

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Title: Job Januarie and Paulus Benjamin Januarie	Case No: HC-MD-CIV-MOT-EXP-2022/00297
Applicant	Division of Court: Main Division
Respondent	Heard on: 3 November 2022
Heard before: Honourable Lady Justice Rakow	Order: 20 January 2023
	Reasons: 23 January 2023
Neutral citation: <i>Januarie v Januarie</i> (HC-MD-CIV-MOT-EXP-2022/00297) [2023] NAHCMD 6 (23 January 2023)	
Order:	
<ol style="list-style-type: none">1. The application brought by Paulus Benjamin Januarie is hereby dismissed with costs.2. The matter is postponed to 14 February 2023 at 15h30 for hearing of the <i>rule nisi</i> application.	
Reasons for order:	
RAKOW J	
<u>Introduction</u>	
[1] The initial ex-parte application dealt with the appointment of curators for Mr. Henry Hermanus Januarie and a declaration that Mr. Henry Hermanus Januarie is no longer able to manage his own affairs. The application was supported by a founding affidavit of Mr. Job Januarie, a brother of Mr. Henry Hermanus Januarie. Mr. Job Januarie indicated that they as a	

family always experienced Mr. Henry Hermanus Januarie as a bit 'slow' but did not draw any conclusion about this fact. This affidavit further referred to a report by Mrs. Burmeister-Nel who assessed Mr. Henry Hermanus Januarie and found that Mr. Henry Hermanus Januarie does not have the ability to make important decisions for himself.

[2] This came after Mr. Job Januarie learned that Mr. Henry Hermanus Januarie sold or donated a portion of the farm Mr Henry Hermanus January inherited from their late father, to another brother of theirs, Mr. Paulus Benjamin Januarie. This transaction is the basis of a matter currently pending in this court.

Ex-parte application

[3] The ex-parte application reads as follows:

1. That Adv Lotta Ambunda-Nashilundo be appointed as curator ad litem for Henry Hermanus Januarie in this matter;
2. That a Rule nisi be issued calling upon all interested parties to show cause, on a date to be determined by this Court, why the following order should not be confirmed:
 - 2.1. Declaring Henry Hermanus Januarie to be of unsound mind and not having full control of his mind and as such incapable of managing his affairs (as provided for in terms of Rule 81(1)(a));
 - 2.2. That Mr Wilhelm Theodore Christians be appointed as *curator bonis* to the property of Henry Hermanus Januarie;
 - 2.3. That Adv Lotta Ambunda-Nashilundo be appointed as *curator ad litem* for Henry Hermanus Januarie in case number HC-MD-CIV-ACT-OTH-2021/03840;
3. That the relief as set out in paragraphs 2.1, 2.2 and 2.3 above shall become immediately operative pending the return date of the Rule nisi granted in paragraph 2 above;
4. That the costs of this application be borne by the estate of Henry Hermanus Januarie;

[4] This application became opposed when Mr. Paulus Benjamin Januarie filed his opposition to the order being sought, but he is only opposing the appointment of Mr. Wilhelm Theodore Christians's appointment as curator bonis to the property of Mr. Henry Hermanus Januarie. According to the affidavit filed by Mr. Paulus Benjamin Januarie his objection against Mr. Wilhelm Theodore Christians's appointment is specifically based on the fact that Mr. Christians is a close associate of Mr. Job Januarie and Mr. Karl Januarie, another brother of Mr. Henry Hermanus Januarie. It is contended that if Mr Christiaans is so appointed, he will be able to take decisions, with and on the advice of the *curator ad litem*, regarding the further ongoing litigation, possible settlement of a dispute or contenting the dispute toward the bitter end.

The arguments

[5] For the intervening party, Mr. Paulus Benjamin Januarie, it was argued that he is not against appointing *curator ad litem* and a *curator bonis* for his brother Henry, but that the individual proposed to serve as *curator bonis* is too close for comfort. It was further submitted that there is absolutely no personal attack on Mr. Christiaans, and that they concede that he is a well-respected member of the legal profession but that the complaint that is raised can also be raised against a High Court judge, who is too close to a dispute that he or she must be resolved; not ill founded, it is a factual scenario that can present itself in the life of any professional and must be duly identified and managed. The role of a *curator bonis*, must be exercised in the utmost good faith and even a blink of a possible conflict of interest should have deterred the learned counsel, Mr Christiaans out of his own accord to stay clear of the appointment.

