

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, PORT ELIZABETH)

CASE NO. 2422/2008

Ex Parte:

LEONARD ARTHUR FUTTER

(the Patient)

In re:

ALISTER JAMES WALTER

APPLICANT

and

ROAD ACCIDENT FUND

FIRST RESPONDENT

LEONARD ARTHUR FUTTER

SECOND RESPONDENT

JUDGMENT

D VAN ZYL, J:

- [1] This is an application for the appointment of a *curator ad litem* to Leonard Arthur Futter (**the second respondent**) as a preliminary step to the appointment of a *curator bonis* to take control of his assets and affairs. The applicant is an attorney who represented the second respondent in legal proceedings against the Road Accident Fund (**The Fund**) for the recovery of damages sustained by him as a

result of injuries he sustained in a motor cycle collision in May 2006. The action was concluded successfully in favour of the second respondent in December 2011 when it was settled and an amount of 3.9 million rand was awarded to him as compensation. The monies were paid into the applicant's trust account where it still is.

[2] In February 2012 the applicant launched the present application under the same case number. The application is divided into two parts. The relief sought at the hearing of the matter is formulated as follows in the notice of motion.

"1. Appointing Advocate Charl van Rooyen as *curator ad litem* to Leonard Arthur Futter, for the purposes of reporting to this Honourable Court on whether a *curator bonis* ought to be appointed to the estate of the said Leonard Arthur Futter.

2. Postponing the application *sine die*, to be reinstated by the Applicant for the purpose of receiving the reports of the *curator ad litem* and the Master of the Honourable Court, and for the granting of the further relief set out hereunder.

3. Ordering that the proceeds of the patient's action against the respondent shall be held in trust by the applicant pending the finalisation of both parts of this application."

[3] The issue for consideration at this stage is therefore limited to the question whether a *curator ad litem* should be appointed to the second respondent. In the application the Fund is cited as the respondent and the second respondent is referred to therein as **"the patient"**. At the hearing of the matter the second respondent sought leave to intervene in the application and to be joined as a party thereto. The application was not opposed and he was added as a respondent.

[4] It is common cause that the second respondent sustained a severe head injury in the accident. According to the medico-legal reports placed before the Court in his damages action, the injury resulted in the second respondent suffering *orbito-frontal dementia* with associated organic mood disorder. Relying on three of the reports placed before the Court in the damages action, and after having **"briefly consulted"** with the second respondent, the applicant expresses the view in his founding affidavit that he is **"not satisfied**

that the patient is capable of managing the funds” awarded to him. As the second respondent was compensated on the basis that he no longer has an income earning capacity, the applicant is of the view that a *curator bonis* should be appointed to manage the second respondent’s estate, so as to protect the monies awarded to him by the Court.

- [5] The parties are, in my view correctly, *ad idem* that the application is regulated by the provisions of Rule 57 of the Uniform Rules of the High Court. Subrule (1) of Rule 57 provides that “any person desirous of making application to the court for an order declaring another person (referred to in the rule as “the patient”) to be of unsound mind and as such incapable of managing his affairs, and for appointing a curator to the person or property of such patient, shall in the first instance apply to the court for the appointment of a curator *ad litem* to such patient”. In the present matter the applicant does not seek an order declaring the second respondent to be of unsound mind. The order sought in the second part of the application is that the second respondent be declared to be incapable of managing his own affairs. The basis for this order is the contention that the applicant is suffering from a mental

disability which renders him incapable of managing his own affairs. It is accordingly an application as envisaged in sub-rule (13) of Rule 57 which provides that **“Save to such extent as the court may on application otherwise direct, the provisions of subrules (1) to (11) shall, *mutatis mutandis*, apply to every application for the appointment of a *curator bonis* to any person on the ground that he is by reason of some disability, mental or physical, incapable of managing his own affairs.”**

- [6] Rule 57(2) *inter alia* requires the applicant to “**fully**” set out the following: the grounds upon which he claims to have *locus standi* to bring the application; The patient’s age and sex, particulars and information of the patient’s means and his general state of physical health; and, in the context of the present matter, facts and circumstances relied on to show that the patient is of unsound mind and is incapable of managing his affairs. (paragraphs (a), (c) and (e) of subrule (2).) In terms of subrule (3)(a), the application should also as far as possible be supported by an affidavit from at least one person to whom the patient is well known and setting out facts and information which are within the deponent’s own knowledge concerning the patient’s mental condition. Subrule (4)

provides that with the leave of the Court any of the requirements of Rule 57 may be dispensed with **“on good cause shown, and by reason of urgency, special circumstances or otherwise.”** This subrule further authorises the Court hearing an application as envisaged in subrule (1), to appoint the person suggested, or any other suitable person as *curator ad litem*, or to dismiss the application or **“make such further or other order thereon as to it may seem meet.”**

