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

- (1) REPORTABLE
- (2) OF INTEREST TO OTHER JUDGES
- (3) REVISED.

CASE NO: 25753/2010

8/2/2019

In the matter between:

LALU SHEILA MKHONTO

Applicant

and

GERRIT VAN DER NEST

First Respondent

FRANS SCHUTTE & MATTHEW PHOSA

INCORPORATED

Second Respondent

CONSTANT WILSNACH

Third Respondent

MASTER OF THE HIGH COURT

Fourth Respondent

IN RE:

SENZO ZAMA PERSEVERANCE HLATSHWAYO

Applicant

and

FRANS SCHUTTE

First Applicant

FRANS SCHUTTE INC

Second Applicant

**CONSTANT WILSNACH
MASTER OF THE HIGH COURT**

**Third Applicant
Fourth Applicant**

and

**LALU SHEILA MKHONTO
obo S Z P H**

Applicant

and

ROAD ACCIDENT FUND

Respondent

JUDGMENT

STOOP AJ

1. The Applicant who is the mother and natural guardian of the minor S Z P H ('the minor') applied on an urgent basis for the following relief:
 - "1. The appointment of Constant Wilsnach as a curator bonis (identity no: [...]) for Senzo Mzamo Percival Hlatshwayo of identity no: [...]) is hereby with immediate effect declared null and void ab initio, and the appointment thereof is terminated and withdrawn.
 2. That the First, Second and Third Respondents are hereby with immediate effect directed and ordered to transfer a total sum of R3,254,470 (Three Million Two Hundred and Fifty Four Thousand Four Hundred and Seventy Rand) into the Trust Account of Mugebe B Attorneys, FNB Account: [...] Branch code: 255355, Pretoria North.
 3. That the Master of the High Court Pretoria is hereby with immediate effect authorised and directed to terminate and to re- tract the appointment certificate of estate no: MC 347/2017 in favour of Constant Wilsnach, identity no: [...] on behalf of Senzo Mzamo

Percival Hlatshwayo, identity no: [...].

4. That the costs order dated 28 September 2018 and prayer for costs de bonis propriis against the attorney Brian Mugebe of Mugebe B Attorneys is hereby recalled, and same is set aside with immediate effect.
 5. That the First, Second and Third Respondents are hereby with immediate effect directed and ordered to submit before this Honourable Court the Bank statements of Trust Account: [...] Standard Bank, from 18 August 2016 to 8 October 2018, and for Mr Constant Wilsnach from 31 July 2017 to date of hearing of this application."
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2. For reasons that were not altogether clear to me, the matter came before me in the ordinary opposed motion Court. Even though the Court file was in an appalling state (the papers were not indexed and paginated) and the Applicant did not file a practice note and heads of argument (as required in terms of this Division's Practice Directive), I allowed the matter to proceed. This was after counsel representing the First, Second and Third Respondents indicated that they are ready to argue the matter.
 3. The following background is relevant:
 - 3.1. On 12 August 2016 and following a settlement reached between the Applicant and the Road Accident Fund ('RAF'), this Court (per Pretorius J) made the following order (I quote only the relevant portion):
 - "1. Defendant shall pay the amount of R2 375 470.97 (TWO MILLION THREE HUNDRED AND SEVENTY FIVE THOUSAND FOUR HUNDRED AND SEVENTY RAND AND NINETYH SEVEN CENT) in settlement of Plaintiff's claim into the trust account of the Plaintiff's attorneys, FRANS SCHUTTE INC, STANDARD BANK - WHITE RIVER, ACCOUNT NO.: [...] which amount will be kept in an section 78(2)A account

until the appointment of a *curator bonis*."

- 3.2. The amount payable in respect of general damages was not settled and on 8 August 2017 a further agreement between the Applicant and the RAF was made an Order of Court in terms whereof the RAF had to pay an amount of R650,000.00 into the Trust Account of the Applicant (the Plaintiff in the action).
- 3.3. On 31 July 2017, it was ordered (per Motepe J) that the Third Respondent be appointed as *curator bonis* for the minor with the powers and duties set out in an Annexure attached to the Court Order;
- 3.4. On 25 September 2018, an application was brought in the name of the minor's twin brother for an order removing the Third Respondent as *curator bonis*. That application was dismissed on 25 September 2018 and the issue of costs postponed to Friday 28 September 2018. Attorneys, MO Mokoana and B Mugebe were instructed to provide reasons by way of affidavit or personal appearance on 28 September 2018, why they should not be held liable for the costs of the application, jointly and severally;
- 3.5. On 28 September 2018, the Court then made the following order:

