

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION, EAST LONDON]**

CASE NO.: EL 785/09

ECD: 2685/09

In the matter between: -

N[...] C[...] S[...]

PLAINTIFF

and

NOMPOZOLO & GABELANA INCORPORATED

1ST DEFENDANT

LINDILE BRIAN NOMPOZOLO

2ND DEFENDANT

MZINGAYE GQOMO

3RD DEFENDANT

ROAD ACCIDENT FUND

4TH DEFENDANT

JUDGMENT

NORMAN J:

[1] **“Justice delayed is justice denied”**. This legal *maxim* was analyzed in an article penned by Professor Tania Sourdin and a senior researcher, Naomi Burstyner¹. They stated that: *“Historical acknowledgements of delays in the justice system*

¹ Article: Justice delayed is justice denied”. Both authors are from the Australian Centre for Justice Innovation, Monash University, article published in October 2014: Victoria University Law and Justice Journal 4(1) DOI:10.15209/vulj. v4i1.61.

often recognize the perspective of the accused or the disputant, and suggest that for a person seeking justice, the time taken for resolution of their issue is critical to the justice experience. In essence, these acknowledgements are consistent with more recent research which has shown that the time taken to deal with a dispute is, and in many cases, the critical factor in determining whether or not people consider that the justice system is just and fair.”

[2] The consequences of delayed justice, in the context of the Road Accident Fund(“RAF”) matters, are that a victim’s dignity is affected and his or her quality of life is compromised. Where a victim is from a disadvantaged background that delay will keep him or her entangled in the chains of poverty for the longest time. Those delays are difficult to ignore when they are caused, directly or indirectly, by the conduct of legal practitioners, as is the position in this case.

Background facts

[3] On 11 March 1996 at approximately 15h30, S[...] M[...] was crossing the Old King William’s Town road, in Mdantsane when a Toyota Hilux with registration numbers B[...], driven by one Mlungisi Mayedwa, collided with him. He was born on 24 April 1984 and was 12 years old at the time of the accident. S[...] M[...] is currently 39 years old. He was allegedly residing at No. 9[...], M[...]e. He sustained head injuries. A report by a neurosurgeon Dr Makangee found that there had been a significant impact on the patient’s cognitive abilities and he had severe mental, behavioural and cognitive changes which would make him dependent on his family for the rest of his life.

[4] The attorneys Nompozolo & Gabelana Incorporated, the first defendant herein, instituted an action on his behalf, under case number EL 295/06; ECD 1195/06. The person who gave instructions to the first defendant was the biological mother of S[...] M[...], Mrs N[...] D[...] M[...]. It appears from the record that the action was not instituted in the name of Mrs M[...] but in the name of one N[...] C[...] S[...] (Ms S[...]) who was purportedly acting on behalf of S[...] M[...] as a *curator-ad-litem*.

[5] It appears that on 3 April 2006, the first defendant brought an application in the Magistrate's Court for the appointment of Ms S[...] as a *curator- ad- litem*, but that did not eventuate. In that application Ms S[...] made it clear that she was S[...] M[...]’s aunt and guardian.

[6] On 28 August 2006, the first defendant forwarded an application for the appointment of Ms S[...] as curator, to the Master of the High Court in Makhanda and requested a report. On 13 September 2006 the Master of the High Court wrote to the first defendant and indicated that it appeared that *‘the person who is applying to be appointed as curator ad litem does not comply with the requirements set by Rule 57(5) of the Uniform Rules of Court where it is stated that the curator ad litem should if practicable be an advocate or an attorney’*. The Master also posed a question *‘Is there any reason why an advocate or an attorney cannot be appointed?’*.

[7] On or about 14 December 2007, it appears that the first defendant brought another application for the appointment of an attorney, Mr Bongani Nduli, as a curator- *ad – litem*. I must mention that this is not the only application, there were quite a few applications where the appointment of certain attorneys, as curator *ad litem*, were sought at different times. Most of the documents relating to these applications do not bear the Registrar's stamp and thus make it difficult to conclude whether or not they were in fact delivered as envisaged in terms of the Rules of Court. If they were delivered it is not clear from the record what became of those applications.

[8] On 7 February 2008, Bate Chubb & Dickson, attorneys for the RAF, appear to have served a notice containing an offer of settlement in terms of Rule 34. The offer was for an amount of R1 018 720.80, an undertaking in terms of section 17 (4) (a) of the Road Accident Fund Act 56 of 1996, 80 % for the costs of the future accommodation of S[...] M[...] in a hospital or nursing home and costs of the action including reasonable and qualifying expenses of the plaintiff's expert witnesses. That offer was in the name of Ms S[...]. There is another offer made in the name of “Claimant: M[...] ND”, for the same amount dated 15 February 2008 addressed to the first defendant by the RAF. This offer is relied on by Ms S[...] in her particulars of claim in the current action.

[9] On 12 February 2008 the settlement was made an order of Court by Dambuza J (as she then was). There is a dispute whether the amount of R1 018 720.80 paid into the trust account of the first defendant was made in the name of Ms S[...] or Ms M[...]. That is not an issue that I have to decide herein and is not relevant for the purposes of determining costs in the withdrawn action. It is common cause that S[...] M[...] never received any of the monies offered and accepted.

