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

CASE NUMBER: 34770/2018

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED NO

In the matter between:

H [....] 1, R [....] D [....]

INTERVENING PARTY AS APPLICANT

In re:

TAUTE, JEAN PIERRE

APPLICANT

for the appointment of a *curatrix ad litem* to

H [....] 2, C [....] M [....]

THE PATIENT

(Identity number [....])

In re:

The matter between:

H [....] 1, R [....] D [....]

PLAINTIFF

and

H [...] 2, C [...] M [...]

DEFENDANT

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 18th of August 2022.

DIPPENAAR J

[1] The present application concerns the appointment of a curator ad litem to Mrs H [...] 2 ("the patient"), who is the defendant in pending divorce proceedings between her and the intervening applicant, Dr H [...] 1, the plaintiff in the divorce action. The divorce proceedings were instituted during September 2018 and have been under case management since about July 2021 as the parties were experiencing difficulties in getting the matter ready for trial.

[2] Mr Taute, a candidate attorney in the employ of the patient's erstwhile attorneys of record, on instruction of the patient, during or about July 2021 brought an application for the appointment of a *curatrix ad litem* to the patient, initially to determine whether she was inter alia capable of defending the divorce action and subsequently to act on behalf of the patient in the pending divorce proceedings against her. The reason for the application was that the attorneys were not able to obtain meaningful instructions from the patient. I return later to deal with his averments in detail. The issues in the divorce proceedings are rectification of an ante nuptial contract and spousal maintenance for the patient.

[3] Pursuant to the launching of the application, Advocate Fabricius was appointed by order of court as *curatrix ad litem* to the patient on 13 August 2021 for purposes of investigating whether she is capable of managing her own affairs, more specifically

whether the patient is capable of comprehending and meaningfully participating in the pending divorce proceedings against her.

[4] The erstwhile attorneys of record for the patient withdrew on 26 August 2021. The original application was not withdrawn but was also not enrolled for hearing given the withdrawal of the patient's attorneys of record.

[5] During May 2022, Dr H [...] 1 launched an application for leave to intervene in the curatorship application and seeks the appointment of a *curatrix ad litem* only for the divorce action to the patient, who is the defendant in the pending divorce action.

[6] He further seeks the appointment of Advocate Fabricius as *curatrix ad litem* to the patient for purposes of continuing and finalising the pending divorce action only and for certain duties and powers to be afforded to Advocate Fabricius necessary to fulfil her appointment. The powers and duties are the normal ones afforded to a *curatrix ad litem*.

[7] In addition, the exceptional power is sought to obtain and establish the patient's full financial position from independent third parties, if necessary, and to disclose the information so obtained only for purposes of the divorce action. As one of the issues in the pending divorce proceedings is spousal maintenance, the patient's financial information is self-evidently important.

[8] On 9 December 2021, Advocate Fabricius presented a comprehensive report, concluding that the patient will not be able to fully understand the legal proceedings in the divorce action; will not be able to give any meaningful instructions to an attorney representing her in the divorce action; and should be assisted by a *curator ad litem* in the divorce action to prevent her acting to her own detriment and to bring the action to its final conclusion. Advocate Fabricius's report is comprehensive and supported by the facts. She has consulted with Dr Liebenberg and the patient on various occasions. Extensive communication has further been exchanged between Adv Fabricius and the patient via Whatsapp.

[9] Advocate Fabricius records that Dr Liebenberg is of the opinion that a *curator ad litem* should be appointed to the patient. Advocate Fabricius does not make any mention of Dr Liebenberg having authored a letter on 23 August 2021 recording that the patient no longer wishes for a curator to be appointed to her, weeks after her letter of 03 August 2021 recommending a curator be appointed to the patient. It appears that the patient may have approached Dr Liebenberg to retract her previous recommendation. In my view this illustrates the erratic nature of the patient's conduct, which has been a feature of her conduct throughout the proceedings. The exact facts remain unclear and were not clarified by the patient in her affidavit.

[10] In opposition to Dr H [...] 1's intervention application, the patient on 11 July 2022, delivered an affidavit, styled "Patient's explanatory and answering affidavit". The patient independently obtained legal assistance from Mr Mabasa via Legal Aid. Mr Mabasa also represented the patient at the hearing of the application.

