

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

Case No: 2330/2018

Date heard: 14 March 2019

Date delivered: 30 April 2019

In the matter between:

JAN ABRAHAM DE WET N.O.

Applicant

and

MARITSA BARKHUIZEN

First Respondent

DEON VAN DER MERWE

Second Respondent

THE MASTER OF THE HIGH COURT

Third Respondent

**THE REGISTRAR OF DEEDS
(KING WILLIAMS TOWN)**

Fourth Respondent

**THE REGISTRAR OF DEEDS
(CAPE TOWN)**

Fifth Respondent

JUDGMENT

RUGUNANAN, AJ

- [1] The applicant in his capacity as *curator bonis* seeks an order setting aside the sale and transfer of the immovable property (hereinafter referred to as “the farm” or “the property”) described as:

Remainder Portion 1 (Kaalsfontein Suid) of the farm Kaalsfontein Number 259 in the Inkwezi Municipality, Division of Jansenville, Province of the Eastern Cape, (“Kaalsfontein”);

from the estate of Christo Johannes Kleinhans (“the patient”) to that of the first respondent on 6 August 2013.

- [2] The applicant commenced proceedings against the respondents with a notice of motion reflecting truncated time periods for filing notice of opposition and answering affidavits. The notice of motion incorporated relief sought in two parts namely, *Part A* and *Part B*. In respect of the relief in *Part A*, the notice of motion indicated that the application was set down for 26 July 2018 as an urgent matter. On 25 July 2018 the applicant removed the matter from the roll. The circumstances occasioning the removal are dealt with later in this judgment where the issue of costs is addressed. The relief aforementioned is contained in *Part B* of the notice of motion to which this judgment is directed. Save for the first and second respondents, the remaining respondents have not entered the fray in these proceedings. Parenthetically the patient’s wife, Heidi Kleinhans, and the patient himself have deposed to affidavits supporting the first and second respondents’ opposition to these proceedings and expressing the wish that same be dismissed with costs.
- [3] The patient is the youngest of six children of Stephanus Andries Hendrik Kleinhans and Georgina Johanna Kleinhans. His siblings in order of seniority, commencing with the eldest, include: (i) Stephanus Johannes Kleinhans (a brother); (ii) Georgina Johanna Rheeder (a sister); (iii) Deon Kleinhans (a brother); (iv) Johannes Jurgens Kleinhans (a brother); and (v) Mathilda van Eeden (a sister).
- [4] The patient’s parents executed a joint will on 6 November 1998 in terms of which they bequeathed, *inter alia*, the farm to the patient subject to registration of a usufruct in favour of his mother.

- [5] It is common cause that the will required the patient to first offer the farm to his brothers starting with the eldest to the youngest in the event that he intended to sell it. When the patient's father passed away on 25 April 2006, the farm was transferred to the patient (as owner of the bare dominium) and a usufruct was registered in favour of his mother (as usufruct holder). On 26 February 2013 the patient and his mother concluded an agreement of sale with the first respondent. The first respondent is the daughter of the patient's eldest brother Stephanus Johannes Kleinhans.
- [6] In terms of the sale agreement the patient sold the farm to the first respondent for the amount of R1 100 000.00 and the patient's mother agreed to the cancellation, without value, of the usufruct held by her over the property. The agreement was signed by the parties in the office of the second respondent. The second respondent is an attorney whose office prepared the documents required for effecting transfer of the farm, including the agreement of sale. His office engaged a correspondent in Cape Town who ultimately attended to the transfer of the property into the name of the first respondent. On 6 August 2013 transfer of the farm was registered in her name.
- [7] In the events that followed the patient married Heidi Kleinhans on 6 July 2016. A few months later the patient's his mother passed away on 16 November 2016. On 19 June 2017, and at the instance of Mathilda van Eeden, the patient was evaluated by a psychologist. This culminated in the appointment of the applicant as *curator bonis* to the patient on 27 February 2018. The patient was then aged 47. On 4 June 2018 he qualified for renewal of his firearm licence and presently holds a valid driver's licence. The applicant deposed to the founding affidavit in this

application on 29 June 2018. Letters of curatorship were granted in the name of the applicant by the Master of the High Court on 2 July 2018. Proceedings in this matter were instituted on 3 July 2018.

