



Republic of South Africa

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

Case No: **18926/2018**

In the *ex parte* application of:

S M W

Applicant

For the appointment of a curator *ad personam* to

R W S W

Patient

and

J J W

Intervening Party/Respondent

(nee A nee O)

In her application to intervene

Heard: 12, 15 March 2019

Revised Judgment: 28 March 2019

28 March 2019

JUDGMENT

De Waal AJ:

[1] In this Judgment I deal with an intervention application brought by Ms J J W
("the Intervening Party") in respect of the application brought by Mr S M W

("the Applicant") for the appointment of a curator *ad personam* to R W S W ("the Patient"). The Applicant is the son of the Patient and the Intervening Party is his wife, them having married on 8 June 2018. I should add that the Applicant believes that the Patient's marriage to the Intervening Party is void due to the latter's lack of mental capacity when he entered into that marriage.

- [2] In 2017, the Patient had a first stroke. As a result he now suffers from loss of speech and impaired coordination. After his discharge from hospital he also displayed episodes of mania and aggression. His health subsequently deteriorated further, as I shall explain below.
- [3] In May 2017, the Applicant found space for the Patient in a care facility known as St Johannis Heim situated in Parow. This is an upmarket retirement home. The Applicant believed this home would give the Patient the best chance of recovery.
- [4] During this time, the Patient was also examined by a neurologist who came to the conclusion that the patient cannot manage his own financial affairs due to him having severe functional deficits; having no ability to use language and speech; and suffering from a cognitive impairment. The neurologist recommended that a curator *bonis* and a curator *ad personam* be appointed for the Patient. The Patient's medical practitioner also came to the conclusion that the Patient is unable to manage his financial and personal affairs and recommended that curators be appointed for him.
- [5] On 18 July 2017, the Applicant instituted an application for the appointment of a curator *bonis* for the Patient. On 5 September 2017, Mr Johann Vos

("Mr Vos") of Visagie Vos Attorneys, a firm specialising in curatorship matters, was appointed as the curator *bonis*.

- [6] At that time, the Applicant believed that it would be unnecessary to appoint a curator *ad personam* as the Patient was residing at St Johannis Heim, a care facility that is professionally equipped to see to the Patient's every day and medical needs.
- [7] The Intervening Party, who has had a relationship with the Patient for over 8 years, visited the Patient on a regular basis. This resulted in conflict between her and the Applicant. There is a long history of animosity between the two.
- [8] The Patient's circumstances changed in April 2018 when it appeared that he suffered another stroke. The Intervening Party then removed the Patient from St Johannis Heim and took him to the Panorama Hospital. This escalated the tensions between the Applicant and the Intervening Party. During this time, it appeared to the Applicant that the Patient's condition was deteriorating. The Applicant mentions an occasion when he took the Patient out for a pizza but the latter was so confused that he could not differentiate between a slice of pizza and a serviette, and he kept trying to eat the serviette.
- [9] On 4 June 2018, the Applicant received a phone call from one of the Patient's friends informing him that the Intervening Party planned on marrying his father on Saturday, 9 June 2018. The Applicant found this absolutely bizarre as, according to him, the Patient was not mentally capable of comprehending what he was going to do. Medical professionals confirmed that the Patient

was unable of understanding the meaning and consequences of entering into a marriage relationship.

[10] The Intervening Party nevertheless went ahead and, on her version, married the Patient at St Johannis Heim during the course of Friday evening, 8 June 2018. She then left with the Patient, with the permission of the staff, and took him back on the Sunday evening.

[11] After the wedding, the Patient continued to reside in St Johannis Heim, but the Intervening Party was now frequently taking him out for day trips.

[12] On 16 July 2018, the Applicant received a WhatsApp message from a friend of the Patient which contained a photo of his father walking in the street with a piece of cloth wrapped around his hand. The Applicant then opened a missing persons case at the Muizenberg police station. It appears that the Patient was stabbed. He was initially taken to Groote Schuur Hospital but was later admitted to Kingsbury Hospital. It appears from a meeting held between the curator *bonis*, the Intervening Party and a private social worker, a Ms Edna Lambrechts ("*Ms Lambrechts*"), that what happened was that the Intervening Party left the Patient at her house unsupervised while she went to work. Upon her return she realised that the Patient was gone and she notified the neighbourhood watch. The Patient ended up at a mall where someone called an ambulance which took him to Groote Schuur Hospital. The hospital had the Intervening Party's name as a contact and the Patient was then transported to Kingsbury Hospital, on the instructions of the Intervening Party. He stayed there overnight and was then discharged and fetched away by the

Intervening Party. In the intervention application, the Intervening Party gives a different version of the events, to which I shall revert below.

