

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 11881/2021

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	REVISED.
<u>3/8/2022</u> DATE	
 SIGNATURE	

In the matter between:

JOHANNES CHRISTIAAN PRINSLOO N.O.

Applicant

as *Curator ad litem* to

TSHEPO TSHALETE

The Patient

And

SYDWELL MOSUNGWA

First Respondent

GQWEDE ATTORNEYS

Second Respondent

JUDGMENT

MAKUME, J:

- [1] The Applicant is the duly appointed *curator ad litem* to the patient, Tshepo Tshalete. In this application he seeks an order compelling the first and second Respondents to hand over to the Sheriff of the above honourable Court the

contents of their respective files relating to the claim instituted on behalf of the patient against the Road Accident Fund for injuries sustained by the patient in a motor vehicle accident during 2002.

BACKGROUND

- [2] The first Respondent is a legal Practitioner and is a former curator ad litem to the patient. His services were terminated via a Court order granted on the 3rd May 2022 by Manoj J. He having been appointed on the 05th January 2017.
- [3] The second Respondent is a firm of Legal Practitioners and acted as attorneys of record for the patient on instructions of the First Respondent. They lodged a claim against the Road Accident Fund and received payment for general damages in the sum of R600 000.00 on the 7th June 2017. The second Respondent's mandate was also terminated. Bove Attorneys are now the attorneys of record for the patient on instructions of the present *curator ad litem*.
- [4] The patient's claim for future loss of earnings has not been settled. Both the patient's present attorneys of record and the *curator ad litem* are unable to prosecute the claim further as the Respondents are holding on to vital information and documents relating to the patient.
- [5] In order to enable the Applicant to prosecute the claim further he instructed Bove Attorneys to collect the files relating to the patient's claim from both Respondents. On the 5th June 2022 second Respondent informed Bove Attorneys to collect the files on Friday the 10th June 2022. On the 10th June 2022 an incomplete file was handed over to the messenger. Second Respondent informed Bove Attorneys in a letter that some documents like expert notices would follow later as same were with the costs consultant who were attending to the second Respondent's bill of costs.

- [6] In the letter dated the 10th June 2022 second Respondent further advised the attorneys that: "the file was settled with all heads of damages i.e. general damages, future medical treatment and loss of earnings."
- [7] Bove Attorneys in a letter addressed to second Respondent dated the 10th June 2022 noted that what they had received from the second Respondent earlier that day were documents attached to papers comprising of the application for removal that served before Manoim J on 3rd May 2022. Bove Attorneys informed second Respondent that they will be proceeding by way of an urgent application unless the documents as required are handed over as agreed and as ordered by Manoim J.
- [8] When all along this was taking place the first Respondent who is the erstwhile curator ad litem kept quiet. Late in the afternoon of the 10th June 2022 the second Respondent sent an email to Bove Attorneys informing them that the balance of the file documents were now available for collection. On the 13th June 2022 once more an incomplete file of documents was delivered to the Applicant's Attorneys.
- [9] On the 13th June 2022 the first Respondent having been served with a notice of motion addressed a letter to Bove Attorneys and said the following:
- "We confirm receipt of your application to compel to which we are not sure as what are you compelling from our office in this matter as we have indicated that we don't have the file of your client, but you can get copies from the instructing attorneys. So we very much should be served with your order."
- [10] On receipt of the above letter Bove Attorneys reminded the first Respondent that in an earlier letter from them dated the 25th January 2022 they had indicated that their original file was with Counsel. First Respondent was further reminded that as former *curator ad litem* he has obligation in terms of Rule 57 of the Uniform Rules of Court.

PRINCIPAL SUBMISSIONS

- [11] In a letter addressed to Bove Attorneys dated the 3rd May 2022 Mr JC Prinsloo the Applicant informed Bove Attorneys that he has now as the curator ad litem decided to appoint them as attorneys of record and instructed them to collect from the Respondents the complete Court file. The Applicant in that letter made an undertaking to tax the former attorneys and curator's party and party costs in respect of work done and make payment thereof on receipt of payment from the Road Accident Fund
- [12] Only the first Respondent appeared with Counsel on the 28th June 2022 to oppose the application. The second Respondent made no appearance. According to the first Respondent he handed everything all the contents of his file to the second Respondent. It was argued that the relationship between the first and second Respondents has deteriorated and they are not communicating with each other.
- [13] In responding to the question why during January 2022 he the first Respondent had indicated that the file was with Counsel he said that he meant the file containing the application for his removal as *curator ad litem*.

