a report to Ms Baartman in compliance with paragraph 5 of the Weinkove order. Her explanation was accompanied by various supporting documents explaining all of the transactions made on the patient's cheque account.

[26] Thereafter the curator *ad litem* conducted her investigation, interviewing all of the principal actors in the piece. In the result the curator *ad litem* took longer than the parties originally anticipated and her report was only filed on 30 July 2014. This left insufficient time for the respondents to respond to the report and for the parties to prepare for the hearing on 18 August 2014. In the circumstances the matter was postponed until 22 October 2014 when it was heard by Schippers J.

THE ORDERS MADE BY THE COURT *A QUO*

[27] When the matter came before Schippers J he was asked to appoint both Messer's Pitman and Calmeyer as joint curators *bonis.* In addition, the court was asked to direct the first appellant to repay to the patient's estate the sums of R3750 and R5000 in respect of legal services said to have been unlawfully rendered to her, as also his commission on the off-shore investments said to amount to R50 000. The court was also asked to order the second respondent to repay the sum of R50 000 (the proceeds of the cheque drawn in her favour in September 2013) to the estate, and to hand over a leather-bound collection of National Geographic magazines to the

patient. The latter were referred to by the second respondent in her report to the curator *ad litem* as being a gift from the patient to her adult son.

[28] The court *a quo* was also asked to make a punitive costs order against the respondents jointly on the basis that their conduct had necessitated the application for curatorship. In the founding affidavit the appellant reasoned as follows in purporting to make this demand on behalf of the estate of the patient:

> *"100. Although the respondents cannot be held responsible for the deterioration in the mental health, and for the cognitive and memory impairment of Ms Huijskamp, and accordingly would not, under normal circumstances, be responsible for the fact that an application had to be made for the appointment of a curator bonis on behalf of Ms Huijskamp, the facts set out below justify a costs order against each of the respondents, jointly and severally, in these proceedings, including the extent thereof that relates to the appointment of a curator ad litem and curator bonis.*
>
> *101. Prior and up to 6 July 2013 Calmeyer was managing the financial affairs of Ms Huiskamp in an impeccable manner. But for the intervention of the 3 respondents, he would have continued to do so uninterrupted to date hereof, and would have been able to address any issues arising from the deterioration in the cognitive and memory facilities (sic) of Ms Huijskamp.*
>
> *102. Despite the onset of the conditions (sic) as identified in the affidavits of the two psychiatrists, Calmeyer would have discharged his duties as if he were*

a curator bonis, but for the interference of the three respondents in the affairs of Ms Huijskamp.

103. As a direct result of the intervention of the three respondents, Calmeyer's services were terminated. The intervention of the three respondents accordingly necessitated both of the urgent relief sought in this application, and the relief seeking the appointment of a curator bonis for Ms Huijskamp, who (in the curator), in the final analysis, is likely to be Calmeyer.

104. I accordingly contend that it is only fair and reasonable that the respondents, jointly and severally, be held liable for the entire extent of the costs occasioned by this application."

[29] In the founding affidavit the appellant made much of the fact that the first respondent had purported to act as an attorney when in fact he was precluded from doing so by virtue of the fact that he no longer held a trust account but was registered with the Cape Law Society as a so-called "*non-practicing attorney*". It was claimed that the first respondent had wrongfully debited fees to the estate of the patient for doing the work of an attorney in drawing up mandates and powers of attorney.

[30] The first respondent explained that he had previously practiced as an attorney but had left the profession to work in the financial services sector. When he did so he placed his name on the "*non-practicing roll of attorneys*". He went on to say that he had consulted senior colleagues and staff at the Cape Law Society at the time, all of whom assured him that he was entitled to continue with the drafting of wills and setting up of trusts and the like on behalf of his clients. In the process of rendering

services to the patient the first respondent says he presented her with invoices for services rendered in respect of the drafting of her will (R3500-October 2013) and mandates (R5750-December 2013). This was disclosed in his report to the curator *ad litem.*

[31] During argument before the Court *a quo* counsel for the first respondent, Ms Liebenberg, conceded from the Bar that these amounts were repayable to the patient's estate on the basis of a potential contravention of the Attorneys Act.

[32] In the result, Schippers J found that the patient was incapable of managing her own affairs and directed that Mr. Pitman be appointed as the sole curator *bonis* to the patient on the customary terms[4]. In addition the court made the following orders in para 27 of the judgment.

> *"(c) The application for an order directing the first respondent to pay the sum of R 50,000.00 received pursuant to his appointment as financial advisor to Ms Huijskamp, is refused.*
>
> *(d) The application for an order directing the first respondent to repay the following amounts received from Ms Huijskamp, is granted: R3500.00 in September 2013; and R5750.00 in November 2013. The first respondent shall pay the said amounts to the curator bonis within 14 days of the date of this order.*

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[4] For so long as he remained an attorney in possession of a valid fidelity certificate he was exempted from furnishing security to the Master, and he was further granted the powers set out in Annexure A to the Master's report to the Court.

