



OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case number: **5299/2024**

In the matter between:

DARREN JENS TIBSHRAENY

Applicant

and

JENS PETER TIBSHRAENY

Respondent

For the appointment of:

Curatores ad Litem et Bonis to Jens Peter Tibshraeny

Coram

:

Da Silva Salie, J

Written Judgment delivered

:

Tuesday, 18 March 2025

Counsel for Applicant	:	Adv. Peter Hodes SC Adv. Paul Tredoux
Instructed by	:	(<i>Previous Attorney</i>): The Law Practice of B.L. Segal (<i>Present Attorney</i>): Kili Inc. Attorneys
Counsel for Respondent	:	Adv. Fiona Gordon-Turner SC Adv. B F Nöthling
Instructed by	:	Frank Biccari Attorneys

JUDGMENT ELECTRONICALLY DELIVERED ON 18 MARCH 2025

DA SILVA SALIE, J

Introduction:

[1] The applicant, Mr Darren Tibshraeny ("Darren"), seeks the appointment of a *curator ad litem* and ultimately a *curator bonis* for his father, Mr. Jens Tibshraeny. Initially, the application was brought *ex parte*, however, after an intervention application by Mr

Tibshraeny, the matter proceeded, by agreement, as an opposed application in terms of Rule 57 of the Uniform Rules of Court. The matter proceeded with Mr Tibshraeny as the respondent.

Historical Background:

[2] Sometime during early 2023, the applicant noticed significant cognitive decline in his father, leading to concerns about his capacity to manage his affairs. His father is a 79-year-old restaurateur, has significant assets, including the well-known Cape Town Waterfront restaurant, Willoughby's, conducted through Willoughby's (Pty) Ltd.

[3] The application is brought by the applicant as the son of the respondent. He submits that he has the standing to bring this application as he is well known to the respondent. The founding affidavit sets out facts and information which he alleges are within his own knowledge concerning his father's mental condition. The respondent and his wife, Mrs Elizabeth Tibshraeny (aged 80) have two children, Mrs Natalie Bezemer ("Natalie") and Darren, both of whom reside in the USA. However, the respondent and his wife would regularly visit the USA, also owning an apartment in Huntington Beach, USA and would also stay with Natalie in USA from time to time and/or spend time with their son Darren either in USA or in South Africa.

[4] Whilst Natalie and her husband are permanently resident in the USA they have until recently temporarily moved into the Fresnoy residence of their parents. Darren alleges that Natalie and her husband have effectively taken control of their parental home and vehicles and restricted his communications with their parents.

[5] The sister of the respondent, Mrs Angela MacLachlan ("Angela") and her husband, Mr Dennis MacLachlan ("Dennis"), are resident in Jeffrey's Bay but have also moved into the home of his parents. He alleges that Angela and Dennis have taken over control of their parents' credit cards and residence and assisting Natalie in controlling their parents.

[6] Over the past several years, it had become evident that the respondent is increasingly unable to manage his personal affairs, handle his financial responsibilities or ensure his own safety effectively. The deterioration in his cognitive abilities has been noted by Darren and subsequently confirmed by healthcare providers, who have observed a marked decline in his memory, reasoning and problem-solving capabilities.

[7] This impairment, the applicant avers, has reached a point where his father's ability to make informed decisions is severely compromised, thereby posing a significant risk to his financial security and to the conduct of his business.

[8] With the passage of time, the respondent's mental health challenges have become gradually worse. Darren set out incidents where the respondent had acted contrary to his normal nature and posing risk to himself. His father had also sought brain mapping therapy from the Amen Clinic in California, USA. This is a non-invasive technique used to improve cognitive, emotional and psychological function, by identifying the areas of the brain which are not functioning optimally and then using that information to guide therapeutic intervention. The respondent had stopped using the medication after leaving the USA.

[9] The further deterioration in the respondent's cognitive abilities became more apparent over several visits which he made to the USA and where his son had interacted with him over the past few years. This included incidents where the respondent did not have insight into his actions, the details of which I would not repeat herein. His driving skills became highly compromised by veering off the road when distracted or looking in a different direction and he has been unable to cope with the functions of his business by missing appointments, dealing with suppliers, food costing, monitoring stock levels, etc. In short, he is completely reliant on the ability of others to perform the tasks which he was once able to do. In particular, the management of the restaurant has been handed over to his nephew, Mr. Phillip Human, whom the applicant alleges draws a salary far in excess of what is reasonable and exploits his position and the vulnerability of the respondent by having his father sign handwritten promissory notes against his anticipated profit share for his business of the year totalling in excess of R1,3 m.

[10] The applicant further states that the dependency which the respondent has on others is a stark departure from his former self-sufficiency. It follows that Angela, Natalie and their husbands have moved into his parents' home as they (his parents) are no longer able to function and live independently.

[11] The respondent presents with memory lapses and communication difficulty in struggling to find a word to complete his sentence, resulting in his frustration and sadness.

[12] The respondent started to be mistaken of his ownership of certain properties by letting out the Clifton property as being owned by him in his own name instead of that of the Trust which owns it (of which he is a trustee) or would lease the same property in two lease agreements to different tenants. He would also forget about the actions of a delinquent tenant and proceed to re-lease the property to the same tenant.

[13] In short, the applicant reports that his father's battle with mental challenges is heart-wrenching, with the fading of his abilities, incremental losses and the constant adjustment to their family life are testament to the cruel nature of his condition. The respondent's challenges with daily living activities, coupled with his inability to manage his finances, underscore the urgent need for a *curator bonis* to be appointed. In his view, his father requires a level of care and oversight that goes beyond what can be provided without formal legal authority.

[14] The tension within the family, causes the applicant grave concerns regarding the current management of his father's affairs. The applicant claims that he has a strong suspicion that his sister, Natalie, along with his aunt, Angela, and her husband, are exploiting his father's mental condition to their comfort and advantage. He concludes this from a number of factors, particularly the consistent efforts on their part to isolate their father, specifically by maintaining constant supervision and hindering their communication with each other. On a visit to Plettenberg Bay in February 2024, his conversation with his father would be abruptly interrupted by Natalie forbidding any private interaction between himself and his father and screeching to their dad that she had told him that Darren wants to steal the business from him, as she had warned him before.

[15] Subsequently, his contact with his father has been limited by those around his father, including his cousin who had been appointed as the general manager of Willoughby's restaurant. Various expenses are charged to the Respondent's credit card which are undoubtedly not for him. Follow-up medical appointments made for the respondent, in particular for his mental health, are cancelled by his caretakers in circumstances in which it is necessary to attend. No appointments have been made with similar medical professionals to see to his declining mental health. These factors are amongst a few, together with the findings of two medical practitioners, which are set out below and who support the appointment of a curator for the respondent.

