

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 2155/2009

In the matter between:

MICHAEL MOLETE

Respondent

and

**MEMBER OF THE EXECUTIVE COUNCIL
FOR THE HEALTH, FREE STATE**

Applicant

JUDGEMENT: RAMPAI J

HEARD ON: 28 MAY 2012

DELIVERED ON: 22 JUNE 2012

[1] These are motion proceedings. The applicant applies for the appointment of curators for the dual purpose of firstly having the minor child legally represented and secondly his estate separately administered by an individual other than any of his biological parents. The respondent vigorously opposes the application. The master abides.

[2] The facts of the matter were fully set out in the main judgment which will be simultaneously delivered together with this subsidiary judgment. I do not intend repeating them

here. In brief, the minor child fell out of the tree. He sustained a fracture of the left forearm and a dislocation of the left elbow. There was a misdiagnosis of the minor's injury. On behalf of the minor, the respondent instituted a claim in the total sum of R21 million against the applicant. The applicant conceded liability.

[3] No evidence was led as regards the merits but was as regards the quantum. The minor's arm was so impaired that he suffered rotational deformity. Physically he is now impaired. I was satisfied that the physical impairment constituted permanent disability and that a total award of $\pm$ R2,5 million would represent a fairly reasonable compensation to the minor.

[4] The initial relief sought in the current application is fully set out in annexure "a" to the notice of motion. In a nutshell the applicant seeks to have the compensation to be awarded for the benefit of the minor by virtue of the main litigation between the parties paid over to the master and held in the Guardians Fund pending the outcome of this two-legged application for the appointment of the curators. The principal

relief sought is to have a senior counsel appointed as curator *ad litem* on behalf of the minor as a prelude to the appointment of a *curator bonis* in accordance with the second draft order, annexure “b”, to the notice of motion and to have the costs hereof made costs in the second leg of the current application.

[5] In the founding affidavit, the applicant’s deponent stated that the purpose of the current application was to safeguard the interests of the aforesaid minor by, among others, appointing a curator *ad litem* to protect an award which was expected to be made at the end of the trial for the benefit of the minor.

[6] In the answering affidavit the respondent denied the allegation that the applicant was impelled by genuine and honourable motive to safeguard the minor’s interests. He alleged that the interests of the minor were not in jeopardy whatsoever. According to him the application amounted to an unsubstantiated and unwarranted interference with his parental sights as the biological father and natural guardian of the minor. He state that the application was premised on the erroneous assumption and prejudiced contention that

parents on the lower end of the social spectrum were less responsible and able than those in the higher social end. The latter, he asserted, lived in more privileged circumstances than the former. He asserted further that, since the application was based on incorrect facts and actuated by social prejudice, it had absolutely no foundation in fact and in law.

[7] In the replying affidavit the applicant denied the respondent's allegation that the application had no legally firm foundation. The applicant specifically denied the allegation that the minor's parents were discriminated against on the ground of their low social lifestyle or station in society. It was the applicant's contention that the body of child law seeks to have all children, irrespective of their social background, equally treated and protected.

[8] There were certain undisputed facts. The respondent's surname and the minor's surname. There was no evidence whatsoever led by any of the parties as regards the substantive merits of the claim. The applicant admitted that her department of health was liable to pay compensation for

the minor's benefit. The respondent does not suffer from any disability whatsoever. The beneficiary of the award is still under the legal incapacity of minority. His parental dependence will endure for the next eleven years. The respondent is not gainfully employed on permanent basis. He has entered into contingency agreements with his lawyers.

- [9] The respondent's attorney is currently under police investigation, which was seemingly initiated by the Road Accident Fund in connection with some 34 third party claims. The Guardian Fund, which functions as a fiduciary investment vehicle under the auspices of the Master of the High Court administers the fiduciary funds, entrusted to it for the exclusive benefit of certain persons living with disabilities, such as minors, free of any administration charges. There are discrepancies in some of the information the respondent gave to the various experts. So much about the common cause.

- [10] Now the disputed factual allegations. The respondent denied the purpose of the application, the soundness of its

factual and legal foundation, the need to appoint curators, the allegation that the minor's interests were at risk if the future administration of his estate was left in the hands of his parents and the applicant's allegation that the minor was not his biological child.