[11] In her answering affidavit, the patient did not seek dismissal of the application or oppose the intervention of Dr H [...] 1 as applicant. Instead, the patient sought an order that the application be stayed for an unspecified time for her to be assessed and evaluated by two unspecified medical practitioners at the cost of the Intervening Applicant, which medical practitioners will then file affidavits, without a time being specified, reporting to the court on her mental assessment. It was argued on behalf of the patient that the requirements of r 57 had not been complied with as there were no affidavits filed by the applicant as envisaged by r 57(3).

[12] No replying affidavit was filed on the basis that Dr H [...] 1 had no further factual information to provide to the court.

[13] The intervention application is not opposed and I am satisfied that Dr H [...] 1 has a direct and substantial interest in the proceedings. An order for his intervention will be granted by agreement between the parties.

[14] In the original founding affidavit, Mr Taute set out that he, as a candidate attorney at the patient's erstwhile attorneys of record, had been dealing with the patient personally since 2018, when Shapiro & Ledwaba Incorporated began representing the patient in the divorce action. He had consulted with her personally over three years to take instructions and to arrange for her to be assessed by professionals. These consultations and the contents of the professional reports obtained, which states that the patient's mental capacity is below normal and unstable, have led him to believe that the patient is unable to participate meaningfully in the divorce action. Despite representing the patient, her inability to give him proper and actionable instructions has resulted in compelling and costs orders being granted against her. Mr Taute has experienced the patient as anxious, paranoid and expressing a belief that she is in danger. He is thus aware of her incapacity to contribute meaningfully to the pending divorce action.

[15] Mr Taute annexed reports of psychiatrist Dr R M Liebenberg, clinical psychologist S C Strijdom and industrial psychologist S Schlebusch to his affidavit. Dr Liebenberg's notes and reports indicate that the patient has been her patient since 2005. Dr Liebenberg has found the patient to be anxious and paranoid. She lacks social intelligence, emotional skills and organisational ability due to her low IQ (85). She has difficulty with abstract concepts. Dr Liebenberg in her report concludes that the patient will not be self-supporting at any time in the future. Dr Liebenberg sets out that the best diagnosis she can make of the patient is that she has a paranoid personality disorder.

[16] The annexed reports of Dr Liebenberg up to 26 November 2019 were all made available by the patient in the divorce action on 19 March 2020 as part of Ms Schlebusch's expert report, to support her claim for spousal maintenance. Dr Liebenberg supports the appointment of a curator to oversee the patient's interests as she does not believe the patient has the ability to oversee her own interests.

[17] Ms Strijdom's report indicates that she conducted psychometric testing of the patient's cognitive function on the referral of Dr Liebenberg. The patient's test scores place her in the range of intellectually impaired. She is functioning at a borderline intellectual level which compromises her ability to cope with daily situations and makes dealing with change and learning new information especially taxing. The patient cannot cope in the open labour market. The report of Ms Strijdom was made available by the patient in the divorce action on 19 March 2020 as part of Ms Schlebusch's expert report, to support her claim for spousal maintenance.

[18] Ms Schlebusch's report indicates that the patient's diagnosed paranoid personality disorder, her low IQ, cognitive difficulties, poor executive functioning and interpersonal skills "*will adversely affect her competitiveness for employment in open labour market*". The report of Ms Schlebusch was filed as an expert report by the Patient in the divorce action on 19 March 2020, to support her claim for spousal maintenance.

[19] In her explanatory and answering affidavit the patient raised her concerns, expressed a distrust in Advocate Fabricius, based on a misconception of Adv Fabricius' willingness to act on a pro bono basis and sought that the matter be postponed indefinitely for further mental assessments of her. She did not deal in sequence with every allegation made in the founding papers and those averments remain undisputed. The patient indicated that she is willing to subject herself to independent medical practitioners for assessment to determine if she is capable of managing her affairs and denied that she has any psychiatric impairment that justifies the appointment of a *curator ad litem* to her or prevents her from giving proper instructions to an attorney. She further referred to psychiatric drugs, she took some 17 years ago, which take the matter no further. Reliance is placed on the fact that a mental state examination of her lasting 72 hours during 2018 by a Dr Heiberg, did not make any psychiatric diagnosis during the observation period, which assessment recommended further formal assessment, which apparently did not take place.

