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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Before His Lordship Mr Justice Labuschagne AJ on 8 March 2024

Case No: 15493/2021

In the application between:

ADV M D MATSETELA
(Intervening Party)

Applicant

and

EVAH MALEBO MASHABA

Respondent

In re:

BEN MBALANE MASHABA
(ID NO: 6[...])

Patient

and

ROAD ACCIDENT FUND

First Respondent

MASTER OF THE HIGH COURT, PRETORIA

Second Respondent

JUDGMENT IN APPLICATION FOR LEAVE TO APPEAL

[1] On 21 July 2023 Dr Evah Malebo Mashaba brought an application against Adv M Dashwood Matsetela, the curator *ad litem* of Mr Ben Mbalane Mashaba (“the patient”) for his removal and the appointment of a different curator. Dr Mashaba was motivated by the urgent need of her uncle (a patient with a significant brain injury) being moved to a step-down from a hospital that had been requesting his discharge and transfer since May 2023. Dr Mashaba contends that the curator *ad litem* was aware of the request but did not respond.

[2] The application served before court approximately two weeks before the action of the patient against the RAF proceeding to trial.

[3] The urgency of the application lay in the appointment of an interim curator *personae* who could take a decision transferring the patient from the hospital to a step-down facility. This was not within the remit of the curator *ad litem*, although he was the only person representing the interests of the patient in the pending proceedings.

[4] The curator *ad litem* was appointed on 15 September 2021 on application of Dr Mashaba. The order appointing him contains the usual provisions pertaining to the prosecution of the patient’s claim against the RAF. However, Prayer 2 of the order reads:

“The curator is hereby directed and authorised to approach the Honourable Court in the event the patient is found to be of unsound mind and incapable of managing his affairs upon investigation and to declare him as such.”

[5] Based on an amended notice of motion, no longer seeking the removal of Adv Matsetela as curator *ad litem*, but seeking an appointment of an interim curator *personae*, I granted the following order date stamped 21 July 2023:

“[1] The application is heard on the basis of urgency in terms of Rule 6(12) and the forms, service and time periods prescribed by the Uniform Rules of Court are hereby dispensed with.

[2] *The curator ad litem is directed to report to the trial court on 28 July 2023, or on whichever date the trial proceeds, on the need for the appointment of a curator personae and/or a curator bonis for the patient. Such report should include a detailed exposition regarding the appropriateness of the appointment of any person he may recommend.*

[3] *The applicant is appointed as interim curator personae of the patient for the sole purpose of deciding whether it is in the interests of the patient to be transferred from his current care facility to a step-down facility. She has the following duties:*

(a) To exercise powers in regard to matters relating to the patient's physical and mental wellbeing;

(b) To determine whether the patient has to have any particular medical, surgical or dental treatment, by whom and to ensure that the patient gets the necessary treatment in respect of his physical or mental wellbeing;

(c) To exercise all such powers as may be necessary to ensure the wellbeing and safety of the patient.

[4] *The applicant is directed to report to the trial court on what steps she has taken to determine whether the patient needs to be moved to a step-down facility or not, what her decision in this regard is, and how effect has been given thereto.*

[5] *The appointment of the interim curator personae will terminate on 28 July 2023, unless extended by the trial Judge.*

[6] *The interim curator personae is exempted from the need to post security for purposes of taking the aforesaid steps and exercising the aforesaid obligations.*

[7] *A copy of this order is to be served on the Master of the High Court.*

[8] *No order as to costs.*

[9] *No costs are to be recovered from the award to the patient or from his estate.*

[10] *A copy of the applicant's report is to be served on the curator ad litem and the curator ad litem is directed to report to the trial court on the steps taken by the interim curator personae and whether he concurs.*

[11] *The curator ad litem is directed to bring this order to the attention of the trial judge."*

[6] The curator *ad litem* has applied for leave to appeal the aforesaid order.

[7] The notice of the application for leave to appeal is stated to be against "*part of the orders of His Lordship Mr Justice Labuschagne AJ dated the 20th day of July 2023.*"

[8] The grounds of appeal are the following:

"The learned Judge erred in NOT FINDING THAT:

1.

1.1 The respondent's second application brought under the amended notice of motion and supported by an affidavit in terms of which she sought to be appointed a curator personae constitutes a separate and new application distinct from the respondent's first application in terms of which he sought to set aside the appointment of Adv ... Matsetela, as curator ad litem to ... (the patient) ... and that Adv Belinda Delport be appointed as curator ad litem to the patient.