Two medical practitioners and reports:

[16] The respondent was taken to see Dr Roy Spammer, a physician, practising in Panorama. His report dated 13 March 2023 states as follows regarding his observation of Mr Tibshraeny:

*"I have been in contact with the 79-year-old Mr Tibshraeny. **It is clear talking to him that there is an element of memory difficulty. He tries to be humorous, but he is missing out on a lot of detail.**" (emphasis added)*

The applicant was in the USA at the time and did not attend the consultation with his father. Stemming from the results and findings of Dr Spammer, the respondent was referred to a practising psychiatrist, Dr Michael Mason, of Panorama Psychiatry and Memory Clinic for psychiatric evaluation. Whilst the applicant was not afforded a copy of the report by the family, he subsequently spoke with the said doctor and obtained a copy of the report dated 4 December 2023 and addressed to the physician, Dr Spammer. The summary of which reads:

*"Mr. Tibshraeny is showing signs of a Major Neurocognitive Disorder as summarised above and will require [an] increasing level of support and care going forward. This will be especially important with respect to the taking of medication, nutrition and self-care. I do not recommend that he drive. **I also advise support and protection with respect to financial matters, which may necessitate the appointment of a curator.** Independent living is not feasible without assistance, either in the form of live-in care or moving to an*

environment that can offer an ever-increasing level of support going forward.” (emphasis added)

[17] Dr Mason set out earlier in his report:

*“On Neurocognitive assessment, Mr Tibshraeny engaged well, but **with obvious deficits in time orientation, short-term memory function and executive function** as evidenced in impaired clock drawing and Luria II. He scored 8/15 on the Boston Naming Test and 22/30 on the Mini-Mental State Examination Score. Short-term memory was in fact severely impaired, even with 3 attempts at learning the same list of 10 words, he could never recall more than 3.” (emphasis added)*

[18] The opening paragraph of his report reads:

*“Thank you for the opportunity to be involved in the care of Mr. Jens Pieter Tibshraeny, who attended an appointment at Panorama Psychiatry and Memory on 1 November 2023 and went for an MRI brain on 21 November 2023. **The reason for the referral was a growing concern about forgetfulness and cognitive functioning,** especially given that his wife is also struggling with similar difficulties.” (emphasis added)*

[19] The applicant met with Dr Mason on 23 February 2024 to discuss his parents’ medical condition and findings. During the conversation, he learnt that his parents’ follow

up appointment on 29 February 2024 had been cancelled. In the hope that they would be brought for the appointment, Darren reinstated the appointment for 1 March 2024, however, he was informed that his sister or aunt had cancelled the appointment, and his parents were not brought for the appointment.

[20] The affidavits filed by the doctors set out that the patient presents with a major neurocognitive disorder - "dementia" and, according to one of the reports, may also suffer from Alzheimer's. The affidavit of Dr Spammer (FA 5, record page 59) in support of the curatorship application reads:

"He [the patient] struggled with insight in medical explanations and as he is ageing further deterioration is to be expected. He was always supported by Mr. D. MacLachlan [Dennis] [who] made sure advice was adhered to in view of his [the patient's] poor insight.

I am of the opinion that he is not able to grasp complex ideas and should not make important own decisions and curatorship may serve him well as to allow that things happen in his best interest. (emphasis added)

[21] Dr Mason, a registered psychiatrist, similarly attests on 1 March 2024 (FA4, record page 58) that:

"2. Mr Jens P Tibshraeny suffers from Dementia. He has severe functional deficits secondary to the dementia. The dementia is characterised by disorientation, poor memory, impaired judgment and impaired insight.

3. *He is not able to manage his own affairs.*
4. *The course of the disease is such that any improvement in his condition is unlikely. In fact, decline is expected.*
5. **I hereby recommend the appointment of a curator bonis** *and curator personae so that his interests can be protected.” (emphasis added)*

[22] Based on the aforesaid averments and medical evidence, the applicant alleges that the respondent is unable to manage his own affairs, is relatively wealthy, and a curator *bonis* will have to investigate this matter and take steps to ensure that his assets are protected. The applicant seeks the appointment of a *curator ad litem* to provide the patient with the necessary assistance for the purpose of the application. Consents to appointment as *curator ad litem* was filed of record by Adv Philippa Susan van Zyl and during the hearing of the matter, Adv Diane Davis S.C. similarly consented to the appointment in the Court’s discretion. If so granted, the *curator ad litem* would be required to report on the suitability of the curator *bonis* or *curators bonis*.

[23] The respondent filed a substantial and detailed answering affidavit in opposing the relief sought. The respondent kicks off his opposition on the basis that his son brought the application serving his own interests and not with the aim of serving the respondent. The respondent sets out the infrastructure that he had created to enable him to continue to conduct his own affairs in his retirement years. He acknowledges that he is forgetful, requiring assistance with daily activities, however, he strongly advocates that he is able

to manage his own affairs. He emphasises repeatedly that he has the support of trusted family members and relevant professionals. The respondent states that at no stage can it be said that he is dissipating his assets or conducting his affairs in a reckless manner or to his prejudice.

[24] The respondent denies vehemently that his support structure, particularly in the form of his daughter, Natalie, and sister, Angela are taking advantage of him.

[25] He established Willoughby's more than 30 years ago. He was fortunate and enjoyed great success in establishing Willoughby's, a business which allowed him to amass a sizeable financial fortune. He has considerable means and enjoys a comfortable life. His financial success has enabled him to provide his family, including both his children, financial security and a good standard of living. He has a generous nature, from which both his children have benefitted substantially.

[26] Mr Tibshraeny maintains that he has established structures to ensure his affairs are protected and properly managed. He, however, still exercises oversight of his affairs to ensure that they are appropriately managed. He no longer drives as he has since early 2023 realised that he was no longer comfortable operating a motor vehicle, wherefore, his sister and her husband, Angela and Dennis, assist him and his wife with driving appointments and grocery shopping. With both children residing in the USA, Dennis and

Angela's family presence is welcomed as they keep them company and help with their care.

[27] The respondent repeats at various points in his answering affidavit that he is perfectly satisfied with his living arrangements and that he and his wife, Liz, are taken care of. Assistance with personal tasks, healthcare and financial matters are left to his *"trusted supporters and advisors [who] adequately respond to the task."* He maintains that he is not at risk of neglect or exploitation.

[28] A substantial part of his answering affidavit is directed to what he considers to be the underhandedness on the part of his son, acting in concert with his erstwhile attorney, Mr. Neville Cohen, to bring and pursue this application including placing the two medical practitioners under undue influence to make the recommendation of curatorship. All this was done, he believes, because of Darren's wish to serve his own financial interests including escaping the liability of his loan account owing to the business in excess of R9m. His son did not accede to any transparent attempt to mediate settlement, however, he wanted to include all his trusted advisers in the mediation efforts. The respondent, he believes, is acting with malice and unclean hands, purely motivated and aggrieved by the financial control which the applicant had recently implemented, and which does not allow his son financial access anymore. He states that Darren considers the business as his *"wallet"*. (Answering affidavit, paragraph 55). The respondent set out in a detailed account and dates when he sought to have time spent with Darren but that his son rejected these

invitations. Since Darren had not spent adequate time with him, he denied that his son was in the position to comment on his mental health and general well-being. In the respondent's view, the purpose of the appointment of a curator would be to ask the curator that Willoughby reinstate the payments to Darren which have historically been made, and which had recently been stopped.

[29] The respondent pauses repeatedly in his answering affidavit to re-affirm that Darren's application is not a *bona fide* attempt born out of his concern for his well-being, but intended to serve a different agenda, that being, that he wishes to establish unfettered access to his financial resources.