(e) The application for an order directing the second respondent to pay the sum of R 50,000.00 received in September 2013, and to return a leather-bound set of National Geographic magazines to Ms Huijskamp, is refused.

(f) The costs of this application, including the costs of the curator ad litem, shall be paid out of the estate of Ms Huijskamp.

(g) The costs of the first respondent, limited to the sum of R 13,000.00, shall be paid out of the estate of Ms Huijskamp.

(h) The second respondent's party-and-party costs shall be paid out of the estate of Ms Huijskamp."

[33] In refusing to grant the relief in terms of para's 27(c) and (e) the Court *a quo* found that the appellant had failed to make out a case for such relief in the founding affidavit.[5] The order made in terms of para 27(g) was based upon the first respondent's alleged customary hourly rate[6].

THE NOTICE OF APPEAL

[34] On 14 March 2016 the appellant filed his notice of appeal pursuant to the order of the Supreme Court of Appeal on 15 February 2016 granting him leave to approach the Full Bench. This document, which runs to 16 pages, contains extensive narrative and argument rather than just stating the grounds of appeal as required by

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[5] Director of Hospital Services v Mistry 1979(1) SA 626 (A) at 635H.

[6] He said that he usually charged R1000/hour for his time and had spent 13 hours answering the appellant's allegations against him.

Rules 49 (1)(b) and (4). Nine pages of the notice are devoted to an attack on the costs orders made by the court *a* quo: that in itself is probably a fair indication of the true purpose of the appeal.

[35] I would add, for the benefit of practitioners, that the notice of appeal is unduly lengthy and verbose and seems to follow a trend in this Division in which the case is effectively argued in the notice, much like heads of argument which are required to be filed prior to the hearing of the appeal. In *Hing* [7] Binns- Ward J (on behalf of the Full Bench) restated the purpose of a notice of appeal:

> *"In deciding whether the appeal should be entertained in the current rather different situation I consider the purpose of the notice of appeal must be kept in view. It is to define the ambit of the appeal for the benefit of the appellate court and the respondent. The court needs to know the issues arising out of the judgment of the court a quo that it is called upon to determine and the respondent needs to be informed of what it has to address in argument."*

That purpose is not served by the filing of a voluminous document which is akin to a litigant's heads of argument: a notice of appeal is not the place to make submissions and assert facts which do not appear from the judgment. Importantly, brevity and conciseness rather than verbosity is the preferred approach.

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[7] Hing and Others v Road Accident Fund 2014 (3) SA 350 (WCC) at p354E [5]. See too Songono v Minister of Law and Order 1996(4) SA 384 (E) and Xayimpi v Chairman Judge White Commission (formerly known as Browde Commission) and others [2006] 2 All SA 442 (E).

[36] In addition to appealing against the costs orders made in para's 27(f), (g) and (h), the notice of appeal attacks the orders made in para's 27(c) and (e) of the judgment. There is no appeal against the order made in para 27(b). I shall revert later to the appeal against the costs orders but before I do so it is necessary to address the *locus standi* of the appellant in relation to the attack made on appeal against para's 27(c) and (e) as also his *locus standi* in the court below.

LOCUS STANDI OF THE APPELLANT – *A QUO* AND ON APPEAL

[37] In an initial 4 page preliminary answering affidavit dated 15 April 2014, the second respondent took the point that the appellant had no *locus standi* to seek interdictory relief against her.

> *"7. I am advised that it appears from the founding papers that the Applicant lacks the necessary locus standi to bring the application for the interdictory relief sought against me, and that no proper case has been made out for the very broad and drastic further relief sought. I am advised that the requirements for a final interdict are the existence of a clear right, an injury actually committed or reasonably apprehended, and the absence of an alternative remedy. The Applicant in this matter lacks any clear or even prima facie right to the relief sought against me, and my conduct has not caused any injury or harm to Applicant or to my aunt. Applicant is also not entitled to delivery of any of my aunt's documents or property to him, or to require me to report to him. These issues will be addressed in legal argument at the hearing of this application, and this Honourable Court will be requested to dismiss Applicant's application against me with costs."*

[38] In that affidavit the second respondent stressed that she wished to avoid incurring unnecessary legal expenses (which she said she could not afford) and referred the court to a letter which her attorney had written to the appellant's attorneys on 3 April 2014 in which her position was set out in detail and in which certain interim undertakings were furnished on behalf of the second respondent. In that letter, too, the appellant's *locus standi* was challenged. However, the second respondent's undertakings were not acceptable to the appellant and in the result the parties agreed on the terms of the Weinkove order.

[39] After the curator *ad litem* had filed her report, the second respondent filed a comprehensive answering affidavit on 5th August 2014. In that affidavit too she challenged the appellant's *locus standi* on a similar basis to that set out above. On 15 August 2014 the appellant filed a replying affidavit and dismissively dealt with the allegations of his lack of standing in the supplementary answering affidavit as follows–

"43.1 The contents of the paragraphs under reply are misconceived, and to the extent that any merit might have lurked (sic) therein, in any event (sic) water under the bridge.