[13] At the time when the application for the appointment of a curator *ad personam* was launched, the Patient was still staying with the Intervening Party.

[14] According to expert reports annexed to the founding affidavit, the Patient suffers from severe functional deficits resulting in the following:

14.1. The inability to use language and to fully understand spoken words;

14.2. Poor insight and judgment;

14.3. Behavioural changes;

14.4. Inability to plan motor tasks;

14.5. Spatial disorganisation;

14.6. Inability to express himself in a verbal or non-verbal manner; and

14.7. Impaired comprehension of simple daily tasks.

[15] The experts further state that the Patient's condition is of such a nature that any improvement in his condition or his return to full social and occupational functioning, is highly unlikely.

[16] Against this background, the High Court appointed a curator *ad litem* for the Patient on 24 October 2018.

[17] In terms of the Court order, the curator *ad litem* had to report to the Court on the desirability of declaring the Patient incapable of managing his own personal affairs and that a curator *ad personam* be appointed for him.

[18] The curator *ad litem*, Adv Genevieve Hayward, duly compiled a report which is dated 22 November 2018. In her report, she recorded that:

18.1. She interviewed the Patient and found that he was unable to communicate. His speech is unintelligible and he only makes the same repetitive sounds (duh duh duh).

18.2. Two expert geriatric psychiatrists expressed the opinion that the Patient is unable to communicate and that he suffers from vascular dementia.

18.3. Both psychiatrists are of the opinion that the Patient needs to live in a frail care facility that allows for 24-hour nursing care, especially because the Patient is often active at night.

18.4. The experts asked the Patient to indicate his answers by tapping once for "yes" and twice for "no", but the Patient was unable to do so. He has conduction aphasia. He cannot communicate yes or no on demand.

18.5. According to the Intervening Party the patient is fully functioning. However, the Intervening Party also indicated that she wishes to be appointed as the curator *ad personam* to the Patient.

18.6. The experts concluded that the Intervening Party does not understand the Patient's needs and that she cannot cope with the care of the Patient.

18.7. During an interview held on 9 November 2018, the Intervening Party informed the curator *ad litem* that she intends to obtain another medical report regarding the Patient's condition. She undertook to provide the curator *ad litem* with the report. However, at the time of the completion of the report, the curator *ad litem* had not received the promised medical report from the Intervening Party.

18.8. The Intervening Party and the Patient have been in a relationship for 8 years. They had discussed marriage but the time was never right.

[19] In the light of the above,, the curator *ad litem* found that it is in the Patient's best interest that his current living arrangement and medical care and treatment be investigated and that decisions be made on his behalf in this regard. She further found that these issues need to be urgently resolved as they pertain to the Patient's wellbeing, safety and care.

[20] The Applicant suggested that Ms Lambrechts be appointed as the curator *ad personam* whilst the Intervening Party, as stated before, suggested that she herself be appointed as curator *ad personam*.

[21] Given the conflict between the views of the Applicant and the Intervening Party, the curator *ad litem* recommended that it would be counterproductive to appoint the Intervening Party as it would not result in the issues being

resolved. Given the objection by the Intervening Party to Ms Lambrechts, nominated by the Applicant the curator *ad litem* recommended that Ms Patricia Lucette Lindgren ("**Ms Lindgren**") be appointed. Ms Lindgren was a director at Action on Elder Abuse (SA) which had to close its doors due to a lack of funding. She also previously served on the board of Dementia (SA). She has many years of experience working with elderly patients with mental illnesses. She charges R500 per hour for her services.

[22] I pause to mention that it is clear from the curator *ad litem*'s report that the Patient is in the fortunate position of being able to afford the services of a curator *ad personam* at the rate of R500.00 per hour. The Patient has some four immovable properties registered in his name to the value of well over R3 million as well as cash in bank accounts to the value of approximately R450 000.00. He receives rental income and a monthly pension pay-out. The income easily covers the two home loans in respect of two of these properties. It should further be borne in mind that the intention is not for the curator *ad personam* to personally take care of the Patient at R500 per hour but rather for her to investigate and arrange the best solution for him.

[23] On 28 January 2019, the curator *ad litem* filed a supplementary report following her second meeting with the Intervening Party which took place on 24 January 2019.