- [7] Both respondents are opposing the application for the appointment of a *curator ad litem*. The second respondent filed an answering affidavit to which the applicant replied. The Fund's opposition is essentially in relation to the applicant's request that the Fund, on the basis of having issued an undertaking in terms of section 17 of the Road Accident Fund Act No. 56 of 1996 **(the Act)** in the damages action, should pay the costs of the application. The second respondent in turn denies that he is incapable of managing his own affairs and that there is any need to appoint a *curator ad litem* or *bonisto* him as contended by the applicant. His opposition to the appointment of a *curator ad litem* is essentially premised on the contention that the applicant in his founding affidavit has failed to establish a case for the relief sought. The submission is that the

applicant has failed to show that he has *locus standi* to bring the application, and that the application does not comply with the requirements of rule 57.

- [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) at 534C-E, where it was held that the sufficiency of the interest is “altyd afhanklik van die besondere feite van elke afsonderlike geval, en geen vaste of algemeen geldende reëls kan neergelê word vir die beantwoording van die vraag nie. . .Vorige beslissings kan behulp same algemene riglyne vir bepaalde soort gevalle aandui, maar meestal het dit weinig nut om die besondere feite van een geval te vergelyk met dié van 'n ander.” 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 therefor rests upon the applicant (see *Mars Incorporated v Candy World (Pty) Ltd* 1991(1) SA 567(A) at 575H – I and *Kommissaris van Binnelandse*

Inkomste v Van der Heever 1999(3) SA 1051 (SCA) at para [10].), and it is an *onus* in the true sense. (*Mars Incorporated vs Candy World Pty Ltd* supra at 575 I and *Gross and Others v Pentz* supra at 632 E).

- [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 recognised in the many principles forming part of our legal tradition. Another consideration effecting the issue of *locus standi* in the context of the present matter is that an order placing someone under curatorship effects the status of that person and involves a serious encroachment upon the personal freedom and the rights 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 to not only 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. At the hearing of the matter Counsel for the Applicant sought to place reliance on the fact that the applicant acted as the second respondent's attorney in the action against the Fund and that he may potentially be exposed to litigation in the future should he allow the second respondent to squander the monies awarded to him in the damages action as a result of his inability to manage his financial affairs. There is in my view no merit in this argument. Formulated in this manner, the applicant's interest in the relief claimed is not current but rather hypothetical.
- “ . . . andersins word daar ook gesê, na gelang van die samehang van die feite, dat daar 'n werklike belang moet wees (nie abstrak of akademies nie), of dat dit 'n teenswoordige belang moet wees (nie hipoteties nie)”**

(Per Botha JA in *Jacobs en 'n Ander v Waks en Andere* supra at 534B.).

[11] Further, from a reading of the case law 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 their 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 (see Erasmus **Superior Court Practice** at B1 – 393.)

[13] An attorney – client relationship cannot, as contended on behalf of the applicant in argument, *per se* create a sufficiently close relationship to confer *locus standi* on the attorney concerned. It is subject to the circumstances of the particular case, and factors such as the unavailability or unwillingness of the patient's next of kin to act, the nature and extent of his relationship with the patient, and its duration, that are determinative of the issue of *locus standi*. These aspects must be fully dealt with in the founding affidavit, particularly where, as in the instant matter, it is evident from the documentation which the applicant incorporated by reference thereto into his application, that the second respondent is married and has next of kin.

[14] The applicant failed to address any of these matters in his founding affidavit. He attempted to deal therewith in his replying affidavit only after it was raised by the second respondent in his answering affidavit. According to the applicant in reply the second respondent instructed him, prior to the finalisation of the action, to

invest any monies he may receive from the Fund until such time as a *curator bonis* is appointed to “**administer and protect**” the award. He states that the second respondent’s wife agreed to bring the application. However, after the action was finalised, she advised the applicant that she was no longer willing to do so. As he does not know anyone else who is close to the second respondent, the applicant says that he had no choice but to bring the application himself.