[20] Against the uncontested facts presented, both by Mr Taute and Advocate Fabricius, the patient's denial that she has any impairment that requires her to be assisted by a *curatrix ad litem* in the divorce action or prevents her from giving proper instructions to any attorney representing her in the divorce action does not bear scrutiny and can be rejected on the papers as untenable¹. The facts presented illustrate that the patient is not able to properly comprehend the nature of the divorce action and her obligations in relation thereto. Her answering affidavit and her conduct in relation to the matter, illustrates that she does not fully understand the process or its implications properly. This is illustrated, inter alia, by the fact that despite a senior attorney indicating that he would represent her in the divorce proceedings pro bono, she insisted in procuring Legal Aid to assist her, on the basis of an unjustified distrust in the bona fides of Adv Fabricius and the assistance of the attorney she had procured to assist on a pro bono basis.

[21] I agree with the argument advanced on behalf of Dr H [...] 1 that no amount of further medical assessment will change the patient's ability to participate meaningfully in her divorce action or progress the matter in any way and that the patient's ability to understand and participate meaningfully in her divorce is the essential issue, not any psychiatric diagnosis *per se*.

[22] From the information provided by the mental health professionals, going back to 2005, it appears clear that the patient will have difficulty in dealing with anything stressful or out of the ordinary in her life. This would certainly include the divorce action.

[23] In her affidavit, the patient further conflates a specific psychiatric diagnosis with an inability to properly conduct the divorce action. She further conflates the present relief sought in relation to the appointment of a *curatrix ad litem* for purposes of the divorce action with the appointment of a curator with much broader powers. This in my view underscores her lack of understanding with the present process.

¹ Wightman t/a JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA) para [13]

[24] In the present instance this court is only required to determine whether or not the patient is able to participate meaningfully in the divorce action without assistance and not whether she is not capable of managing any of her own affairs.

[25] I am persuaded that any further delay for any further investigation not essential to the current application, would prejudice both parties and unnecessarily delay the resolution of the divorce action.

[26] Dr Heiberg in her report confirms that the patient only has partial insight; a thought form that was most circumstantial and even tangential at times; and thought content that involved persecutory preoccupation towards Dr H [...] 1, his family and his friends. This is no more favourable to the patient than any of the earlier information provided by Dr Liebenberg and Ms Strijdom, or the later information provided by Ms Schlebusch.

[27] The patient claims that the present application is fatally defective as it does not comply with r 57 in that it is not supported by the affidavits of two medical practitioners. It was further argued that no exceptional circumstances exist in the matter and that the provisions of r 57(3) are peremptory that affidavits should be presented.

[28] Although the aforesaid reports were not supported by affidavits, a point raised by Mr Mabase during argument, it is uncontested that those are the medical reports relied on by the patient in the divorce proceedings which were provided as expert reports.

[29] The relevant portions of Rule 57 provide:

“De Lunatico Inquirendo, Appointment of Curators in Respect of Persons under Disability and Release from Curatorship.

(1) Any person desirous of making application to the court for an order declaring another person (hereinafter referred to as ‘the patient’) to be of

unsound mind and as such incapable of managing his affairs, and appointing a curator to the person or property of such patient shall in the first instance apply to the court for the appointment of a curator ad litem to such patient

(2) . . .

(3) The application shall, as far as possible, be supported by-

(a) an affidavit by at least one person to whom the patient is well known and containing such facts and information as are within the deponent's own knowledge concerning the patient's mental condition. If such person is related to the patient, or has any personal interest in the terms of any order sought, full details of such relationship or interest, as the case may be, shall be set forth in this affidavit; and

(b) affidavits by at least two medical practitioners, one of whom shall, where practicable, be an alienist, who have conducted recent examinations of the patient with a view as to ascertaining and reporting upon his mental condition and stating all such facts as were observed by them at such examinations in regard to such condition, the opinions found by them in regard to the nature, extent and probable duration of any mental disorder or defect observed and their reasons for the same and whether the patient is in their opinion incapable of managing his affairs. Such medical practitioners shall, as far as possible, be persons unrelated to the patient, and without personal interest of the order sought.

