

Master of the High Court v The Pretoria Society of Advocates (1st amicus curiae) and Others Case 35182/2016 – delivered 20 May 2022

1. The Master of the High Court requested guidance on certain identified issues involving the Master's supervisory powers over trustees and curators *bonis* in matters where damages have been awarded by courts.

Issues raised

2. In her report the Master raised two broad areas of concern. The first pertained to what she described as practical difficulties the Master experiences in implementing court orders that are ambiguous in that, while they are aimed at establishing trusts in personal injury matters, they appear to confuse the powers extended to the Master under the Estates Act and those under the Trust Act.
3. The second was an overarching concern that the Master expressed as being a developing practice among legal professionals to circumvent, indeed, to evade, the checks and balances afforded the Master under the Estates Act by establishing Issues raised.
4. In light of the concerns expressed, the Court considered a list of questions to be determined by this Court. They are the following:

'(a) Appointment of Trustees and Curators Bonis in RAF/Medical Negligence Matters

- (i) Does the Administration of Estates Act sanction the creation of a trust and the appointment of a trustee(s) in terms of the Trust Property Control Act for the purpose of administering funds awarded to minors and persons under curatorship who have been incapacitated as a result of road accidents and/or incapacitated due to medical negligence and if so under what specific instances;
- (ii) Alternatively, is it legally permissible that a trust be created, and a trustee(s) be appointed in relation to funds awarded to minors and

persons who have been incapacitated due to road accidents, medical negligence and other related matters instead of appointing a Curator Bonis in such circumstances?

- (iii) What is the legal authority, if any, of subjecting trustees appointed in terms of the Trust Property Control Act to the authority of the Master in terms of the Administration of Estates Act, in relation to minors and persons incapacitated due to road accidents, medical negligence and other related matters?
- (iv) Is the Master competent to appoint a trustee(s) in terms of section 7 of the Trust Property Control Act, in relation to minors and to persons incapacitated as a result of road accidents, medical negligence and other related matters?
- (v) If so, is the Master authorised to insist that trustees appointed in terms of the Trust Property Control Act, should comply with the provisions of the Administration of Estates Act and if so which provisions?
- (vi) Would a Court Order to this effect alone be sufficient authority to empower the Master to insist on such compliance?
- (vii) In the event of a trust being created and trustee(s) appointed, in relation to funds awarded to minors and persons incapacitated through road accidents, medical negligence and other related matters should the drafters of the trust instrument include either express or implied provisions for a trustee's remuneration?
- (viii) Should the fees and administration costs of a trust be determined on the basis of the directives pertaining to curator's or trustee's remuneration and the furnishing of security in accordance with the provisions of the Administration of Estates Act, as amended from

time to time and include but not be limited to disbursements incurred and collection commission calculated at a percentage on the amounts recovered from the Defendant in respect of the section 17(4)(a) undertaking?

- (ix) Can the monthly premium that is payable in respect of the insurance cover, which is to be taken out by a trustee, serve as security in terms of the trust instrument?
- (x) Should the Defendant be liable for costs associated with the yearly audit of the trust by a chartered accountant as determined in the trust instrument?
- (xi) Should the Defendant effectively be liable for all costs pertaining to the administration of the trust?

(b) The Guardian's Fund and RAF Matters

- (i) Should the Guardian's Fund be utilised to administer RAF awards of R500 000 and less in respect of a minor or person incapable of managing his/her own affairs or should such RAF awards be administered through the appointment of a Curator Bonis, tutor, or a trustee?

(c) Declarations of Partial Incapability

- (i) Should a Curator *Bonis* be appointed in matters where a recommendation is made by a Curator ad litem or medical expert for a person to be declared partially incapable of managing his/her affairs and for the protection of funds awarded by the Court?

5. Broadly speaking, the questions identified under paragraphs (a)(i) and (ii) of the Directive fall within the overarching concern of the Master that the establishment of trusts to protect damages awards does not serve the interests of vulnerable plaintiffs. Those identified under paragraphs (a)(iii) to (xi) relate to the Master's

concern regarding ambiguities common in court orders establishing trusts for the protection of damages awards and the practical impediments the Master faces in implementing such orders.

6. The question under paragraph (b)(i) relates to minors specifically. That under paragraph (c)(i), while purporting to deal with 'partial incapacity', is linked to both the overarching issue of trust versus curator *bonis*, as well as to the Master's practical concerns.