- [11] In the replying affidavit the applicant persistently denied that the respondent was the minor's biological father; that the respondent and the alleged lady were legally married to each other; that they were the biological parents of the minor; that no reason existed, as the respondent alleged, for the applicant's concern about the manner in which the minor's funds would be dealt with; that the proposed creation of a trust by the respondent's attorney and its management by a bank appointed trustee would adequately protect the interests of the legally unrepresented minor against financially burdensome and disadvantageous decisions by the respondent, the attorney and the proposed trustee; that a curator(s) would not seize all the powers of the minor's natural guardians and singularly decide what he considers good or not for the minor; that the only basis for the launch of the current application was the wrong perception that the

funds would not be properly expended for the minor's benefit because, as the applicant alleged, his parents were unemployed and that the applicant was unfairly influenced by the low level of education of the minor's parents or their low social standing.

[12] The issue in the case is whether or not, on the peculiar facts of this particular matter, a proper case has been made out to deprive the child's parents and natural guardians of their right to administer the estate of their child notwithstanding their ability and willingness to do so without the interference of an outsider such as a curator or the master.

[13] Some of the applicable principles of child law need to be restated. The court is the upper guardian of all children and is obliged to see to it that the best interests of any child are meaningfully protected wherever necessary. Every child has the right to have a legal practitioner assigned to him or her by the state and at the state expense, in civil proceedings affecting such child, if substantial injustice would otherwise result - section 28(1) 1996 Republic of South Africa Constitution. The best interests of a child are of paramount

importance in every matter concerning a child – section 28(2).

- [14] The costs relative to the appointment of a curator *bonis* as well as the curator's future remuneration for the running of the victim's affairs can be quantified and included as part of the global compensation awarded in favour of the victim if the appointment of a curator is an unavoidable result of the injuries since the quantum of the damages awarded would otherwise be diminished by the costs of appointing and later remunerating such curator – REYNEKE v MUTUAL & FEDERAL INSURANCE CO LTD 1992 (2) SA 417 at 419H – I and the authorities there cited.
- [15] In the case of EX PARTE OPPEL & ANOTHER 2002 (5) SA 125 (C) at 129G – H the court cautioned that because of the nature of the inroads curatorship makes into the relationship between parent and child a court should be loathe to grant an application for the appointment of a curator *bonis* to a minor's estate unless it was satisfied that a minor's parent was incapable to manage such an estate.

[16] It has been held on more occasions than one that a proposed curator should preferably be someone completely independent and outside the radar of local influence – **EX PARTE MARITZ; EX PARTE DE KLERK** 1968 (4) SA 130 (C).

[17] Section 9 of the Childrens' Act 38 of 2005 lays down the salient norm contained in the constitutional imperative that in all matters concerning the protection, care and well-being of a child, the supreme standard that the child's best interest is of paramount importance must be applied.

[18] Section 15 of the Childrens' Act 38 of 2005 obliges almost everyone to act in the interests of a child in matters involving the health and well-being of a child.

[19] The applicant sought to have curators appointed and relied on a few grounds to justify the application. The first ground relied upon was that the respondent had no *locus standi* to sue the applicant on behalf of the minor. The contention of the applicant, which was raised during the course of the second phase of the hearing viz the adjudication of the

quantum, was that seeing that the respondent, as the plaintiff, did not testify during the first phase of the civil trial viz the substantive stage, there was no evidence of the minor's parenthood. The lack of such evidence prompted the applicant to contend that the respondent was not entitled to act in the alleged representative capacity as the father and natural guardian of the minor and to receive the expected award on behalf of the minor.

[20] The respondent's marital status was also under attack. The applicant bemoaned that there was no averment in the particulars of claim that the respondent was married to the minor's mother, whoever she was (para 22, founding affidavit).

In the answering affidavit the respondent averred that he and the minor's mother were spouses (para 1 answering affidavit). In the replying affidavit the applicant persisted with the denial of the respondent's marital status (para 15, replying affidavit).

