



SPECIAL INTEREST

**IN THE HIGH COURT OF NAMIBIA
75/12**

CASE NO: A

In the matter between:

**ZENOBAY CLOETE
DIDI DE KLERK
APPLICANT**

**FIRST APPLICANT
SECOND**

and

**LUKE MOELLER
RESPONDENT
MICHELLE GROUP TRUST HOME
AND CARE CENTRE
RESPONDENT**

**FIRST

SECOND**

IN RE: SYBILLE BIANCA MÖLLER

SUMMARY

Curator Personae - appointment of - The appointment of a *curator personae* involves a serious encroachment upon a person's liberty and the Court will only make such appointment when a real need in this regard has been shown.



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IN RE : SYBILLE BIANCA MOELLER

CORAM: GEIER, J

Heard on: 13, 19, 26 April 2012 and 31 May 2012

Delivered on: 4 June 2012

JUDGMENT

GEIER, J.: [1] On 13 April 2012 the Applicants initially approached the court on an urgent basis for the following relief:

- a) An order in terms of which these proceedings are heard in camera.
- b) Condoning the applicants' non-compliance with the Rules of the High Court of Namibia in relation to forms and service and that this application be heard on an urgent basis as envisaged in Rule 6(12) of the aforesaid Rules.
- c) That a rule nisi be issued calling upon first respondent to show cause, if any, on a date to be determined by the Registrar of this Honourable Court why an order in the following terms should not be granted:
 - i) Ordering the first respondent to return Sybille Bianca Möller to the custody and care of the Michelle Group Trust Home and Care Centre immediately, alternatively, in the event that the first respondent refuses or fails to do so, that the Deputy Sheriff be authorized to arrange medical transport to return Sybille Bianca Moller to the Centre, at the cost of the applicants;
 - ii) 'Interdicting and restraining first respondent from removing the said Sybille Bianca Möller from the custody and care of the Michelle Group Trust Home and Care Centre pending finalization of the application for the appointment of first applicant as curator bonis to the person and property of the said Sybille Bianca Möller;
 - iii) An order in terms of which the first applicant shall have the sole authority to consent to medical or other treatment in

respect of Sybille Bianca Möller as well as her detention in or removal to any hospital or similar institution like the second respondent;

- iv) That the first respondent be ordered to pay for the cost of this application.
- d) Granting the applicants leave to amplify these papers and to approach the Honourable Court on the return date on these papers, as amplified, for an order in the following terms:
- i) Dispensing with the appointment of a curator ad litem for Sybille Bianca Möller;
 - ii) That Sybille Bianca Möller be declared to be of unsound mind;
 - iii) That the first applicant be appointed as curator bonis to the person and property of Sybille Bianca Möller with inter alia the following powers and capacities:
 - iv) That the curator be exempted from furnishing security;
 - v) That the first respondent pay for the costs of this application.
- e) An order in terms of which prayers c (i) to c(iii) shall serve as an interim interdict pending the outcome of the application for the appointment of first applicant as curator bonis to the person and property of Sybille Bianca Möller.
- f) Authorizing the applicants to serve a faxed or emailed copy of the order on the first respondent on Friday, 13 April 2012, and to serve the original order as soon as practically possible.

[2] On the 13th of April 2012 the court, inter alia, ordered that, by agreement between the parties, the matter be postponed for hearing to

the 19th of April 2012 and, more importantly, that the first respondent return Sybille Bianca Möller, (herein after referred to as the 'patient'), into the custody of the Michelle Group Trust Home and care Centre, the second respondent, where she was to remain until the matter would be heard.

[3] On the 19th of April 2012 the matter was again postponed to 26 April 2012 to afford the applicants, both sisters of the patient, the opportunity to inspect the premises and facilities, created for the patient's care at the first respondent's home, the first respondent, incidentally being the husband of the patient and the referred to home being the common home of the first respondent and the patient.

[4] Mr Pieter Hamann, an attorney, was on that date appointed as *curator ad litem* to the patient and he was directed to file his report by the 18th of May 2012.

[5] The parties were also granted leave to supplement their papers.

[6] On the 26th of April 2012 the parties concluded an agreement which settled the question of the interim relief sought and in terms of which the first respondent was now authorized to remove the patient to the said common home.

[7] This agreement further regulated the day-today care and nursing of the patient.

[8] Importantly that agreement, made an order of court, also provided that such care should take place without interference from the first respondent or any other person acting on his behalf. The first respondent would in addition have to procure the services of a medical practitioner qualified to treat *Dementia*. The matter was then postponed for argument to the 31st of May 2012, also on the issue of costs.

[9] The report of the curator ad litem was duly filed on 18 May 2012.

[10] Essential to the decision in this matter is his opinion that the patient is incapable of managing her affairs and that the prognosis of any improvement is poor.

[11] This opinion was based on- and is in accordance with the findings contained in a medical report filed with the court by the specialist psychiatrist Dr. Pieter van der Westhuizen, whose views are shared by Dr B.D. Roberts, a general medical practitioner.