[30] As regards his recent mistakes in the lease agreements, the respondent explains in bald terms that all is not lost, as the tenant in question was ultimately evicted. In explaining the mistake, the respondent states that:

"Risk is an incidence of commercial transactions. I managed the risk in that situation, with my advisors at my disposal to assist in this endeavour." (Answering affidavit, paragraph 82)

[31] The respondent maintains that whilst he strongly relies on his circle of trusted individuals who maintain a watchful eye on his interests and limit the risks, financial and

otherwise, to which he may be exposed, he states further at paragraph 84 of his answering affidavit:

“...I still have the ultimate say...”

[32] At paragraph 85 of the answering affidavit the respondent repeats:

“I have an effective support infrastructure to assist me, I have implemented sufficient controls, including the establishment of a group of trusted individuals, that will ensure my affairs are not exploited or mismanaged.”

Medical reports challenged:

[33] The respondent challenged the reports and the affidavits of the two medical practitioners who support this application on the basis that he had only once consulted with Dr Mason on 1 November 2023. From this interaction and assessment, at some stage together with his wife, Angela and Dennis, the respondent does not believe that the doctor could have made such a far-reaching conclusion to recommend him for curatorship. On 21 November 2023 he went for the MRI scan, as did his wife. They did not consult with Dr Mason on that day. The only other interaction he had with Dr Mason was, after this application was launched, and he attended to uplift and remove his medical file from the doctor's practice.

[34] I pause to mention that the file note of Dr Mason indicates that the attendance at his rooms was without appointment and that the patient was escorted by his daughter, Natalie, to collect his file. Both Mr Tibshraeny and his daughter came across as upset. Dr Mason records on his file note of 5 April 2024 (after the institution of this application on 15 March 2024):

*"Mr and Mrs Tibshraeny arrived with their daughter and her partner unannounced at my rooms demanding copies of their results and reports regarding their condition. They apologised for not attending their follow-ups, **were not keen to discuss the results at all**. I explained briefly why I recommend curatorship and what it entails but they were insistent that they had limited time and only wanted reports. They said they would arrange a follow-up later."* (emphasis added)

It is common cause that no follow-up was arranged for both Mr and Mrs Tibshraeny, nor is there any record of the respondent having been seen by a similar medical professional.

[35] The respondent sets out in his affidavit that Dr Mason had not assessed his functional ability as this would require a more detailed investigation. This would include an assessment of how he is able to socialise and communicate with other people effectively. It was also incumbent on the doctor to interview those people and professionals who are associated with him and have an intimate knowledge of his abilities and decision-making. That did not happen. Their medical opinions expressed at the time appear to the respondent as an interim opinion rather than a final one. In any event, it is

apparent that the doctor expressed a final opinion based on a meeting with the applicant (his son) and his partner as well as his erstwhile attorney shortly before 1 March 2024, the date of the signing of the doctor's affidavit. In Mr Tibshraeny's view, Dr Mason had no right to meet with them without seeking his prior permission and in any event Mr. Cohen had at that stage already been fired as his attorney. The respondent is of the view that none of them possessed the knowledge to sustain the information which is required for the functional assessment and further expressed that the intention of the meeting was to obtain an affidavit to support this curatorship application. He goes on to say that Dr Mason was unaware of his functional ability and could not as a result have formed a professional opinion to support the curatorship as he had. The shortcomings of the two medical professional opinions are supported by the affidavits and professional opinion of Dr Leon Fine, who formed the view that the assessments by the two doctors were not complete to substantiate the recommendations so made. Dr Leon Fine is a psychiatrist in private practice in Johannesburg.

[36] The respondent states that he only saw Dr Spammer, the physician, once. He is not his usual treating physician. It was at Dr Spammer's request that he consulted with Dr. Mason. The affidavit of Dr Spammer does not give any background or information regarding his cognitive abilities. The medical records obtained from him consisted of a MRI scan radiology report, blood tests and a medical report.

Critique by Dr. Fine:

[37] The professional opinion of Dr. Fine was filed in support of the respondent's opposition, who reviewed the medical evidence including notes and scans from the two medical professionals and in short stated that:

[37.1] Dr Mason ought to have had at least two more sessions with the respondent to have been able to express an opinion that his patient is incapable of managing his affairs.

[37.2] It was essential for Dr Mason to have assessed his functional ability.

[37.3] It cannot be said that there is necessarily a correlation between loss of brain cells and actual functional ability, because sometimes a person who shows severe loss of brain cells may still be able to function normally.

[37.4] The opinion that his cognitive decline is so severe it renders him incapable of managing his own affairs ought to have been supported by a neurologist and a neuropsychologist given the far-reaching effects of curatorship.

I pause to add that the latter requirement, that being that the recommendation ought to have been supported also by a neurologist and neuro psychologist, exceeds the requirement of Rule 57 which require two medical practitioners, one of which is a psychiatrist.

[38] Dr Fine's affidavits dated 17 April, and 22 April 2024 primarily critique the work and opinion of the psychiatrist, Dr Mason and do not include independent assessment or direct interactions with the applicant. In short, Dr Fine did not conduct any tests or a personal assessment of the respondent and is limited to his opinion based solely on a very brief review of documents provided to him. He set out more of an academic review of what would be ideal theoretically in the recommendation by a medical professional for curatorship of a patient. Dr Fine's position is that whilst the respondent suffers from cerebral atrophy (in this case symptomatic of a major neurocognitive disorder) such diagnosis only supports a clinical finding but does not illustrate a functional diagnosis of such a disorder. In support of this, a substantial part of the argument by counsel for the respondent was directed at the critique that the 2 medical professionals, particularly the psychiatrist, did not do an in-depth assessment of the respondent's functional ability which was to be conducted over at least 2 or more sessions with a detailed evaluation together with input from persons who engage with the respondent.

[39] Whilst Dr Fine's affidavits critique and views raised valid points about the need for comprehensive evaluations, I questioned Counsel during the hearing as to the position

this Court would be in to dismiss the strong views of two independent medical professionals supporting the curatorship application, both of whom had consulted, engaged and assessed the respondent in person including interpretation of the MRI (brain) scan. It was not disputed by Dr Fine that the respondent suffers severe cognitive decline as a result of MNCD (dementia). Dr Fine opined that the assessment ought to have been more extensive. I need add that Dr Fine's input was mostly set out as a minute of a virtual conference held with the respondent's legal representatives. Same is set out as a 2 page annexure to his affidavit (record page 351-352).

Appointment of an independent psychiatrist Prof Niehaus:

[40] To this end, given the wide powers which are bestowed upon the Court in terms of Rule 57 together with the previously written proposal by the respondent in correspondence of March 2024 addressed by Mr. Biccari for the respondent (at paragraph 11 thereof), that the respondent would consent to an assessment by a professional of his choice and that he will bear the costs of the psychiatrist he so appoints (Record page 305): I enquired about the prospects of the respondent being assessed accordingly and the matter stood over till the following day in order for counsel to take instructions. The respondent filed an affidavit asserting his Constitutional right to dignity and bodily integrity, refusing an assessment by a medical professional. In the circumstance, we discussed the alternative of the appointment of a medical expert to consider the medical evidence, reports, scans etc as well as the affidavits of Dr. Fine. I granted an order postponing the matter to a date in August 2024, with provision for a medical expert appointed by the Court (Prof DJH Niehaus, a registered specialist geriatric psychiatrist) to consider the

medical reports and attachments thereto filed in support by the applicant and the affidavits by Dr Fine filed in opposition thereto by the respondent. Furthermore, Prof Niehaus was directed to prepare a report in his professional opinion, as to the adequacy of the medical reports filed in support of the application for curatorship with reference to Rule 57(3)(b). Paragraph 4 of the interim order also granted Prof Niehaus leave to set out aspects which he may conclude from the aforesaid medical reports and which he, in his professional opinion, may consider relevant for the Court's determination of this application for curatorship.