[10] On 4 September 2008, Mr Bernadus Christian Gysbertus Niehaus (Mr Niehaus) of Niehaus McMahon & Oosthuizen Attorneys was nominated and appointed by way of a special power of attorney by Ms S[...] purportedly on behalf of S[...] M[...].

[11] On 26 September 2008 the first defendant delivered a notice of reinstatement of the application for the appointment of a *curator bonis*, for hearing on 15 April 2008. On that day the matter was struck from the roll.

[12] On 26 August 2009 Niehaus McMahon & Oosthuizen Attorneys issued summons against the defendants under the current case number. In the particulars of claim attached to the summons, it is alleged that the plaintiff, Ms S[...] was suing in her capacity as a *curator ad litem* to S[...] M[...]. In the action Ms S[...] claimed an amount of R4 100 000.00 (Four Million One Hundred Thousand Rand) as and for damages against the first defendant, alternatively the second defendant, or the third defendant, the one paying the other, to be absolved. She also claimed interest on the amount of R1 018 720.80 from 20 February 2008 to date of payment. She also sought costs relevant to the application for the appointment of a *curator bonis*.

[13] In their plea, the first and second defendants admitted that an offer made by the RAF was accepted on behalf of Mrs M[...], who is identified therein as the mother of S[...] M[...], in the amount of R1 273 401.00 (including the apportioned amount) together with an undertaking in terms of section 17 of the Road Accident Fund. The value of the undertaking is recorded as R 656 288.00. They further tendered an amount of R526 856.13 to the plaintiff.

[14] On 16 September 2009, Mr Niehaus directed a letter to the Attorney's Fidelity Fund where he indicated, *inter alia*, that the second defendant was interdicted from practice and an application for striking him off was pending. He also indicated that the third defendant had been struck off the roll of attorneys.

[15] It is common cause that the plaintiff's erstwhile attorneys, the second defendant herein, was interdicted from practicing on 3 September 2009 and his name was struck from the roll of attorneys during October 2010 for, amongst others, allegations of misappropriation of the plaintiff's funds, as aforementioned.

[16] A claim was submitted on behalf of the plaintiff to the Attorneys Fidelity Fund in terms of section 26 of the Attorneys Act No. 53 of 1979. In support of this claim the plaintiff himself deposed to an affidavit on 12 January 2010. There is some controversy about this affidavit because Ms S[...] disputed that S[...] M[...] was capable of deposing to an affidavit.

[17] On 25 March 2010 the parties held a Rule 37 Conference where it was recorded that the plaintiff's attorney, Mr Niehaus had been placed in possession of a copy of the first defendant's client office file, relating to the proceedings in the action of *Silo v Road Accident Fund*. Mr Niehaus offered to copy the file at the cost of the second and third defendants.

[18] On 12 July 2012, the Attorneys Fidelity Fund made payment into the trust account of Niehaus McMahon Incorporated in the amount of R 527 457.98. It further advised the attorneys that the balance of the claim will be paid once the plaintiff's attorneys had excused against the defendants. It is common cause that to date no funds have been paid to the plaintiff or to Ms S[...] by Niehaus McMahon Incorporated who is now deceased.

[19] During September 2016, an application was brought by Ms S[...] wherein the following relief was sought: that the action be removed from the roll of trial actions, that the action be postponed *sine die*, that an application be brought for the appointment of a *curator- ad- litem* and that costs of the application be borne by the

respondents opposing the application on an attorney and client scale. I will deal with the issue of costs in respect of this application later in this judgment.

[20] On 19 September 2016, Ms S[...] deposed to an affidavit in support of the relief mentioned above, and stated, *inter alia*, the following:

‘4. *I have no knowledge of the application brought in Magistrates Court in Mdantsane for my appointment as curator ad litem to S[...] M[...] by the Third Defendant.*

5. *I have for all practical purposes accepted that Application for my appointment as the Curator- ad- litem was approved, more so specifically in the light thereof that I was cited as the Plaintiff in the preceding action against the Road Accident Fund.*

6. *I respectfully submit that the Respondents have negligently, and/or otherwise made a false representation to the Road Accident Fund and have persisted with same throughout the proceedings.*

7. *The Respondents, have at no stage, informed me, nor my attorneys that the Application for my appointment as Curator- ad - litem was never granted in the Magistrate’s Court in Mdantsane, nor for the reasons of this Application not having been granted.*

8. *The aforementioned true status of the events with regard to the Application for my appointment as Curator- ad- litem only came to light when my attorney instructed to search for this particular file in the Archives at the Magistrate’s Court as the presence of this file has previously simply been reported as “missing”.*

9. *I furthermore respectfully submit that the respondents herein have in the High Court action against the Road Accident Fund failed to disclose the truth about the status of the Curator ad- litem and have effectively continued throughout the proceedings and in the settlement of the claim with the Road Accident Fund*

conducted the action and negotiations with the Road Accident Fund on behalf of the non-existing person.

10. I respectfully submit that it is inevitable for a Curator -ad - litem with proper status such as the Advocate to be appointed to review the entire process and such proceedings.