- [8] In resisting the relief sought by the applicant in *Part B* of the notice of motion, the first and second respondents placed the validity of the founding affidavit in issue, contending that it is a nullity and void *ab initio* for being in contravention of section 71(1) of the Administration of Estates Act¹ (“the Act”).
- [9] Before dealing with section 71(1) of the Act, it would be convenient to set out the salient provisions of the order in terms of which the applicant was appointed *curator bonis* to the patient. The order provided, *inter alia*, as follows:

“1. THAT JAN ABRAHAM DE WET of DE WET ATTORNEYS, practising at 2 Twelfth Avenue, Melkbosstrand, Western Cape and a member of the Cape Law Society be and is hereby appointed curator bonis to the (sic) CHRISTO JOHANNES KLEINHANS (“the patient”), with the following powers:

1.1 to receive, take care of, control and administer the property constituting the estate of the patient;

1.2 to institute any proceedings that may be necessary in the interest of the patient and of the due and proper administration of the patient’s property;

1.3. ...;

1.4. ...;

¹ Act 66 of 1965, as amended.

1.5 ...;

1.6 ...;

1.7 ...;

1.8 ...;

1.9 ...;

1.10 ...;

1.11 ...;

1.12 ...;

2. *THAT the powers conferred upon the said curator bonis in sub-paragraphs 1.1 to 1.10 shall be exercised subject to the approval of the Master.*

3.

[10] The order appointing the *curator bonis* manifests the following attributes: It does not declare the patient incapable of managing his affairs. It specifically authorises the *curator bonis* to perform functions in relation to the receipt, care, control and administration of the property in the estate of the patient and to institute any proceedings in relation to such property. The order does not operate retrospectively and the exercise of the powers conferred on the *curator bonis* are dependant or conditional upon approval by the Master of the High Court.

[11] Section 71(1) of the Act may conveniently be quoted in full:

“Certain persons not to administer property as tutor or curator

without letters of tutorship or curatorship - (1) No person who has been nominated, appointed or assumed as provided in section seventy-two shall take care of or administer any property belonging to the minor or other person concerned, or carry on any business or undertaking of the minor or other person, unless he is authorised to do so under letters of tutorship or curatorship, as the case may be, granted or signed and sealed under this Act, or under an endorsement made under the said section.”

- [12] The letters of curatorship granted by the Master contains the following wording:

“This is to certify that Jan Abraham De Wet ... has been duly appointed and hereby authorised to act as curator bonis of the estate of Christo Jacobus Kleinhans ... in terms of the Order of the High Court of South Africa (Eastern Cape Division: Grahamstown) dated 27 February 2018 with the powers set out in paragraph 1.1 to 1.10 of the said Order of Court, which powers are to be exercised subject to my approval in terms of paragraph 2 of the Order of Court.”

- [13] Referring to the first and second respondents’ notice in terms of Uniform Rule 6(5)(d)(iii) and her heads of argument, Ms Morgan contended that the applicant’s founding affidavit is null and void *ab initio* on the basis that when the applicant deposed thereto on 29 June 2018 he did so in contravention of the peremptory provisions of section 71(1) of the Act in that he was not in receipt of letters of curatorship granted by the Master. Ms Morgan contended that the powers conferred on the applicant as *curator bonis* were dependant or conditional upon approval by the Master and that the *ab initio* nullity of the founding affidavit precluded its resuscitation through ratification or subsequent approval by the Master when letters of curatorship were granted. In support of these contentions Ms Morgan relied on the case of ***Shea v Legator McKenna and Others [2008] 1 All SA 491 (D)***.

- [14] In opposition to the challenge against the applicant’s authority Mr Bothma

essentially raised two arguments. He contended, firstly, that the power conferred on the *curator bonis* in paragraph 1.2 of the order of court is one ordinarily associated with a *curator ad litem* and is, for that reason, extraneous to section 71(1) of the Act. Stated otherwise, the argument is that it was not required of the applicant as *curator bonis* to have been authorised under letters of curatorship to depose to the founding affidavit for instituting these proceedings because section 71(1) is applicable to the administration or management of property in the estate of the patient. Secondly, Mr Bothma argued that the challenge by the first and second respondents is in respect of the applicant's authority to depose to the founding affidavit before the granting of letters of curatorship; and not to the institution of these proceedings, an event which occurred on 3 July 2018. In support of this submission Mr Bothma relied on the following passage in **Ganes and Another v Telecom Namibia Ltd**,² where it is stated that:

“ ... it is irrelevant whether Hanke had been authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised. In the present case the proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the respondent. In an affidavit filed together with the notice of motion a Mr Kurtz stated that he was a director in the firm of attorneys acting on behalf of the respondent and that such firm of attorneys was duly appointed to represent the respondent. That statement has not been challenged by the appellants. It must, therefore be accepted that the institution of proceedings was duly authorised. In any event, rule 7 provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant. The appellants did not avail themselves of the procedure so provided.”