THE LEGAL POSITION

- [14] The curator is in the position of an ad hoc guardian of the patient and as such has a fiduciary duty. A *curator ad litem* has to act solely for the benefit of the patient. (See: **Martin N.O. v Road Accident Fund 2000 (2) SA 1023 (W) at 1036**). In that case Wunsh J said the following at page 1036 "The duty of a *curator ad litem* is to represent the minor in the particulars case then pending, and to watch and protect his interest in the case as a good and prudent father would have done. Beyond what is embraced in the case he has nothing whatever to do with the minor person or property and his duties end with the completion and final settlement of the case."

- [15] It is also trite law and common practice that when one attorney's mandate is terminated that attorneys has a legal duty to hand over the contents of the client file which is in his possession to the new attorneys provided the new attorneys undertake to have his fees up to that stage paid. This is what usually happens in claims especially against the Road Accident Fund. In other matters an attorney is entitled to hold on to the file until his or her fees are paid as he or she has a *lien* over the documents in the file.
- [16] In the current matter the Applicant has tendered to pay and have the costs of both Respondents taxed and paid on receipt of the claim from the Road Accident Fund.

EVALUATION AND ASSESSMENT

- [17] During or about the 25th January 2022 the first Respondent informed the Applicant's Attorneys that the contents of the patient's file was with their Counsel. Three months later when he is again asked for the file he now says he has handed everything to the second Respondent.
- [18] It must be recalled that the function and duty of the first Respondent were different from those of the second Respondent. In his Answering Affidavit at paragraph 11.1 the first Respondent tells the Court that "After recommending that the offer of the Road Accident Fund has offered is reasonable I handed back all the documents relating to the medico legal reports as they were the only documents, I received and same was returned to the second Respondent.
- [19] The first Respondent's Answering Affidavit was brought to the attention of the second Respondent who chose to keep quite. This in my view lends credibility to the first Respondent that he handed the contents of his file to the second Respondent. The second Respondent has not disputed this and has in fact chosen to stay away from Court.
- [20] In the result though I have a feeling that the first Respondent has acted negligent in carrying out his obligation as a *curator ad litem*. I have to give him

the benefit of the doubt that he is not in possession of any document. In the result the application against the first Respondent falls to be dismissed.

[21] The position as regard the second Respondent is different. The correspondence exchanged between Bove Attorneys and the second Respondent clearly indicates that they are in possession of the file of all documents relating to the patient. Their mandate has been terminated. They had no right to hold on to the file as an undertaking to pay their fees has been made. They are not acting in the best interest of the patient. I accordingly find not only that this application is urgent but that the Applicant has made out a case as prayed for.

[22] In the result I make the following order:

1. The application is urgent and complies with the requirements of rule 6(12) read with the Practice Directive of this division.
2. The application against the first Respondent is dismissed with costs on a party and party scale.
3. The application against the second Respondent is granted. The second Respondent is hereby ordered to:
 - a) Hand over to the Sheriff upon production of the this order the contents of the files relating to the claim brought on behalf of the Patient against the Road Accident Fund claiming compensation for the injuries sustained by the Patient in a motor accident together with:-
 - b) Medico legal reports obtained from medical experts on the injuries sustained by the Patient in the said accident and their sequelae.
 - c) All medical reports received by the Respondent on behalf of the Patient relating to and specifying his physical and mental condition prior to the accident.

- d) All school reports received by the Respondent in relation to the progress made by the Patient in his education.
- e) A copy of the fees agreement signed on behalf of the Patient and the Second Respondent in relation to the mandate he received to process the claim against the Road Accident Fund.
- f) Documentary proof of all payments received by the Second Respondent from the Road Accident Fund as part of or final settlement of the claim on behalf of the Patient.
- g) Copies of all invoices rendered by the Second Respondent to the Patient's mother in respect of the professional services he rendered on behalf of the Patient.
- h) Copies of all invoices rendered to the Second Respondent from all service providers in respect of disbursements incurred in connection with the conduct of this claim.
- i) Proof of payment by Second Respondent to the Patient's mother tendered as the Patient's entitlement to general damages.
- j) Copies of all reports submitted by the First Respondent to the Second Respondent and the above Honourable Court (if any) in respect of his curatorship of the Patient.
- k) The Second Respondent is hereby ordered to pay the Applicant's costs of and incidental to this Application on the scale as between Attorney and Client de bonis propriis.

Dated at Johannesburg on this 3rd day of August 2022



M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances:

DATE OF HEARING : 28 JUNE 2022
DATE OF JUDGMENT : 03 AUGUST 2022

FOR APPLICANT : ADV UYS
INSTRUCTED BY : MESSRS BOVE ATTORNEYS INC

FOR RESPONDENT : ADV MATHEBULA
INSTRUCTED BY : MESSRS MOSUNGWA INC