IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

Case No.: CA61/2020

Date Heard: 22 November 2021

Date Delivered: 7 December 2021

In the matter between:

JAN ABRAHAM DE WET NO	Applicant
and	
MARITZA BARKHUIZEN	First Respondent
DEON VAN DER MERWE	Second Respondent
THE MASTER OF THE HIGH COURT	Third Respondent
THE REGISTRAR OF DEEDS (KING WILLIAM'S TOWN)	Fourth Respondent
THE REGISTRAR OF DEEDS (CAPE TOWN)	Fifth Respondent

JUDGMENT

EKSTEEN J:

[1] Do the provisions of s 71(1)[1] of the Administration of Estates Act, 66 of 1965 (the Act) prevent a duly appointed *curator bonis* from attesting to an affidavit, before the receipt of his letters of curatorship, issued by the Master of the High Court (the Master) pursuant

[1] The material portion of s 71(1) of the Act are quoted in full in para [5] below.

to s 72 of the Act, in support of an application commenced thereafter? The court *a quo* held that it did and, accordingly, it declared the affidavit to be *void ab initio* and dismissed the application. It also made a punitive costs order against the *curator bonis* and his attorney of record in the application. The appeal to this court against the finding of nullity is with leave of the judge *a quo,* who specifically limited the scope of the appeal to his finding that the founding affidavit had been *void ab initio*. The appeal against the costs order is with leave granted, on petition, by the Supreme Court of Appeal.

[2] On 27 February 2018 the appellant, Mr Jan Abraham De Wet, was appointed by the High Court, Eastern Cape Division, Grahamstown, as the *curator bonis* to the property of Christo Jacobus Kleinhans (Christo), who had been declared incapable of managing his own affairs. He had been given the power, in terms of the court order, amongst others, to institute any proceedings which may be necessary in the interest of Christo and the due and proper administration of his property. After his appointment, but before the Master had issued letters of curatorship, he decided that it would be necessary to institute proceedings in order to set aside the sale by Christo of his farm, Kaalsfontein, in the district of Jansenville in the Eastern Cape. Kaalsfontein had been a family farm which Christo had inherited from his late father and he had sold it, in 2013, to the first respondent, Ms Maritsa Barkhuizen, who is his niece. Other members of the family contended that Kaalsfontein had been sold under value and that Christo did not have the mental capacity to enter into a legal contract at the time. In anticipation of the issue of his letters of curatorship, Mr De Wet proceeded to prepare the application and attested to the founding affidavit therein on 29 June 2018. Letters of curatorship were issued by

the Master on 2 July 2018. Accordingly, on 3 July 2018, Mr De Wet launched the application. The first and second respondents entered an appearance to oppose. The second respondent, Mr Deon van der Merwe, is a duly admitted and practising attorney who had drafted the Agreement of Sale in respect of Kaalsfontein and witnessed the signature thereof.

[3] Prior to the hearing of the application the first and second respondents delivered a notice in terms of rule 6(5)(d)(iii) of the Rules of Court (the rules).[2] After referring to the content of s 71(1) the notice proceeded to record:

> "2. Any conduct or act/s carried out or otherwise performed by a *curator bonis* who has been appointed by the Court, but who was yet in receipt of letters of curatorship issued by the Master, are nullities and of no legal force or effect.
>
> 3. There can be no ratification of an act which a statutory prohibition has rendered *void ab initio,* therefore such acts are not capable of being resuscitated by subsequent ratification.
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> 4. The Applicant deposed and executed the founding affidavit on 29 June 2018.
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> 5. At the time that the Applicant deposed to and executed the founding affidavit … the letters of curatorship had not yet been issued.
>
> 6. The letters of curatorship were issued on 2 July 2018.
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> 7. The Applicant had no authority to act or to depose to the founding affidavit on 29 June 2018 and the founding affidavit is accordingly [a] nullity and *void ab*

[2] The rule provided that any person opposing the grant of an order sought must, if they intend to raise a question of law only, deliver a notice of their intention to do so setting forth such question.

initio, for being in contravention of section 71 of the Administration of Estates Act.

8. The application is premised on an action (the founding affidavit) taken before the issue of the Master's letters of curatorship and is therefore fatally defective and stands to be dismissed with costs."