11. It is my submission that Advocate Charles Wood of East London be nominated to this position and to henceforth be so appointed for consideration of all the issues relevant and then for him to make a recommendation with regard to the preceding procedures in the High Court in East London in respect of the action against the Road Accident Fund and also the present action against the present Defendants.

12. It is accordingly my submission that having regard to the recent developments and the establishment of the lack of status of Plaintiff, that this action is not ready for trial and that it should be postponed.

13. In view of the Defendants' opposition to agree to a postponement, it is submitted that a punitive Costs Order must be awarded against them.' (my emphasis).

[21] Mr Niehaus also deposed to an affidavit, on the same day, where he stated, *inter alia*,

“ 1. I am an attorney for the Applicant.

2. The facts material hereto are within my personal knowledge and I am as such authorized to make this affidavit.

3. I have read the Affidavit by Applicant and where the references to me are applicable, I confirm the contents thereof.”

[22] On 5 October 2016, Mr Niehaus deposed to an affidavit giving a time line, he stated, amongst others:

“5.2 At the time when Summons was issued against the Road Accident Fund, S[...] M[...] was already a major, aged 22 and Mrs Silo was then (incorrectly) cited as the curator – ad – litem on behalf of S[...] M[...]....

9. I furthermore respectfully submit that all proceedings in the preceding action against the Road Accident Fund be reviewed by a curator ad litem and that consultations be held with S[...] M[...] and family as well as all medical and expert witnesses, to properly assess proceedings and to report to Court with regard to such recommendations made and the appointment of a curator – ad litem to attend to the aforementioned proceedings, and for the final appointment of a Curator Bonis.”

(my emphasis).

[23] In a replying affidavit deposed to by Mr Niehaus on 16 October 2016, he stated:

“6. Because of the misrepresentation by the Defendants with regard to the appointment of the curator-ad-litem, and the lack of capacity of S[...] M[...], no person had a mandate to settle any claim against the Road Accident Fund or for that matter subsequently thereto against Defendants. It therefore remains incumbent for a curator – ad -litem to be appointed as stated and set out in previous affidavits. 7

If I knew at the time when receiving instructions and considering the papers, that the claim against RAF contained a misrepresentation to the effect that Silo was appointed as a curator- ad – litem, I would have myself taken instructions for the appointment of a curator ad – litem. “

[24] On 17 February 2017, an application was brought by Ms S[...], where she sought an appointment of Advocate Wood as a *curator ad litem*. She sought costs against the defendants herein. In that application and at paragraph 9 she stated:

“9. *I am advised and submit that I have the necessary locus standi to bring this Application on behalf of the patient.*”

[25] The second defendant opposed the application on the basis that Ms S[...] had no *locus standi* to institute the action and he raised a point that this court was not clothed with jurisdiction since S[...] M[...] resided in Mdantsane and the cause of action arose from Mdantsane. He contended that the Bhisho High Court had jurisdiction to deal with the matter. He stated in response to paragraph 9:

“Ad Para 9

*The Applicant does not state on what basis is she having locus standi, and as aforesaid also for reasons advanced supra the **Applicant has no locus standi in this application**, what she does not state though is why other siblings of the patient are not involved in this matter.”*

[26] The third defendant also opposed the application for the appointment of a curator *-ad- litem* contending that Ms S[...] had conceded in an affidavit deposed to on 19 September 2016 that she lacked status of being a plaintiff in the action.

[27] Beshe J dismissed with costs the application for the appointment of a *curator ad litem*, on, *inter alia*, the basis that the applicant had not made out a case for the relief sought.

[28] On 30 April 2020 the defendants’ objections in relation to jurisdiction and *locus standi* were dismissed by Hartle J and she ordered them to pay costs jointly and severally.

[29] On 15 April 2021, Dolamo J granted an Order, *inter alia*, appointing Advocate Johan Jacobus Bester as a curator- *ad -litem*. The Court further made, amongst others, the following orders which are relevant for the purposes of the issue at hand:

“1.2 pending the finalization of a Curator Bonis, to do all things necessary to preserve the movable and immovable assets of the patient, which shall include the

*power to institute legal proceedings and/ or **ratify** and conduct same, where same may be considered necessary in the interests of the patient, more particularly:*

1.2.1 to assist the patient in the conduct of legal proceedings instituted in this Court under case number EL295/2006 ECD 1195/2006, which action was brought to recover damages under the Road Accident Fund Act of 1995 as amended, arising out of injuries sustained in a collision with a motor vehicle accident which occurred on 11 March 1996 and further to assist him in considering and, where appropriate accepting offers of settlement;

1.2.2 to assist the patient in determining whether the action referred to in paragraph 1.2.1 hereof ought to be proceeded with or whether the action ought to be withdrawn;

1.2.3. in the event of it being determined that the action under case number EL295/2006 ECD 1195/2006 be withdrawn thereafter reinstituted to assist him in all things necessary in instituting such action and bringing the matter to a conclusion;

1.2.4 to investigate and consider the terms of the attorney and client mandate in the aforesaid action;