[41] The appointment of an expert by the Court is to give evidence as set out in the order, and ultimately, the Court remains the final arbiter of the matter before it, taking into account the totality of the evidence in arriving at its conclusion.

In *S v Rohde*¹ the court stated:

"Opinion evidence must not usurp the function of the court for this remains the domain of the Bench. Furthermore, the expert witness is not permitted to give opinion on the legal probabilities or the general merits of the case. The evidence of the opinion of the expert should not be proffered on the ultimate issue. The expert must not be asked to answer questions which the Court has to decide."

¹ 2019 1 All SA 740 (WCC) at 806

As to the nature of an expert's opinion, the Court stated in *Gentiruco AG v Firestone SA (Pty) Ltd*:

*"an expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert"*²

[42] In his analysis of all the medical evidence, including clinical notes, correspondence, reports and MRI scan results, as well as the affidavits of the three doctors, Prof Niehaus set out a detailed report that the cognitive tests performed on the respondent at the assessment on 1 November 2023 showed significant cognitive impairment. Whilst he agrees with Dr Fine that additional information would have enabled a more comprehensive review of the respondent's financial capacity, he is of the view that enough information is available to substantiate the concerns of Dr Mason and Dr Spammer. He set out at page 28 of his report that the affidavits provided by the two medical professionals could have benefitted from more contextual content but in his view, contain the minimum required information to substantiate their concerns for the appointment of a curator *bonis*. Prof Niehaus also noted the consensus between Dr. Fine,

² 1972 (1) SA 589 (AD) at 616H

Dr Mason and Dr Spammer that the respondent suffers from a major neurocognitive disorder ("MNCD"), commonly referred to as dementia.

[43] On the issue of the respondent's financial capacity, considering the medical findings and results, Prof Niehaus sets out that the DSM-5 criteria for a MNCD (dementia) implies impaired instrumental activities of daily living of which management of finances is one such activity. The critique raised by the respondent that the medical assessment did not include adequate collateral information ought to be tempered by the recognition that self-report questionnaires rely heavily on the patient's insight into their activities of daily living and therefore may be less reliable if a patient was noted by the medical professional to have poor insight such as the case herein. The input of collateral information by caregivers must also be afforded its appropriate weight in the face of the very clear results of severe cognitive decline as caregivers may suffer from informant bias. To this extent, the value of collateral information or inadequacy thereof cannot be considered as the overarching factor in the clinician's assessment of his diagnosis and findings, and subsequent recommendation.

[44] The cognitive tests performed on the respondent showed significant impairment and in particular a substantial impairment of the executive function domain which is a critical aspect of decision-making and judgement. This is a higher order function critical for decision-making, insight and judgement, as well as foresight and planning.

[45] Despite the limitations of the available collateral information, he believed that the available medical evidence favoured the findings and recommendation for the appointment of a curator *bonis* to protect the respondent's interests.

Oversight by the Respondent into his financial affairs:

[46] The respondent states that most of his "*other assets are held through trusts*". The trustees of those trusts are himself, his wife and his accountant, Mr. Margolis. The financial statements of Willoughby's and of the trusts are prepared by Mr. Margolis. These are then discussed with him and approved by him. (Record page 262, paragraph 195) The respondent is of the view that Mr. Margolis would not present the financial statements to him if he did not consider that he had the necessary mental capacity to approve them. The respondent also maintains that although he has delegated the operation of the business to his nephew, the general manager, he still maintains a watchful eye over the performance of the restaurant. Whilst Darren had worked in the restaurant for 11 years, he had hoped that his son could take over the running of it himself in the future, but his expectation did not materialise. He concluded that Darren was incapable of taking control of the business and after his son returned to the USA in 2019, he appointed his nephew, Phillip, who remains the general manager to date. The respondent defends Phillip's remuneration on the basis that it is commensurate to the scale of the business operation and to what he had been paid historically.

[47] The respondent states that whilst he is forgetful, he can recall events when reminded. Despite this, he can comprehend and show understanding on matters that affect him and his assets and/or finances.

[48] The respondent denies that his daughter is controlling his affairs or financial interests and that given that his business and assets are already well looked after and protected by trusted family and professionals, to the extent necessary, the appointment of a curator *bonis* is unnecessary.

Applicant's reply:

[49] Whilst the applicant was invited to mediation, he maintained in reply that the appointment of a curator *bonis* remains the most appropriate and legally sound solution to ensure that his father's assets are properly managed and that any decisions made regarding his financial affairs are subject to proper scrutiny and oversight. In any event, an agreement between the parties would not provide the necessary legal safeguards to prevent further exploitation or mismanagement of his assets. He maintained that his interest in bringing the application was in pursuit of protection for his father given his ailing mental condition.

Issues before the Court:

[50] The fundamental issue at hand is whether the Respondent suffers from a diminished mental capacity and as a result, he would not have the ability to make informed decisions regarding his personal and financial affairs. The averments by the applicant must be considered with the opinion of the two medical professionals who support the granting of the curatorship order. It is not in dispute that the respondent suffers from a major neurocognitive impairment (dementia). The issue is whether it had been proven, on a balance of probabilities, that the respondent is as a result incapable of managing his affairs, warranting the granting of the relief sought.

[51] The respondent's assertion that he had created an adequate infrastructure must be juxtaposed with some relevant facts, *inter alia*, that his previous and long-term advisor, Mr. Neville Cohen, had abruptly been replaced by the attorney or close associate of his daughter, Natalie. It is significant a fact to me that she forms part of the respondent's trusted infrastructure. This may potentially create a conflict of interest. The respondent presents with a loss of short-term memory, severe brain cell damage and other symptoms of dementia such as confusion, difficulty solving problems which was evident from the medical tests and his inability to do a basic clock drawing correctly, lack of insight and foresight. It is also significant to me that Natalie and her husband escorted Mr and Mrs Tibshraeny to Dr Mason's practice in what clearly transpired as a fairly hostile demand for the file contents, with absolutely no interest in the results of the MRI scan nor follow up appointments with the said doctor or records of other treating physicians.

[52] The respondent's repeated assertion that he had placed into position a reliable and trusted infrastructure in the form of his carers, namely, his sister and her husband, his daughter and her husband, his (now attorney of record) Mr Biccari, and his accountant, Mr. Margolis, which renders the appointment of a curator nebulous, cannot be accepted by the Court as the final say on the matter. The ability to appreciate this infrastructure support system requires that the respondent be able and continues to have the ability to understand and make informed decisions regarding his personal, financial and legal matters.

[53] The question for this Court is whether, given his severe cognitive decline, the respondent is nonetheless on a balance of probabilities, of full mental capacity. I must equally be satisfied on the same burden of proof, that notwithstanding his cognitive decline (dementia) his capacity is not so diminished as alleged by the applicant and as confirmed by the two independent doctors, which would warrant the dismissal of this application.