[4] At the hearing of the application Ms *Morgan*, who appeared on behalf of the first and second respondents, argued that the factual support for the application was found only in the affidavit of Mr De Wet, which she contended was *void ab initio.* She contended that any act performed by Mr De Wet prior to the issue of letters of curatorship had been null and void by virtue of the provisions of s 71(1) of the Act. As I have said, the court *a quo* upheld her argument and dismissed the application on that ground only.

[5] The material portion of s 71(1) of the Act provides that:

"No person who has been … appointed[3] … as provided in section *seventy-two* shall take care of or administer any property belonging to the … other person concerned, or carry on any business or undertaking of the … other person, unless he is authorised to do so under letters of … curatorship, … granted[4] or signed and sealed under this Act, or under an endorsement made under the said section."

[3] Section 72(1)(d) provides for the appointment of a person by the court or a judge to administer the property of any person as curator and to take care of his person or, as the case may be, to perform any act in respect of such property or to take care thereof or to administer it.

[4] Section 72(1) provides that the Master shall, subject to certain conditions, on the written application of any person, grant letters of curatorship to a person, *inter alia*, who has been appointed by the court.

Section 102(1)(g) stipulates that anyone who contravenes the provisions of s 71 shall be guilty of an offence.

[6] As adumbrated earlier, the affidavit of Mr De Wet constituted the founding affidavit in proceedings launched after the issue of the letters of executorship. Ms *Morgan* referred to three paragraphs in the founding affidavit which recorded:

> '3. In terms of a Court Order, dated 27 February 2018 under case number 4760/2017 of the High Court of Grahamstown, I was duly appointed as Curator Bonis to the estate of Christo Jacobus Kleinhans …. At the date of signature hereof the Master had not yet issued letters of curatorship. My attorney of record will however file same as soon as it comes to hand.
>
> 4. In terms of paragraph 1.2 of the aforesaid order … I was inter alia granted the power to *"institute any proceedings that may be necessary in the interest of the patient, and of the due and proper administration of the patient's property*."
>
> 5. … I accordingly aver that I have the requisite locus standi to bring this application.'

[7] She contended that these paragraphs demonstrated that Mr De Wet was acting in his capacity as *curator bonis* in attesting to the affidavit. The crisp issue for determination in the appeal is whether, in deposing to the affidavit, the appellant contravened the provisions of s 71(1) by "taking care of" or "administering" Christo's property, or by "carrying on any business or undertaking" of Christo's. This requires a consideration of the terms of s 71.

[8] In the interpretation of statutes, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. When more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one which leads to insensible or unbusinesslike results or undermines the apparent purpose of the provision.[5] The approach requires that "from the outset one considers the context and the language together, with neither predominating over the other".[6]

[9] It is convenient to consider first the apparent purpose of s 71(1). In *Bouwer NO*[7] Hartzenberg J had regard to the section and concluded, correctly, that the intention of the legislature was not to guard or protect the interest of third parties, but to protect the interests of the "*de cujus"*. This is evidenced by the fact that, before letters of curatorship may be issued, a *curator bonis*, although duly appointed, is required to provide security[8] to the satisfaction of the Master in the amount determined by the Master for the proper performance of his functions. The purpose of the provisions are to ensure that no person, even a duly appointed *curator bonis*, may perform any act which would place at risk, the

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[5] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA); ([2012] 2 All SA 262 (SCA); [2012] ZASCA 13) para [18]

[6] *Endumeni* para [19]; *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC) at para [65]

[7] *Bouwer NO v Saambou Bank Beperk* 1993 (4) SA 492 (T) at 497

[8] Section 77 of the Act

property or interests of the *de cujus*. Hence the Master is empowered to refuse to grant, endorse or sign and seal letters of curatorship in certain circumstances.[9]

[10] In *Bouwer* Hartzenberg J concluded that any act performed contrary to the provisions of s 71(1) of the Act was a nullity.[10] The conclusion must be supported.[11]

[11] So, did Mr De Wet contravene s 71(1) by deposing to an affidavit, prior to receipt of his letters of curatorship, in preparation for the commencement of proceedings after the issue of his letters of curatorship? By attesting to an affidavit Mr De Wet did not purport to take care of or to administer property belonging to Christo, nor did he carry on any business or undertaking of Christo. The preparation and attestation of an affidavit has no legal consequence and does not, of itself, place any property of Christo at risk. Until such time as the application, duly supported by the affidavit, is commenced, Christo's estate can incur no liability. Deposing to the affidavit was no more than a preparatory step taken in anticipation of the later commencement of an application. What s 71(1) sought to prevent is conduct which may have some legal consequence for the estate of the *de cujus,* such as the payment or receipt of money, the purchase or sale of property or the initiation of legal proceedings. To hold otherwise would lead to an insensible or unbusinesslike result which would serve to undermine the purpose of s 71(1)