[12] From the supplemented papers filed of record it appears that also the parties are not in disagreement on this issue.

[13] It follows that the patient should be declared to be of unsound mind and incapable of managing her own affairs.

[14] This declarator brings with it the necessity to appoint a curator.

AD THE APPOINTMENT OF A CURATOR PERSONAE

[15] Mr Hamman recommended to the court that the first applicant is suitable and should be appointed as *curator personae* to the patient, but that her powers be executed in conjunction with the first respondent.

[16] Recognising the fact that the relationship between the first applicant and the first respondent is not entirely harmonious he further recommended that any issue, on which they might not agree, be referred to Dr Roberts, (or any person nominated by him for that purpose), whose decision would be accepted as final.

[17] There is indeed friction between the two main protagonists to this application and there is thus a degree of risk should the court follow this recommendation.

[18] Importantly however both the first applicant and first respondent share a 'deep and complete devotion to the patient' - which devotion - coupled with the severity of the situation - on the other hand surely is partly to blame for the strained relationship that exists - which factor is obviously exacerbated by human emotion. For these reasons I have no doubt that both first applicant and first respondent, on occasion, lose the ability to act objectively.

[19] That the feud between them is ongoing is also borne out by the further papers filed of record.

[20] The question thus arises, whether or not, in such circumstances, a third party should be appointed as curator to the person of the patient, or

whether or not the need for such an appointment can be dispensed with altogether?

[21] In terms of the applicable authorities it would appear firstly that a curator to a person is not lightly appointed as '*applications of this nature involve serious encroachments on a person's liberty, and ... the court should only make appointments when a real need for them has been shown.*'¹

[22] It emerges from the *curator ad litem's* report in this instance that he at least came to the conclusion, as an objective outsider, that the first respondent has lost his ability to be objective towards the needs of the patient and her immediate family. He goes on to observe that an outside person would be able to assist the first respondent to keep his objectivity. Although Mr Hamman does not say so, I have no doubt, given the history of this matter, that the same goes for the first applicant.

[23] In a situation however where the patient has already had a stroke, suffers from severe *Dementia* and terminal HIV related illness, weighing less than 30kg's, were she is 'skeletonised and emaciated' and were, in addition, she is grossly impaired mentally and neurologically, being unable to converse and move, lying mostly in a foetal position and were Dr van der Westhuizen states in no uncertain terms that the prognosis is hopeless, I have no doubt that a real need for the appointment of a *curator personae* has been shown and that the serious encroachment on

¹See for instance : *Martinson v Brown* 1961 (4) SA 107 (CPD) at 110A and *Ex Parte Powrie* 1963 (1) SA 300 (WLD) at 300D – See also *Ex Parte Hill* 1970 (3) SA 411 (CPD) at 413 A

the patient's liberty, which such appointment brings with it, is warranted in the circumstances of this matter.

[24] The applicants, as per 'amended notice of motion' endorse Mr Hamman's recommendations in this regard.

[25] The first respondent initially opposed the appointment of the first applicant as curator to the patient's person. This stance was abandoned during the hearing of this matter on 31 May 2012, in reaction to the court's concern's to follow Mr Hamman's recommendation and that rather an outside third party be appointed, in view of the continuation of the feud between first applicant and first respondent, as evidenced by the amplified papers filed of record, from which it appeared that that first applicant and first respondent, despite the graveness of the situation, still were not able to 'bury the hatchet'. The first respondent now contended for the appointment of an outsider to this position.

[26] It is obvious that the appointment of an outsider as *curator personae* would be the least preferable option in this instance.

[27] As the patient may possibly also be 'very close to the end' - as first applicant has put it - humane considerations would surely dictate that those relatives - possessed with the necessary empathy - be by the patient's side during this difficult period. It is clear that both the first applicant and the first respondent possess those qualities and it is really this consideration, in the main, that militates towards the adoption of the *curator ad litem's* recommendations.

[28] Importantly the involvement of an outsider is not totally discarded, through the appointment of the person of Dr Roberts, or his nominee, as final arbiter should first applicant and first respondent lose their objectiveness in any given situation and not 'see eye to eye'.

[29] I am thus prepared to take a calculated risk - in the firm belief - that first applicant and first respondent will now 'bury the hatchet' and co-operate - in the interests of the patient - dear to both of them. I will thus adopt the recommendations made by the *curator ad litem* in this regard.

AD THE APPOINTMENT OF A CURATOR BONIS

[30] As to the related question of the appointment of a *curator bonis* it appears firstly from Mr Hamman's report that the patient has been a housewife all her life, with no meaningful business or professional interests.

[31] Importantly she is married to the first respondent in community of property.

[32] In spite of the first applicant originally aspiring to be appointed as such it was on the basis of the above listed factors recommended that the first respondent should rather be appointed as *curator bonis* to the patient, with the powers set out in paragraphs 4.3.2 to 4.3.12 of the original notice of motion.

[33] From the amended notice of motion and supplemented papers filed of record it however now appeared that the first applicant has abandoned this quest - in my view correctly so - particularly in view of the marital regime of the parties. This issue so became common cause. In such premises there was thus no reason not to accede to the relief sought in prayer 4 of the notice of motion, as amended.