[21] A marriage certificate, marked annexure "mm1", was

attached to the respondent's answering affidavit. The document certifies that the husband is a certain Tefo Michael Molete whose national identity number is given as 691101 5344 08 0. It also certifies that the wife is a certain Thembi Mariam Maseko whose national identity number is given as 751010 1369 08 1. The place of the couple's marriage is given as Johannesburg and the date of the marriage as 10 September 2004.

[22] The respondent averred that he was the husband referred to in the aforesaid marriage certificate, that he was commonly known as "Michael Molete"; that he instituted the action under such name but that his full and formal names were "Tefo Michael Molete".

[23] I accept that the names "Tefo" and "Michael" are the first and second names of the plaintiff. It follows, therefore, that Tefo Michale Molete and Michael Molete is one and the same person, namely: the plaintiff in the action proceedings and the respondent in these motion process.

[24] Accordingly I find that the respondent was lawfully married

to Thembi Mariam Maseka at all times material to this application and the summons. The respondent relied on an official document to prove that he was legally married and who his wife was. The document, annexure “mm1”, was a *prima facie* proof of the facts it asserted. In the replying affidavit I could find nothing to the contrary. Since the applicant dismally failed to rebut such *prima facie* evidence that evidence became conclusive proof of the respondent’s marital status according to our law of evidence.

[25] Now I revert to the question of the minor’s parenthood. The onus of proving it rested squarely on the shoulders of the plaintiff, now the respondent. Ms Norman correctly submitted that it was incumbent upon the respondent, as the plaintiff, to place evidence before the trial court to establish that he was the biological father and thus a natural guardian of the minor and that, as such, he was entitled to receive the award, on behalf of the minor, whose biological offspring he was. Obviously, the respondent would have had no *locus standi in iudicio* unless he discharged such onus. If he failed then there would have been so much to be said for the appointment of curators for the parentless child.

[26] Despite the applicant's request(s) the respondent failed to furnish the applicant with official documentation to prove that he was indeed the biological father of the child. His failure to do so was one of the reasons which made the applicant sceptical and eventually precipitated the current application.

[27] In spite of the respondent's failure to prove that he had *locus standi* to act in his alleged representative capacity in the main action, the applicant attached a full birth certificate, labelled annexure "sc1", to the founding affidavit. The annexure reflected the names of the following three individuals: firstly, Moahlodi Daniel Molete with national identity number 010605 5665 08 2 described as a child, secondly, Tefo Michael Molete with national identity number 691101 5344 08 0 described as a father and thirdly, Thembi Marriam Maseko with national identity number 751010 1369 08 1 described as a mother.

[28] In the answering affidavit the respondent once again asserted that he was the minor's biological father as annexure "sc1" evidenced. In her confirmatory affidavit n

support of the answering affidavit Thembi Marriam Molefe (ex Maseko) asserted that she was the minor's biological mother. A copy of her identity document was annexed to her sworn statement as annexed "tmm1". The personal particulars as reflected in the identity document precisely corresponded with those in the marriage certificate and the unabridged birth certificate.

[29] Notwithstanding all of the aforesaid mountain of information as verified by official documents such annexure "tmm1", annexure "sc1" and annexure "mm1" the applicant, in the replying affidavit", still denied that the respondent was the minor's biological father and that his wife Thembi Marriam Molete (ex Maseko) was the minor's biological mother as they averred they were. According to the respondent, the unabridged birth certificate constituted *prima facie* evidence that the respondent was (and still is) the biological father of the minor.

[30] The same applied to the respondent's wife. The minor's unabridged birth certificate constituted *prima facie* evidence that she was the minor's biological mother. In the absence

of any further and more credible and reliable evidence to the contrary, in the replying affidavit, the unrebutted *prima facie* proof of the minor's parenthood becomes conclusive proof thereof and the party upon which the onus rested discharges it – **Ex Parte MINISTER OF JUSTICE: REX v JACOBSON AND LEVY** 1931 AD 466 at 478 and Hoffmann & Zeffert: **The Sale**, fourth edition 596.