1.2.5 to assist the patient in determining whether the present action ought to be proceeded with or whether the action ought to be withdrawn and in any event to assist him in all things necessary to bring this matter to a conclusion; and

*1.2.6 insofar as may be necessary, in the interests of the patient, **to ratify or reject with retrospective effect**, all steps and actions taken on behalf of the patient in the present action and/ or the action referred to in paragraph 1.2.1 above.” (my emphasis).*

[30] Upon his appointment, the curator-*ad-litem* gave instructions on 7 July 2021 in relation to the action that was instituted in 2006 by Nompozolo & Gabelana Attorneys on behalf of the plaintiff against the RAF. He also gave instructions in relation to the

relevant action herein that was instituted against the defendants where Ms S[...] was represented by Mr Niehaus. He directed as follows: That, the Order of Dambuza J (as she then was) be rescinded; that a new action be instituted; that the current action under Case number (EL 785/09, 2685/09) be withdrawn. He was of the view that the first to third defendants should be held liable for costs, however, he recognized that the issue of costs is within the court's discretion; he further expressed a view that "I am further of the view that it was in the best interests of the patient at the time, to institute the current proceedings (even though, without a valid mandate) and as far as may be necessary, I ratify the mandate given in this regard." (my emphasis). He expressed an opinion that the Road Accident Fund should pay the costs for the appointment of the curator *ad litem* and a subsequent *curator bonis*. He was also of the view that the costs of any opposition should be paid by the parties who opposed the said application.

The costs issue

[31] On 16 March 2023, at court, the plaintiff delivered a notice of withdrawal of the action against the defendants. There was no tender of costs. Plaintiff and the first defendant reached agreement that each party is to bear its own costs. The second and third defendants insisted that the attorney of record of the plaintiff, Mr Niehaus, should bear the costs of the withdrawal of the action due to his allegedly reckless conduct in the manner in which he handled the action. The respondents contended that the plaintiff's attorney of record acted recklessly when he pursued an action knowing full well that Ms S[...] had no *locus standi*.

[32] This court was called upon to determine the issue of costs only. Plaintiff opposed the application. Ms Watt appeared for the plaintiff, Mr Poswa appeared for the first and second defendants and Mr Metu for the third defendant.

Plaintiff's submissions

[33] In argument, Ms Watt correctly conceded that by 19 September 2016, when the above quoted affidavit of Ms S[...] was deposed to, it must have dawned on

everyone, including the plaintiff's attorneys of record, that Ms S[...] had no *locus standi* to institute the action.

[34] Ms Watt relied on the order issued by Dolamo J and with specific reference to those orders that gave the curator *ad litem* the power to ratify all conduct that preceded his appointment to the extent that such actions were in the interests of the plaintiff.

[35] She argued that the act of the curator, of ratifying the actions of the plaintiff's attorney of record actually validated those actions, retrospectively. She argued that even where the acts were taken on the instructions of Ms S[...] who *had no locus standi*, the ratification cured that. In this regard she relied on **Vereins-Und West Bank AG v Veren Investments and Others**² and **Smith v Kwanonqubela Town Council**³.

[36] She further submitted that the effect of ratification is retrospective resulting in the same situation as if authorization had been given beforehand. She blamed the defendants for failing to give details about Ms S[...] and for such failure, she argued, the court should hold them responsible for delays and costs in the matter.

Second defendant's submissions

[37] Mr Poswa on behalf of the second defendant argued that the ratification would not extend to acts that were invalid. He argued that the plaintiff's attorney of record knew that Ms S[...] lacked *locus standi* but he continued to pursue the litigation despite such knowledge. On this basis alone, he argued, this court should order him to pay costs of the action *de bonis propriis*. In his supplementary heads of argument, where he addressed the ratification issue only, Mr Poswa submitted that in spite of its retrospective effect ratification does not detract from rights acquired by other parties before ratification. In this regard he relied on **United Methodist Church of South Africa v Sokufudumala 1989 (4) SA 1055 (O)** and **SA Allied Workers Union v De Klerk 1990 (3) SA 425 (ECD)**.

² 2002 (4) SA 421 (SCA).

³ 1999(4) SA 947 (SCA) at para10.

[38] He submitted that ratification is to correct a procedural defect. An invalid act or an act that is *void ab initio* cannot be ratified. He relied on ***Neugarten NO v Standard Bank of South Africa 1989 (1) SA 797 (AD)*** where ratification was dealt with in the context where consent was required in terms of a statute, and lack thereof before or at the time the loan was made or the security provided was fatal to the validity of the transaction.

[39] He further submitted that the interpretation accorded by the plaintiff to the Order of Dolamo J would have an effect that the court can bestow *locus standi* on litigation that was void from the beginning. That interpretation, he submitted, would be contrary to the jurisprudence of this country that proceedings brought without the necessary authority or authorization are *void ab initio*. He submitted that Ms S[...] had no authority to act on behalf of the plaintiff. Her actions are not only *void ab initio* but they cannot be attributed to the curator under the guise of ratification. To do so, he submitted, would prejudice the rights that the defendants had before ratification.