Legal framework

Curators *bonis*

7. The Court proceeded to discuss the procedure for the appointment of a *curator bonis* as well as the powers and duties of a curator *bonis* with specific reference to the supervisory powers of the Master and remuneration of curators *bonis*.

Trusts and trustees

8. The Court also discussed trusts and the underlying principle of the Trust Act that state control of trusts should be limited to a minimum, and where existing procedures and common-law controls function effectively, the Trust Act does not seek to regulate trusts further. The duties, responsibilities and obligations of trustees were discussed as well as the Master's supervisory powers under the Trust Act.
9. The court recognised that the Master is fully empowered under the Trust Act, should circumstances require it, to undertake a range of actions to protect the interests of vulnerable trust beneficiaries and concluded that it is something of a misnomer to describe the Master as having less power than she has in respect of curators *bonis*.

10. On consideration of the question whether courts should be permitted to protect damage awards via the mechanism of a trust as opposed to the appointment of a curator *bonis*, the Court found that they can see no reason why a court could not, in any appropriate case, direct the establishment of a trust to protect an award of damages where such protection is indicated due to the plaintiff's incapacity. Their view was that the default position ought not necessarily to be the appointment of a curator *bonis*.
11. The Court concluded that for both principled and pragmatic reasons practitioners representing vulnerable plaintiffs in RAF and medical negligence matters (including curators *ad litem* where appropriate) should be permitted to apply to court for either the appointment of a curator *bonis* or for the establishment of a trust to protect the damages awarded. In each case it should be open to the court to determine whether the proposed protective mechanism will properly and effectively manage the award in the plaintiff's interests.
12. It was found that a Court should be placed in a proper position to enable it to make a determination in each case as to whether the proposed protective mechanism is appropriate. This will require practitioners to provide the court with all information relevant to enable the court to make a proper determination as to whether it is proper to sanction the establishment of a trust rather than the appointment of a curator *bonis*. In addition, a court can, and should ensure that the powers and duties of the trustee are spelled out fully in the order and trust deed. Where appropriate, the court may impose additional obligations on a trustee to ensure that supervision by the Master is effective in terms of the Trust Act.
13. The difficulties experienced by the Master about the ambiguity of court orders were also discussed and the Court suggested, that in future, to avoid the ambiguities raised,

- i The trustee should be appointed in terms of the Trust Act and in the interests of clarity, the court should desist from making any reference to the Administration of Estates Act, thus obviating the Master's authority over the trustee in terms of this Act.
 - ii Section 84(1)(b) of the Administration of Estates Act makes provision for the determination of remuneration of a curator *bonis* by the Master. This does not apply to trustees, and as such the taxation and approval by the Master of trustee's fees, disbursements or administration fees and expenditure should not be incorporated in court orders.
 - iii The Master is not generally empowered in terms of the Trust Act to determine the reasonableness of expenditure on the part of a trustee. Orders should not imply that this is the case, nor may the RAF refuse to reimburse a trustee without the Master's approval.
 - iv Critically, it is imperative that orders establishing trusts should set out in detail how trustees are to be remunerated in terms of their fees and costs.
14. The court dealt extensively with remuneration and all administration costs for trusts and curators *bonis* and concluded that in circumstances where a trust is established, the remuneration and administration costs must be dealt with explicitly and comprehensively in the court order and/or trust instrument incorporated into the order of court.
15. It was found that the remuneration and out of pocket costs, and a basis for their calculation, must be specifically set out in the court order or trust instrument. Once the remuneration provisions have been made subject to the court's scrutiny and are approved, the ambiguities discussed earlier are overcome. Approval by the

court of the remuneration places a necessary safeguard in place which ensures that the fees paid are commensurate with the particular responsibilities and work undertaken and will allay the Master's concern that the trustees 'set their own fees'. The annual approval of curators' accounts and audit of the trusts ensure that no untoward behaviour of either a curator or a trustee remains undetected.

16. It is also important that the trust instrument must be available for consideration and scrutiny by the court and the defendant. The trust instrument should also expressly state that any amendment to the trust instrument shall be subject to the approval of the High Court which will ensure that any amendments dealing with remuneration of the trustees will be brought to the attention of the Court.
17. The Court also discussed the problem that the exercise of curators *bonis*' powers, under the terms of their appointment, is subject to prior approval by the Master.
18. The Court discussed the specific powers of curators *bonis* and concluded that the Master's approval is only required for the following powers:
 - i. to let, exchange, partition, alienate and for any lawful purpose, to mortgage or pledge any property belonging to the Patient, or in which the Patient has an interest;
 - ii. to raise money by way of mortgage or pledge or any of the movable or immovable property of the patient, for the payment of the Patient's debts or expenditure incurred or to be incurred for the Patient's maintenance or otherwise for the Patient's benefit, or provision for the expenses of the Patient's future maintenance; or the improvement or maintenance of the Patient's property;
 - iii. to expend any moneys belonging to the Patient on the maintenance, education or advancement of any relative of the Patient, or any other person, wholly or partially dependent on the Patient. To continue such other acts of bounty or charity exercised by the patient as the Master having regard to the circumstances and the value of the estate of the Patient considers proper and reasonable.

