THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION)

JUDGMENT

Case No: 19238/2018

In the ex parte application of

SANDY DENNIS ROBERT VALENTINO ZANELLO	**APPLICANT**

for the substitution of the curator bonis of

ROSINA ZANELLO	**THE PATIENT**

Coram: Rogers J

Heard: 26 & 28 June 2019

Delivered: 10 July 2019

JUDGMENT

Rogers J

[1] The above application for substitution of a curator bonis came before me in Third Division on Wednesday 26 June 2019. It was uncontentious that the curator appointed by this court on 27 March 2019, Mr P F Theron, should be replaced and that Mr Johan Swart was a suitable substitute. An order to that effect was made.

[2] The contentious issue is the costs of the substitution application. The applicant (one of the patient's sons), supported by the curator ad litem, Mr S R Kotze, submitted that these costs should be paid by the outgoing curator, Mr Theron. The latter opposed this request. The matter stood down to Friday 28 June 2019 to allow for the filing of opposing and replying papers. Although it occurred to me that Mr Theron should have been cited as a respondent if the applicant sought relief against him, it seemed to me undesirable to deal with the matter on such a technical basis, particularly since this course was only likely to cause delay.

[3] The circumstances of the present case are unusual and unlikely to arise again. The order appointing Mr Kotze as curator ad litem was made on 24 October 2018. In his report of 18 December 2018 Mr Kotze identified Mr Theron as a suitable candidate for appointment as the patient's curator bonis. Mr Theron was at that time a director of the firm Heyns & Partners. He signed a consent on 16 January 2019. The application for the declaration in respect of the patient and for Mr Theron's appointment was only brought in late March 2019. As I have said, the order for Mr Theron's appointment followed on 27 March 2019.

[4] In the meantime there had been ructions at Heyns & Partners. Mr Theron says that in February 2019 various disputes which had been simmering between the five directors reached boiling point, to such a degree that each director appointed his or her own legal representative. Mr Theron appointed his lawyer on 12 February. Channels of communication were 'severely strained', conducted mainly through the legal representatives. On 15 February Mr Theron resigned, and was followed by two others, leaving the firm with only two directors. The disputes between the directors and former directors have not yet been resolved and are the subject of investigation by the Legal Practice Council.

[5] Mr Theron states that when he signed his consent on 16 January he did not envisage leaving the firm. He has signed no consents since his departure.

[6] After making representations to the Legal Practice Council, Mr Theron informed that body that he no longer intended to practise as an attorney, and his name was duly moved from the roll of practising attorneys to the roll of non-practising attorneys.

[7] Mr Theron says that when he left the firm he no longer had access to any of his files or to his Heyns email account. Any queries relating to matters with which he had been concerned would have been dealt with by the two remaining directors. Aware that he had been appointed as curator in various estates, he instructed his lawyer to write to the firm on 28 February to seek details and court orders relating to such matters so that he could take the appropriate steps to deal with them. Two months later, on 29 April, his lawyer received a response from the firm attaching a list of such appointments. The firm stated that in their submission Mr Theron would have to be substituted. They proposed that he voluntarily resign and that one of the remaining directors be appointed as curator bonis in his stead.

[8] The attached list consisted of 37 estates in which Mr Theron had been appointed curator bonis, identified by name and the Master's reference number. To judge by the reference numbers, these appointments were made over a period of many years (1994 to 2018). Most recently there were three appointments in 2015, six in 2016, two in 2017 and five in 2018. At the end of this list, after the 37 estates so identified, appeared the name 'Zanello, R' with a question-mark in the column recording the Master's reference numbers.

[9] Since Mr Theron had no other information concerning these estates, he applied to the firm for fuller particulars but has not received a reply.

[10] While this was going on, and as I have mentioned, Mr Theron was on 27 March appointed as a curator in the present matter. According to the applicant's affidavit in the substitution application, his attorneys informed Mr Theron of the granting of the order by way of an email of the same date to his Heyns email address but received no reply. The reason for this, we now know, is that Mr Theron had left the firm. On the evidence before me I must find that the firm did not pass on the email to him.