(4) Upon the hearing of the application referred to in subrule (1), the court may appoint the person suggested or any other suitable person as curator ad litem, or may dismiss the application or make such further order or other order thereon as to it may seem meet and in particular on cause shown, and by reason of urgency, special circumstances or otherwise, dispense with any of the requirements of this rule”.

[30] It is thus clear that r57(4) affords a court a discretion to dispense with any of the requirements of the subrule. Although the medical reports presented were not confirmed under oath, they form the basis of the expert reports to be presented by the patient

herself in the divorce proceedings. She can hardly now disavow the contents those same reports for not being under oath when the same content is being used to prove a different issue in the divorce proceedings.

[31] In such circumstances, I am persuaded that strict compliance with the affidavit requirement can be waived and that special circumstances exist to do so.

[32] Moreover, whilst it is correct that the application is not supported by the affidavits of two medical practitioners, this does not make the application fatally defective. R 57 governs a slightly different situation: being the appointment of *curators bonis* and *ad personam* in circumstances where a patient is completely unable to manage her affairs at all because of some physical and/or mental disability under which she labours. Even Rule 57 does not make supporting affidavits absolutely essential, but only requires them “as far as possible”².

[33] The patient’s denial that she gave any informed consent to the original applicant to bring this application, is not consistent with the basis on which the original application was brought. In context, the statement serves to confirm that the patient does not wish to have a *curator ad litem* appointed for her in the divorce action. It does not appear that she appreciates the benefits such appointment may have for her in the divorce proceedings.

[34] The patient does not wish to be assisted by Advocate Fabricius. If she is to be assisted, she wishes the appointment to be made by the LPC. On her version, she has no confidence in Advocate Fabricius as she supports the appointment of a *curatrix ad litem* to the patient and will be paid from the patient’s estate after finalisation of the divorce action. This illustrates a misconception on the patient’s part as to the concept of acting pro bono.

² Uniform Rule of Court 57(3); Scott and others v Scott and another 2021 (2) SA 274 (KZD) at para [33]

[35] Advocate Fabricius' report foreshadows some difficulty with the Patient's interpretation of their conversations and she states that the patient misunderstands or makes things up and then genuinely believes that the conversation happened along the lines reported by the patient. Advocate Fabricius has indicated that she will act *pro bono* for the patient.

[36] The patient's paranoia about Advocate Fabricius has been evident since her report was filed. Advocate Fabricius set out that the patient expressed the view that she had been appointed by Dr H [...] 1's legal representatives and was being paid by his brother. This impression is incorrect.

[37] I agree with the argument advanced by Dr H [...] 1 that the patient's suggestion that a different *curator ad litem* be appointed by the Legal Practice Council is not sustainable. No alternative individual has been proposed and nobody has provided consent that he/she would be prepared so to act. I am satisfied that Adv Fabricius has the necessary qualifications, good standing and experience to be a suitable person to be appointed as *curatrix ad litem*.

[38] Mr Mabasa could not during argument propose an alternative individual who would be appropriate for appointment. Despite inviting submissions to me made on the issue after the hearing, no such submissions were received. It is well established that an appointment is a decision made by the court having regard to the particular individual who will be tasked to take on the responsibility: "*(ordinarily) an advocate of sufficient experience, proven experience and good standing to ensure that the patient receives optimal forensic advice and service*"³.

[39] I agree with Dr H [...] 1 that the decision on the identity of a *curator ad litem* cannot be left in the hands of a nominated third party. The patient has failed to nominate

³ Modiba in re Ruca v RAF (unreported judgment delivered on 24 January 2014; 2014 ZAGPPHC 1071 at para 35

any other advocate who is willing to act as her *curator ad litem* and expressed his/her consent to do so and set out his/her experience to do so to the court.

[40] Ultimately, the patient seeks that the application be stayed for an unspecified time for her to be assessed and evaluated by two unspecified medical practitioners at the cost of Dr H [...] 1, which medical practitioners will then file affidavits, at an unspecified time, reporting to the court on her mental assessment.

[41] I am not persuaded that such relief is appropriate or sustainable or that it is in the interests of justice to grant such relief as it will not progress the divorce action in any way. It is significant that no substantive application was launched for the relief sought by the patient, which constitutes a further obstacle in her path.