"That Mr Brian Mugebe from the firm Mugebe Attorneys, situated at Gerrit Maritz Street, 507 Zelda Park, Suite 203, Office 8 & 9, is directed to pay the costs of the application heard on 25 September 2018, on an attorney and client scale *de bonis propriis*."
- 3.6. The Notice of Motion in the present application was issued on 12 November 2018. Service was effected on the Third Respondent on 12 November 2018 and on the Master on 13 November 2018.
- 3.7. Mr Mugebe is the Applicant's current attorney of record.

4. Counsel for the Applicant submitted that the application is brought in terms of Rule 57(14). Rule 57(14) provides as follows:

"(14) Every person who has been declared by a court to be of unsound mind and incapable of managing his affairs, and to whose person or property a curator has been appointed, and who intends applying to court for a declaration that he is no longer of unsound mind and incapable of managing his affairs or for release from such curatorship, as the case may be, shall give 15 days' notice of such application to such curator and to the master."

5. The Notice of Motion was served on the Master on 13 November 2018 and the 15-days period contemplated in Rule 57(14) expired (as far as notice to the Master is concerned) on 4 December 2018. The matter was enrolled for hearing on 3 December 2018 prior to expiry of the 15-day period, as a result.
6. The Third Respondent did not object to the short notice and the Master filed a report which was handed up from the bar. The Master also did not object to the short notice. As a result and, to the extent that it may be necessary to do so, the Applicant's failure to comply with the time period in Rule 57(14) is condoned.
7. The Applicant appears to have proceeded from assumption that, because a *curator bonis* was appointed, the minor was declared to be of unsound mind and as such incapable of managing his own affairs. That this need not necessarily be the case, appears from Ex parte van der Linde 1970 (2) SA 718 (O) where it was stated that in terms of the common law, a *curator bonis* may be appointed to a person who, though not of unsound mind, is incapable of managing his own affairs (also see Ex parte Comins 1951 (2) SA 249 (W) at 251H-253A).
8. Rule 57(13) give recognition to the common law position in that it provides for the appointment of a *curator bonis* to a person on the ground that he is by reason of some disability incapable of managing his own affairs. In an

application for the appointment of a *curator bonis* in terms of Rule 57(13), the patient need not be of unsound mind and the Court is not required to issue a declarator to that effect.

9. Rule 57(14) also allows a person who has not been declared of unsound mind but to whose property a curator has been appointed, to apply for release from such curatorship.
10. The Applicant's main complaint (as it appears from the Founding Affidavit) is that she did not authorise the application that led to the appointment of the Third Respondent as *curator bonis* on 31 July 2017 and that her signature on the affidavit filed in support thereof, was forged. According to the Applicant, she became aware of the Third Respondent's appointment on or about 25 September 2018.
11. These are startling allegations which, if true, would not only justify the setting aside of the Order made on 31 July 2017, but would also require investigation and serious consideration by the prosecuting authorities and the relevant professional bodies. Clearly for these reasons, the First Respondent in his answering affidavit dealt at length with the circumstances under which the application was brought and the founding affidavit filed in support thereof. was commissioned.
12. According to the First Respondent, the terms of the settlement and the contents of the Court Order of 12 August 2016 (which provided for the payment of the settlement amount into the attorney's trust account pending the appointment of a *curator bonis*) were discussed with the Applicant and she instructed the Second Respondent to settle the matter on those terms.
13. The First Respondent then also states that the Applicant attended the Second Respondent's offices on 16 March 2017 for the purpose of finalising the application for the appointment of the *curator bonis*. During that consultation, the Third Respondent's appointment was discussed and it was explained to the Applicant that she would have to depose to an affidavit in support of the necessary application. The Second Respondent confirmed the contents of the consultation and in a letter to the Applicant.

A copy of the application for the appointment of the *curator bonis* was attached to the letter and the Applicant obtained a copy and she signed a copy of the letter to acknowledge receipt thereof.