[11] When the issued court order came to hand on 2 April 2019, the applicant's attorney phoned Mr Theron on the Heyns telephone line but was told that he had left the firm and that another director of the firm had taken over his matters. When the attorney spoke with the director in question to obtain Mr Theron's contact details, the latter informed her that the firm did not have his contact details and that she doubted Mr Theron would return to practice.

[12] The applicant's attorney confirmed the discussion in a letter to the director in question the following day and asked the latter to explain on what basis she thought it possible for her to be substituted as curator upon Mr Theron's resignation. On 9 April the applicant's attorney emailed the director again,

pressing for a reply, which she received the same day. In the reply the firm stated that Mr Theron's only involvement in the matter had been to sign the consent form. No file had been opened and there was no way in which any member of the firm could have ascertained that he had signed a consent. She confirmed having received the applicant's attorneys' letter of 27 March but by then the appointment had been made so there was nothing the firm could have done to prevent it.

[13] Mr Theron expresses surprise that the director in question should have told the applicant's attorney that the firm did not have his contact information. He had been a director of the firm for more than 15 years, and the firm had all his contact information, including his telephone numbers and residential address. The remaining directors knew, too, who his lawyer was. Furthermore Mr Theron's father and sister are still employed at the firm's Goodwood branch.

[14] The applicant's attorney managed to get Mr Theron's mobile number from a colleague and made various attempts to reach him but received no answer. She states that she also left two detailed voice messages for him on 16 and 17 April 2019 to which she received no response. In answer to these allegations, Mr Theron says that he received no missed calls or voice messages from the applicant's attorney on his cellphone on the dates in question. He has had his current phone for some years. He has never enabled his voice message facility so nobody could have left a voice message for him on that phone. He pointed out that the applicant's affidavit did not identify the number which the applicant's attorney had dialled. Since the applicant's attorney did not in her replying affidavit supply the number she used, I must find on the papers that she had the wrong cellphone number.

[15] Be that as it may, the applicant was then advised to bring the substitution application. A tracing agency was appointed to establish Mr Theron's residential

address so that the application could be served on him. On 18 June 2016 the application was so served. An attachment to the affidavit in support of the substitution application reflects that the tracing agency charged R600 for its report.

[16] In the light of what has been set out above, one must infer that the inclusion of the name 'Zanello' in the list sent by the firm to Mr Theron's lawyer on 29 April was based on the letters the firm received from the applicant's attorneys on and after 27 March. According to the Heyns letter of 9 April, there would have been no other documents in the firm's possession to indicate that Mr Theron might have consented to act or been appointed as a curator to Mrs Zanello. It is most regrettable that the firm did not pass on to Mr Theron the communications it received from the applicant's attorneys.

[17] Although the substitution application was presented as one for the removal of Mr Theron, it seems to me that he did not at any time become the patient's curator bonis. Although there was a court order appointing him, he was not aware of the order and did not apply to the Master for letters of curatorship in terms of s 72 of the Administration of Estates Act 66 of 1965. In terms of s 71 he could not administer the patient's estate without such letters.

[18] The applicant's counsel argued that the general rule was that an outgoing curator bonis should pay the costs of his or her substitution. I do not think that such a general rule can be laid down or that it is supported by authority (the cases to which I was referred were *Ex parte Bate* 1928 CPD 186; *Ex parte Place* 1930 EDL 149; *Ex parte Smuts* 1935 TPD 23; *Ex parte African Board of Executors and Trust Co Ltd* 1939 TPD 37; and *The Master v White* 1946 CPD 24). The overriding principle is that costs are in the discretion of the court, such discretion to be exercised judicially with reference to all relevant circumstances. In

accordance with that principle, courts have sometimes held that it would be just for a curator who wishes to be relieved of his duties to pay the cost of substitution out of his remuneration (and normally it is the outgoing curator who is the applicant for substitution). Whether such an order is just would depend on the period for which the curator has held office and the extent of his or her remuneration. In other cases, where the appointment has endured for a relatively short period or the remuneration has been low in relation to the burdens imposed by the office, courts have expressed the view that the costs of substitution should come from the ward's estate, at least where there are sound reasons for the outgoing curator to seek substitution. Misconduct on the part of the outgoing curator will naturally be a very relevant consideration.