[6] For the applicants in the ex-parte application it was argued that the only ground on which he desires to be heard is that the appointment of the nominated *curator bonis*, Mr Christiaans, is opposed. The basis of the opposition is that Mr Christiaans is a family friend who may not faithfully execute the duties of the office of trust, simply because the Intervening Applicant is of the view that the Mr Christiaans may be unduly influenced by the other brothers of Mr. Henry Hermanus Januarie. No evidence is submitted in support of these allegations and as such it becomes an allegation without basis.

[7] Adv. Lewis further submitted that the notion that a *curator bonis* (appointed over the property of the patient, as prayed for in the instant case) can “influence” pending litigation of the patient is misplaced. The powers of the *curator bonis* are delineated in terms of the provisions of Article 76 of the Administration of Estates Act 66 of 1965. Since the curator bonis is solely responsible to manage the financial affairs of patient, it is improbable that he can “influence” the pending litigation in case number HC-MD-ACT-OTH-2021/03840, particularly since a curator ad litem has been appointed to represent the patient in the aforesaid litigation.

Legal considerations

[8] Rule 72(4) and (5) provides as follows:

‘(4) Any person having an interest which may be affected by a decision on an application being brought ex parte may deliver notice of an application by him or her for leave to oppose, supported by an affidavit setting out the nature of that interest and the grounds on which he or she desires to be heard, after which the registrar must docket-allocate the matter to a managing judge who must set it down for

hearing.

(5) At the hearing the court may grant or dismiss either or both applications as the case may require or may adjourn the hearing on such terms as to the filing of further affidavits by either applicant or otherwise as the court considers suitable or proper.'

[9] *Ex facie* the rule, it is evident that the Intervening Party must meet the following requirements to obtain leave to oppose these proceedings:

- He must have an interest which may be affected by a decision on this application being brought *ex parte*;
- He must deliver notice of an application by him for leave to oppose, supported by an affidavit;
- The affidavit must set out the nature of that interest and the grounds on which he desires to be heard.

[10] It is further true that a *curator at litem* and a *curator bonis* are two different appointments which deal with different aspects of the person on whose behalf they are appointed's life. In terms of the definition of a *curator at litem* as per *Claassen's Dictionary of Legal Words and Phrases*¹ a *curator ad litem* 'is a curator for the purpose of a suit, ie a curator appointed by the court to protect the interests of some party to a legal proceeding who is unable, or is alleged to be unable, to protect his own interests.' The same dictionary describes a *curator bonis* as '(a) person appointed by the court to manage and control the property of a person, who, for reasons satisfactory to the court, is unable to manage and control his own property'

[11] Ms von Wielligh placed Mr. Christiaans in the same position as a judge in court listening to a case where the parties are known to him or her. It is however so that in recusal applications of judges it is necessary to show actual bias, not only perceived bias. The point of departure in recusal applications as per the Supreme Court in the matter of the *Minister of Finance and Another v Hollard Insurance Co of Namibia Ltd and Others*², is set out as follows:

'The departure point is that a judicial officer is presumed to be impartial in adjudicating disputes and that the presumption is not easily dislodged. A mere apprehension of bias is therefore not sufficient to rebut the presumption.'

Similarly, it must be said that the court accepts that a person appointed as *curator bonis* will act

¹ Dictionalry of Legal Words and Phrases, second edition, volume 1 Juta August 2008

² Minister of Finance and Another v Hollard Insurance Co of Namibia Ltd and Others 2019 (3) NR 605 (SC) para 25.

in the best interest of the person on whose behalf he or she was appointed and as such an apprehension of bias is not sufficient to show that the *curator bonis* will not perform his or her functions sufficiently.

Conclusion

[12] From the above it is clear that the roles of the two curators, Adv Lotta Ambunda-Nashilundo who stands to be appointed as the *curator at litem* and Mr. Wilhelm Theodore Christians who stands to be appointed as *curator bonis* differ vastly. There is further no grounds set out by the intervening party as to why he is of the opinion that Mr. Christians will have any influence in the manner in which Adv. Ambunda-Nashilundo will conduct the court case regarding the inheritance of Mr. Henry Hermanus Januarie. The apprehension of bias placed before the court in this matter is simply not strong enough for this court to find that there will indeed be bias on the part of Mr. Wilhelm Theodore Christians and that he will use his position as *curator bonis* to influence the *curator at litem* in the exercise of her duties.

[13] In the result, I make the following order:

1. The application brought by Paulus Benjamin Januarie is hereby dismissed with costs.
2. The matter is postponed to 14 February 2023 at 15h30 for hearing of the rule nisi application.

Judge's signature	Note to the parties:
E RAKOW Judge	Not applicable
Counsel:	
Applicant:	Defendant:
Adv Lewies Engling Stritter and partners	Mrs von Weiligh Liesl Mouton attorneys