[24] During the course of the second meeting, the Intervening Party reported that the Patient was doing well and that he was still living with her. She further stated that a carer, Ms Vanessa Moses, now looks after him while the Intervening Party was at work. At the meeting, the Intervening Party

presented a letter prepared by a psychiatrist, Dr Chris George (“Dr George”). In this letter, Dr George concluded that, due to his expressive aphasia, the Patient was totally unable to give any information regarding himself, his health, family and financial affairs. The Intervening Party further provided the curator *ad litem* with a written response to her report which she requested the curator *ad litem* to provide to the Court. This response is indeed annexed to the supplementary report of the curator *ad litem*. In fact, some twelve documents were provided by the Intervening Party to the curator *ad litem*, including a statement that the Intervening Party declined the position as frontline supervisor at her work as she wished to focus on the Patient.

[25] In her supplementary report, the curator *ad litem* concluded that there is a conflict between the contents of the founding affidavit and the responses of the Intervening Party. According to the curator *ad litem*, the Applicant and the Intervening Party express different versions regarding past events and they agree on very little, if anything, regarding important matters pertaining to the Patient. Given that the Patient is incapable of communicating, a vulnerable adult and a person who is completely dependent on others to assist him with his affairs, the curator *ad litem* confirmed the recommendation in her first report that the Patient be declared incapable of managing his own personal affairs and that Ms Lindgren be appointed as curator *ad personam*.

[26] When the matter was called in the Third Division on Tuesday, 12 March 2019, Mr J Moses announced that he was acting for the Intervening Party and that he intended to bring an application to intervene and ultimately to oppose the appointment of the curator *ad personam*. I then ruled that the matter should

stand down until Friday, 15 March 2019 in order for the Intervening Party to prepare and file papers in support of the application. Such an application was duly delivered during the course of Thursday, 14 March 2019.

[27] However, in the founding affidavit, the Intervening Party traverses much of the same terrain as covered in her interactions with the curator *ad litem*. In this regard, the Intervening Party:

- 27.1. Emphasises her long relationship with the Patient, including her marriage to him.
- 27.2. Claims that the Applicant and his father never had a good relationship.
- 27.3. States that she invited the Patient's family to the wedding ceremony but that only his brother's stepdaughter and her friend came.
- 27.4. States that the Patient was very agitated and frustrated with his placement at the St Johannis Heim frail care centre. For this reason, he attempted to abscond from the centre on or about 15 July 2018 and was on his way to his house when he was found in Frans Conradie Road, Parow.
- 27.5. Claims that the Patient can drink coffee / tea; can eat on his own; can indicate what he likes; can dress himself; can use the toilet; walk normal and will communicate with facial and sound expressions and hand gestures.

- 27.6. Lists the documents provided to the curator *ad litem* which are the subject matter of the latter's supplementary report as well as certain further medical reports which she claims were not annexed to the curator's report even though referred to therein.
- 27.7. Explains that she has earned a decent income in her life and has acquired two properties as well as two motor vehicles in her own name. Says furthermore that she has always used her own resources to buy things necessary for the Patient.
- 27.8. Objects to the enormous cost implications of the appointment of the curator *ad personam* for the Patient.
- 27.9. Acknowledges that there are differing medical opinions regarding the condition of the Patient and asks for more time to obtain medical opinions and explore ways of improving his physical and mental health and wellbeing.
- 27.10. Claims that the Patient's biggest impediment is his inability to speak.
- 27.11. Contends that the Patient was not "*abducted*" on 8 June 2018 in order to marry him but that he willingly went with the Intervening Party and then spent a wedding night together with her at her house whereafter he returned to the frail care centre on Sunday, 10 June 2018.
- 27.12. Explains that on 15 July 2018, whilst the Patient was in her care, she left him to go to work and asked her sister and uncle to look after him. It was during this time that the Patient somehow managed to leave

the house and was found in the vicinity of a crowd of demonstrators. After the news of his disappearance broke, he was picked up by an acquaintance who saw the WhatsApp messages regarding him and this person then took him to the Westgate Mall. From there he appears to have ended up in Groote Schuur Hospital and Kingsbury Hospital, as was explained above.

[28] I have considered the affidavit of the Intervening Party as well as the annexures thereto. In my view they do not cast any doubt on the question as to whether the Patient is capable of managing his own affairs and whether there is a need for the appointment of a curator *ad personam* to assist him. As things stand, he is clearly incapable of managing his own affairs.

[29] I do not understand the Intervening Party to contend otherwise. The argument made by the Intervening Party at the hearing of the matter was rather that the Patient primarily suffers from a speech impediment which could improve with proper treatment and furthermore that it was unnecessary that a curator *ad personam* be appointed as she herself could look after the Patient at minimal cost to his estate.