[19] In the present case Mr Theron has earned no remuneration under the court order appointing him as curator. As I have said, he did not even enter upon the curatorship. In the circumstances, and in the absence of relevant misconduct, I do not think it would be just for him to pay the costs of the substitution.

[20] The submissions on behalf of the applicant and by the curator ad litem at times appeared to rest on the notion that I should disbelieve Mr Theron when he says that he had no idea of leaving the firm at the time he signed the consent. In that regard I need only say that I have no grounds for rejecting what an officer of this court has said under oath and that in accordance with the usual rule in motion proceedings I cannot reject his version out of hand.

[21] If Mr Theron, when he left the firm on 15 February, recalled that he had signed a consent relating to Mrs Zanello, and recalled the identity of the curator ad litem or of the applicant's attorneys, it would have been reasonable to expect of him to contact Mr Kotze or the applicant's attorneys to inform them that he was no longer able to accept the appointment. Since the application for his

appointment was only made in the latter part of March, such a communication would have enabled the applicant to propose a different curator to the court, rendering any later substitution unnecessary.

[22] Mr Theron does not in terms state that he did not recall these matters, but the whole tenor of his affidavit is inconsistent with his having done so. I cannot say that an attorney in his position would definitely have recalled the relevant details a month after signing the consent. He was a senior practitioner dealing, I may suppose, with many matters. The disputes among the directors would also have occupied his mind. I think he acted reasonably by seeking particulars from the remaining directors by way of the letter his lawyer sent to the firm at the end of February. He only received a response to that enquiry at the end of April. By then the order appointing him had already been made, and the substitution application could not be avoided.

[23] Mr Theron has not explained the two-month delay between the enquiry from his lawyer and the firm's reply. In the light of what he says elsewhere in the affidavit, one gains the impression that he attributes this to a lack of cooperation from the remaining directors. I do not know whether, in the intervening two-month period, his lawyer pressed the firm for a reply. If one assumes that his lawyer did not do so, and that such action would have elicited an earlier response, such response might have come before or after 27 March. If it was before 27 March, the list provided by the firm would not have included the name 'Zanello', because before 27 March there was no file or source from which the firm could have established that Mr Theron had signed a consent. Accordingly, a reply before 27 March would not have reminded Mr Theron of the Zanello case. If the firm had replied to Mr Theron's enquiry on or after 27 March, the need for a substitution application would not have been avoided.

[24] What should Mr Theron have done once he received the list containing the name of ‘Zanello’? I think that this would or should have caused him to remember signing a consent in respect of such a patient. The name is an unusual one in this country. The curator ad litem’s report of 18 December 2018 indicates that Mr Kotze had discussed the proposed appointment with Mr Theron. The curator had tried without success to find a suitable Italian-speaking person to accept the appointment, so it is probable that this aspect was mentioned during the discussion.

[25] If Mr Theron did not remember the identity of the curator ad litem or of the applicant’s attorneys, and wished to find out what had happened in respect of the matter, an enquiry to the Master’s office may have drawn a blank because the Master had not yet issued letters of curatorship to anyone. On the other hand, it would have been possible to establish from this court’s daily rolls whether a curatorship application in respect of a person with the name Zanello had served before court. The rolls are published on SAFLII. If Mr Theron had entered the name ‘Zanello’ as a search term on the SAFLII website, he would have immediately learnt that a curator bonis application with the name ‘Zanello’ and with case number 19238/2018 served before court on 27 March. (I have done the exercise myself.) He could then have inspected the court file.

