

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: A321/2021

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

DATE: 14/6/2023

SIGNATURE

In the matter between:

DANIEL JACOBUS MARAIS N. O.

Appellant

and

LINDA MARAIS

Respondent

In re:

WILLEM FRANCOIS MARAIS

The Patient

JUDGMENT

TOLMAY J (CONCURRING MALINDI J AND BAM J)

1. This appeal relates to an exception that was heard in the court a quo. The court a quo had to determine two issues, namely whether the appellant has *locus standi* to act on behalf of Mr Willem Francois Marais (the patient) in these proceedings and whether, before instituting these proceedings, the approval of the Master was required.

2. The court a quo dismissed the first ground of exception and upheld the second ground. The court a quo found that in the absence of an averment in the particulars of claim, that the Master's written approval has been obtained, the particulars of claim was excipiable. The court a quo upheld the exception and proceeded to dismiss the appellant's claim and made no order as to costs.
3. The background to this appeal is that the patient and the respondent married each other on the 19th of March 2005 and one minor child was born of the marriage. The patient suffered a stroke during August 2011 and was subsequently diagnosed with dementia. On the 29th of June 2016, the appellant was appointed as *curator bonis* of the patient. The court order inter alia authorized him to institute legal proceedings, including proceedings of a matrimonial nature on behalf of the patient. The court order furthermore states that the powers conferred on the *curator bonis* "shall be exercised subject to the approval of the Master". The amended particulars of claim indicate that the patient has been in a care centre in Pretoria since 2013, whilst the respondent resides in Kwazulu-Natal.
4. Before dealing with the appeal, two condonation applications brought by the appellant should be considered, both are opposed. In the first application, condonation is sought for the late filing of the Record of Appeal and the late filing of the application for an appeal date. This application was filed on the 17th of December 2021. In the second condonation application, which was launched on 22nd February 2022, condonation is sought for the late filing of the appellant's special power of attorney, and a declaratory order is sought to declare that the appeal was properly noted and prosecuted, alternatively an order is sought reinstating the appeal.
5. Leave to appeal was granted on the 2nd of August 2021 and the Notice of Appeal was filed on the 3^{1st} August 2021, within the prescribed time limit. The application

for an appeal date and record of appeal was due on 25th November 2021. It was however filed on 17th December 2021, and was accordingly 15 days late.

6. The appellant's attorney of record explains the reasons for the delay in her affidavit. The matter was decided on papers and no oral evidence was heard, she enquired from the Judge in the court a quo's registrar whether in those circumstances a record of appeal was required, as all the papers were already uploaded on case lines. The registrar informed her by e-mail that it was not required under these circumstances. She also enquired from Ms Dreyer and a registrar by the name of Thomas, whether anything further was required. Both informed her that in these circumstances nothing else was required. On Friday, 26 November 2021, she however received an e-mail from Ms Bhana, another registrar in the Appeal's section, informing her that she, *inter alia*, had to upload the appeal record and an application for an appeal date. The attorney was incapacitated due to illness from the 29th November 2021 until 3 December 2021. On Monday 7th December 2021, she personally attended the Appeal Section, where she was informed that she should indeed have filed the record. She, on that very same day, instructed Digital Audio Recording Transcriptions to attend to the record on an urgent basis. On the 17th of December 2021 the typed record was finalized.
7. The second condonation application relates to an oversight. The special power of attorney was not signed and filed simultaneously with the appeal record and application for an appeal date. The applicant's attorney of record did file a notice of appointment as attorney of record on 17th December 2021. The signed rule 7 (2) special power of attorney was subsequently served on the 22nd February 2022, one day after it came to the attention of the attorney. The appeal was however not set down prior to the special power of attorney being filed. A date for hearing of the appeal was provided on the 13th of April 2022 and the appeal was set down for 22 February 2023.