- [15] This does not assist the applicant. Not only does he fail to give any particulars of the duration and intimacy of his relationship with the second respondent, he does not state what steps, if any, he took to find any other person who may be related to the second respondent and / or who is sufficiently close to him and willing to bring the application. To simply state that he does not know of such a person is not enough. Further, as correctly pointed out by Counsel for the second respondent, an applicant in motion proceedings is bound to justify his claims and to make out his case in his founding affidavit. (See *inter alia Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger* 1976(2) SA 701(D) at

704F – G). He may therefore not introduce new matter or make out a case in his replying affidavit. (*Director of Hospital Services v Mistry* 1979(1) SA 626(A) at 635G – 636B and *Bowman NO v De Souza Roldao* 1988(4) SA 326(T) at 327D – H.). Where he does so, the Court may either ignore it or strike it out. (*Titty's Bar and Bottle Store (Pty) Ltd and others v ABC Garage (Pty) Ltd* 1974(4) SA 362 (T) at 368H). While the Court has an overriding discretion to allow an applicant to introduce new matter in his replying affidavit, the applicant must provide an adequate and acceptable explanation for its omission from the founding affidavit. Such an explanation is absent in the present matter.

- [16] Counsel for the second respondent further submitted that the application is defective in that it fails to comply with most of the remainder of the requirements laid down in subrules (2) and (3) of Rule 57. It does not contain any information relating to the applicant's financial position as required by subrule (2)(c), other than that he was awarded an amount of money by the Court as compensation in the action. It was further submitted that the applicant has failed to fully deal with the physical health of the

applicant in his founding affidavit and did not set out the facts and circumstances relied upon to show that the second respondent is by reason of a mental defect incapable of managing his own affairs. Counsel for the applicant responded by submitting that although the applicant may not have set the required information out in his founding affidavit in any detail, he has sufficiently complied with Rule 57 by making reference in his founding affidavit to, and relying on three of the medico-legal reports placed before the Court in the damages action. The required information, so it was argued, appear from these reports. In addition, the persons who compiled the said reports deposed to affidavits in which they support the appointment of a *curator bonis* to the applicant.

- [17] The difficulty with this submission is that although an applicant in motion proceeding is not debarred from incorporating the contents of documentation into his affidavit, he is required to do so by identifying the portions thereof on which reliance is placed, and indicating the case which is sought to be made out on the strength thereof. As stated by Joffe J in *Swissborough Diamond Mines v Government of the Republic of South Africa* 1999(2) SA 279(T) at

323G to 324G, affidavits in motion proceedings serve not only to place evidence before the Court, but also to define the issues. The parties must know the case they are called upon to meet and in respect of which they must adduce evidence in their affidavits. **“Regard being had to the function of affidavits, it is not open to an applicant or a respondent to merely annexe to its affidavit documentation and to request the Court to have regard to it.”** (*Swissborough* supra at 324F.) These comments are of particular relevance to an application in terms of Rule 57 where the applicant is required by the Rule itself to give full particularity of the facts and circumstances on which reliance is placed.

- [18] The more fundamental question which however in my view arises on the facts of the present matter is whether the applicant has, on the evidence on which he places reliance, established a case for the appointment of a *curator ad litem*. The procedure in Rule 57 of appointing a *curator ad litem* as a preliminary step to the appointment of a *curator bonis*, has its origin in the practice which developed and was followed in the different High Courts (See for example *Ex Parte Hartzenberg* 1928 CPD 385; *Ex Parte Stewart* –

Wynne: In re Mason 1944 EDL 176 and *Ex Parte Estate van Rensburg* 1948(2) SA 753(O).) An overview of the cases on the subject however shows that the appointment of a *curator ad litem* is not to be regarded as an inflexible rule, or simply as a procedural step in the process of appointing a *curator bonis* to someone's estate. In *Ex Parte Kloppe: In Re Kloppe* 1961(3) SA 803(T) at page 805H the Court held that the *onus* is on the applicant in proceedings in terms of Rule 57 to satisfy the Court on a balance of probabilities that the appointment of a *curator ad litem* to the patient is a necessary step. (Also *Delius v Delius* 1960(1) SA 270(N) at 272E.)