19. It follows, particularly in regard to the alienation or mortgaging of immovable property but also in respect of the continuance of any act of bounty or charity on behalf of the Patient, that the consent of the Master must be obtained beforehand.
20. However, save for the abovementioned three powers, all the other powers are exercised for the benefit of the Patient by the curator *bonis* in the ordinary course of the administration of the estate and do not require the prior approval or consent of the Master. The Master's control over the curator *bonis*'s administration of the estate is exercised in the consideration and approval or not of the annual curatorship account.
21. The Court suggested that all other conditions about powers are undesirable and not in the patients' interests and concluded, that the prior approval condition in respect of the other powers ought not to be included in court orders appointing curators *bonis* as a matter of routine. It is not the function of the Master's office to micro-manage the exercise of a curator's powers.
22. The powers of trustees were also discussed, and it was stated that unless the trust deed or court order establishing the trust specifically provides therefor, a trustee is not required to seek the prior approval or consent of the Master to enter into a particular transaction.
23. The Court concluded that the Master is able to exercise sufficient oversight over both curators *bonis* and trustees – in the case of the former through the provisions of Section 72(1)(d) read together with Sections 77 and 80 of the Estates Act and with the review of the annual curators' account. In the case of the former, through the provisions of Section 6 read together with Sections 9 and 15 of the Trust Act.
24. The requirement of security by trustees and the appointment of family members as co-trustees were also considered.

25. The Court found that the monthly premium that is payable in respect of the insurance cover which is to be taken out by a trustee cannot serve as security in terms of the trust instrument. Insurance and security do not necessarily serve the same purpose. The provision of security, quite apart from any insurance that a trustee may wish to obtain, is an important statutory buffer against malperformance by a trustee. While the Master has the power to release a trustee from the obligation to pay security in a particular case, the fact that the trustee has insurance cover should not, as a general rule, serve as a basis for doing so.
26. About family members being appointed as co-trustees, the Court reiterated that the establishment of a trust to protect damages awards is not a one-size-fits-all exercise. In each case, a court should consider whether it is practicable to appoint a particular guardian or family member as a co-trustee and, if so, what her powers should be, and whether she should be required to provide security. In addition, if a family member is appointed as a co-trustee, the trust instrument must make provision for a mechanism to break any deadlock between the co-trustees so that the interests of the plaintiff are not undermined.
27. The question of partial incapacity was also discussed, and it was found to be cases in which the medical experts conclude that the plaintiff does not suffer from an incapacity such as to manage her affairs, but that the funds to be awarded by way of damages require some form of protection. In these matters, trusts may be used to provide the necessary protection.
28. It is important in these matters that sufficient medical evidence is placed before the court to support an order of this nature. Courts must be guided, but not be bound by the opinion of the experts on this score. Consideration should be given to whether, despite there being no medical evidence of incapacity for purposes of Rule 57(1), the appointment of a curator *ad litem* would nonetheless be in the interests of the plaintiff and/or of assistance to the court.

29. It was also suggested that Trust provisions can be tailor made to suit the needs and interests of each plaintiff in such cases and that court orders and trust instruments should
- i specify the objective of the trust in each case;
 - ii expressly provide for termination of the trust by order of court.
30. The Court also discussed the possibility to use the Guardian's Fund for awards of R500 000, 00 or less but it was, unless another form of protection is not cost effective, not found to be ideal.
31. Essentially, the same principles apply as with the protection of any other damages award, save that the court will also consider whether the funds should be paid to the parents of the child on her behalf. Practitioners will be required to place all relevant facts before the court so that the court is placed in a position to determine the kind of protection that will be in the child's best interests. In addition, and as the court is the upper guardian of all minors, it is advisable that the default position should be that a curator *ad litem* be appointed to represent the child's interests in each case, unless a departure from this practice can be justified in a particular case.

Summary of findings on issues identified in the Judge President's Directive

32. We return now to the issues identified in the Judge President's Directive. Our summarised findings, drawn from the discussion and analysis in the body of our judgment, are set out below.