43.2 The application is no longer in a phase where I specifically seek any relief against Holscher.[8] *The opportunity for Holscher to have objected to my locus standi would have been prior to the date upon which the court order*

[8] This is to be understood as a reference to '*substantial relief*' given that the appellant persisted throughout (including on appeal) with a prayer for punitive costs against the second respondent.

made by His Lordship Mr. Justice Weinkove came into existence.[9] *From the date of such court order, the obligations of the second respondent arose from such court order, and not from any relief that I sought in the notice of motion.*

43.3 To illustrate my above contention, I point out that the obligations of Holscher arise from the provisions of paragraph 5 and 6 of such order. In brief, for purposes of complying with such order Holscher bore the obligation to hand over to the appointed curator ad litem the documents stipulated by paragraphs 5.1 to 5.3 of the order, and to compile the report contemplated by paragraph 6 of such order.

43.4 In addition to the above, the obligation was imposed upon Holscher to, in terms of the provisions of paragraph 5.4 of the order, hand over to the curator ad litem any movable assets of whatsoever nature 'that any of the respondents claimed to have received from [the patient], or that they took from the latter' subject to the provisions of paragraph 8 of the order.

43.5 There is accordingly no separate relief other than the enforcement of the court order and payment of the costs of the proceedings jointly and severally with Botha, that I currently seek against Holscher. The obligations that caused Holscher to file papers in this matter arose from the provisions of a court order to which she had agreed to be bound. The only substantive 'relief' at all, is the enforcement of the court order against Holscher.

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[9] The appellant had either not read para 7 of the affidavit of the second respondent of 15 April 2014, or chose to conveniently ignore it.

43.6 For the above reason the exposition (sic) by Holscher of what is required for purposes of obtaining an interdict against her amounts to irrelevant verbiage. The interdict has (sic) already been granted on 17 April 2014.

43.7 To the extent necessary, my counsel will however demonstrate in argument that I have locus standi to have launched the application in the first place, upon the basis of the provisions of rule 57 (4) of the rules of court.

43.8 I furthermore note that Holscher is of the intention(sic) to request the Court 'to dismiss applicant's application against me with costs on the punitive scale', and that 'it would be argued that applicant's conduct of the matter with regard to me constitutes an abuse of the process of this Honourable Court.'

43.9 I shall not dignify the above misconceived contentions with any comment, other than stating (sic) that the recording of such intentions, gauged (sic) against the background of the findings and conclusions of the curator ad litem, is (sic) remarkable, if not dumbfounding."

[40] This court has not seen the heads of argument filed when the matter came before Schippers J but a reading of his judgment does not suggest that the court was requested to determine the *locus standi* point. Nevertheless, Ms Venter, counsel for the second respondent, persisted in argument before this court that from the outset the appellant lacked the necessary standing for the relief sought against her client, and in any event, that the appellant had no *locus standi* to prosecute the appeal.

[41] Counsel's argument challenges the standing of the appellant in this matter in relation to three discrete issues:

- Firstly, did he have the *locus standi* to apply for the appointment of the curators *ad litem* and *bonis?*

- Secondly, did he have the *locus standi* to apply for an anti-dissipatory interdict or a *mandamus* against the second respondent?

- Thirdly, did the appellant have the requisite *locus standi* before this court?

[42] The various affidavits filed by the first and second respondents make it clear that there was never any objection on their part to the appointment of either a curator *ad litem* or curator *bonis*. Accordingly, the relief sought in this regard was not an issue before Schippers J. There was no attack before this court in regard to the decision of the court *a quo* to appoint only Mr. Pitman as curator *bonis* and the non-appointment of Mr. Calmeyer accordingly does not afford any basis for an appeal. However, in light of the remaining issues of *locus standi* referred to above, and in particular because of the punitive costs orders persistently sought by the appellant, it is necessary to consider the legal position in relation to the his standing before the court *a quo* and in this court.

[43] A thorough discussion of the law relating to the requisite *locus standi* in curatorship applications brought in terms of rule 57 is to be found in the judgment of

van Zyl J in *Futter*[10], a judgment with which I associate myself. The matter concerned an application for the appointment of a curator *ad litem* in order to bring a damages claim for personal injury against the Road Accident Fund on behalf of Mr. Futter. The following remarks of the learned judge are relevant to this matter:

> *"[8] Dealing firstly with the question of locus standi, it is a well established principle of our law that a litigant who claims relief must show that he has an interest in the subject matter of the litigation which is recognised at law as sufficient to give him legal standing (See Gross and others v Pentz 1996(4) SA 617 (A) at 632C-D and Jacobs en 'n Ander v Waks en Andere 1992(1) SA 521 (A) at534C-E)…. The general rule is that it is for the party instituting proceedings to not only allege, but also to prove that he has locus standi. The onus of establishing locus standi in application proceedings therefore rests on the applicant…. and it is an onus in the true sense….*
>
> *[9] By way of introduction to the issue of locus standi, the general position in our law is that whatever moral duty any person may think or believe he has, there is no legal duty on anyone to prevent harm or to look after the affairs of another (See Swinburne v Newbee Investments 2010 (5) SA 296 (KZD) at 302G.) Although significantly eroded over the years, particularly by legislation, the principle of individual freedom which has as one of its components the duty to look after one's own interests and the concomitant right to insist that others mind their own business, is recognized in the many principles forming part of*