[54] Whilst the respondent maintained that he has always been a generous person, and in that way explains his benevolence to others, the question remains whether the expenditures so made to them can be considered as having been made with the full appreciation of the respondent given memory difficulties, cognitive decline, lack of insight and foresight. It cannot be doubted that the respondent's mental health renders him vulnerable in various respects.

[55] The medical evidence in the form of the medical reports and affidavits of Dr. Spammer and Dr Mason records the respondent's cognitive impairments and his inability to make informed decisions regarding his personal and financial matters. The medical evidence includes an MRI scan (imaging of the brain) performed on 21 November 2023 which supports overwhelmingly that the respondent suffers a significant loss of brain cells (neurons) and the connections between them leading to noticeable shrinkage in the brain volume. Whilst the loss of brain cells is a normal ageing process, the question is whether the decline in the case of the respondent is so severe that it justifies the granting of this application, firstly by way of the appointment of a curator *ad litem*, followed by a curator/s *bonis* after the filing of a report by the curator *ad litem*.

[56] The answering affidavit sets out repeatedly that the respondent has at every turn put into place trusted persons and professionals to advise him and that this would serve his best interests. I must however consider that contention against the recommendations and findings of the two independent doctors, physician and psychiatrist, as well as examples of a sudden change in the respondent's longstanding lawyer to that closely associated with his daughter, reported events which indicate his memory loss and actions which are not congruent to his usual style of business and character.

[57] The contention that there is a sufficient and trusted infrastructure must be considered against the medical evidence before me, and I cannot merely accept the assurance of the respondent that his appointed advisors and infrastructure are acting in

his best interests as he believes. This assurance does not assuage the Court in the fundamental concerns raised that he has diminished capacity as well as the reports and affidavits provided by two medical practitioners which support the appointment of a curator. Whilst I am mindful of the fact that the respondent enjoys a Constitutional right of autonomy and dignity, I need to be satisfied that the evidence supports the conclusion that the respondent is still able to make informed decisions, a cardinal basis of autonomy.

Assisted decision making – The South African Law Commission Report of December 2015 – Project 122:

[58] The South African Law Reform Commission recommended changes to our law in the 2004 discussion paper to allow for alternatives like an “enduring power of attorney” (or “EPA”) which would remain valid despite the subsequent incapacity of the principal; and a “conditional power of attorney” which would come into operation only on the incapacity of the principal.

[59] This was further discussed in the 2015 - Project 122 Report. The Commission in its Report on Enduring Powers of Attorney (“the Report”) recognised that whilst the law ought to establish a structure within which autonomy and self-preservation are recognised and protected; while also protecting persons with decision-making impairments from abuse, neglect and exploitation, South African law does not fulfil these requirements at present. The recommendation of the Report aims to provide suitable solutions for this deficiency regarding existing impairments as well as possible future impairment.

[60] The Commission's investigation illustrates that the curatorship system is outdated and unduly paternalistic, a "*one-size-fits-all*" solution that tends to take over the affairs of the person with a disability. The High Courts have the power to develop the common law to ensure that the curatorship system accords with the Constitution and the Convention of the Rights of Persons with Disabilities (United Nations) in short referred to as the CRPD. Judicial development of the common law is, however, a notoriously slow process.

[61] The Report acknowledges that many persons who foresee the possibility that their ability to make choices – or to make informed or fully informed decisions – might be impaired in future, wish to cater for that eventuality. An obvious way of doing so is to authorise a trusted person to take care of one's affairs, should one become a person with a disability. Under our current law, however, such an authorisation and/or Power of Attorney is terminated by the subsequent disability of the person who made the authorisation (the principal). It follows that under our current law, a person (a principal) cannot authorise another (an agent) to take care of his or her (the principal's) affairs after he or she has become a person with a disability. In this respect, South African law is out of step with comparable legal systems.

Development of the Common Law:

[62] I am mindful of the fact that whilst law reform is called upon in curatorship applications, moreover, to the extent of recognising assisted or supported decision-making by a principal in the wake of future or declining mental health or capacity, it is the

position in our law that a person who does not have full mental capacity cannot appoint an agent. Similarly, a power of attorney becomes invalid when the principal loses mental capacity and is unable to appreciate the terms of the power of attorney. That would be the case herein where the respondent no longer has full legal capacity or differently put, in the case of the respondent who presents with major cognitive decline and memory loss, it is unlikely that the respondent is still able to fully appreciate the powers which he granted, with the requisite insight and oversight ability. More particularly, even in the law reform proposals for the recognition of assisted or supported decision-making in circumstances such as these, the agents are required to provide security for their administration of the principal's affairs, together with proposed supervisory roles of the Master of the High Court, including payment of security in the discretion of the Master, recordkeeping to the Master of assets and expenditures as a safeguard against the risk consequent of possible maladministration, including a number of other checks and balances proposed for the statutory implementation of a system of assisted decision-making. In the case before me, the infrastructure of the respondent is a far cry from the law reform's proposed mechanism of protection, checks and balances. In any event, whilst the law reform commission has proposed the system of assisted decision-making, such law reform and legal system had not yet been promulgated into our law. However, the *curator ad litem* would serve her mandate well by considering whether the system proposed by the law reform commission on this issue could be implemented in this case by developing the common law position, albeit within the current legal position and ambit of Rule 57 and the law of curatorship with powers extended to various *curators bonis* given the complexities or vastness the respondent's estate and business. The curator is

also directed to investigate whether certain of the persons who form the support infrastructure of the respondent may be viable and well suited *co-curator bonis* in a specific ambit and with the necessary checks, balances, security, recordkeeping and report to the Office of the Master of the High Court.

[63] The development of the common law as indicated above would be in line with international jurisdictions and regimes where it works well in Australia, England, Wales, Scotland, New Zealand and United States. The United Kingdom has ratified the Hague Convention on the International Protection of Adults which allows for the recognition of Scottish Continuing Powers of Attorney and Welfare Powers of Attorney in countries that have also ratified the convention such as France, Germany and Switzerland. (See: The Hague Protection of Adults Convention, formally the convention on the International Protection of Adults, a convention concluded by the Hague Conference on Private International Law 2000).

[64] This position would certainly ameliorate and assuage the crippling fear of the unknown for the future of a person faced with the reality that his or her medical condition will decline further with the passage of time. I believe it affords the principal dignity confronted with these disabling circumstances but so too protection by oversight of the Master of the High Court against any abuse of power, negligence or lack of accountability.

[65] Given the extraordinary circumstances of the vast business, personal financial interests and trust ownership of assets of which Mr and Mrs Tibshraeny are two of the three Trustees, I am of the view that exceptional circumstances exist warranting to the possible appointment of more than one curator, alternatively a main curator with sub curators who shall report to the former and in turn to the Master of this Court.

[66] I have considered the ubiquitous submission by the respondent that his son brought this application to protect his own financial interests such as wanting to escape an alleged loan account owed by the applicant to the business. The applicant denies that he is indebted to the business or that he has a loan account due to the business. If it is so that applicant's application to place his father in curatorship is to avoid his indebtedness, it can hardly be accepted by this Court that the applicant would escape his financial liability to the company without further ado, as the oversight of curatorship by a third party/s would be clinical to the enquiry as to this loan account or the extent thereof, in line with his or her Court ordered mandate and oversight by the Master's office. It is more believable that the applicant may escape his indebtedness to the business by it remaining in the discretion of his father (without curatorship) to write it off or reduce it given that he is loved by his father who could be open to the choice or manipulation (as the case may be) and pivot in absolving him from this liability.