Third defendant's submissions

[40] Mr Metu argued that there was no basis whatsoever for the plaintiff to join the third defendant in the action because he had no instructions from the plaintiff whatsoever. When the third respondent was included in the litigation which dragged on for years, the plaintiff's attorney of record was on a frolic of his own and should be held responsible for his actions. He submitted that the third respondent had indicated to the plaintiff's attorneys that the action should be withdrawn against him but that fell on deaf ears. He argued that there was no basis in law to have the third defendant joined in the litigation. The third defendant had raised the issue of his joinder with Mr Niehaus who ignored it. On this basis, he argued, the Court must find that Mr Niehaus was reckless and must accordingly order him to pay costs of the litigation. In this regard he relied on ***Sheshe v Vereeniging Municipality***⁴.

[41] He submitted that Mr Niehaus acted recklessly and in this regard relied on ***South African Liquor Traders Association and Others v Chairperson Gauteng***

⁴ 1951(3) SA 661 (A)

Liquor Board and Others⁵. He submitted that the fact that the basis for the withdrawal of the action stems from the lack of *locus standi* on the part of Ms S[...], is reason enough to mulct the attorneys representing the plaintiff with costs. He submitted that reliance on ratification was misplaced where there was lack of a valid mandate and lack of *locus standi* to institute the action.

Discussion

[42] The costs that I have to decide relate only to the action that has been withdrawn, Case No: 785/09 ECD 2685/09.

[43] Rule 41 of the Uniform Rules of Court provides:

“Withdrawal, Settlement, Discontinuance, Postponement and Abandonment

(1) (a) *A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events he shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs, and the taxing master shall tax such costs on the request of the other party.*

(b) *A consent to pay costs referred to in paragraph (a), shall have the effect of an order of court for such costs.*

(c) *If no such consent to pay costs is embodied in the notice of withdrawal, the other party may apply to court on notice for an order for costs.”*

[44] Rule 41 (1) (c) finds application herein since no costs were tendered by the plaintiff when the withdrawal was sought. The defendants seek a cost order against the plaintiff’s attorneys of record. In terms of Rule 1 of the Uniform Rules of Court, a party is defined as: *“party’ or any reference to a plaintiff or other litigant in terms,*

⁵ 2009 (1) SA 565 (CC).

shall include his attorney with or without an advocate, as the context may require". It appears therefore that the Rule makers were mindful of the proximity that a legal representative has to his or her client and thus decided to include a representative to be a party in the proceedings.

Did the curator ratify lack of locus standi

[45] In ***Tulip Diamonds FZE v Minister of Justice and Constitutional Development and Others***⁶, the Constitutional Court stated :

"Standing is an important element in determining whether a matter is properly before a court. Our law accords generous rules for standing that permit applicants to bring lawsuits either on their own behalf or on behalf of others. But these are not limitless. A methodical and thorough application of the rules of standing is necessary to ensure, amongst other things that relief is being sought by the appropriate party".

[46] In ***Four Wheel Drive Accessory Distributors CC v Rattan NO***⁷, Schippers JA stated:

"[7] The logical starting point is locus standi – whether in the circumstances the plaintiff had an interest in the relief claimed, which entitled it to bring the action. Generally, the requirements for locus standi are these. The plaintiff must have an adequate interest in the subject matter of the litigation, usually described as a direct interest in the relief sought; the interest must not be too remote; the interest must be actual, not abstract or academic; and it must be a current interest and not a hypothetical one. The duty to allege and prove locus standi rests on the party instituting the proceedings.

[8] The rule that only a person who has a direct interest in the relief sought can claim a remedy, is no more clearly expressed than in the judgment of Innes CJ in Dalrymple:

⁶ 2013[10] BCLR 1180 CC para 1.

⁷ 2019 (3) SA 451 (SCA) (26 September 2018) para 7&8.

“The general rule of our law is that no man can sue in respect of a wrongful act, unless it constitutes a breach of a duty owed to him by the wrongdoer, or unless it causes him some damage in law’. (footnotes omitted).

[47] The fact that the curator *-ad- litem* instructed that this action be withdrawn is not consistent with the broad validation or ratification given by the plaintiff’s representatives to the ratification of the conduct of the plaintiff’s attorney. If the action was instituted by someone who lacked standing as the plaintiff contends, then why would it be necessary to withdraw it even though the curator had ratified an invalid mandate? The *curator -ad -litem* was aware that “ratification” could not restore *locus standi* where there was none, hence he suggested a withdrawal of the current action.

[48] This is a distinguishing factor between this case and the *Smith case* relied upon by the plaintiff. In that case Smith raised the issue that an employee of the provincial administration, Watson lacked *locus standi* to institute an application. Watson was duly appointed in terms of section 29 A of the Black Local Authorities Act 102 of 1982 from 6 August 1993 to 30 November 1993 and then from 1 December 1993 until 31 May 1994. The second term was interrupted by the repeal of the Black Local Authorities Act. Any council or committee established under the repealed act was to continue to exist in spite of the repeal. In the founding affidavit to an application which claimed, *inter alia*, repayment of some of the monies paid to Smith, Watson contended that his appointment had in fact been extended but had not yet been published due to the change of government. There was also a letter that confirmed that extension and the period covered the date of the institution of the application. The court found that section 28(1) of the Municipal Ordinance 20 of 1974, by necessary implication authorized an appointment with retroactive effect. The objection based on Watson’s *locus standi* was dismissed. These facts are distinguishable because Ms S[...] was never in the position that Mr Watson was in, because his authority was derived from the provisions of an Ordinance.