[31] There was virtually nothing in the replying affidavit, other than hollow denials, to rebut the strong *prima facie* evidence as to who the natural parents of the minor were. It will be recalled that the minor's full birth certificate was part of the applicant's own founding papers. On the applicant's own papers the very opposite of what the applicant endeavoured to prove was proven. There was overwhelming documentary evidence which materially fortified the respondent's case and drastically destroyed the applicant's case as regards question of the respondent's *locus standi*.

[32] The mere fact that the respondent, as the plaintiff, did not testify at the initial phase of the trial is neither here nor there. Nobody testified then. The applicant, as the defendant,

unconditionally admitted liability and thereby implicitly admitted the respondent's relationship to the minor. To hold otherwise would be illogical and absurd.

[33] The wording of the court order of 31 August 2010 is of particular significance in this regard. The order was made by agreement between the parties. The concise import of the order was that the merits and quantum were separated, **the defendant conceded that the defendant was liable for the payment of the plaintiff's proven or agreed damages.** My understanding of the defendant's admission of liability was that, by necessary implication, the defendant also admitted the plaintiff's *locus standi*. To that admission the defendant, now the applicant, has to be held.

[34] To uphold the defendant's belated objection would boil down to unfairly ambushing the plaintiff. The objection should have been raised before the substantive merits were conceded. We know now that they were conceded without any reservation of rights to revisit and attack any aspects of the particulars of claim besides the quantum. In the circumstances, I am of the firm view that the first ground on

which the appointment of curator(s) was sought, had no substance. I would, therefore, dismiss the objection and indeed the entire application if it were based on that ground alone. But there is more to it.

[35] The second ground on which the applicant relied for the relief sought was that the respondent had probably concluded certain contingency agreements with his lawyers, which agreements might be prejudicial to the minor's interests.

[36] In the founding affidavit the applicant's concern about the suspected contingency agreements was articulated as follows:

"The fact that the parties (if proved to be) are not employed suggests that the legal representatives involved in the matter are conducting litigation on a contingency basis. A contingency agreement would have been signed by the Plaintiff. It is therefore important that a legal representative other than the Plaintiff's attorneys of record should have regard to those agreements to satisfy himself or herself that such agreements will not prejudice the child in any way.

Should it be found that the award will be depleted contrary to the interests of the child, the *curator bonis* should be empowered to have those agreements annulled, if necessary, or amended in accordance with justice.”

[37] In the answering affidavit the respondent made no attempt whatsoever to specifically deal with the applicant’s concern pertaining to the conduct of the litigation on contingency basis. The question of the alleged unemployment of the minor’s parents gave rise to the suspicion of contingency agreement to cover the legal fees of the respondent’s lawyers. In his response, the respondent had this to say:

“The heart of the Applicant’s case, that we are “unemployed” and therefore a *curator bonis* should be appointed, besides being factually inaccurate, is based on a prejudiced assumption. That is that persons of humble means, on the lower end of the social spectrum, are less responsible parents than those who have more access to means.”

[38] In the replying affidavit the applicant replied:

“The reading of the answering affidavit has confirmed the fears of the Defendant in that:

4.1 The deponent to the answering affidavit has not taken this Court into its confidence. It has not dealt with the allegations made in the founding affidavit instead has simply recorded his general feelings as a guardian. All of these are not based on any law. In fact the legal basis referred to in the founding affidavit upon which the applicant is based has not been challenged.”

[39] The respondent did not pertinently address the applicant’s concern. He deliberately evaded the point. He had a lot of critique to voice out about the factually inaccurate allegation that he and his wife were unemployed but he said nothing about the factual inaccuracy, if any, of the suspected existence of contingency agreements. His calculated omission to refute the applicant’s apprehension justified the drawing of an adverse inference against him that such agreements probably exist. The omission validated the apprehension of the applicant. His failure to disclose details of such contingency agreement fuelled the fires of suspicion. The law obliges a service provider to provide his client with a copy of a contingency agreement. Seemingly, it was not done in this instance. Was there something to hide? I am certain the respondent was not

knowledgeable enough to figure it out for himself and to demand it from his attorney. The withholding of the crucial information relating to the deal clinched by the respondent and the attorney concerning the minor's funds strengthened the fear that such deal placed the child's interests at risk.