[15] It is my view that the opposition to the challenge against the applicant's

² 2004 (3) SA 615 (SCA) at paragraph [19]

authority is misplaced and that the applicant's response thereto is unsound for the reasons indicated below.

- [16] It is illogical to contend that the power conferred on the *curator bonis* in paragraph 1.2 of the order of court is extraneous to section 71(1) of the Act. The composition of paragraph 1.2 plainly conveys that the power to institute proceedings conferred on the applicant as *curator bonis* is one that is intimately associated with the patient's property. Furthermore, as pointed out by Ms Morgan, it incontrovertibly appears from the applicant's replying affidavit that disbursements attendant on the proceedings for the appointment of a *curator ad litem*, including those for the appointment of the *curator bonis* and disbursements relevant to the present application have thus far been met from the patient's estate. The first point of contention raised by Mr Bothma is therefore unsustainable.
- [17] Dealing with the second point and reverting to the passage in **Ganes**, I respectfully entertain doubt whether it is applicable as a general proposition to situations affected by the provisions of section 71(1) of the Act. Section 71(1) received judicial consideration in **Bouwer NO Saambou Bank Bpk 1993 (4) SA 492 (T)**. A considered analysis of the authorities and relevant legal principles led the court in **Bouwer** to conclude that acts carried out or otherwise performed by a *curator bonis*, though appointed by the court but not yet in receipt of letters of curatorship granted by the Master, were nullities and of no legal force or effect. This conclusion was informed by the primary consideration that in enacting section 71(1) of the Act the intention of the legislature was not to guard or protect the interests of third parties, but to protect the interests of the person (i.e. the *de cuius*) on whose behalf the *curator bonis* was appointed to act. Thus it could not be accepted that measures intended for
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the protection of the *de cuius* (such as the need for the *curator bonis* to find security to the satisfaction of the Master as a necessary prerequisite to the granting of letters of curatorship), were not intended by the legislature to be of fundamental importance and that acts in conflict therewith would still be valid.

[18] The findings and conclusion reached in ***Bouwer*** found favour with Motata AJ (as he then was) in ***Shea v Legator McKenna and Others***.³ Motata AJ, in addition, considered judgments⁴ dealing with section 6(1) of the Trust Property Control Act No. 57 of 1988 (“the *TPCA*”). Section 6(1) is comparably worded to section 71(1) *supra*.⁵ By parity of reasoning section 6(1) of the *TPCA*, like section 71(1), precludes the relevant functionary from acting unless authorised thereto in writing by the Master. In the enactment of section 6(1) of the *TPCA* and section 71(1) of the Administration of Estates Act, the intention of the legislature undoubtedly was informed by a common consideration namely, the protection of the interests of the *de cuius* on whose behalf the nominated functionary was in each instance appointed to act. From this perspective where an act is a nullity *ab initio* because the trustee or *curator bonis* performed prior to the granting of written authority, neither the court nor the Master is cloaked with a discretion to retrospectively validate it.

[19] Looking further into the Administration of Estates Act, one finds in section 102(1)(g) an attribute that provides for the imposition of a penal sanction in the event of a breach of any of the provisions in section 71(1). This fortifies the conclusion that the legislature clearly intended to visit with

³ [2008] 1 All SA 491 (D) at pages 497h-498b

⁴ At page 498 b-c where reference is made to *Simplex (Pty) Limited v Van der Merwe and Others* NNO 1996 (1) SA 111 (W) and *Van der Merwe v Van der Merwe en Andere* 2000 (2) SA 519 (C)

⁵ section 6(1) reads: “Any person whose appointment as trustee in terms of a trust instrument, or a court order comes into force after the commencement of this Act, shall act in that capacity only if authorised thereto in writing by the Master.”