[34] This leaves the issue of costs.

THE QUESTION OF COSTS

[35] Both parties seek an award in their favour.

[36] Ms Bassingthwaighe, who appeared on behalf of the applicants, sought a costs order in her client's favour firstly on the ground that the first respondent was the cause of this application due to the first respondent's breach of an undertaking - given to the applicants' legal practitioner of record, Mrs Angula - I will deal with this ground in the context of the costs argument mounted on behalf of first respondent - and secondly on the ground that - as the first respondent had breached the terms of the interim agreement concluded between the parties, as made an order of court, on 26 April 2012 - this should attract the courts censure in the nature of a costs order.

[37] Mr Tjitemisa, who represented the first respondent resisted a cost order and sought an award in his clients favour on the grounds that the applicants had made out no case for the appointment of a curator

personae and that all the necessary arrangements for the proper care of the patient had been put in place before the first respondent had taken the patient home and in any event the first respondent had duly notified the applicants legal practitioner of his intention to do so, as agreed, and that therefore the applicants had approached the court frivolously and without ground. His client also denied being in breach of the interim agreement.

[38] Despite such denial it appeared that there was substance in Ms Bassingthwaight's argument in this regard as it does indeed appear from annexure "PFH4" to Mr Hamman's report that the first respondent and his sister Enid had taken over the care of the patient at night despite the court order decreeing that "the day-to-day care and nursing of the patient shall be attended to solely by the caregiver and registered nurse employed by 'His House Care Centre' ... without interference from the first respondent ... " and in terms of which the first respondent was also ... "ordered to ensure that no person, including his relatives, interfere with such day-to-day care and nursing." It is also clear that the applicants had always made out a case for the appointment of a curator.

[39] On the other hand however, and upon closer analysis, Mr Tjitemisa's argument, on behalf of first respondent, that his client had complied with the undertaking given to Mrs Angula, prior to the launch of the application will have to be upheld in view of the manner in which the oral undertaking had been recorded and was phrased in a subsequent letter - annexure 'ZFC 3' - and which is/was open to the interpretation - as contended for by Mr Tjitemisa - and from which it did not expressly emerge that the first

respondent did not – contrary to what was alleged – have to first satisfy the applicants that all the necessary arrangements for the proper care of the patient had to be in place before the patient could be removed from the Michelle Group Trust Home and Care Centre. On a simplistic reading of Mrs Angula’s letter – not taking the context and preceding letter into account – the first respondent could genuinely – as a layperson – have harboured the view that all he had to do – in terms of the recorded undertaking – was to inform the applicants of his intention to take the patient home – which is precisely what he did as per annexure ‘ZFC 4’.

[40] It has also now become clear from the papers exchanged between the parties that the first respondent had indeed started, well in advance, to put the necessary measures in place for the proper care of the patient at their home. This appears for instance from an annexure to annexure ‘SFC 7’ to first applicant’s replying affidavit from which it is apparent that the first respondent, as far back as December 2011 had already obtained a quotation from ‘His House Care Centre’ for the care of the patient. This quotation was then also accepted, on the 12th of April 2012, prior to the bringing of this urgent application.

[41] It is obvious that the bringing of this urgent application could have been averted through better communication between the parties and that the application was thus brought about, in material respects, by the miscommunication between the parties. Both parties are at fault in this regard.

[42] Although the first respondent's non-compliance with the interim agreement made an order of court is not to be overlooked and although conduct of this nature would, in the ordinary course, at the very least, have attracted the consequences contended for by Ms Bassingthwaite, I am, in the circumstances of this matter, and were the emotional stress caused by the overall situation in the first respondent's home must be overwhelming, were the first respondent is working away from home at the Langer Heinrich mine during the day, having to care for the patient and two minor children as well, after hours, all whom have contracted the same terminal illness as the patient, prepared to condone the first respondent's actions.

[43] Finally I believe that cognisance should be taken of the incontrovertible effect that any costs order made against the first respondent would have. The first respondent is married in community of property to the patient. Any such costs - clearly - would have to be paid out of the common estate. These common estate resources are currently taxed to the limit due to the financial demands that the patient's situation presently creates. Surely such resources should now be preserved and employed, as best possible, to the benefit of the patient.

[44] Taking into account all of the above aspects I am of the view that justice in this matter is best served by ordering each party to pay its own costs. I exercise my discretion accordingly.

[45] In the result:

- a) I grant an order in terms of Prayers 1,2,3, 4 and 5 of the Notice of Motion, as amended;
- b) And by agreement between the parties, paragraph 3 of the order of 26 April 2012 is hereby also incorporated into this order.
- c) Each party to pay its own costs.

GEIER, J

ON BEHALF OF THE APPLICANTS

Adv. Bassingthwaighte

Instructed by:

AngulaColeman

ON BEHALF OF THE 1ST RESPONDENT

Mr Tjitemisa

Instructed by:

Tjitemisa & Associates