[40] In the circumstances I find that the respondent had concluded contingency agreements with his attorneys; that he, on purpose, chose to withhold instead of revealing details thereof to me as the court and upper guardian of the minor child and that, objectively, there is a reasonable apprehension that the best interests of the minor might be at risk. I would, therefore, be inclined to intervene to safeguard such interests.

[41] The third ground on which the applicant applied to have curators appointed was based on the need felt by the expert witness to have the minor's award protected from depletion. The majority of those advisors were the respondent's own expert witnesses, namely: Ms F A van Vuuren, Ms J C Bainbridge. The same view was shared by the applicant's expert witness, Mr B Moodie.

[42] The experts suggested in their written assessment reports that curator(s) should be appointed to safeguard the minor's award. In their oral testis they once against repeated and confirmed their recommendations. Their evidence was never attacked. In my view their unchallenged oral evidence could not be subsequently modified as the respondents tried to do. I am with Ms Norman's submission that the attempts to have the original oral evidence of the expert witnesses altered by way of subsequent sworn statements have to be rejected.

[43] To the extent that the two confirmatory affidavits by the aforesaid two ladies sought to water down their original testimonies, they have to be simply disregarded. The respondent is now precluded from advocating a cause different from the one he previously supported, albeit indirectly, through his own witnesses now that the applicant is having a ride on the same ticket. There is a long-felt need by experts to have the minor's funds safeguarded. The only critique against the expert was that none of them gave any reason as to why the funds had to be safeguarded. Perhaps

they reckoned that the need to do so was obvious. Since they were not invited to explain in order to challenge their explanation afterwards, I also assumed that the respondent, like everyone, also implicitly recognised such need. He cannot now cry foul play. In my view the common opinion of the experts is an objective factor that cannot be ignored. It is but one of the factors that have to be taken into consideration in the process of determining a solution that will preserve the best interests of the child.

[44] The fourth ground of concern on which the current application was based was that there were some disturbing discrepancies which emerged upon the comparative and critical analysis of the various expert assessment reports concerning certain historical background compiled on the strength of the information obtained by some experts from the respondent.

[45] The discrepancies related to matters such as the minor's date of birth, the apparent or perceived disinterest of the minor's mother in the litigation, the minor's alleged head injury and matters of family habitat. By and large the

respondent did not seriously dispute those discrepancies save that the minor's mother supported him all along in prosecuting their son's claim and that they were in it together as responsible parents concerned with the best interests of their child.

[46] In the founding affidavit the applicant expressed some concern that the attorney-client relationship that existed (and still exists) between the respondent and his attorneys of record would determine how the money to be awarded for the benefit of the minor should be utilised. This was the fifth ground on which the application was based. The concern was that in the absence of a legal representative appointed for the minor; there would be no guarantee that the interests of the minor would be protected as against decisions detrimental to the minor's best interests taken by the respondent or his attorney(s) or both.

[47] In the answering affidavit the respondent countered by saying he had been advised that the relationship between him and his attorney was a matter of professional privilege and that it was completely irrelevant to the application. I

hope I am right that this was the respondent's correct answer to the applicant's concern that that relationship alone did not afford satisfactory and adequate protection to the minor's interests. My difficulty is that the answering affidavit was not drafted in a conventional and expedient manner whereby each allegation in the founding affidavit is numerically identified and specifically answered seriatim.

[48] The respondent's answer opened a can of worms in the replying affidavit:

“44.1 I note the professional privilege between the Plaintiff and his attorney. This privilege, however, does not extend to the award which is intended for the benefit of the child. It is my concern that once the Plaintiff and his attorney hide behind professional privilege, it will be difficult for this Honourable Court to investigate how the child's award was handled.”

[49] The applicant set out to investigate the conduct of the respondent's attorney. The private investigation revealed that the lawfirm was under police investigation; that the Road Accident Fund was behind it all; that there were 34 cases

involved and that they all concerned victims of the road accidents.