14. In addition, the First Respondent attached an affidavit by commissioner of oaths who stated that the Applicant signed the founding affidavit in her presence on 16 March 2017. The First Respondent also attached a report by a handwriting expert who confirms that he examined the signature of the deponent to the founding affidavit and that in his opinion, that signature belonged to the Applicant and was not a forgery.
15. The Applicant did not file a replying affidavit and the above allegations by the First Respondent stand uncontested. It follows that, on the application of the principles laid down in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634H-I, that the Applicant did in fact authorise the application that led to the appointment of the Third Respondent as *curator bonis* and that she did in fact sign the affidavit filed in support thereof.
16. In my view, the Applicant failed to make out a case for the setting aside of the Court Order granted on 31 July 2017 (for the appointment of the Third Respondent as *curator bonis*). What at now remains, is to consider whether the Applicant made out a case for the release of the minor from curatorship as contemplated in Rule 57(14).
17. The Applicant alleges that the minor is capable to manage his own affairs and in support of that contention, referred the Court to the report of a Dr FN Karuki, a psychologist specialist and the report of a clinical psychologist, Dr Murerewe. According to the Applicant, both experts are in agreement that the minor is capable to manage his own affairs.
18. The Applicant has failed to attach the above reports to the Founding Affidavit and none of the experts have deposed to confirmatory affidavits.
19. The Application's current version is in stark contrast with what she stated in the affidavit filed by her in support of the application for the appointment of the Third Respondent. In that affidavit (the affidavit was commissioned on 16 March 2017), the Applicant motivated the appointment of a *curator*

bonis as follows:

"6.

In considering the best manner in which these funds are to be administered and safeguarded, I have been advised, and agree, that it would be appropriate for a *curator bonis* to be appointed to assist [the minor] although he is at present still a minor. The reasons for this are as follows:

- 6.1 [The minor] will attain majority on 30 June 2020, thus approximately three and a half years from now;
- 6.2 It is evident from the medico-legal reports used in the main action that [the minor's] brain injury is of such a nature that he will probably, upon attaining majority, be incapable of managing his affairs as an adult and would require the assistance of a *curator bonis* from then on;
- 6.3 It was the broad consensus amongst the experts on both sides of the litigation that [the minor] would require remedial schooling and that he would in all likelihood not obtain sufficient academic qualifications to ultimately have a significant future earning capacity. It is further the consensus of the experts that the award made to [the minor] should be protected."

- 20. The Applicant also referred to a joint report compiled by Educational Psychologists wherein the experts concluded that the minor's funds should be protected and that some form of curatorship was strongly suggested.
- 21. The Applicant's present version directly contradicts the general consensus of the experts on the strength whereof she on 31 July 2017 sought an order for the appointment of the Third Respondent as *curator bonis* to the property of the minor. No explanation is tendered for the remarkable about-turn.
- 22. Also, as I have indicated, the Applicant's present version (that the minor is capable of managing his own affairs) is not supported by any evidence

and is in my view nothing more than speculation or conjecture. In my view the Applicant has failed to make out a *prima facie* case for the release of the Third Respondent.

23. In terms of Rule 57(17) the Court has the power, upon the hearing of any application referred to in Rule 57(14), to declare the applicant as being no longer of unsound mind and as being capable of managing his affairs; to order his or her release from such curatorship; or dismiss the application; or *mero motu* appoint a curator *ad litem* to make such enquiries as it considers desirable and to report to it. I may add that, had the Applicant made out a *prima facie* case for the release of the Third Respondent, I would have had no hesitation to order that a curator *ad litem* be appointed to make such enquiries as it considers desirable and to report back to the Court thereafter.
24. It is trite that, in matters where the interests of children are at stake, that their interests be fully aired before the Court so as to avoid substantial injustice to them and possibly others (Du Toit v Minister of Welfare and Population Development 2003 (2) SA 198 (CC) at 201).
25. I should also add that the Master urges the Court to maintain the appointment of the Third Respondent as it is in the best interest of the minor child. The Master also considered it advisable that a case worker / social worker be appointed to assess the special needs of the minor child and whether he will be receiving the care at home or needs to be admitted to a home for special needs.
26. I share the Master's concern as far as the care of the minor child is concerned. I am unable to find on the papers before me, that the minor child is not properly cared for or that he needs to be admitted to a home for special needs, however.
27. I do agree that it is in the best interests of the minor that the funds he obtained from the litigation against the RAF be protected as contemplated in the Court Order of 12 August 2016.
28. The Applicant also seeks an order for the setting aside of the costs order granted against her attorney. During argument, Counsel for the Applicant

did not seriously argue that this relief should be granted. This is hardly surprising since the Applicant has completely failed to put forward any facts in the Founding Affidavit that could justify the setting aside of the costs order. The highwatermark in the founding affidavit is that Mr Mugebe has deposed to a lengthy affidavit explaining as to why he should not be liable for the costs of the application that was enrolled for 25 September 2018. The contents of this affidavit is not disclosed and no facts were placed before me that could support a conclusion that the costs order ought to be set aside.