[67] It is maintained throughout the opposition that the applicant lacks personal knowledge of his father's daily function and cognitive abilities given his lack of visits with

the respondent and interactions with him over the past two years. As such, the answering papers also attempt to cast in doubt the examples which are set out in the founding papers of his father's diminished capacity, confusion, memory problems, uncharacteristic behaviour and vulnerability to influence.

[68] I am satisfied that the applicant has the locus standi to bring the application and complies with Rule 57(3)(a) in that he is a *"person to whom the patient is well known and that the affidavits contains such facts and information as are within the deponent's own knowledge"* concerning his father's mental condition. I need to add that the examples provided to support the application are the classic symptoms of major neurocognitive decline which overlap or mirror the test results set out in the medical evidence. The respondent in a number of ways either boldly denied the examples or failed to deal with it in his answering affidavit.

[69] It is worthy of mention and of concern to this Court that the follow-up appointments with Dr Mason were cancelled by the respondent's trusted support network, a strong suggestion that their actions appear to be driven by a desire to avoid the scrutiny and medical attention to the respondent. It also concerns me that it is mostly likely done to avoid oversight which a curatorship would bring. This raises concern about the motivations of the members of the trusted support network, the potential for undue influence and gatekeeping of the respondent's affairs and health. It points this Court in the direction of the need for the appointment of a curator.

[70] Much shadow had been cast over the motivations; timing and the way the applicant had gone about to institute this application to place his father under curatorship. It is clear from the respondent's affidavit that upon being informed by "*others*" that his son sought to place him under curatorship, he stopped his son's financial benefits received from the business. However, Dr Mason raised the issue of curatorship in his report to Dr Spammer in December 2023 well before the meeting with the applicant on 23 February 2024. The recommendation for curatorship by the two doctors was made prior to the applicant's contact with them and I cannot find that it was because of undue influence or pressure from the applicant or anyone for that matter. The doctors, upon their assessment of the respondent, raised the need for the applicant to have safeguards put in place given his diagnosis and in particular curatorship. It is the follow-up by the applicant as to the diagnosis and proposal of the appointment of a curator which brought about the reaction by the respondent to stop his son's benefits more likely and as a form of sanction and consequence. Given his memory loss and declining mental state, it is highly probable that the respondent was puffed up by the members of his trusted advisors to act accordingly, supported by an inflicted fear that his son wished to cause him harm, embarrassment and take the business from him. It is more likely that the respondent's perception of the situation limited by his loss and insight and vulnerability was skewed by the individuals who surround him, that being, his trusted advisors.

[71] The applicant's inclusion of his father's former attorney who had been his trusted advisor, lawyer and friend for over two decades makes eminent sense as Mr. Cohen would have been able to give in-depth knowledge of Mr Tibshraeny to the medical expert

apropos his decline or not in managing his affairs or unusual behaviour. Mr. Cohen has however personally observed the applicant's mental decline. For reasons which the respondent deems as a conspiracy against him, he terminated his mandate with his long-time lawyer and advisor without any ado and appointed his present attorney who is the attorney or attorney closely associated with his daughter. This lends itself to the ineluctable inference that the respondent had been placed into fear by making him believe that his lawyer is conspiring with his son to wring his financial control from him. A strong suspicion of manipulation is unavoidable and one which the Court must be alive to in considering this application with the totality of the evidence and the reasons which compel the appointment of a curator.

[72] I am satisfied that the appointment of a curator will bring the needed layer of scrutiny and control over the respondent's financial matters. This will include reviewing all past practices and ensuring that any future expenditures are justified and properly approved. This measure will safeguard against any potential misuse of funds and the financial integrity of Willoughby's and the respondent's estate.

[73] In *Stoffberg obo Xaba: In re Xaba v Road Accident Fund* [2018] 3 All SA 145 (GP) the Court held at paragraph 18 of the judgment:

"The curator ad litem is the eyes and ears of the Court. This is achieved by the curator investigating and reporting back to the Court and the Master. The report is there to draw

the Court's attention to any consideration which in view of the curator ad litem might influence the Court with regards to the terms of the order sought."

[74] A *curator ad litem* would also be empowered to investigate whether the respondent requires assistance in the further litigation of this matter and provide the Court considerable insight into the granting of the order for the appointment of the *curator/s bonis*.

[75] Counsel for the respondent argued that the Court's dismissal of a *curator ad litem* in *Scott and Others v Scott and Another 2021 (2) SA 274 KZD* is pertinently on all fours in consideration of this application. In *Scott*, the Court held that as Rule 57(1) – (3) is predicated on a peremptory requirement that the application must be supported by the required medical reports in support of the facts and circumstances relied on to show that the patient is of unsound mind and incapable of managing his affairs, the application must be supported by such medical reports. Unlike in the present case, in *Scott* no medical reports have been provided by the applicants. The application was brought without any medical reports and they sought an order from the Court to subject the respondent to a medical examination to comply with the provisions of the rule. The matter before this Court is however distinguishable from that of *Scott* as this application is supported by affidavits of at least two medical practitioners, who had recently assessed the patient with a view to ascertaining and reporting upon his mental condition and whether the patient is in their opinion incapable of managing his affairs. In *Scott*, it was contended by the children and

brother of Mr. Scott who had made substantial earnings from the footwear as well as horse racing industry, that the appointment of a *curator ad litem* could recommend whether the respondent is of unsound mind and incapable of managing his own affairs and for their father to undergo whatever medical and other examinations necessary for the purpose of preparing a report for the court. Mr. Scott opposed the relief sought.

[76] In *Scott*, the Court quoted with approval the matter of *Nicolakakis and Another: in re appointment of Curator Bonis to Arthur Nicolakakis* [2019] ZAGP-PHC 997 (4 November 2019) involving litigation amongst family members, where a son, together with his mother, brought an application to have this father (the patient) placed under curatorship in terms of Rule 57 on the basis that his father was incapable of managing his own affairs. The patient was a highly successful businessman, the sole shareholder of the well-known Roman's Pizza franchise. In *Nicolakakis* it was contended that the patient was suffering from dementia and his son and wife feared that as a result of the patient's condition, he intended to leave to his friends and personal assistant, amongst others, much of his wealth. The patient opposed the attempt to have him examined by doctors.

[77] In *Scott* the respondent confirmed that he has been perfectly happy in his living arrangements with his wife and did not see any need or basis for the Court to intervene to appoint a curator to him. He was adamant that he was of sound mind and able to make his own decisions and that there was no basis for his children to suggest otherwise. The

Court held that in light of the first respondent having a trusted group of advisors, including his long-standing financial advisor, his accountant, bank officials, his attorney and his wife of over 30 years, **without the applicants meeting the requirements of Rule 57**, the Court dismissed the application.