- [19] This is in my view the correct approach. The person appointed as *curator ad litem* as envisaged in Rule 57, is not appointed to simply act as *amicus curiae* to assist the Court in determining whether the patient is capable or incapable of managing his own affairs, and whether the proposed *curator bonis* is a fit and proper person to administer the estate of the patient. He is appointed as *curator ad litem* to the patient, to act on his behalf and to represent his interests in the litigation pertaining to the appointment of a

curator bonis to manage his estate. The appointment itself reflects negatively on the status of the patient and his legal capacity, not only to manage his own affairs, but also to litigate on his own. In *Ex Parte Kotze* 1955(1) SA 665(C), Herbstein J quite correctly said at page 666 G - H that the appointment of a *curator ad litem* constitutes an interference with the right of an adult person to control his affairs, and that before such an appointment is made, the Court “. . . **must be satisfied, on proper enquiry; that the mental condition of that person is such as to justify interference of this kind.**”(See also du Bois at al **Wille’s Principles of South African Law** 9th ed at page 380.) In *Delius v Delius*^{supra}, where the issue was whether a *curator ad litem* should first be appointed in an application to declare someone a prodigal and for a *curator bonis* to be appointed to her estate, the Court declared that “**Generally speaking a *curator ad litem* should not be appointed unless there is reason to think that the person concerned does not understand the nature and effect of the proceedings.**” (At page 273D). These remarks are equally apposite in proceedings for the appointment of a *curator bonis* in terms of Rule 57.

[20] Whether or not it is necessary to appoint a *curator ad litem* as

envisaged in subrule (1) must accordingly be determined on the facts and circumstances of each individual case. There are in my view at least two considerations relevant to this enquiry. The first relates to the sufficiency of the evidence on which the applicant places reliance in support of the application for the appointment of a *curator bonis*. The second consideration, which is pertinently raised by the facts of the present matter, relates to the ability of the patient to understand the nature and consequences of the Rule 57 proceedings. The relevance of the first consideration is the following: Having regard to the duties of the *curator ad litem* (for which see Joffe et al **High Court Motion Procedure: A Practical Guide** at page 1-97 to 1-98), the aim of appointing a *curator ad litem* to the patient is to facilitate the second part of the proceedings, namely the appointment of a *curator bonis* to the estate of the patient. If there is therefore insufficient evidence at the first stage of the proceedings to support a finding that the patient is suffering, as the allegation is in this matter, from a mental defect which renders him incapable of managing his own affairs, no purpose would be served by the appointment of a *curator ad litem*, thereby rendering it unnecessary. Applied to the facts of the present matter, this accordingly requires an

examination of the evidence on which the applicant relies in support of his contention that a *curator bonis* should be appointed to manage the second respondent's estate.

[21] As stated earlier, in his founding affidavit the applicant placed reliance on three medico-legal reports filed in the damages action in support of his contention that the second respondent is incapable of managing his own affairs. In his report dated June 2011, the psychiatrist Crafford does not state that the second respondent is incapable of managing his own affairs. He simply states, without providing any factual basis therefor, that the second respondent would benefit from the appointment of a *curator bonis* and *ad litem*. In an affidavit annexed to the present application the said psychiatrist simply added that he is of the opinion that a *curator bonis* be appointed to assist the second respondent in the management of the funds awarded to him. It quite clearly amounts to nothing more than an opinion without disclosing the factual basis for it as required by sub-rule (2)(e).

[22] The medico-legal report provided by Eaton, the clinical psychologist in October 2008 equally does not assist the applicant. In fact the opposite of what the applicant contends. It is said in the report that **“The examiner would not feel it appropriate to take away his (the second respondent’s) right to make his own financial decisions, because he is regarded to have the insight and wisdom to recognise the extent of his difficulties . . .”** and **“Therefore the examiner would not support the appointment of a *curator bonis* in this case.”** The said clinical psychologist subsequently in April 2011 had a change of heart and in a letter to the applicant recommended that a *curator bonis* be appointed to the second respondent. This recommendation is stated to have been made on the basis of him having read **“ . . . additional medico-legal reports that were recently provided . . .”** Which reports these are, is not stated. As in the case of *Crafford*, Eaton’s affidavit filed in support of the application does not provide any assistance. He simply states, without any factual basis, that in his opinion a *curator* should be appointed to assist the second respondent.

[23] The psychologist Holmes in turn in his report dated June 2009

simply deferred to the psychiatrist and the clinical psychologist regarding the placing of the second respondent under curatorship. At the time when this report was made, the psychiatrist stated that the appointment of a *curator bonis* was not called for, while the clinical psychologist merely postulated that the second respondent could benefit from such an appointment. The statement of Holmes in his report that **“there is reason to believe that he (the second respondent) would be at significant risk . . .”** with regard to managing his own financial affairs, is not motivated and can not assist the applicant.