29. Also, Mr Mugebe is not a party to the present application and in my view the Applicant has no *locus standi* to seek the setting aside of the costs order granted against her attorney. It follows that the Applicant is not entitled to the relief in prayer 4 of the Notice of Motion.
30. Finally, the Applicant seeks an order compelling the First, Second and Third Respondents to submit bank statements of the First Respondent's Trust Account for the period 18 August 2016 to 8 October 2018. Again, no basis is laid in the Founding Affidavit for this relief. There cannot be any doubt, in my view, that the Applicant would be entitled to an account by the *curator bonis*. This is not what she is seeking, though. The Applicant seeks to inspect the First Respondent's Trust Account and no basis is laid in the Founding Affidavit for such relief.
31. In any event, the Third Respondent stated in his answering affidavit that he only received the funds from the RAF on 31 July 2018 and that he then invested the monies in an Investec Corporate Cash Manager Account (the account reflected a balance of R1,500,254.59) and a Nedbank Corporate Saver Investment Register(that account reflected a balance of R885,839.54). The total amount currently invested by the Third Respondent is R2,386,094.33.
32. The Third Respondent attached banking statements in support of the aforementioned and in my view he accounted sufficiently to the Applicant.
33. In my view the entire application was ill-conceived and completely without merit.

34. I would be shirking in my duty if I do not comment on the conduct of Counsel for the Applicant. A disturbing feature of the Application is the fact that most of the allegations contained in the Founding Affidavit which relate to the circumstances whereunder the Applicant signed the founding affidavit in support of the application to appoint the Third Respondent appear to be false to the knowledge of the Applicant. At least, this should have been clear to Applicant's Counsel when the matter was argued.
35. Counsel for the Applicant chose to ignore the facts set out in the First and Third Respondent's Answering Affidavits and which the Applicant did not deny and insisted that the Applicant did not authorise the Application for the appointment of the Third Respondent and that the founding affidavit filed in support of that application was a forgery. He also suggested that the minor's monies had been depleted and even went so far as to suggest that the Master's report was a forgery.
36. Counsel has a duty towards the Court and also towards the other litigants. He or she should fearlessly uphold the interests of the client. That duty does not translate into a licence to act irresponsibly or foolishly, however (*S v Baleka* (1) 1988 (4) SA (T) at 7050). In this case, Counsel for the Applicant sadly appears to have lost sight of what his duty as advocate entails and he made submissions that could not on any reasonable interpretation, be supported on the papers before the Court. Also, Counsel made a number of scurrilous attacks on Counsel who appeared for the First, Second and Third Respondents and when called to order, he directed his wrath at the Court to such an extent that I had to adjourn the matter and had to urge Counsel in chambers to show restraint and also respect the dignity of the Court.
37. The name of Counsel will be withheld. It is hoped that he will take a lesson from this judgment and conduct himself in future becoming of an Advocate and an officer of the Court.

Costs:

38. In my view, the conduct of the Applicant ought to be deprecated. She

enrolled an application brought on an urgent basis in the ordinary motion court and under circumstances where the matter was clearly not urgent. She also failed to comply with the practice directives that apply in this division as far as indexing, paginating and the filing of a practice notice and heads of argument is concerned.

39. In addition she made extremely serious allegations against the First and Third Respondents which turned out to have been completely unwarranted and were knowingly not the truth.
40. The First, Second and Thirds Respondents seek a costs order on a punitive scale. Punitive costs orders are not likely granted. In my view, the conduct of the Applicant justifies the granting of a punitive costs order, however (see: Hawkins v Gelb and Another 1959 (1) SA 703 (W) at 708G-H).

ORDER:

1. The Application is dismissed with costs on the scale as between attorney and client.

BC STOOP AJ
Acting Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing:

3 December 2018

APPEARANCES:

For the Applicant:

Counsel's name withheld

Instructed by:

MUGEBE B ATTORNEYS

Pretoria