[78] It is trite that the onus is on the applicant to prove on a balance of probabilities that the appointment of a *curator ad litem* to the patient is a necessary step. *Prima facie* proof is not sufficient. In the matter before this Court, however, the application is brought with the support of two affidavits by two independent medical practitioners who have examined the respondent. The critique is, however, that the medical practitioners did not investigate the respondent adequately in that they did not do a functional assessment. I am not persuaded that this distinction is so acute in these circumstances that it warrants me to dismiss the medical opinion of these two practitioners. I have considered the reports, the chronological sequence of events together with other relevant facts, and I am satisfied that the medical professionals had sufficient information to have formed their opinion and recommendation. I am of the view that the requirements of Rule 57(3) are met by way of the affidavits of Dr Spammer and Dr Mason. This Court is certainly in a markedly different position as that of the respective courts in *Scott* and *Nicolakakis* where the application were brought without any medical evidence and no basis for special circumstances existed for condonation thereof by the Court as otherwise permitted in terms of Rule 57(4). Importantly, in the matter before this Court, the applicant had set out in substantial and sufficient detail the basis for his case, from knowledge which he has acquired first-hand as the son of the respondent and his wife and confirmed by the third parties, to the extent

that he relies on their input, by way of confirmatory affidavits. The burden of proof has been met that on a balance of probabilities, the respondent suffers from a moderate to severe diminished mental capacity warranting the appointment of a curator.

[79] Counsel for the respondent argued that this application is about wanting a curator to investigate the need for granting a curatorship order. I raised with counsel for the respondent, that the appointment of a curator *ad litem* is not to be considered as investigating the matter for this Court to decide whether to grant the application or not. I emphasised that that is certainly not permitted in law. Leaving such a decision in the hands of a person other than the Court would undoubtedly be a misdirection. I will deal with this in further detail below.

[80] I consider this an opportune juncture to turn the objection which respondent's counsel raised to my appointment of an expert to assess the medical evidence of the two doctors and in particular that the medical opinion of the psychiatrist did not include a functional assessment.

[81] The respondent's counsel submitted that the wide powers afforded by Rule 57(4) cannot reasonably be interpreted as permitting the Court, at the first stage of the curatorship application, to cure a defective case mounted by an applicant. The argument followed that since the Court has expressed its concern that the issue goes to the heart of the welfare of an older person, the Court is "not under any duty to interfere with the

respondent's life to prevent harm from ensuing." Counsel argued that the *curator ad litem* is not on a similar footing to an application affecting the welfare of children, in regard to whom the Court is the upper guardian, and in which the interests of children are paramount. Whilst I agree that as the upper guardian of all minor children, the Court can and must make such orders as it deems appropriate to avoid the prospects of harm, I found it somewhat problematic to accept the argument that the Court has no duty to interfere with the respondent's life to prevent harm from ensuing and dismiss the application for curatorship in the premise, where the Court is confronted in this matter with some unique circumstances, *inter alia*:

[81.1] The application relates to a person of an advanced age of almost 80 years old suffering from dementia (MNCD).

[81.2] There are reports of behaviors by the respondent which are uncharacteristic and harmful to himself and his financial affairs, consistent with the medical scan results showing the respondent has severe brain damage (cerebral atrophy (shrinkage)).

[81.3] Reports that his medical appointments have been cancelled by his infrastructure of family members which medical treatment is aimed at facilitating, delaying or managing the ailing condition of his diagnosis.

[81.4] Two specialized medical doctors who have had the opportunity to consult with the respondent, together with MRI brain scans, taking into account his medical and mental health history and who found the respondent to be unable to retain information in a coherent manner and thus incapable of managing his affairs.

[81.5] The aforesaid two medical practitioners have maintained their professional opinion under oath that the respondent is certainly not able to adequately take care of his affairs, including his substantial financial affairs.

[81.6] The respondent is relying on a criticism by a medical practitioner who had not consulted with the respondent. Indeed, there is no reverse onus on the respondent to provide a physical assessment challenging the medical reports upon which the application is brought. However, the affidavits which seek to impugn the findings and medical recommendations of the aforesaid two medical practitioners, are a general overview of medical assessments in theory and how in practice it should ideally be over a period of 2 or 3 sessions, to do a full investigation as to the patient's functional ability and other suggestions for a comprehensive assessment with the application for curatorship needing to be appointed by four clinicians as opposed to the mandatory minimum of two doctors.

[81.7] The position of Dr. Spammer and Dr Mason were that it was very patent upon meeting with the patient respectively, that together with the tests, MRI brain scan and in the course of their interaction with the patient and members of his circle, that they had enough evidence to come to their respective conclusions.

[82] I was of the view that the Court would benefit from an expert to consider the medical evidence not as a general observation but in detail, together with the criticism of Dr Fine and place the Court with insight into whether the medical evidence upon which the application is brought is sufficient to warrant the relief sought. I am of the view that my decision to appoint Prof Niehaus as an expert for the Court did not amount to garnering more evidence to cure a 'defective' application as argued by respondent's counsel. In fact, it was open to Prof Niehaus to state that he agrees that further assessments were warranted before Dr Spammer and Dr Mason could each support an application for the appointment of a curator. Irrespective of the report of Prof Niehaus, this Court is able to decide, taking into account the totality of the evidence, whether the application ought to have been granted. Given the circumstances set out above, I was of the view that the Court ought to proceed with caution and that it was in the interests of justice to consider an assessment of the adequacy of the medical evidence.

[83] However, even if I am wrong in the appointment of Prof Niehaus, as an expert to evaluate the medical evidence, and his report is altogether disregarded, the weight of the evidence before me is substantial enough to find that the applicant had discharged the

onus upon him on a balance of probabilities. It is significant to mention that Dr Mason's affidavit filed after having sight of the critique levelled by Dr Fine as follows: (paragraph 10, record page 674 to 677)

*"I respectfully submit that this is a **case specific determination**. While multiple consultations may be ideal in some cases, the indication in Mr. Tibshraeny's case were **sufficiently clear and compelling** to warrant my diagnosis of dementia after one such consultation/assessment....I maintain that, in light of the medical evidence, Mr. Tibshraeny's need for assistance and care, and financial security, it would have been negligent for me not to have recommended the appointment of a curator to protect his interests."* (emphasis added)

[84] For the respondent it was argued that "*mere suspicion*" would not discharge the applicant's onus. I cannot disagree more. This matter was not mere suspicion. I am satisfied that the papers before me (even without the report of Prof Niehaus) overwhelmingly support the appointment of a curator for Mr. Tibshraeny to protect his interests. The respondent's severe cognitive impairment and executive function severely impacts his ability to manage his own affairs, especially complex financial matters. Whilst the respondent maintained throughout this matter, that professionals and other support members would act according to his instructions and that he would have "*the final say*", I am not persuaded that the respondent's final say, or approval is an informed decision, nor can it be considering his mental condition. For example, the business of Willoughby's runs at an annual gross turnover of R1m per annum. (Affidavit of Mr. Phillip Human). Mr.

Tibshraeny was unable to do the clock drawing during his medical evaluation and notwithstanding repeated attempts at a 10-word list, could only repeat 3 words. Together with the other medical evidence, I cannot accept that the respondent has the capacity to exercise overall (informed) control over his affairs and in particular grasp the complexities of the financial demands of this business and his other financial interests.