[49] In the *Vereins matter* at para12 page 429 the Supreme Court of Appeal stated:

“[12] ... Though the general rule is that the means of payment must be determined by agreement between the payer and payee, it is clear that unilateral conduct on the part of the debtor in purporting to effect payment, if subsequently accepted by the creditor, is effective to discharge the debt. Thus, should the debtor unilaterally pay a stranger to the contract, if the creditor later ratifies and approves the action, this constitutes a valid payment and is considered valid from the moment of payment (and not from the moment of ratification and approval).”

[50] What is apparent from the quotation, above, is that the debtor and the creditor were both involved in the ratification because they each had rights that needed to be protected. In the *Smith* case it appears that the enquiry does not end with ratification, it goes beyond and the enquiry is what vested rights of the defendants were affected or prejudiced by the ratification? Harms JA in *Smith* at para [14] D-E stated:

“A party to litigation does not have the right to prevent the other party from rectifying a procedural defect. Were it otherwise, one party would for instance not be entitled to amend a pleading, especially not after the filing of a valid exception. The ratification in the present instance did not affect any substantive rights of Smith.”

[51] The above quoted passage from the *Smith* decision, in my view, is confined to procedural defects. The facts in the *Smith*'s case show that Mr Watson had *locus standi* to institute the action. There was a letter recording that authority had been granted for the appointment of Mr Watson as a commissioner of the Town Council. Most importantly, the Transitional Council discussed the case that had been instituted by Mr Watson in full and resolved to proceed with it. The facts that evince authority and *locus standi* in the *Smith*'s case do not exist at all in Ms S[...]’s case.

[52] In my view, the ratification of the conduct of the plaintiff's attorneys by the curator cannot and does not extend to lack of *locus standi* on the part of Ms S[...]. The natural consequence of ratification is to validate an invalid act. In the case where *locus standi* is lacking, the action is *void ab initio*, a nullity and cannot be validated. If it could be validated, then the *curator ad litem* would have simply stepped into the shoes of Ms S[...] and continued with the litigation.

[53] There are other difficulties with the plaintiff's argument on ratification. They are : The curator could not be granted powers that would affect decisions that were taken before he was even appointed as a curator, meaning decisions taken in 2009 (when the action was instituted) when he, himself, was only appointed in 2021. That would also mean that Dolamo J's order would have a retrospective effect. Dolamo J did not record that his order would operate retrospectively. He did not backdate the appointment of the curator. To give his order and the powers of the curator retrospective effect cannot be countenanced in a democratic state. The powers given to the curator, if the plaintiff's interpretation were to be correct, would be overbroad and unconstitutional. The most crucial aspect of the purported ratification is that it would shield a legal practitioner from being held responsible for his or her reckless conduct in handling litigation to the prejudice of, not only the patient but of the defendants, who have been dragged to court on litigation that continued for almost 14 years. Such wide powers are not envisaged in Rule 57 of the Uniform Rules of Court.

[54] In ***Blou v Lampert & Chipkin***⁸, the Appellate Division when dealing with trustees who had instituted proceedings without *locus standi* to do so stated :

“This means that they had no authority to represent. The insolvent estate in the proceedings; and that, de jure, the insolvent estate was not before the Court, and did not litigate, and cannot be ordered to pay costs. The right persons to be mulcted in costs for the abortive application are the trustees who purported to bring it on behalf of the insolvent estate without right or authority to do so. This seems to me logically inescapable.”

[55] There is merit in the arguments made by Mr Poswa and Mr Metu that where a person who purported to have *locus standi* to institute the action did not have it in the first place, that cannot be ratified.

⁸ 1973(1) SA 1 (AD) at page 14 para D-E.

[56] I need to state that the order of Dolamo J only relates to those decisions that are capable of being ratified in law. Any interpretation that seeks to extend it to matters that cannot be ratified, would be a distortion of the order. It follows that the curator can only ratify decisions or actions that are consistent with that order. Ratification cannot be used as a blanket amnesty to validate even decisions that are not capable of being ratified. That is certainly not the intention conveyed by Dolamo J's order. I accordingly find that Ms S[...]’s lack of *locus standi* is not capable of being ratified hence even the curator instructed a withdrawal of the action. It follows that the plaintiff's submissions in this regard, must fail.

Are the defendants to blame for Ms S[...]’s lack of locus standi in these proceedings?

[57] It is not clear on the record the basis upon which the *curator -ad- litem* found that where the attorneys acted “without a *valid mandate*” by, amongst others, instituting litigation in the name of someone who had *no locus standi* , was in the patient's interests. Ms S[...], according to the affidavits deposed to by her, never concealed her relationship to S[...] M[...]. She further disclosed who the parents of S[...] M[...] were, that they were alive and what their financial position was. A legal representative, acting prudently, would have investigated the reasons why an aunt, instead of the mother of S[...] M[...] was giving him a mandate. During March 2010 , Mr Niehaus had in his possession the first defendant's file for the plaintiff. It is as a result of this failure to ascertain the true facts that the void litigation continued for almost 14 years. The defendants have urged the court to order Mr Niehaus to pay costs for the entire action including all reserved costs.