nullity any act or conduct in contravention of section 71(1).⁶

- [20] In the circumstances I am in respectful agreement with the authorities and legal principles dealt with in ***Shea v Legator McKenna and Others***. I am satisfied that the founding affidavit is null and void *ab initio* and that the application must, in consequence be dismissed.
- [21] Turning to the issue of costs, the notice of motion incorporated relief in two parts, namely *Part A* and *Part B*. In respect of the relief sought in *Part A*, the notice of motion specifically indicated that the matter will be heard on Thursday, 26 July 2018 as one of urgency. No certificate of urgency as required by rule 12 of the Joint Rules of Practice of the High Courts of the Eastern Cape Province was filed of record. The relief sought by the applicant in *Part A* concerned the production of various documents pertaining to the transfer of the property, *inter-alia* bank statements in relation thereto, the agreement of sale *supra*, the transfer duty receipt, and the second respondent's file notes pertaining to scheduled attendances with the patient and his mother. Ms Morgan contended that notwithstanding compliance with *Part A* by the first and second respondents, and despite their attorney of record directing correspondence objecting to the alleged urgency, the applicant nonetheless chose to proceed with the matter on an urgent basis without amending the notice of motion as indicated in paragraph 4 of the below-mentioned "Note To The Presiding Judge".
- [22] On the afternoon of 25 July 2018 the applicant unilaterally removed the matter from the opposed motion court roll. The notice of removal did not include a tender for the first and second respondent's costs. Simultaneously with such notice, the applicant filed a "Note To The

⁶ *Shea v Legator McKenna and Others supra* at page 499e

Presiding Judge". It reads:

- "(1) The application was not intended to be set down on an urgent basis and therefore the provisions of paragraph 12 of the Eastern Cape practice directives were not complied with;*
- (2) The papers were drafted according to Western Cape practice directives [for] motion court proceedings.*
- (3) The application should not have been placed on the opposed roll for 26 July 2018 by the Registrar.*
- (4) The application will be brought on an amended notice of motion in the ordinary course in terms of the rules of court."*

[23] The applicant, by profession, is a practising attorney and so is Ms Johannie Lötter of Lötter Attorneys who represents him. In instituting these proceedings without the requisite certificate of urgency, it appears that neither one of them had prior recourse to the applicable rule of practice in this division. If they did, they did so irreverently; and to censure the registrar for enrolling the matter is disingenuous. Such conduct on their part may be attributed to negligence, unreasonableness or even bad faith.

[24] In ***January v Standard Bank of South Africa Ltd***,⁷ Goosen J stated that:

"A failure to file a certificate which not only accords with the provisions of the rules of practice and which manifestly does not meet its purpose may well result in the matter being struck from the roll. It may also, in an appropriate matter, result in an appropriate costs order being made, not against a litigant but against the practitioner responsible for the failure to comply with the rules of practice."

[25] Regard being had to all the above Ms Morgan contended for an order of costs *de bonis propriis* against the applicant and his attorney jointly and severally on an attorney-client scale, the one paying the other to be

absolved. She urged for the same order in the event of the issue raised in the first and second respondents' rule 6(5)(d)(iii) notice being decided in their favour by dismissing the relief in *Part B* of the notice of motion. The principle underlying such costs orders is that the conduct in connection with the litigation in question must have been *mala fide*, negligent or unreasonable to justify a personal order for costs against a litigant occupying a fiduciary capacity.⁸ In this regard, facts indicating that the sale of the farm took place on 26 February 2013, that the applicant was appointed *curator bonis* on 27 February 2018, and that this application was launched on an urgent basis on 3 July 2018, (a period of more than 5 years after the farm was sold and more than 4 months after the *curator bonis* was appointed), should not be overlooked on the issue of costs.

[26] Mr Bothma correctly conceded that the application was not initiated with the required certificate of urgency and for that reason it had not been properly set down on truncated time periods. He did not address me on the circumstances attendant on the removal of the matter from the roll on 25 July 2018, nor did he take issue with the contents of the "Note To The Presiding Judge". He urged however that I apply my discretion by not awarding costs on the basis contended for by Ms Morgan. I am unable to do so for the reason that there is ample justification to award costs as contended for by Ms Morgan.

[27] In the circumstances the following order issues:

[27.1] The application is dismissed;

[27.2] The costs in respect of *Part A* and *Part B* of the notice of motion are to be paid by the Applicant and Ms Johannie Lötter jointly

⁷ [2015] JOL 34176 (ECG) at paragraph 41

⁸ *Vermaak's Executor v Vermaak's Heirs* 1909 TS 679 at page 691

and severally, *de bonis propriis* on an attorney-client scale, the one paying the other to be absolved.

S RUGUNANAN

ACTING JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Adv. P. S. Bothma instructed by Lötter
Attorneys, Panorama c/o Rushmere Noach
Inc., Port Elizabeth.

For First and Second

Respondents: Adv. M. P. Morgan instructed by Wouter Minnie
Attorneys, Port Elizabeth.