8. The respondent also persisted with her allegation that no security for costs was provided, despite the fact that proof of payment of R 150 000.00 (one hundred and fifty thousand rand) was provided and no objection was raised against the amount. The answering affidavit in the condonation application deteriorated into a scathing personal attack on the appellant's attorney. It is not necessary to deal with the content thereof in detail. No substantive case for prejudice was made out by the respondent, as a result of the delays and oversight in signing the power of attorney. All that the opposition to the condonation applications resulted in was an unfortunate conflict between the legal practitioners which should not be encouraged. This matter deals with matrimonial disputes and involves the rights of a minor child and mentally compromised person and those rights should be the main focus of the litigation.
9. The objections against the condonation applications are extremely technical and to not grant the applications will not serve the interests of justice. The court has a discretion whether or not to grant condonation and in this instance, "principles of justice and fair play demand it".¹
10. The discretion must be exercised judiciously, taking into account all facts and keeping in mind fairness to both sides.² In this instance the delays were not substantial and were of a purely technical nature. The appellant has good prospects of success in the appeal and no substantial prejudice will be suffered by the respondent if the condonation is granted. On the other hand, the patient will suffer considerable harm if condonation is not granted. It must be noted that the respondent was also late in filing her answering affidavit to the condonation application and did not seek condonation for that failure.

¹ Suidwes- Afrikaanse Personeel Veronigings v Minister of Labour and Another 1978 (1) SA 1027 SWA; Mathibela v The State (714/2017) [2017] ZASCA 162 (27 November 2017), paragraph 8

² United Plant Hire (Pty) Ltd v Hills 1976 (1) SA 717 (A), Palmer v Goldberg 1961 (3) SA 692 N, South African National Road Agency Ltd V Cape Town City 2017 (1) SA 468 (SCA), Centre for Child Law and Others v Minister for Basic Education and Others 2020 (3) SA 141 (EC).

11. In my view, the opposition to the condonation applications was not only ill-conceived, but also points to a lack of bona fides. Under normal circumstances, the party seeking condonation should pay the costs, but in this instance and in light of all the facts, I am of the view that the respondent should pay the costs of the opposition to the condonation applications.
12. This brings us to the real issue, namely the exception. In light of the fact that the first ground of exception is not appealed against, nor is there a cross-appeal in that regard, nothing further needs to be said about it. The court a quo upheld the second ground of exception, relating to the fact that no averment has been made in the particulars of claim in respect of obtaining the Master of the High Court's approval before the institution of divorce proceedings.
13. The court a quo proceeded to dismiss the appellant's entire claim, without providing the appellant an opportunity to amend the particulars of claim. The court a quo found, after applying the principles applicable to interpretation, that the authority given to institute legal proceedings on behalf of the patient was subject to the Master's approval and sets a condition that the appellant must fulfil before instituting proceedings. The court a quo further found that such approval should have been obtained at the outset and not after the proceedings have been instituted. It was found that this would equally apply in any litigation that the appellant institutes on behalf of the plaintiff.
14. The court a quo considered the question of whether an opportunity to amend the particulars of claim should be granted and concluded that in this particular instance it would be futile as the appellant would require the approval of the Master or the Master should rectify the appellant's actions. She then also stated that such rectification was apparently already sought and refused.
15. It is required to determine first, whether the allegations that the approval of the Master was obtained, constitutes an essential averment to support a cause of

action. The principles pertaining to the exceptions are trite. “A court must accept all allegations of fact made in the particulars of claim as true, may not have regard to any other extraneous facts or documents and may uphold the exception to the pleadings only when the court was satisfied that the cause of action or conclusion of law in the pleading cannot be supported on every interpretation that can be put on the facts”.³

16. It would seem that the court a quo erroneously went beyond the particulars of claim and considered the averment contained in the respondent’s exception that such approval was not obtained, as well as documents attached to the respondent’s written submissions. If that was not done, the particulars of claim, standing alone, clearly set out a cause of action and the exception on this ground would have followed the same fate as the first ground.
17. The question of whether the approval of the Master was required must be considered by answering the question “whether such averment constitutes *facta probanda* or *facta probantia*.”⁴ In my view, the question of whether the Master’s approval was obtained, or should have been obtained is clearly a matter for evidence and might have been raised as a special plea. It is however not a ground for exception. It was argued by the appellant’s legal representatives and correctly so, that once the court a quo had concluded that the appellant had locus standi, the question of the approval by the Master became moot.
18. In dismissing the appellant’s entire claim, the court a quo unduly limited the patient’s right to further recourse, because no opportunity was given to amend the particulars of claim.⁵ Although I am of the view that the exception to the second ground should not have been upheld, at the very least the appellant

³ Pretorius and Another v Transport Pension Fund & Others 2019 (2) SA 37 (CC) para 15, also see Buliso v First Rand Bank Ltd t/a Westbank 2017 (1) SA 292 (CC) at 303 para 33.