[85] I am satisfied that the totality of the evidence supports the granting of the application on a balance of probabilities. It is trite that the investigation by the curator and reporting back to the Court and the Master is to draw the Court's attention to any consideration which, in view of the curator *ad litem*, might influence the Court with regard to the terms of the Order sought. I stated in paragraphs 62 - 65 that this may be a suitable case to develop the common law, as indicated, the curator's role is not deciding on the granting of curatorship but rather the terms which she may propose as an order. The appointment by this Court of a curator would be in the best interests of the respondent. Any further delay or diversion from an order placing the respondent under curatorship would only serve to prolong the respondent's vulnerability and potentially expose him to harm.

[86] Lastly, the application was made by the respondent on 25 September 2024, after the final hearing of this matter, for leave to permit the filing of further affidavits. I granted such leave as being in the interests of justice for the complete ventilation of the matter, including those factors which have come to the attention of the parties or transpired after

the hearing of the matter. I have considered the affidavits of the respondent, and Mr. Phillip Human, the manager of the Willoughby's Restaurant and cousin of the applicant, dated 31 October 2024. As set out in the affidavits, its purpose is to bring to the attention of the Court facts which are believed by Mr Tibshraeny and Mr Human to be indicative of the self-serving interests of Darren in bringing the curatorship application. In short, it refers to events where the applicant had commenced occupation of the Clifton apartment valued more than R30 million, owned by the Laguna Trust, of which the respondent, his wife and his accountant, Mr Margolis are the trustees. The occupation of the apartment took effect without the consent of the three trustees. It is alleged that the applicant clandestinely arranged with the applicant's erstwhile attorney, Mr. Cohen, to cause the early vacation of the tenant, Mr Mouton, including repayment of the deposit and advance rental to him, thereby arranging for the applicant's occupation. Mr Cohen filed an affidavit denying these averments and set out that he acted in accordance with his mandate held in respect of the Trust. Notwithstanding written demands by Mr Biccari for Darren's vacation by 18 September 2024 and payment of occupational interest for the period of his stay from 11 August 2024 in the amount of R80 000 per month, pro-rated to the daily rate and payable to his practice trust account, he remains so resident without the payment of rental and refuses to vacate. If anything, the appointment of a curator would also address the occupation of the Clifton apartment, as the respondent is a trustee of the Laguna Trust who owns it.

[87] The affidavit of Mr. Human also sets out that the applicant had been dining at the restaurant on numerous occasions, sometimes with guests, and refused to effect

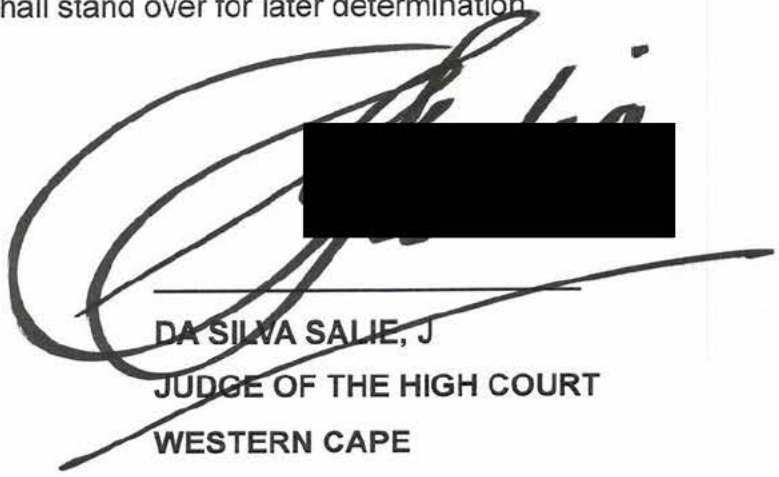
payment of the bill instead he would merely sign it. On certain occasions he would also enter the non-patron areas and engage with staff, making certain enquiries as if entitled to do so which Mr. Human considers as a gross interference of the business and disruptive to staff which erodes the morale of the employees. He also alleges that the respondent would be recorded on video footage and occasionally would look "*defiantly*" into the cameras. He furthermore considers the actions of the applicant as undermining his position as the general manager of the business which he speculates may very well be the intention of the applicant. He also alleges that the applicant has conveyed to the other manager, Mr. Clint Fennel, that the applicant has openly declared to Mr. Fennel that he considers himself to have the right to be the owner of Willoughby's by succeeding the respondent, his father, and that he considers himself as the rightful person to be in charge of Willoughby's business and not his cousin, Mr Human. Furthermore, when the applicant succeeds as owner, he will run the business and remove his cousin as general manager. Confirmatory affidavits for Mr. Fennel, Mr Margolis, Mr Human and the daughter of the respondent, Natalie, are respectively filed of record to these further affidavits filed.

[88] I am not persuaded that the belated alleged facts change the findings of this Court. It is common cause that this family is at war with itself. The papers are sadly replete with the reality that the financial success of the applicant and the wealth of the family had resulted or contributed in significant conflict and deep division within the family. Different caucus groups have formed together with outsiders actively opposing each other, creating a hostile, combative and tense atmosphere. It is not in dispute that Mr Tibshraeny had always maintained that the business had been built up into a lucrative empire for the

benefit of the family and should remain in the family. It is not in dispute that he loves both his children, his daughter, Natalie and the applicant, Darren. It is apparent however that during this feud, suspicions and negative emotions towards polarised groups, anger, resentment, bitterness and self-preservation have become a prevalent feature within the family dynamic. The vilification of the applicant by the respondent and those who form part of his support infrastructure and their allegations with regard to Darren's *mala fides* is a pervasive and very burning allegation throughout the papers. So too, is the suspicion and allegations by the applicant that his father is being manipulated and that his parents are subjected to an unlawful palace revolution by those his father trusts the most. The portrayal of these events and emotions is unfortunate. However, it does not detract from the findings of this Court. The members of this family are urged to find common ground. The children of the respondent, and his wife, are urged by this Court to accept that the vulnerable positions of their parents including their state of health and their advanced age require of their children to be at peace with each other. It is hard to imagine that a young Jens Tibshraeny, with the support of his wife, Elizabeth, had started a business which had boomed into success with hard work and sacrifice, only to have its exponential achievements haunt them in their old age and divide their family. *Apropos* this reality, the appointed curator *ad litem* is also directed to investigate the discord between the family and propose to this Court, in her report, ways in which the acrimony and tensions can be reduced for the respondent and resolved in a manner which would lessen the pressure which bears upon him as a result.

[89] For the reasons to which this Court has come and in all circumstances of the matter, I make the following order:

- i] **ADVOCATE DIANE DAVIS SC** is appointed as *Curator Ad Litem* to represent **JENS PETER TIBSHRAENY** ("the patient") in an application to have him declared incapable of managing his own affairs and for the appointment of a *curator bonis* or *curators bonis* to the patient.
- ii] The curator *ad litem* is also requested to investigate the question of whether Attorney **SEMIRA FUAD HRISTOV** should be appointed as curator bonis to the patient in addition to such other persons as the *curator ad litem* may wish to recommend as additional curators.
- iii] The curator *ad litem* is directed to file her report with the Registrar of this Court and the Office of the Master of the High Court by 30 May 2025.
- iv] The matter is postponed to Tuesday, 17 June 2025.
- v] The costs of this application shall stand over for later determination.



DA SILVA SALIE, J
JUDGE OF THE HIGH COURT
WESTERN CAPE