- [24] Not only can the reports relied upon hardly be said to be based on **“recent”** examinations of the second respondent as required by subrule (3), they do not in my view support a finding that the second respondent is by reason of a mental disability incapable of managing his own affairs as envisaged in subrule (13). The applicant himself simply states in his founding affidavit that he **“briefly consulted with the plaintiff in respect of the proposed utilization of the funds, and bearing in mind the opinion of the expert witnesses referred to above, I cannot be satisfied that the patient is capable of**

managing the funds.”When this “**brief**” consultation took place and what it was about is not stated. This statement similarly amounts to nothing more than an opinion without stating the factual basis therefor.

[25] To make matters worse, in his answering affidavit the second respondent directed the Court’s attention to a report which was prepared by a neurosurgeon, Dr Keeley who examined him in January 2009 wherein the following is stated: **“He(the second respondent) is not an invalid. He is carrying on a successful business albeit with significant restrictions and he may always be in a position to care for himself and for his family. He is quite capable of understanding the nuances of litigation and of critically and judiciously dealing with his financial situation.”** Keeley was clearly of the view at the time he compiled his report that there was no need for the second respondent to be assisted, either in the pending litigation in the damages action, or insofar as his financial affairs are concerned. I agree with Counsel for the second respondent that there was a duty on the applicant to pertinently draw the attention of the Court in his founding affidavit to the opinion expressed in this report. An

application in terms of Rule 57 is brought *ex parte*(subrule 21) and the utmost good faith is consequently required. The applicant's explanation for his failure to do so, namely that the said report forms part of the bundle of documents before the Court, is simply unacceptable.

[25]

[26] Counsel for the applicant in argument dealt with the shortcomings in the evidence relating to the second respondent's ability to manage his own affairs by making the submission that it is not necessary in an application for the preliminary appointment of a *curator ad litem* in Rule 57 proceedings for the applicant to provide the same particularity as would be required at the second stage, when the Court would be asked to conclude and find that the second respondent is incapable of managing his own affairs and to appoint a *curator bonis* to manage his estate. Relying on the decision in *Ex Parte Klopper: In re Kloppersupra* Counsel for the second respondent argued on the other hand that it is not open to

an applicant during the first stage of proceedings in terms of Rule 57 to merely produce, what is no more than a skeleton case, with the aim of supplementing it with what may be unearthed by the *curator ad litem* after his appointment. At page 805C to D of that judgment Galgut J rejected the argument that with the appointment of a *curator ad litem* a judicial enquiry is envisaged into the state of the patient's capacity to take care of himself or his property with a view of protecting him against loss, and that it is therefore only necessary to produce enough evidence at the preliminary stage to cause the Court **"to believe that it might be necessary for the protection of the respondent to appoint a *curator* . . ."**

- [27] For two reasons I agree with this finding: The first is that it is clearly not what is envisaged by Rule 57 if one has regard to the requirements thereof. As stated earlier, the applicant is required to set forth **"fully"** the facts and circumstances relied on to show that the patient is by reason of a mental defect incapable of managing his affairs (subrule (2)(e)). It must be supported by the affidavit of at least two medical practitioners **"stating all such facts as were observed by them at such examinations in regard to such condition, the opinions found by them in regard to the nature, extent and**

probable duration of any mental disorder or defect observed and their reasons for the same and whether the patient is in their opinion incapable of managing his affairs.”(subrule (3)(b)) (emphasis mine).

Secondly, as stated in paragraph [19] above, the appointment of a *curator* constitutes an interference with the right of the person concerned to manage his own affairs. That right should not lightly be interfered with, especially not on the basis of what amounts to no more than vague and unsubstantiated allegations.

- [28] The question then is how the evidence relating to the patient’s ability to manage his own affairs is to be approached during the first stage of proceeding in terms of Rule 57?As the sufficiency of the evidence placed before the Court in relation to the capacity of the patient is considered in the context of, and for the limited purpose of deciding whether it has been shown that the appointment of a *curator ad litem* to the patient is a necessary step, it is in my view to be dealt with on the same basis as an *in limine* objection raised in application proceedings that the applicant has failed to establish a *prima facie* case for the relief claimed. Applied to the present matter, and whether the applicant’s founding

affidavit alone falls to be considered in the same manner as in exception proceedings (*Eagles Landing Body Corporate v Molewa NO 2003 (1) SA 412(T)* at 437I – 438A), or as it seems to be suggested in *Valentino Globe B v Phillips and another* 1998(3) SA 775 (SCA) at 779G – 780A, similar to an application for absolution from the instance in a trial action, I am satisfied that the applicant's evidence does not meet with the required standard.