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[9] Section 71(3) as read with s 22 of the Act

[10] *Bouwer* at 498A; *Shea v Legator McKenna Incorporated and Others* [2008] 1 All SA 491 (D) at 497i-j. Compare also *Simplex (Pty) Limited v Van der Merwe and Others NNO* 1996 (1) SA 111 (W) and *Van der Merwe v Van der Merwe en andere* 2000 (2) SA 519 (C) which concerned a similarly worded provision in s 6(1) of the Trust and Property Control Act 57 of 1988.

[11] See *Legator McKenna Inc and Another v Shea* 2010 (1) SA 35 (SCA)

of the Act. I can find nothing in the language of s 71(1), nor the context in which it appears, that suggests otherwise.

[12] When confronted with this difficulty, Ms *Morgan* was constrained to argue that by deposing to the affidavit in the terms recorded earlier Mr De Wet had started the application, which concerned the sale of the farm. He did so, or so the argument went, in his capacity as *curator bonis*. The submission cannot be sustained. A witness requires no authority to attest to an affidavit and no ratification of their conduct is required.[12] In law, application proceedings are, generally, commenced by service of the notice of motion upon the respondents.[13] It has been held that where a necessary procedural step is required to precede the commencement of litigation, for example an application for edictal citation,[14] or an attachment to found jurisdiction[15], proceedings may be deemed to have been initiated by the taking of such a step. However, the collection, or preparation, of evidential material cannot be equated to the commencement of proceedings. Before some procedural step has been taken in the process the litigation has not begun. The issue of the application on 3 July 2019, after receipt of the letters of curatorship, was the first act of legal consequence which Mr De Wet performed in order to take care of or administer the property of Christo. Accordingly, Mr De Wet did not contravene the provisions of s 71(1) of the Act by deposing to the affidavit on 29 June 2019 and the affidavit was admissible as evidence in the application.

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[12] *Ganes and Another v Telecom Namibia* Limited 2004 (3) SA 615 (SCA)
[13] *Finishing Touch 163 (Pty) Limited v BHP Billiton Energy Coal* SA 2013 (2) SA 204 (SCA)
[14] *IGI Insurance Co Limited v Madasa* 1995 (1) SA 144 (TkA)
[15] *Dave Zick Timbers (Pty) Limited v Progress Steamship Co. Limited* 1974 (4) SA 381 (D)

[13] I turn to consider the appeal against the costs order granted. When the application was initially launched it was intended to serve a dual purpose. First, (Part A of the notice of motion) it sought to obtain relevant information pertaining to the purported Deed of Sale entered into between Christo and Ms Barkhuizen. Second, (Part B of the notice of motion) sought a declarator that the sale was null and void as Christo had not had the mental capacity to enter into a valid Agreement of Sale. The application was launched on a semi-urgent basis with Part A to be enrolled for hearing on 26 July 2018. However, it was not accompanied by a certificate of urgency as required in terms of rule 12 of the Joint Rules of Practice of the High Courts of the Eastern Cape.[16] Prior to 26 July 2018, the respondents provided the documentation requested in Part A of the notice of motion thereby rendering the relief sought therein moot. Accordingly, on 25 July 2018 the applicant removed the matter from the roll for 26 July, but did not tender the costs occasioned by the enrolment. Simultaneously with the removal Mr De Wet's attorneys of record, Ms J Lötter filed a "Note To The Presiding Judge" in the following terms:

> "(1) The application was not intended to be set down on an urgent basis and therefore the provisions of paragraph 12 of the Eastern Cape practice directives were not complied with;
>
> (2) The papers were drafted according to Western Cape practice directives [for] motion court proceedings.
>
> (3) The application should not have been placed on the opposed roll for 26 July 2018 by the Registrar.

[16] Rule 12 of the Eastern Cape: Practice Directions provides: "(a) In all applications brought other than in the ordinary course in terms of the Rules of Court, the legal practitioner who appears for the applicant must sign a certificate of urgency which is to be filed of record before the papers are placed before the judge and in which the reasons for urgency are fully set out.

(4) The application will be brought on an amended notice of motion in the ordinary course in terms of the rules of court."