[30] My findings are as follows:

30.1. In the present matter all the formal requirements for the appointment of a curator *ad personam* have been met. The curator *ad litem*'s report has been filed. In that report a convincing case is made out that the Patient is unable to manage his affairs that there is a need for the appointment of a curator *ad personam*.

- 30.2. The Master has also filed a report which does not cast any doubt on the recommendations of the curator *ad litem*, although pointing to case law which held that there must be a real need for the appointment of a curator *ad personam*.
- 30.3. Having regard in particular to the incident on 15 July 2018 where the Patient somehow left the Intervening Party's house and was later found wandering in the area and, it appears, stabbed in the hand, it is imperative that a curator *ad personam* be appointed immediately.
- 30.4. There is a dispute about whether the Patient will improve to such an extent where a curator *ad personam* is no longer necessary and there is also the dispute about who the curator should be.
- 30.5. Those matters do no need to be resolved immediately and I have made provision in the order I intend to make for these aspects to be revisited in due course. At the moment it is imperative that an independent third party act as curator *ad personam* in order to ensure that the Patient receives the best assistance possible in the circumstances.

[31] Uniform Rule 57(10) confers a wide discretion on the High Court to impose “*such terms as to it may seem meet*” when appointing a curator *ad personam*. In this regard, the Court should obviously specify the powers conferred upon the curator. But I see no reason why the Court cannot also require that the question of whether a curator remains necessary and who that curator should be, should be revisited after a certain period of time has expired. In the

present matter and given the dispute between the Applicant and the Intervening Party I consider it necessary that these aspects be revisited in a few months from now. I have to this end incorporated a paragraph into the order to be made which requires the curator *ad personam* to compile a report to the curator *ad litem* and for the latter to re-enrol the matter in October 2019 for reconsideration. In this regard, I have further provided for the Intervening Party to be furnished with a copy of the curator *ad personam*'s report for her comments, which comments are also to be considered in October 2019 by this Court.

[32] It would be inappropriate for this matter to be reconsidered in the Third Division in and amongst many other unopposed matters. The duty Judge simply does not have sufficient time to give proper consideration to the matter if opposed, which is highly likely to be the case. For this reason I have decided to refer the reconsideration of the appointment of the curator *ad personam* as well as the identity of that curator to the Fourth Division for determination. The parties may approach me once they have agreed on a date for the reconsideration of the matter in the Fourth Division and obtained the necessary compliance certificate. I shall then refer the issue set out in paragraph 4 below for hearing on the semi-urgent roll on the agreed date.

[33] In the result, the following orders are made:

1. The application for intervention is dismissed with no order as to costs.
2. For and until the matter is reconsidered by the Court in terms of this order, and until the Court on reconsideration reaches a different conclusion:

- 2.1 the Patient, Mr R W S W, is declared incapable of managing his personal affairs; and
- 2.2 Patricia Lucette Lindgren is appointed as curator *ad personam* to the Patient with the powers as set at in annexure “B” hereto and subject to her not charging more than R500.00 per hour for her work.
3. The costs of the application for the appointment of a curator *ad personam*, as between attorney and client, including the costs of the application for the appointment and the fees of the curator *ad litem*, is to be paid out of the estate of R W S W.
4. The issue of whether a curator *ad personam* remains necessary for the Patient as well as the issue of who the curator *ad personam* should ultimately be, is referred to the semi-urgent roll in the Fourth Division for reconsideration on a date suitable to the Applicant, the curator *ad litem* and the Intervening Party in terms of the following timetable:
- 4.1 The curator *ad personam* shall compile a report to the curator *ad litem* by no later than 31 May 2019;
- 4.2 The Intervening Party shall be entitled to comment on that report by no later than 31 July 2019;
- 4.3 The Applicant shall file his heads of argument no later than 10 days before the hearing; and

- 4.4 The Intervening Party shall file her heads of argument no later than 5 days before the hearing.



H J DE WAAL AJ
Acting Judge of the High Court

Cape Town
28 March 2019

APPEARANCES

Applicant's counsel: Adv C Bosman

Applicant's attorneys: Visagie Vos Attorneys (Goodwood)

Intervening Party's counsel: Mr J Moses

Intervening Party's attorneys: Bagraims Attorneys (Gardens, Cape Town)

Curator *ad litem*: Ms G Hayward

Applicant's attorneys: Visagie Vos Attorneys (Goodwood)