[42] Considering all the relevant facts and the discretion afforded under r57(4), I am persuaded that the intervening applicant has presented sufficient evidence to illustrate on a balance of probabilities that the patient is unable to appreciate the nature of the legal issues in their divorce action and the nature of the procedural steps required in their divorce action for a *curator ad litem* to be appointed to her for the divorce action⁴.

[43] As the patient has obtained the assistance of Mr Mabasa as attorney, it is not necessary to consider the appointment of an attorney on a pro bono basis as suggested by Adv Fabricius.

[44] The patient has not objected to the powers and duties of the *curatrix ad litem* sought. I am persuaded that the exceptional power to obtain financial information is necessary to obtain clarity regarding the financial position of the patient which is an important consideration in the divorce action.

⁴ Modiba in re Ruca supra paras [35] and [37]; Scott and others v Scott and another 2021 (2) SA 274 (KZD) at paras [38]; [40]; [42] and [44]

[45] It is undisputed that the patient simply failed to make the necessary disclosure despite multiple requests for further discovery, requests for a complete Financial Disclosure Form and questions in terms of Rule 37(4) being directed at her. None of these requests has ever been comprehensively answered, despite the granting of compelling and costs orders against the patient at the instance of Dr H [...] 1 in an attempt to push the divorce action closer to a proper settlement or trial.

[46] I am persuaded that such power and duty would be necessary as, absent such power, the patient's financial information would remain unknown and would thwart the finalisation of the divorce proceedings indefinitely, considering the patient's previous conduct in relation to the matter.

[47] It would in my view further be appropriate for Advocate Fabricius to be appointed as *curator ad litem* to assist the patient in the divorce action, despite her misgivings, which are not based on any objective facts. Adv Fabricius has already provided a proper and comprehensive report, is familiar with the matter and has agreed to assist on a pro bono basis. I am persuaded that she is an imminently suitable person to appoint and meets all the relevant criteria.

[48] It would be appropriate to direct that the costs of this application be determined by the court finally determining the divorce action.

[49] I grant the following order:

1. R [...] D [...] H [...] 1 is allowed to intervene in this application for the purpose of determining whether a curatrix ad litem should be appointed to the Defendant, C [...] M [...] H [...] 2, in the divorce action under this case number;
2. MARI FABRICIUS, an advocate of the High Court of South Africa, practicing as such at Brooklyn Advocates' Chambers, Dey Street, New

Muckleneuk, Pretoria, is appointed as the curatrix ad litem to the Defendant, C [...] M [...] H [...] 2, in the divorce action under this case number;

3. The said MARI FABRICIUS is granted the following powers and duties:

3.1 to act on behalf of the Defendant and to take any and all steps as she may deem necessary, in the interests of the Defendant, for the purpose of continuing and finalizing the pending divorce action instituted against the Defendant under this case number;

3.2 to appoint attorneys and counsel, who shall act pro bono, to defend the divorce action against the Defendant and to ratify, amend or revoke any and all steps already taken by attorneys Shapiro and Ledwaba Incorporated on behalf of the Defendant;

3.3 to obtain full information and supporting documentation from the Defendant and/or any independent third party/service provider to the Defendant setting out the value of any and all assets owned by the Defendant or to which she is entitled to take ownership of; any and all liabilities owed by the Defendant; any and all income actually received by the Defendant or which she may be entitled to receive; and any and all expenditure which is incurred by the Defendant or should be incurred by the Defendant for her personal maintenance or that of her estate;

3.4 to disclose the information received in terms of paragraph 3.3 above to the divorce court and Plaintiff in the divorce action when relevant to an issue in dispute in the divorce action;

3.5 to settle the divorce action or any part thereof, subject to the approval of a Judge in chambers;

3.6 to make recommendations to Honourable Court regarding the administration of any proceeds the Defendant may receive pursuant to the divorce action;

4. The costs of this application are to be determined by the court finally determining the divorce action.

EF DIPPENAAR
JUDGE OF THE HIGH COURT JOHANNESBURG

APPEARANCES

DATE OF HEARING : 29 July 2022

DATE OF JUDGMENT : 18 August 2022

**INTERVENING PARTY'S
LEGAL REPRESENTATIVES**

COUNSEL : Adv G.B. Hardy
ATTORNEY : MC Kruger – MC Kruger Attorneys

PATIENT'S LEGAL REPRESENTATIVES

COUNSEL : Mr C.L Mabasa
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