[14] Notwithstanding para [4] of the note, an amended notice of motion was not filed. However, as I have said, the first and second respondents opposed the application and lengthy answering and replying papers were filed before the application was ultimately heard on 14 March 2019. In dismissing the application, for the reasons adumbrated earlier, the judge *a quo* ordered:

"The costs in respect of *Part A* and *Part B* of the notice of motion are to be paid by the Applicant and Ms Johannie Lötter jointly and severally, *de bonis propriis* on an attorney-client scale, the one paying the other to be absolved."

[15] By virtue of the conclusion to which I have come in respect of the declaration of nullity the costs order, at least in respect of Part B of the notice of motion, cannot be sustained. However, Ms *Morgan* argued that the costs order as framed by the court *a quo* should remain in force in respect of Part A of the notice of motion.

[16] As a general principle it is unusual to order an unsuccessful litigant in a fiduciary position to pay costs *de bonis propriis*. There must be good cause for such an order, such as improper or unreasonable conduct or lack of *bona fides*.[17] The basic notion behind awards of costs *de bonis propriis* is a material departure from the responsibility of office, which would include absence of *locus standi*.[18] An order of costs *de bonis propriis*

[17] *Vermaak's Executor v Vermaak's Heirs* 1909 TS 679 at 691
[18] *Law of Costs:* A C Cilliers (Butterworths) para 10.22

is made against attorneys where a court is satisfied that there has been negligence in a serious degree which warrants an order of costs being made as a mark of the court's displeasure.

[17] In arriving at its costs order the court was clearly influenced by its finding in respect of the standing of the founding affidavit. In addition the judge held:

> "The applicant, by profession, is a practising attorney and so is Ms Johannie Lötter of Lötter Attorneys who represents him. In instituting these proceedings without the requisite certificate of urgency, it appears that neither one of them had prior recourse to the applicable rule of practice in this division. If they did, they did so irreverently; and to censure the registrar for enrolling the matter is disingenuous.[19] Such conduct on their part may be attributed to negligence, unreasonableness or even bad faith."

He advanced no reasons for his conclusion of bad faith.

[18] Finally, he reasoned that the "facts indicating that the sale of the farm took place on 26 February 2013, that the applicant was appointed *curator bonis* on 27 February 2018, and that this application was launched on an urgent basis on 3 July 2018, (a period of more than 5 years after the farm was sold and more than 4 months after the *curator bonis* was appointed), should not be overlooked on the question of costs."

[19] It seems to me that the judge *a quo* considered that delay was self-created. In arriving at this conclusion he overlooked the fact that the letters of curatorship were issued

[19] Reference to para (3) of the note to the presiding judge

on 2 July 2018 so that it was not possible for the applicant to have launched the application at an earlier stage. This, it seems to me, was a misdirection. The only criticism of the conduct of Mr De Wet which remained was that the application should not have been launched as one of urgency. That, on its own, is insufficient to justify a punitive costs order *de bonis propriis* in respect of Part A of the notice of motion.

[20] Once it is accepted, as I have found, that there is no contravention of s 71(1) of the Act, it must follow that the respondents recognised that Part A of the application had merit. Hence the provision of the required documents. In particular the negligence, such as it was, on the part of Ms Lötter, in this regard, could hardly be categorised as serious. In the circumstances but for the finding that the founding affidavit was a nullity the court *a quo* would probably not have come to the conclusion to which it did in respect of Part A. As I have said, despite the procedural shortcomings, Part A was successful. In these circumstances it would be appropriate for the costs occasioned by Part A to be considered together with the merits of Part B.

[21] In the result:

1. The appeal succeeds with costs and the application is remitted back to the court *a quo* for consideration on its merits.

2. The order of the court *a quo* is set aside and replaced with the following:

"1. The question of law raised in the rule 6(5)(d)(iii) notice is dismissed with costs.

2. Costs occasioned by Part A of the notice of motion are reserved."

J W EKSTEEN

JUDGE OF THE HIGH COURT

GOOSEN J:

I agree.

G G GOOSEN

JUDGE OF THE HIGH COURT

GOVINDJEE AJ:

I agree.

A GOVINDJEE

ACTING JUDGE OF THE HIGH COURT

Appearances:

For Appellant:	Adv P S Bothma instructed by Lötter Attorneys c/o Netteltons Attorneys, Makhanda
For 1st and 2nd Respondents:	Adv M P Morgan instructed by Wouter Minnie Attorneys c/o Huxtable Attorneys, Makhanda