Re Paragraphs (a)(i) – (vi): appointment of trustees and curators bonis in RAF/medical negligence matters

33. The Estates Act does not sanction the creation of a trust in terms of the Trust Act. The question posed is somewhat misdirected. The correct legal position is that there are two separate options available to protect funds awarded as damages in RAF/medical negligence matters. The one option, favoured by the Master, is the appointment of a curator *bonis*. The other option is the establishment of a trust by order of court and trust deed. Both protective mechanisms are legally tenable and there is no basis to conclude that a trust ought to be permitted only in exceptional circumstances. The flexibility of the trust as a mechanism for protecting damages awards may in many cases be beneficial to the plaintiff's interests. However, each case must be considered on its facts. The court should be placed in a proper position to be able to make a determination as to whether the chosen option is an appropriate means of protecting the plaintiff's interests. This will require an amendment to the current practice directives of this Division to ensure that a procedure is in place to assist the decision-making process.
34. If a curator is appointed, the Estates Act applies, and if a trust is established, it is the Trust Act and not the Estates Act that is applicable. The court has the authority for establishing a trust in circumstances where the court considers this to be appropriate. The provisions of the Estates Act have no application to the establishment of a trust.
35. A trustee appointed under an order of court is not subject to the powers of the Master under the Estates Act. In that case the Master's powers reside under the Trust Act. Court orders establishing a trust should not make reference to the Estates Act.

36. Orders that purport to subject the trustee to the Master's powers under the Estates Act are invalid. The court cannot give to the Master powers beyond those accorded under statute.
37. In matters that are currently being administered under orders purporting to give the Master Estates Act powers over trustees, applications may be made to court for a suitable variation of those orders.

Re Paragraphs (vii) – (xi): Fees and administration costs of curators and trustees

38. The court order and trust instrument must include express and specific provisions for the remuneration of the trustee, which must cover fees and administration costs and other disbursements. Reference should not be made to the scale of fees provided for curators as a means of calculating trustees' remuneration. Again, the court must be satisfied, on the basis of information provided by the parties, that the remuneration structure proposed is appropriate on the facts of the case.
39. Trustees should be required to provide security in terms of the Trust Act unless there are reasons why this is not warranted in a specific case.
40. The fact that a trustee has insurance cover should not, as a rule, absolve her from the need to provide security.
41. Whether or not guardians or family members should be appointed as co-trustees is a question to be considered on the facts of each case. If a guardian or family member is appointed as a co-trustee, the court should also determine whether she will have decision-making capacity; whether she should provide security; and the trust instrument should provide a mechanism for dealing with any deadlocks in decision-making between the co-trustees.

42. The defendant should be liable for the costs associated with the yearly audit of the trust, the provision for security by the trustee and all other administration costs. The amount should be quantified in the court order and included in the amount awarded as special damages.

Re Paragraph (b): The Guardian's Fund and awards to minors

43. Damages awarded to minors may be paid into the Guardian's Fund. However, save for small awards, where another form of protection is not cost effective, this may not be ideal.
44. Alternative forms of protection for awards made to minors are payment to the child's parents/guardians to manage on her behalf until majority; the appointment of a curator *bonis* to manage the funds; or the establishment of a trust. Practitioners must place all relevant facts before the court to enable the court to decide which form of protection is in a particular child's best interests.
45. In all cases, unless a departure from the practice can be justified, a curator *ad litem* should be appointed to represent the child and to make recommendations to the court as to which form of protection is in her best interests.

Re Paragraph (c): 'Partial incapacity'

46. So-called 'partial incapacity' cases are those in which the medical experts conclude that the plaintiff does not suffer from an incapacity such as to manage her affairs, but that the funds to be awarded by way of damages require some form of protection. In these matters, trusts may be used to provide the necessary protection.
47. It is important in these matters that sufficient medical evidence is placed before the court to support an order of this nature. Courts must be guided, but not be bound by the opinion of the experts on this score. Consideration should be given

to whether, despite there being no medical evidence of incapacity for purposes of Rule 57(1), the appointment of a curator *ad litem* would nonetheless be in the interests of the plaintiff and/or of assistance to the court.

48. Trust provisions can be tailor made to suit the needs and interests of each plaintiff in such cases. Court orders and trust instruments should:
 - i) specify the objective of the trust in each case;
 - ii) expressly provide for termination of the trust by order of court.

49. Guidelines for the development of a practice directive for both courts in the Gauteng Division were also provided.