[10] Ex parte Futter, in re Walter v Road Accident Fund and Another [2012] ZAECPEHC 52 (17 August 2012). See also Modiba obo Ruca: in re Ruca v Road Accident Fund [2014] ZAGPPHC 1071 (27 January 2014).

our legal tradition. Another consideration affecting the issue of locus standi in the context of the present matter is that an order placing someone under curatorship affects the status of the person and involves a serious encroachment upon the personal freedom and the rights [of] the person concerned. Accordingly, the need to establish and determine the standing of the applicant is understandably an essential feature of an application as envisaged in Rule 57(2)(a).(Ex parte Hill 1970 (3) SA 411 (C) at 413A). It matters not whether it is a curator ad litem or bonis who is to be appointed to the individual concerned. It is accordingly incumbent upon an applicant not only to allege that he has locus standi but also to make the necessary factual allegations in support thereof. This is clearly what is envisaged by Rule 57 (2) (a).

[10] The applicant does not at all deal with the issue of locus standi in his founding affidavit……

[11] Further, from a reading of the case it is evident that locus standi in applications for the appointment of a curator to another is not determined by whether the applicant has a financial interest in the ability or inability of another to manage his own affairs. In Judin v Wedgwood and Another 2003(5) SA 472 (W) it was by way of example held that a debtor-creditor relationship alone does not give locus standi to a creditor to apply for the appointment of a curator ad litem to his debtor. It is rather the proximity of someone's relationship to another that is sufficient to create a direct or real interest in the relief sought. An application of this nature is for this reason usually brought by one of the

patient's next of kin, not simply because they may personally be adversely affected by the inability of the patient to manage his own affairs, but also because they are sufficiently close to him so as to have a real concern for his welfare, thereby creating a legally recognised interest in his ability to manage his own affairs.

[12] Dependants of the patient, like his wife and children, who have a right to maintenance, will fall into this category. The inability of a breadwinner to manage his affairs may not only impact negatively on the right to be maintained by him, but they also, by virtue of their close relationship with the patient, have a real interest in his welfare. From a practical point of view they are also better placed to testify with regard to issues such as the health of the patient, his mental state and whether he is able to look after his own affairs. Accordingly, if the applicant in proceedings under Rule 57 is not the spouse or a next of kin of the patient, then the reason why the spouse or next of kin does not bring the application should be stated, and if they are not available to make the application, what steps had been taken to establish their whereabouts before the application was made. If no relatives exist who are in a position, or willing for that matter, to make the application to Court, it may be brought by someone else who, on the facts and in the circumstances of the particular case, stands in a sufficiently close relationship to the person concerned to be recognised at law as someone who has an interest in his welfare, and who is in a position to assist the Court in arriving at a decision. Such persons may be a friend or even a close business associate…"

[44] From perusal of the founding affidavit of the appellant in this matter it appears that no factual or legal allegations were made in relation to his *locus standi* to bring the application and to that extent the application does not meet the procedural requirements of Rule 57(2)(a). In addition, the affidavit contains no allegations suggesting why, for instance, the patient's daughter (as her next-of-kin) could not depose to the founding affidavit. This is all the more strange since it was Carla herself who had first mooted a curatorship application during her 2013 visit.

[45] Furthermore, no allegation is made in the founding affidavit to indicate any proprietary (or other) interest which the appellant had in the estate of the patient, nor was there any other legal basis[11] claimed for the interdictory relief sought specifically against the first and second respondents. Simply put, there was no allegation made to sustain an application for an interdict of any kind in relation to the affairs of the patient's estate.

[46] Recently, the Supreme Court of Appeal restated the necessity to fully traverse the relevant issues in an application the founding papers in ***Mashamaite*** [12]:

> *"[21] It is trite that an applicant in motion proceedings must, in the founding `papers, disclose facts that would make out a case for the relief sought, and sufficiently inform the other party of the case it was required to meet."*

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[11] Such as perhaps *negotiorum gestio.*

[12] Mashamaite and Others v Mogalakwena Local municipality and Others [2017] ZASCA 43 (30 March 2017)

In the absence of any factual allegations in the founding affidavit which would have established the appellant's right to seek interdictory relief against the respondents, I am driven to the inescapable conclusion that the appellant lacked the necessary *locus standi* to approach the court for that relief.

[47] That having been said, it cannot be disputed that the appellant, as a family member two generations removed from the patient, might have had the necessary standing to bring the original application for the appointment of a curator *ad litem* in the absence of the patient's next-of-kin[13], if that absence had been properly explained in the founding affidavit. Be that as it may, the court *a quo* appears to have been satisfied with the appellant's degree of affinity to the patient to warrant the order for curatorship under rule 57[14] and nothing more need be said in that regard given that it is not an issue in this appeal.