[58] It escapes me how the institution of a new action by Mr Niehaus in 2009 under the current case number, as he did, could be attributed to the alleged dishonest previous conduct of the second and third defendants. It is Mr Niehaus who had put up his mandate from Ms S[...]. He must have interacted with Ms S[...] directly. He had an obligation to satisfy himself that indeed Ms S[...] had been appointed as a curator *ad litem*.

[59] The fact that he discovered later that Ms S[...] lacked *locus standi* cannot be attributed to the defendants. Most importantly, it was his responsibility to ensure that

the person who was going to act in the plaintiff's stead had authority to do so. He assumed responsibility for this litigation the moment he accepted instructions from Ms S[...].

[60] It is apparent from the record that it is the first and second defendants who introduced Ms S[...] as a plaintiff on behalf of S[...] M[...]. They attempted, together with the first defendant, to have Ms S[...], on at least two occasions, as aforementioned, appointed as a *curator ad litem*. If Mr Niehaus had carried on with that case as he found it from the defendants, the arguments made by Ms Watt blaming the defendants for the void litigation would have merit.

[61] However, when Mr Niehaus was appointed as an attorney of record he instituted a fresh or new action in the name of Ms S[...] with a different case number, namely, Case No: EL 785/09, ECD 2685/09 against the defendants. One would have expected that when he was given the mandate he would have satisfied himself that Ms S[...] had authority to act on behalf of S[...] M[...]. He ought to have satisfied himself that the person giving him a mandate had authority to do so. That is what is expected of every legal practitioner. If he, for some reason, believed that she had authority, when Ms S[...] stated under oath in her affidavit on 19 September 2016, that she lacked authority, (to which Mr Niehaus filed a confirmatory affidavit) then at that point, Mr Niehaus ought to have taken steps to withdraw the action against the defendants. He failed to do so but continued to keep them as parties to an action that he knew was void, for lack of legal standing .

[62] As soon as an attorney has accepted a mandate the relationship of attorney and client is established⁹. The attorney is then bound to give the client the benefit of his skill and judgment and should continue to act in the matter until its conclusion unless there is good cause for termination of the relationship¹⁰.

Why should the attorney pay costs de bonis propriis?

⁹ Herbstein & Van Winsen: The Civil Practice of the High Court of South Africa, 5th Edition, Volume 1 page 284

¹⁰ Hills v Taxing Master 1975 (1) SA 856 (D) at 859 E-F.

[63] In determining the issue at hand it is crucial to look at the conduct of the plaintiff and his attorneys of record before the withdrawal of the action and assess whether it played any material part in adding to the defendants' costs¹¹.

[64] Professor Digby Koyana, once wrote, in an article entitled:

Costs de bonis propriis : Attorneys and Advocates beware!¹² .

“Turning specifically to legal practitioners, the rule is that costs are awarded against erring attorneys in reasonably serious cases, such as those involving dishonesty, willfulness or negligence to a serious degree. This rule was stated by the Appellate Division in Machumela v Santam Insurance Company Ltd 1977 (1) SA 660 (A). This case was applied in Waar v Louw 1977 (3) SA 297 (O) where Steyn J warned that mistakes that an attorney makes in litigation, which result in unnecessary costs, should not lightly be overlooked.”

[65] In **Khan v Mzovuyo Investments (Pty) v Ltd**¹³, the Court referred to the principle of awarding costs de *bonis propriis* as summed up by Innes CJ in **Vermaak's Executor v Vermaak's Heirs**¹⁴ as follows:

‘The whole question was very carefully considered by this Court in Potgieter's case (1908 TS 982), and a general rule was formulated to the effect that in order to justify a personal order for costs against a litigant occupying a fiduciary capacity his conduct in connection with the litigation in question must have been *mala fide*, *negligent* or *unreasonable*.’

[66] The plaintiff argued that the defendants protracted the litigation by opposing the applications for a *curator-ad-litem*. The truth of the matter is that the plaintiff sought costs against the defendants whether they opposed the applications or not.

¹¹ Nkosi v Caledonian Insurance Co 1961 (4) SA 649 NPD at 658 para G-H.

¹² De Rebus, November 1997 at page 767.

¹³ 1991 (3) SA 47 Tk GD at paras E-F.

¹⁴ 1909 TS 679 at 691.

For example, in the Notice of Motion dated 17 September 2016, the plaintiff sought the following order:

“4. That costs of this Application be borne by the relevant Respondents opposing this application on an attorney / client scale.”

However, in the affidavit annexed thereto at paragraph 14.3, the following orders are sought:

“14.3 That an Application be brought for the appointment of a Curator- ad- Litem;

14.4 That costs of this Application be borne by the Respondents on an attorney/ client scale.”

[67] This application related to the appointment of Mr Wood as a *curator-ad-litem*. Any defendant who did not react to the application ran the risk of being mulcted in costs. To the extent that the applications for the appointment of the curator were brought by Ms S[...], the defendants were justified in raising lack of *locus standi*, as they did. As it turned out even, Ms S[...] and Mr Niehaus, as demonstrated above, acknowledged the fact that she had no *locus standi* to institute the action against the defendants.