[26] In this day and age, practitioners should be aware of the SAFLII website and of the information obtainable there. Mr Theron can thus be criticised for not taking the steps which would have enabled him to make contact with the applicant’s attorneys before they brought the substitution application. But what with this have achieved, practically? A substitution application would still have been needed. The fruitless telephone calls which the applicant’s attorney made in early April would not have been avoided. At most, so it seems to me, such initiative from Mr Theron would have made it unnecessary for the applicant’s

attorneys to engage tracing agents or to have formal service effected on him by the sheriff. The tracing agents charged R600 and the sheriff, according to the return of service in the file, charged R925,75.

[27] Mr Theron can perhaps also be criticised for not having filed his affidavit promptly after service of the application on him. On the other hand, he did take steps to try to resolve the question of costs. Without admission of liability, he tendered R5000 which he later increased to R7500. His counsel repeated the tender of R7500, saying that his client would contribute this sum even if the court found that there were no grounds to order Mr Theron to pay costs. I do not know the precise timeline of these offers, but I think – given the unfortunate circumstances which had occurred – that it was Mr Theron's duty to ensure that his affidavit was placed before court in sufficient time that the question of costs could be resolved without a postponement.

[28] In short, had Mr Theron exerted himself reasonably, all that would have been needed was an unopposed application for substitution which would have been disposed of on 26 June without the need for service by the sheriff. Instead, the applicant and his advisors, on the strength of the information available to them at the time, formed the view, not unreasonably, that Mr Theron had been at fault and that he should pay the costs of the application. Because Mr Theron did not file his affidavit by 26 June, they did not know at that time what his explanation was. This necessitated a postponement so that costs could be dealt with.

[29] But was it reasonably necessary to have a full opposed hearing on the question of costs? In my view, once the applicant and his advisors read Mr Theron's affidavit, they should not have persisted in pressing for costs beyond the amount of R7500 which he had tendered, since the only additional costs caused by Mr Theron's failures were the costs of the tracing agent, of service by the sheriff

and of a second formal appearance to deal with costs on an unopposed basis. I would expect his tender of R7500 to be in excess of such costs. The applicant and the curator ad litem in truth pursued the question of costs on 28 June because they considered that Mr Theron was responsible for the fact that a substitution application had been necessary at all, but for reasons I have explained I disagree.

[30] Mr Theron's counsel submitted that in any event the applicant had pursued an unnecessarily expensive course by applying to court for substitution. He submitted that in terms of s 73(1)(*c*) read with s 18(1)(*b*) of the Act the Master could have been approached to make the substitution. There is authority that substitution under that section is permissible in the case of a curator appointed by order of court (*Ex parte Ganga* 1979 (1) SA 586 (N)). The Master would have needed to publish a notice in the *Gazette*. There is no reason to think that anyone would, in response to the notice, have raised objection to the proposed substitution. The applicant or his attorneys could have transmitted the notice to his brother, who lives in Australia. On the date appointed in the notice the applicant's attorney could have attended before the Master and, in the absence of any other proposal, the Master would have approved Mr Swart's appointment.

[31] I think this argument has merit and is a further reason why I should not mulct Mr Theron in costs above the sum he has tendered. In regard to the balance of the costs, I have no reason to doubt that the applicant has at all times acted in what he conceived to be the best interests of his mother. The costs exceeding those tendered by Mr Theron should thus come from the patient's estate, and should not be ordered against the applicant personally.

[32] I make the following order:

(a) In accordance with his tender, Mr Pieter François Theron shall, within one week from the date of this order, pay to the applicant's attorneys an amount of

R7500 in respect of the costs of substituting Mr Johan Swart in his stead as curator bonis.

(b) Save as aforesaid, the costs occasioned by such substitution, including the appearances on 26 and 28 June 2019, shall be borne by the patient's estate.

(c) No order is made in relation to Mr Theron's own costs.

Judge O L Rogers

APPEARANCES

For Applicant	Ms N van Zyl Instructed by Shepstone & Wylie 18th Floor, 2 Long Street Cape Town
For Mr P F Theron	Mr L J Smit Instructed by De Klerk & Van Gend Inc 3rd Floor, Absa Bank Building 132 Adderley Street Cape Town
Curator ad litem of the Patient	Mr S R Kotze