[48] Pursuant to and since his appointment as such, it is Mr. Pitman, the curator *bonis,* who is (and has been) the person responsible for the management of the patient's estate, and it is he, and he alone, who has the legal standing, *inter alia,* to recover any assets unlawfully removed or transferred from the estate of the patient, or to make decisions in relation to the disposal or acquisition of any assets of the estate. He has literally stepped in to the shoes of the patient and is now required to

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[13] The term is defined in the Concise Oxford English Dictionary as *"a person's closest living relative or relatives".*

[14] In explaining the reason for procuring the patient's general power of attorney in October 2013 the appellant informed the court in the founding affidavit that he decided to take control of her affairs "*in view of the extended family relationship between Ms Huijskamp and me, and the direct blood relationship between her and my wife"*

manage all aspects of her estate in terms of the powers conferred upon him under the order of the court *a quo,* subject only to the directions of the Master.

[49] In the result, if there is any aspect of the court order of Schippers J which negatively impacts on the patient's estate and which the curator *bonis* considers to be capable of being challenged in law, it is he who has the statutory duty to raise that issue by way of an appeal. So, if there is a complaint that the estate of the patient was wrongly ordered by the court *a quo* to bear any party's costs in this matter, it is the curator *bonis* who has the *locus standi* to attack that finding in an appeal. And, if it is said that the court erred in ordering neither of the respondents to repay the capital sums of referred to in para's 27(c) and (e) of its order, or in directing return of the National Geographic magazines, it is the curator *bonis* who has the duty and the *locus standi* to attack those findings on appeal.

[50] The only standing which the appellant might have before this court is in relation to any order which the court *a quo* made which directly affected his own proprietary interests. Against the background of the present factual matrix that would have included an order, for example, that the appellant was liable to bear the costs of one (or both) of the respondents. To assess whether the appellant has any such standing it is necessary to briefly have regard to the notice of appeal filed pursuant to the order of the Supreme Court of Appeal granting leave to this court.

THE GROUNDS OF APPEAL

[51] A party's argument on appeal is bound by the grounds set out in the notice of appeal.[15] In this matter, as I have said, that notice is a cumbersome document with extensive narrative and limited focus. Nevertheless, what it seeks to assert is that the respondents should indeed have been ordered to repay the capital sums and, in the case of the second respondent, that she should have been directed to return the National Geographic magazines. As I have found, the prerogative to advance that argument on appeal vests in the curator *bonis:* the appellant does not have the requisite *locus standi* to do so.

[52] Further, the appellant seeks to appeal the order of the court *a quo* in para 27(g) that the costs recoverable by the first respondent are to be limited to R13 000. This order is attacked on 2 grounds: firstly, that there was no factual basis therefor and, secondly, that the limitation of the amount recoverable by the first respondent to R13 000 usurped the powers of the Taxing Master to fix the amount. However, there is no allegation in the notice of appeal that any of the appellant's proprietary interests were affected by the judgment of Schippers J.

CONSIDERATION OF THE COSTS ORDERS MADE BY THE COURT *A QUO*

[53] In my view there certainly are problems with the order made in para 27(g). Insofar as the first respondent was initially before the court *a quo*, not as an attorney but as a financial consultant – effectively then a lay-litigant - he could not

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[15] Sentrale Kunsmis Korporasie (Edms) Bpk v N.K.P.Kunsmisverspreiders (Edms) Bpk 1970 (3) SA 367 (A) at 395 F-H.

have incurred legal expenses other than out-of-pocket disbursements[16]. However, later in the proceedings the first appellant was represented by attorneys at various stages, and incurred costs which were capable of taxation according to the Taxing Master's guidelines.

[54] In my respectful view the court *a quo* misdirected itself in failing to have regard to the fact that the first respondent, while acting as a lay-litigant, could not (and did not) incur any legal expenses. It further erred in not providing for the costs properly incurred by the first respondent, after he had appointed legal representatives, to be taxed by the Taxing Master. The order in para 27(g) is accordingly an improper exercise by the court *a quo* of its discretion in relation to the fixing of the first respondent's entitlement to recover his costs incurred in opposing the application brought against him. However, I am of the view that, in light of the fact that the costs declared to be recoverable by the first respondent are a liability in the estate of the patient, it is only the curator *bonis* who has the *locus standi* to attack that ruling on appeal. I shall revert to this aspect shortly.

[55] There is a further complaint by the appellant that costs orders were made by the court *a quo* that none of the parties had asked it to make *viz.* that the entire costs of the application (including the costs of opposition incurred by the second respondent) should effectively be borne by the estate of the patient. That issue is addressed in the notice of appeal as follows:

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[16] AC Cilliers Law of Costs, p1-7 para 1.03C

*"**THE ORDER MULCTING THE ESTATE OF MS HUIJSKAMP WITH THE COSTS OF THE FIRST AND SECOND RESPONDENT***

46. It is a trite principle that where a court intends making a costs order not prayed for by any of the parties, the parties to the proceedings should receive notice of such intention, and should be given an opportunity to address such issues in argument.