[68] The second and third defendants had raised the issue of Ms S[...]’s lack of *locus standi*, clearly and unambiguously. They have been vindicated by the withdrawal of the action due to lack of *locus standi*. Of importance is that Ms S[...] herself acknowledged that fact but Mr Niehaus persisted with the action against the defendants. Such conduct warrants censure from this Court. It was reckless, inconsiderate and unreasonable and did not advance any of S[...] M[...]’s interests.

[69] Mr Niehaus was advised by the curator as early as 7 July 2021 that he should withdraw the action. There is no explanation why he did not heed counsel from the curator *ad litem* much earlier and withdraw the action. Ms Watt submitted that, the defendants had, throughout the proceedings against the RAF cited Ms S[...] as the plaintiff and have settled and finalized the claim in her name. That may be so but that does not detract from the fact that Mr Niehaus intended to have Ms S[...] appointed

as a curator *ad litem* in circumstances when, he, together with Ms S[...], knew that she lacked standing in this action.

[70] In a letter he addressed to the representatives of the Defendants on 6 June 2022, at para 4.1, Mr Niehaus stated:

“4.1 It must also furthermore be accepted that the late Ms S[...] was never representing the injured in her personal capacity and can never as such be held liable for any costs.”

5.3 This Honourable Court is respectfully reminded that Ms S[...] (now late) was never properly and correctly appointed as Curator – ad litem and therefore never had any status in the action.” (my underlining).

[71] Again, this statement indicates that by 6 June 2022, Mr Niehaus still acknowledged that Ms S[...] had no standing in the action. That would have been an opportune time to withdraw the action. Surely, he was not expecting to proceed with the litigation if Ms S[...] had no legal standing in the action, as he stated. He was also alive to the fact that Ms S[...] would not be liable for costs. The question is who must be liable for costs in circumstances where he had pursued litigation against the defendants in the name of someone *“who never had any status in the action”*? I find that his actions in this regard were reckless and did not advance the interests of the plaintiff.

[72] These statements are recorded in circumstances where Ms S[...] was a plaintiff in the action that was instituted by him and not by the defendants. The delay in taking and implementing the advice of the *curator-ad-litem* was long and any inconvenience to the defendants could have been avoided. These defendants were legally represented and those costs could have been avoided. They had paid the ultimate price for their alleged wrongs in relation to the action against the RAF. Their names were removed from the roll of attorneys and thus barred from practising. The plaintiff in this case has brought to the fore all the wrongs committed by the defendants in the RAF action. Their wrongs, in my view, do not justify the conduct of Mr Niehaus in this action. The defence based on *locus standi* which was raised by

the defendants had merit. The defendants should be entitled to costs from the time Mr Niehaus knew of lack of standing on the part of Ms S[...].

[73] The question that needs consideration is whether Mr Niehaus should be held liable for all the defendants' costs of the litigation, particularly, from 19 September 2016 to 16 March 2023? That will be a period of some seven years.

[74] In the exercise of its discretion this court takes cognizance of the fact that it is in the nature of litigation that parties get carried away in protecting their respective positions in the litigation. That is apparent from this record. The tensions between the parties are palpable. This court is in a different position because it works from a cold record. In my view, mulcting Mr Niehaus with costs from 19 September 2016 (the date of acknowledgement of lack of locus standi by Ms S[...]) up to and including 16 March 2023, would be onerous. It would entail a detailed analysis of all events in the action to which this court is not privy since only a few bundles were placed, by agreement, before it for the purposes of the hearing on costs. It would be unfair to simply look at the period and impose it, without the necessary context.

[75] The time when the *curator ad litem* intervened by issuing the instructions that this action be withdrawn, is a useful guide to this court in terms of determination of a reasonable period, for the payment of the second and third defendants' costs by Mr Niehaus, *de bonis propriis*. I shall allow a reasonable period of five (5) days after the 7 July 2021 as a period within which Mr Niehaus would have reasonably carried out that instruction. By 15 July 2021, he ought to have complied with that instruction especially after he had held a meeting with the parties who indicated that they were not able to entertain the issue of costs before the withdrawal of the action. A reasonable period for which he should be held liable for costs *de bonis propriis* is from 15 July 2021 up to and including 16 March 2023, being the date when the action was withdrawn and the date of the opposed hearing on costs. Such costs shall include all reserved costs within that period, if any.

I accordingly make the following Order:

[76] 1. The attorney, Mr Niehaus, is directed to pay, *de bonis propriis*, costs of the second and third defendants in relation to the action under Case No.: **EL 785/ 09 ECD 2685/09**: which has since been withdrawn, from the period 15 July 2021 up to and including 16 March 2023, together with costs occasioned by the opposed hearing of 16 March 2023. Such costs shall include all reserved costs within that period, if any.

T.V NORMAN
JUDGE OF THE HIGH COURT

Matter heard on : 16 March 2023
Judgment Delivered on : 25 April 2023

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