1.2 Such respondent's first application in terms of which she sought to set aside the appointment of Adv Magageloa Dashwood Matsetela, as curator ad litem to ... the patient and that Belinda Delport be appointed as curator ad litem to the patient, should therefore be dismissed with costs on attorney and client scale Prior to the hearing of the respondent's application brought under the amended notice of motion and supported by an affidavit in terms of which she sought to be appointed as curator ad personae.

2. The learned Judge erred:

2.1 In failing to afford the applicant's counsel an opportunity to make submission on all the points in limine, so raised in the opposing affidavit to the respondent's application brought under the amended notice of motion and supported by an affidavit in terms of which she sought to be appointed as curator ad personae, as had the applicant's counsel been afforded such opportunity, he ought to have made submissions that the respondent's application in terms of which she sought to be appointed curator ad personae is a new application distinct from the first application to set aside the appointment of curator ad litem.

2.2 Despite the learned Judge pointing out during the proceedings that the respondent brought the first application in terms of what she sought to set aside the appointment of Adv Magageloa Dashwood Matsetela, as curator ad litem to ... (the patient), on misconstrued grounds, namely that the respondent was under the impression that the applicant in capacity as curator ad litem, is responsible to make decisions on the health of the patient, while in fact his responsibility is to conduct litigation on behalf of the patient. This is further despite the fact that the grounds set out in paragraphs 1.1 and 1.2 above were brought to the attention of the court on the 18th of July 2023, prior to the allocation of the matter to 20 July 2023.

2.3 The remainder of the grounds are aimed at an order dismissing the 'first' application with costs on an attorney and client scale."

[9] Mr Matsetela as curator *ad litem* did not only have the obligation to conduct litigation on behalf of the patient. His appointment also directed him to approach the court in the event the patient is found to be of unsound mind and incapable of managing his affairs upon investigation and to declare him as such. This led to interactions during the hearing of the matter, asking why the curator *ad litem* was not applying for a curator *personae* in the light of the plight of the patient. Even then the curator *ad litem* advanced the position that he only conducts the litigation. As he misconstrued his duties to the patient, I disallowed any costs despite Dr Mashaba having approached the court on the incorrect assumption that the curator *ad litem* could take decisions regarding the care of the patient. His duty was to approach the court to appoint a curator *personae* when the need arose.

[10] The application for leave to appeal suffers from a number of defects and falls to be dismissed. The reasons for its dismissal are the following:

10.1 The curator's contention that there were two applications before me is flawed. There was an original application for his removal which, when the true purpose of the application was revealed, resulted in the appointment of a curator *personae* based on an amended notice of motion. The urgency and the facts underpinning the relief were all in the papers before me. This is one application and not two. The relief sought was motivated by the plight of the patient in circumstances where the curator *ad litem* had taken no steps to assist the patient by seeking the appointment of a curator *personae*.

10.2 Secondly, counsel for the curator *ad litem* readily conceded that the relief sought on appeal will have no practical effect other than to saddle Dr Mashaba with an adverse cost order.

10.3 An applicant for leave to appeal must persuade the court that the application is not one that falls within Section 16(2) of the Superior Courts Act (see Section 17(1)(b) of the Superior Courts Act).

10.4 In terms of Section 17(1)(b) leave to appeal would only be competent where the Judge is of the opinion that the decision sought on appeal does not fall within the ambit of Section 16(2)(a), i.e. the nature of the decision sought will have no practical effect. Further, save in exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs.

[11] No exceptional circumstances have been advanced and it is clear that the eventual order sought is an adverse cost order. The application therefore falls within Section 16(2) and leave to appeal therefore falls to be refused in terms of Section 17(1)(b).

[12] By the time the application for leave to appeal was argued, the main action had resulted in a court order in favour of the patient being granted by agreement on 6 October 2023. In terms of paragraph 10 thereof the issue of the appointment of the curator *personae* and/or the creation of a Trust is postponed *sine die*, pending the outcome of a meeting on 23 October 2023 with the DJP. In terms of paragraph 13 the interim curator *personae* stays until a new one has appointed.

[13] When the application for leave to appeal was heard, the interim curator *personae* had resigned, alleging threats to her person and her family being the reason. Nevertheless, an appointment of a curator *personae* at the request of the curator ad litem was imminent. The application for leave to appeal was consequently unopposed.

[14] In the premises I make the following order:

1. The application for leave to appeal is dismissed.
2. No order as to costs.
3. No costs of this application are to be recovered from the award to the patient.

LABUSCHAGNE, AJ

22 March 2024