- [29] The second consideration which arises on the facts of the present matter, and in deciding whether there exists a need for the preliminary appointment of a *curator ad litem* to the second respondent, is the latter's ability to appreciate the nature and consequences of the present proceedings for the appointment of a *curator bonis*. It is common cause that the second respondent was able to litigate on his own and to properly instruct the applicant in his damages action against the Fund. In his replying affidavit the applicant admitted this to have been the position. That there has not been any change insofar as the second respondent's ability to litigate on his own without the assistance of a *curator* is concerned, is not in dispute. Counsel for the applicant properly acknowledged

this to be the case and for this reason did not oppose the second respondent's application to be joined as a party to the present proceedings.

- [30] While each case must depend on its own facts and circumstances, I agree with the view that the Court should generally be reluctant to appoint a *curator ad litem* to a person who not only opposes the application for the appointment of a *curator*, but who has the ability to understand the proceedings at a level which is sufficient to enable him to give meaningful instructions to his legal adviser. Authority for this view is to be found in *Ex Parte Van der Linde* 1970(2) SA 718(O) at 720C-D where Erasmus J in the context of dealing with an application in terms of Rule 57 said the following: **"Algemeen gesproke dink ek dit is korrek om te sê dat 'n *curator ad litem* nie aangestel behoort te word nie waaneer daar nie rede is om te aanvaar dat die pasiënt nie die geaardheid en effek van die procedure verstaan nie. *Ex parte Papendorp*, 1932 CPD 167; *Ex Parte McLinden and Another*, 1945 OPD 96; *Ex Parte Estate van Rensburg*, 1948(2) SA 753(O) op bl. 754; *Delius v Delius*, 1960(1) SA 270(N)." In *Ex Parte Wilson*: In *Re Morison* 1991(4) SA 774(T) it is said that while "...each case must be decided on its own set of facts, . . . as a general proposition it can be**

accepted that the Court does not usually interfere to appoint a *curator* where the person concerned is *compos mentis* and furthermore actively opposes any such appointment . . .” (at page 779J to 780A) (See also *Van Heerden et al Boberg’s Law of Persons and the Family* 2nd ed at page 135, particularly footnote 134 on page 137). It may be more appropriate in a case such as the present for the Court, acting in terms of subrule (4), to appoint a suitable person to act as *amicus curiae*, should it be of the view that there exists a need in the circumstances of the particular matter for a third person to perform any of the functions envisaged in subrule (5) of Rule 57. The appointment of a *curator ad litem* would otherwise unnecessarily reflect adversely on the legal capacity of the patient and interfere with his right to control his own affairs (see *Ex Parte Kotze* *supra* at 666G –H.)

- [31] I accordingly conclude that the applicant has failed to show that he has *locus standi* and that the appointment of a *curator ad litem* is necessary. It follows that the application must be dismissed. In so far as costs are concerned, the respondents’ opposition to the application was in my view fully justified and there is no reason

why the ordinary rule should not be observed, namely that the costs must follow the result. Although it may be open to argument, as Counsel for the applicant has submitted with reliance on the decision in *Reyneke NO v Mutual and Federal Insurance Co Ltd* 1992(2) 417(T), that the costs of the appointment of a *curator* may constitute the “**rendering of a service**” as envisaged in the undertaking issued by the Fund in terms of sections 17(4) of the Act, the applicant has failed to establish that a need exists for the appointment of a *curator ad litem* to the second respondent. I can accordingly see no basis on which the Fund should be held liable for any of the legal costs incurred by these unsuccessful proceedings. Counsel for the second respondent in turn submitted that in the circumstances of the matter a punitive costs order is called for. Although the application is defective, and was clearly launched without proper consideration having been given thereto, I have no reason to believe that the applicant, an officer of this Court, was not *bona fide* in his actions.

[32] In the result the application for the appointment of a *curator ad litem* is dismissed with costs.

D VAN ZYL
JUDGE OF THE HIGH COURT

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Date heard: 07 June 2012

Date delivered: 17 August 2012