[50] Accepting, in favour of the respondent, that the pending police investigation constitute a new matter raised for the very first time in the replying affidavit, recognising the principles that, in motion proceedings, the applicant has to make out his case in the founding affidavit and to amplify it in the replying affidavit – I nonetheless consider, that I am impelled to take such investigations into account as one of the factors. The overriding considerations in the current application are chiefly the best interests of the minor. They supersede the aforesaid principles which are designed to regulate procedural fairness between the applicant and the respondent. Besides, the respondent could have sought leave to duplicate if the allegations were untrue but he elected not to do so. **BAYAT AND OTHERS v HANSA AND ANOTHER** 1955 (3) SA 547 (N) 553C – G.

[51] In coming to the aforesaid conclusion, I am fortified by the neutral stance adopted by Mr Dutton, a very capable counsel who represented the respondent very well in this litigation.

Moreover the rule that an applicant has to make his case in his petition is a relative and not an absolute rule. If new facts subsequently appear in a replying affidavit which were previously unknown to the applicant and which supply facts of material substance not appearing in the founding affidavit, the court has power to grant the relief. This is one such case. **DRIEFONTEIN CONSOLIDATED GOLD MINES LTD v SCHLOCHAUER** 1902 TS 33.

[52] Since the investigations against the respondent's attorneys are still pending, I refrain from making any finding. The law must be allowed to run its own course. At the end of it all the attorney(s) concerned will either be exonerated or condemned. It is not for anyone to prejudge the final outcome of the police investigation. What the future holds I do not know. What I do know is that where trust funds have been embezzled by an attorney, the investigative process is more often than not, inordinately long, very cumbersome and frustrating.

[53] Although the mere investigations cannot be held against the respondent's attorney(s) or be used against him to the

prejudice of his client, the respondent – the fact that the lawyer(s) to whom the applicant is obliged to pay the funds is or are under police investigation and the mere magnitude of such investigation cannot be ignored – not by the upper guardian of children but by any other objectively minded parent.

[54] What I have now is a kind of a wake-up call. I am called upon to be proactive by guarding against a possible misappropriation of the minor's funds under the nose of his unsuspecting or too trusting parents. Some pre-emptive judicial intervention is objectively required. I do not suggest, for one moment, that the attorney will misappropriate the minor's funds and deplete his estate. But currently there are some dark clouds of suspicion hanging over the heads of the respondent's attorneys. Those clouds seem to suggest, rightly or wrongly, that the lawyers have strayed beyond the ethical bounds of propriety in their dealings with the money entrusted to them. To an extent this investigation reinforced the applicant's second ground of concern. There is some connection between the police investigation and the contingency agreements.

[55] Frequently a member of the public finds little joy in reporting an attorney to a responsible law society for disciplinary action or to the police for criminal prosecution after the disappearance of trust funds. Doing so is like closing the gate after a horse has bolted. None of those *post ex facto* remedial processes guarantees recovery of misappropriated funds. The idiom that prevention is better than cure applies. My heart goes out to the minor. I can only ignore the warning signs at his peril. As his upper guardian, I will be guilty of abdicating my duty if I do not instantly intervene for the sake of the child's best interest. There is good reason to believe such interests are under threat – section 15 Children's Act *supra*.

[56] The respondent is naive to think that the proposed creation of a trust by the bank would provide a sound investment haven for the effective protection of the funds of the minor. The applicant ably demonstrated just how burdensome and expensive the running of such trust would be.

“8.5 The rate of the management fee is 1% plus VAT which

on an estimated award, for example, of R1 million rand is R10 000,00 per annum plus VAT totalling to R14 000,00 per year. The minor child is currently 11 years and will reach maturity age when he turns 21. This will mean that by the time he reaches 21 years Absa Bank would have depleted the minor child's estate by an amount of R140 000.00. This is a lot of money. The more the award is the more this amount would be."

- [57] The actual figure I awarded as compensation to the minor is over R2,5 million. By the time the minor reaches the age of 21 years in ten years time (2021) the trust would have raked in a staggering sum of R350 000,00 as management fees. The letter from the bank's commercial trust company annexure "jb1" did not give an indication of the interest rate to be earned by the minor's investment. Whatever the rate may be, the point remains that the proposed creation of a trust does not make a sound investment proposition. This is particularly so in the light of the alternative we have in our law that the minor's award can be kept in "The Guardian's Fund" where his account will not be debited with any charges whatsoever as administration costs but will, instead, earn interest. Currently the applicable rate of interest offered

by “The Guardian’s Fund” is 6.5% per annum. The minor’s capital will handsomely grow instead of being systematically and drastically depleted as already demonstrated in the foregoing paragraph.