47. Neither [the appellant], nor any of the respondents prayed for the costs of the proceedings to be paid from the estate of Ms Huijskamp. [The appellant] prayed that such costs be paid jointly and severally by the first and second respondents, and the latter prayed that the cost (sic) of the application be paid by [the appellant], who they claimed was in cahoots with his attorney and the proposed curator with the improper object of securing the availability of funds, in an ongoing manner, for 'Carla'. That the estate of Ms Huijskamp should pay for the costs of the application was not a prayer pursued by any of the parties nor put to them as an issue to be addressed in argument.

48. The court failed to give any notice to any party that it considered making a costs order against Ms Huijskamp, or her estate.

49. The award of costs against the estate of Ms Huijskamp penalised her estate for having sought the right to be protected against the actions of parties such as the first and second respondent, by a curator. Such award is therefore so fundamentally erroneous, flawed, and constitutionally unfair, that it falls to be set aside.

50. The award was furthermore made against a person and/or estate who was not properly before the court as (sic) party to the litigation between [the appellant] and the two respondents. The functions of the curator ad litem representing the estate of Ms Huijskamp was (sic) to report back to the court and provide the court with information as contemplated by rule 57 of the rules of court, and not to defend the estate of Ms Huijskamp against adverse costs orders.

51. The costs order of the court a quo, in particular the manner in which it was arrived at, accordingly offended the constitutional right and the entitlement of Ms Huijskamp to a fair trial."

[56] While it is trite that a court exercises a wide, general and equitable discretion when making a costs order[17] when doing so it may, no doubt, have regard to the parties' submissions as to success in the litigation and, generally, considerations of fairness. The respective arguments advanced in the court below in regard to costs are summarized by Schippers J as follows in his judgment:

"[25] What remains is the question of costs. The applicant asks for an order that the respondents pay the costs of the application de boniis propriis. There is simply no basis for such an order. The applicant has been justified in instituting these proceedings in the interests of Ms Huijskamp for the appointment of a curator. For this reason, and because it cannot be said that the claim for repayment of the monies received by the respondents was

[17] AC Cilliers *op cit* 2-6 para 2.03.

unjustified, an order directing the applicant to pay the second respondent's costs on an attorney-and-client scale, as sought, is inappropriate. The costs of this application will therefore be paid out of Ms Huijskamp's estate (Ex parte De Jager 1950(4) SA 334 (O) at 338B)

[26] The first respondent has asked that the applicant pays costs in the sum of R 13 000.00 which he incurred in preparing his answering affidavit. I think that this is a reasonable request. The first respondent was compelled to come to court to oppose the applicant's claim for an interdict and costs against him. On the other hand, he has conceded that he was not entitled to receive the amounts of R3500.00 and R5750.00 from Ms Huijskamp. In the circumstances I consider that it would be fair to limit the first respondent's costs to R13 000.00. The second respondent has successfully opposed the application and there is no reason why the ordinary rule that costs should follow the result, should not apply."

[57] From these remarks I conclude that:

57.1. The appellant asked for an order that the respondents jointly bear the entire costs of the application (including the costs relating to the appointment of the curators *ad litem* and *bonis*) on the punitive scale;

57.2 The first respondent asked for his costs to be paid by the appellant, such costs to be limited to the sum of R13 000; and

57.3 The second respondent asked that her costs before the court *a quo* be borne by the appellant on the punitive scale.

Clearly then, no party asked for the estate of the patient to carry any costs, whether in respect of costs incurred on behalf of the patient herself or the costs incurred by the respondents in resisting the claims brought against them by the appellant.

[58] To the extent that it may have been the intention to argue on appeal that the estate was wrongly ordered to bear the entire costs of the application, it was the duty of the curator *bonis* to represent the estate and attempt to persuade this court that different orders should have been made. Had he chosen to do so, there were a number of arguments which the curator *bonis* could have advanced.

[59] Firstly, it could have been contended that the usual order should apply – that the patient's estate would only be liable for the costs strictly necessary in relation to the bringing of the application under rule 57 to procure the appointment of the curators *ad litem* and *bonis*[18], and that the costs of opposition incurred by the respondents should not have burdened the estate but should have been borne by them. Similarly, it was open to suggestion by the curator *bonis* that the respondents should have been ordered to bear the costs incurred by the appellant occasioned by their opposition of the application.

[60] Further, on the basis that the *locus standi* of the appellant was limited to the entitlement to bring the rule 57 application, it could have been argued by the

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[18] A.C.Cilliers *op cit* 10-14 para 10.15; Ex parte de Jager 1950(4) SA 334 (O) at 338 A-D (the decision relied upon by Schippers J); Ex parte Hulett, 1968(4) SA 172 (D&C) at 176.

curator *bonis* (as did the second respondent before the court *a quo*) that the costs of opposition by the respondents (on the basis that they were entitled to come to court to meet the serious allegations made against them and to resist the claims against them for punitive costs) should be borne by the appellant (as the party responsible therefor). All of these arguments had the potential to limit the financial exposure of the patient's estate.