⁴ Koth Property Consultations CC v Lepelle-Nkumpi Local Municipality 2006 (2) SA 25 (T) at 30 para 17-18, Jowell and Bramvell Jones 1998 (1) SA 836 (W) at 903 A-B.

⁵ Dharumpal Transport (Pty) Ltd v Dharumpal 1956 (1) SA 700 A at 706 E.

should have been given an opportunity to amend his particulars of claim.⁶ The court a quo in my view erred when it found that the appellant could not exercise his duties as set out in the court order without proper approval by the Master. It must be kept in mind that the appellant was issued with letters of Authority/Curatorship. I agree with the argument raised on behalf of the appellant that the Master is a creature of statute and the duties and powers of the Master is accordingly regulated by statute.

19. The Master, by issuing a letter of Authority/Curatorship, authorized the appointment of the *curator bonis*, with the powers set out in the court order. By issuing the aforesaid, the appellant was authorized to act on behalf and in the interest of the patient as set out in the court order. In my view there is an argument to be made that the approval was indeed obtained when the letter of Authority/Curatorship was issued. It is furthermore unimaginable, in the light of legislation to which I refer to below, that the Master's approval, is required for a *curator bonis* to be able to execute his court empowered duties.
20. In this regard the following should be considered in terms of the Administration of Estates Act 66 of 1965.

20.1. Section 1, provides that: "*curator*" means any person who is authorized to act under letters of curatorship granted or signed and sealed by a Master, or under an endorsement made under section 72".

20.2. Section 72 (1) (d) provides that: "*The Master shall ... on the written application of any person – who has been appointed by the Court or Judge to administer the property of any minor or other person as tutor or curator and to take care of his person, as the case may be, to perform any act of*

⁶ Ocean Echo Properties 327 CC and Another v Old Mutual Life Insurance Company (South Africa) Ltd 2018 (3) SA 405 (SCA) para 8 - 9.

such property or to take care thereof or to administer it, grant letters of tutorship or curatorship, as the case may be, to such a person”.

20.3 Section 76 (2) provides that: *“The Master shall, by any such letters granted by him – (a) in any case referred to in paragraph (d) of subsection (1) of section 72, confer upon the tutor or curator such powers as will give effect to the terms of the appointment by the Court or the Judge”*

20.4 Section 101 (2) provides that: *“A certificate under the hand of the Master that any person named in the certificate has under any such letters signed and sealed by him been authorized – in the case of a tutor or curator, to perform any act in respect of or to take care of or administer the property in the Republic of the minor or other person so named, or carry on any business or undertaking in the republic of such minor or person, as the case may be, shall be admissible in evidence as prima facie proof that such first-mentioned person has been authorized”*

21. In light of these provisions, it is evident that the letter of Authority/Curatorship, so issued, is sufficient in providing a curator with the necessary “approval” to act in accordance with his duties, in terms of the court order providing for same. In *Ex parte Gunga*⁷ it was found that when a court has appointed a *curator bonis* in terms of section 72 (1), the Master is obligated, when granting letters of curatorship, to confer the powers as set out by the court. This leaves no room for the Master to, of his own accord to refuse or deviate from the court order, unless the court changes or amends the order.

22. The aforesaid does not only illustrate the limits within which the Master must execute his powers, but also the status of the averment, that his consent was indeed obtained. The Master’s function is one of oversight and is administrative

⁷ Ex parte Gunga 1979 (1) SA 586 N at 588 F.G.

in nature and can never supersede a court order. As a result, I am of the view that the appeal should be upheld.

The following order is made:

1. The condonation applications are granted.
2. It is declared that the appeal was properly prosecuted.
3. The appeal is upheld and the order of the court a quo is set aside and substituted with the following:
 - 3.1. "The exception on the second ground is dismissed"
4. The respondent is to pay the costs, including the costs of opposition of the condonation applications.

R TOLMAY J

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

P G MALINDI J

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

N BAM J

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances

Counsel for applicant	: Adv R Ferreira
Attorney for applicant	: Loots Basson Attorneys Inc
Counsel for respondent	: Adv C Welgemoed
Attorney for respondent	: Strauss Daly Attorneys
	: 22 February 2023
Date heard	: 14 June 2023
Date of Judgment	