[58] The respondent has badly misconstrued not only the purpose but the applicable test. The test is not whether the parents are capable or not of managing the estate of the minor child. The test is whether the appointment or non-appointment of a curator(s) will serve the best interest of the minor child regard being had to the peculiar circumstances of this particular matter.

[59] The legal basis of the respondent’s opposition to the appointment of the curator(s) is that the management of a minor’s property is generally the exclusive private preserve of a minor’s parents as natural guardians. As a general legal proposition, the respondent’s contention is indeed correct.

Ex Parte OPPEL & ANOTHER *supra*.

[60] The respondent heavily relied on the Oppel decision. Mr Dutton submitted that the instant matter was on all fours with

that decision in every material respects. I have serious reservations about counsel's submission.

- [61] Brief comparison between this matter and that decision reveals: that in that case the minor had sustained severe head injury; that the 1984 injury resulted in such a disability and permanent adverse impact that in 1999 his mother sacrificed her professional career as a nursing sister to look after her disabled son, then 15 years of age; that if the application was successful, the minor's estate would have been placed under the burdensome curatorship for an indefinite period, probably equal to the minor's lifespan in view of the permanence of his impairment; that the application was brought principally because the appointment of a *curator bonis* was a condition demanded by the Road Accident Fund for the acceptance of the offer and settlement of the minor's motor vehicle accident claim; that the parents applied for the appointment of curator(s) on the sole ground that they supposed they were incapable of running the affairs of their handicapped son; that there were no reasons given as to why a *curator bonis* had to be appointed to the minor's property while his capable, though reluctant, parents

were available; that the costs of the application be paid by the minor's estate.

[62] In the instant matter the scenario is different. If the application is successful the minor's estate would be placed under the burdensome curatorship for a fixed period of eleven years at most. The onerous inroads of curatorship would not endure for an endless period of time. There is no prayer that the minor's estate pays the costs of curatorship. The applicant is prepared to foot the curator's bill in full to prevent any depletion of the minor's property. The application was initiated by an organ of state, an independent and disinterested entity. The minor's parents oppose the application and aver that they can responsibly run the affairs of their son. The current application is based on more grounds than one. The capabilities of the parents was not one of the grounds relied upon. A few reasons were spelt out why the applicant was concerned that it would be in the best interest of the minor to deviate from the general norm of guardianship by entrusting his estate to his parents for management as their exclusive preserve.

[63] Indeed there was no proven disability of any sort on the part of the minor's parents in this matter as was the case in the Oppel decision. While question of parental disability was the sole decisive consideration in that particular case, it was certainly not in the instant matter. I did not understand Ngwenya J to suggest or propound the absolutely rigid rule that any application for the appointment of a curator to a minor's property, irrespective of the peculiar grounds on which it is based, should fail as long as it can be shown that a minor's parent suffers from no disability physical, mental or otherwise. The special circumstances outlined in that decision cannot and should not be regarded as the exhaustive grounds on which application of this nature can be based.

[64] The protective remedy of curatorship has many recognised and undesirable downsides. However burdensome inroads thereof may be to parent and child relationship, great caution has to be exercised not to accentuate the disadvantages or to underplay the advantages of the remedy. A damaged relationship can be repaired but a lost fortune can be hard to recover. A family feud about missing wealth can

permanently destroy close relationships in the end. Some balancing act of the conflicting triangle of interests is required in order to do some damage control. In doing so, a court has to bear in mind that the overriding consideration above all others is the best interest of the minor. The constitution enjoins the courts and everyone else to accord those interests supreme protection.

[65] I note that, in Oppel's case no reference was made to those cardinal provisions of the constitution. I think they were not brought to the attention of the court by counsel for the applicant.