[61] But the curator *bonis* did not seek to make any submissions before this court. Rather, as I have indicated, he adopted a *non possumus* attitude and stood by while his client, the appellant, persisted with his claims for punitive costs against the respondents and sought to attack the short-comings in the order of Schippers J in relation thereto. In so doing the curator *bonis* took no steps on appeal designed to limit the exposure of the estate to the costs orders made by the court *a quo.*

[62] In her heads of argument before this court, Ms Liebenberg indicated that when the application for leave to appeal served before Schippers J the first respondent informed the court through counsel that he had abandoned the costs award of R13 000 in his favour. I did not understand Mr. Barnard to contest this erstwhile concession on the part of the first respondent. In the result, the costs order against the estate made in favour of the first respondent was no longer an issue and he asked for the appeal against him to be dismissed with costs.

[63] On behalf of the second respondent, as I have said, Ms Venter persisted with her argument in relation to the appellant's lack of *locus standi* and asked that the appeal against her client be dismissed with costs. In so doing, the second respondent did not attack the obvious dissonance between Schippers J's finding at the end of

para 26 of the judgment "*that costs should follow the result"* (which implied that the appellant should bear the second respondent's costs) and his order in para 27(h) that her costs on the party-and-party scale should be borne by the estate of the patient. Nor did the second respondent seek to argue on appeal that the costs awarded against her were awarded on the incorrect scale or that the order should have been made against the appellant and not the patient's estate. To do so, the second respondent would have been required to file a cross appeal to the notice of appeal, and she did not do so.

[64] In light of the fact that the appellant lacks the *locus standi* on appeal and that the curator *bonis* has not entered the fray to defend the interests of the patient's estate and, importantly, not sought to attack the order that the estate should bear the second respondent's costs, this court is not in a position to consider the order made by Schippers J in para 27(h). In the result, the appeal must fail. The effect of an order dismissing the appeal is that the second respondent's party and party costs will indeed be paid out of the estate.

THE ROLE OF THE CURATOR *BONIS*

[65] In *de Bie*[19], King J stressed the importance of the role of the curator *bonis* in proceedings such as these.

> *"It is well established that generally a person in the position of the applicant, administering an estate on behalf of someone who is incapacitated from doing so herself, must act with prudence and caution*

[19] Ex parte Wagner N.O: in re de Bie 1988(1) SA 790 (C) at 791 F-G

and only after full and careful consideration, invest the assets of the estate with diligence and safety, avoiding exposure to commercial risk. This rule was enunciated in Sackville West v Nourse and Another 1925 AD 516."

[66] In *Modiba* Bertelsmann J, commenting on the need for impartiality on the part of a curator *ad litem,* observed that –

"35…..One non-negotiable quality of an advocate (or attorney) acting as curator must be indisputable independence to ensure the integrity of the professional service that must be rendered to the patient: see Harms, Civil Procedure in the Supreme Court at para ***B57.9****…*

36. The need for an independent approach to the litigation is especially significant in cases such as the present, in which the attorney acting for the claimant accepted instructions from an individual whose capacity to understand the processes of litigation and the implications of the mandate given to the attorney may subsequently be found to have been compromised. Vigorous vigilance and pronounced independence are essential when issues such as the enforceability of a contingency fee agreement and the validity of instructions allegedly given by the patient in respect of the conduct of the litigation must be examined to protect the patient's interests… (T)he curator's independence must not only exist, it must manifestly be free of any semblance of bias or association with any party having an interest in the outcome of the matter."

It is beyond debate that the same principles apply to the curator *bonis.*

[67] In the context of these considerations, the attitude adopted by the curator *bonis* in relation to the appeal is cause for concern. He did not take adequate steps to ensure that the estate of the patient is not unnecessarily burdened with costs for which it is not liable: in light of the court ***a quo's*** remarks at the end of para [26] of the judgment that the appellant should bear the costs of the second respondent [20] and the failure to reflect that intention in para 27[h] of the order, the curator *bonis* was duty bound to attack that order on appeal. Similarly, if there was a suggestion that the orders in para's 27 (c) and (e) regarding repayment of the capital sums was wrong, it was the obligation of the curator *bonis* to attack those on appeal too, and not just leave it up to the appellant.

[68] The curator *bonis'* failure to take these steps on appeal brings him, *prima facie,* within the proscribed conduct referred to in *de Bie* and *Modiba* and may be a basis for reconsideration of his continued appointment as curator, particularly given his professional association with the appellant, the client whom he represented as attorney of record in court before us. The curator *bonis* has, however, not had an opportunity to address these concerns. In the circumstances I intend referring the matter to the Master for consideration of his continued appointment after hearing the curator *bonis* and any other interested parties in that regard.

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[20] See [55] above

CONCLUSIONS ON APPEAL

[69] In light of the finding that the appellant has no *locus standi* before this court, the arguments advanced by Mr. Barnard on his behalf in relation to the orders for repayment of the capital sums, return of the movables and costs which were not made by Schippers J cannot succeed. And, in light of the failure of the curator *bonis* to participate in these proceedings to defend the interests of the estate of the patient and to attack the orders made against it, this court can similarly not reconsider those orders. The overall result, accordingly, is that the appeal must fail and the orders of Schippers J must stand, subject to the subsequent concession made by the first respondent.