[66] Dealing with a living guardian's requisite attributes prior to the appointment of a curator to a minor's property the court held:

"It seems to me therefore the guardian must have the same handicap as would entitle the Court to appoint a curator to a major person before a curator could be appointed to the estate of a minor who has a guardian."

[67] In a case where it is shown that a minor's guardian is insane,

insolvent, alcoholic, prodigal, fugitive, homeless, fraudulent criminal, drug addict, gambling addict, or suffers from one or other addictive ailments or chronic handicap – such a guardian would be a threat to a minor's interests – and should thus not be entrusted with the management of a minor's estate. Obviously these comments are obiter *dicta*.

[68] To the foregoing list of disqualifying factors another scenario has to be added. Where, as in this matter, a legal representative of a minor's perfectly capable and unblemished guardian is shown to be a suspect, not in one but in a number of criminal cases under police investigation – the paramouncy of a minor's best interests would be seriously undermined if such circumstances were to be disregarded because the guardian is available and capable.

DU TOIT AND ANOTHER v MINISTER OF THE DEPARTMENT OF WELFARE AND POPULATION DEVELOPMENT AND OTHERS (LESBEIAN AND GAY EQUALITY PROJECT AS AMUCUS CURIAE) 2003 (2) SA 198 (CC). Unless the funds are intercepted and the ordinary course of the payment of the award is diverted and recalled substantial injustice may result – section 28 (1) 1996 of the

Constitution of the Republic of South Africa.

[69] In the instant matter, I am persuaded that the best interest of the minor would be better served by entrusting his estate to a curator. I was inclined to order that the minor's award be paid to "The Guardians Fund" with the explicit directive to the master to pay out such funds as may be shown necessary from time to time to the minor's parents for the child's maintenance, education, hospitalisation and medical treatment. But seeing that the applicant, an organ of the state, is obliged to pay for the curator's remuneration for the management of the minor's estate, it will do the minor's interests no harm if his estate is placed in the hand of a curator *bonis*. Similarly there can be no harm if it is left in the capable hands of the master.

[70] The trial has been finalised. The appointment of a curator *ad litem* is really water under the bridge now. It will serve no further useful purpose. I would, therefore, recommend that Adv. P. U. Fischer SC be appointed curator *bonis*. He is a seasoned lawyer and a man of integrity. He is no more of a stranger to the minor's parents than Ms M. M. Prinsloo,

manager trust services at Absa Trust Limited. Corbett J, as he then was, once held that **it was desirable that a person to be appointed as curator should be an advocate who is completely independent and outside the range of local influence.** EX PARTE MARITZ; EX PARTE DE KLERK 1968 (4) SA 130 (C).

[71] According I make the following order:

71.1 The application for the appointment of a *curator ad litem* is refused;

71.2 The applicant is granted leave to apply, on the same papers duly amplified, if so advised, for the appointment of Adv. P. U. Fischer SC as a *curator bonis* to Moahlodi Daniel Molete, a minor child born on 5 June 2001 and presently residing at 7594, Section K9, Kutloanong Odendaalsrus.

71.3 That the total award in the amount of R2 532 543,00 arising from the litigation between the minor's father, Mr Tefo Michael Molete and the MEC: Department of Health, Free State Government under case number 2155/09 be held in a trust account of "The Guardian Fund" under the auspices of the Master of the High

Court, Bloemfontein until the court orders otherwise.

71.4 The Master of the High Court is further directed to make a once-off payment of R100 000,00 (R50 000,00 to each parent) directly to the minor's parents.

71.5 The applicant is directed to pay the costs of this application, the future application for the appointment of a *curator bonis*, should such application become necessary, as well as the curator's remuneration for the future management of the minor's estate.

71.6 The Master of the High Court is hereby authorised to pay out to the minor's parents from time to time, as he in his unfettered discretion, may consider necessary for the minor's maintenance, education, hospitalisation, medical treatment or any other legitimate cause.

M. H. RAMPAL, J

On behalf of applicant:

Adv. T. V. Norman SC
Instructed by:
The State Attorney
BLOEMFONTEIN

On behalf of respondent:

Adv. I. T. Dutton
Instructed by:
Nomxuba Inc.
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