COSTS ON APPEAL

[70] There is no reason not to follow the customary rule that costs should follow the result. Both the first and second respondents have been substantially successful in the appeal advanced by the appellant and they are therefore each entitled to their costs on appeal.

[71] We were asked by Ms Venter to consider awarding the second respondent the costs of appeal on the attorney and client scale. That request falls to be considered, not only in the light of the repeated allegations made by the appellant in the court *a quo* (and persisted with on appeal) that the two respondents were guilty of unconscionable conduct bordering on theft (e.g. *"plundering the estate"*), but also with regard to the supplementary heads of argument filed by Mr. Barnard on the eve of the appeal.

[72] In those supplementary heads of argument Mr. Barnard launched a stinging, personal attack on Ms Venter in relation to submissions advanced by her on behalf of her client and sought to justify the argument that the second respondent should bear the costs of the appeal on the punitive scale. The attack was made on two fronts. Firstly, counsel was castigated by her colleague for making submissions against the appellant, both in the trial court and on appeal, which "*evolved around a clichéd and hackneyed rendition of the old David versus Goliath argument"* in light of the fact that she "*did not shun any opportunity to whip up emotion by referring to the unlimited wealth of the appellant, juxtaposed against the relative poverty of the second respondent."* This was said to amount to "*improper and bad advocacy, that seeks to achieve success by (sic) emotion, as opposed to success based upon proper facts and legal principles."*

[73] The second basis for the attack against Ms Venter was a complaint regarding a suggestion in argument that Messrs. Pitman and Calmayer "*were improperly in cahoots with one another and that they were mendaciously contriving a scheme through the appointment of the latter"* since, it was said, they had been "*jointly acting improperly for purposes of unduly benefiting the mother of the applicant's wife."*

[74] The supplementary heads of argument sought to rely on a plethora of American decisions which deal with the acceptable bounds of conduct of trial advocates in various states in that country. Regrettably, counsel did not refer the court to any decisions closer to home, no doubt, for good reason. Considering the matter as a whole, I am unable to find anything *"improper"* in the way in which Ms

Venter presented her client's case. Further, I am reluctant to import into our constitutional jurisdiction considerations of probity of professional conduct in jurisdictions in which jury trials and the concomitant "*grandstanding"* are the order of the day. I would prefer to believe that judicial officers in this country are possessed of sufficient skill and experience to enable them to separate the wheat from the chaff and determine matters on their merits.

[75] In my view counsel was entitled to complain about the bullying and intimidatory tactics employed towards the second respondent by the appellant, who boasted of his immense wealth in excess of R100m in the founding papers so as to assure the court of his lack of financial interest in the proceedings. As I have shown, the appellant also applied double-standards towards the second respondent in seeking to recover only the proceeds of the cheque paid to her while ignoring the payments made to the other beneficiaries of the patient's benevolence (including Carla) in September to November 2013. And while he did so on the basis that the patient was being manipulated by those close to her, the appellant had no hesitation in taking a power of attorney from an elderly woman whose memory, to his knowledge, was failing her.

[76] Lastly, the concern expressed by the second respondent and her counsel about collusion between the appellant and his attorney in these proceedings may have been well-founded: why did an experienced litigation attorney of this court fail at his first opportunity to defend the interests of the patient's estate by not taking an active part in this appeal?

[77] In the circumstances, I consider that the personal attack made by Mr. Barnard against his colleague consitutes abuse by a practitioner of the kind which is not tolerated in our legal system[21]. The matter will accordingly be referred to the Cape Bar Council for consideration of appropriate steps, if any, against Mr. Barnard.

[78] In the result, I am of the considered view that the overall conduct of the appellant in this matter, and in particular his instruction to counsel to launch a personal attack on a colleague in this court as justifying the basis for a punitive costs order againt the second respondent, warrants us expressing our displeasure by making a punitive costs order against him.

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[21] LAWSA 2nd edition Vol 14 Part 2 p135 para132, relying in footnote 25 on Van der Linden *Jud Pract 1.8.6*

ORDER OF COURT

In the circumstances I would make the following order:

1. The appeal is dismissed.

2. The appellant is ordered to pay the costs of the first and second respondents in the appeal on the scale as between attorney and client.

3. The Registrar of this Court is directed to forward a copy of this judgment to:

    3.1 The Master of the High Court, Cape Town;

    3.2 The President of the Cape Bar Council.

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GAMBLE J

I agree. It is so ordered.

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DESAI J

I agree. _____

WAGLAY J

JUDGES	**:**	Desai J, Waglay J *et* Gamble J
JUGDMENT DELIVERED BY	**:**	Gamble J
FOR FIRST APPELLANT	**:**	Adv. T.A Barnard
INSTRUCTED BY	**:**	Spencer Pitman Inc. -Rondebosch
FOR SECOND APPELLANT	**:**	Mr A V Pitman
FOR RESPONDENTS	**:**	Adv. L Venter
INSTRUCTED BY	**:**	Nilands Attorneys - Cape Town & Marieka Van Rooyen Attorneys - Stellenbosch
DATE OF HEARING	**:**	1 February 2017
DATE OF JUDGMENT (Reasons)	**:**	26 May 2017