GAUTENG DIVISION OF THE HIGH COURT OF SOUTH AFRICA
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31 August 2021

The matters of:-

1. Wentzel, M C vs Road Accident Fund (Case number: 35182/2016)

2. Adv. M Van Rooyen N.O. on behalf of Nomvuyiso Ntozakhe vs Road Accident Fund (Case number: 2016/28304)

3. Sipho Aubrey Segoba on behalf of Minors vs Road Accident Fund and Another (Case number: 2021/40258)

4. Adv. Language N.O. (as *Curator ad Litem* to) Raphulu I E vs Road Accident Fund (Case number: 2018/44200)

5. Adv. Nico Raubenheimer N.O. (as *Curator ad Litem* to) James Hendrik Brian vs Road Accident Fund (Case number: 17258/2015)

JUDGE PRESIDENT'S PRACTICE DIRECTIVE IN TERMS OF SECTION 14(1)(a) OF THE SUPERIOR COURTS ACT, ACT 10 OF 2013

Re: Referral to the Full Court - Matters involving a report and addendum of the Master of the High Court in terms of section 96(2) of the Administration of Estates Act 66 of 1965

This is a Directive issued in terms of Section 14(1)(a) of the Superior Courts Act, Act 10 of 2013, read with Section 173 of The Constitution of the Republic of South Africa. The purpose of the Directive is to make provision for the constitution of a Full Court, to sit at first instance to hear the matters referred to herein; and to determine and resolve the legal issues emanating from a report of the Master of the High Court in terms of section 96(2) of the Administration of Estates Act 66 of 1965.

Introduction:

1. The aforementioned matters encompass relevant issues for determination by the Full Court, emanating from in a report and addendum by the Master of the High Court, Pretoria (The Master) in terms of section 96(2) of the Administration of Estates Act 66 of 1965 that require determination and resolution by a Full Court. The issues referred to in the Master's report requiring such determination are set out further in this Directive.

Background:

2. A brief summary of each matter herewith referred to the Full Court is set out as follows:

    2.1 Wentzel, M C vs Road Accident Fund (Case number: 35182/2016):
    An application for the appointment of a *Curator Bonis* to, inter alia:

        2.1.1 administer an undertaking issued by the Road Accident Fund in terms of section 17(4) (A) of Act 56 of 1996 following a settlement between the Parties which was made an Order of Court on 4 September 2019; and

        2.1.2 invest or re-invest any monies of the patient which become available from time to time for investment, and which are not immediately required for the purposes defined in section 82 (c) of the Administration of Estates Act no 66 of 1965 (as amended).

2.2 Adv. M Van Rooyen N.O. on behalf of Nomvuyiso Ntozakhe vs Road Accident Fund (Case number: 2016/28304): An application by the appointed *Curatrix ad Litem* for the appointment of a trustee to protect and administer an award by the Road Accident Fund in terms of an Order granted on 05 August 2020, by way of a trust and for the sole benefit of the Plaintiff.

2.3 Sipho Aubrey Segoba on behalf of Minors vs Road Accident Fund and Another (Case number: 2021/40258): An application by the appointed *Curator ad Litem* for, inter alia, the remainder of a capital amount paid in terms of an offer of settlement by the 1st Respondent dated 30 October 2019, to be paid into a Trust to be created for the sole benefit of the minor children of the deceased beneficiary to the settlement award.

2.4 Adv. Language N.O. (as *Curator ad Litem to*) Raphulu I E vs Road Accident Fund (Case number: 2018/44200): An application for the appointment of a *Curator Bonis* to, inter alia:

2.4.1 administer an undertaking issued by the Road Accident Fund in terms of section 17(4) (A) of Act 56 of 1996 following a settlement between the Parties which was made an Order of Court on 10 September 2020; and

2.4.2 invest or re-invest any monies of the patient which become available from time to time for investment, and which are not immediately required for the purposes defined in section 82 (c) of the Administration of Estates Act no 66 of 1965 (as amended).

2.5 Adv. Nico Raubenheimer N.O. (as *Curator ad Litem to*) James Hendrik Brian vs Road Accident Fund (Case number: 17258/2015): An application for the appointment of a Curator Bonis to, inter alia:

2.5.1 receive, take care, control and administer all the proceeds of the claimant referred to in Court Orders dated 22 May 2020 and 06 November 2020;

2.5.2 receive, administer and exercise any right the patient might have in terms of Section 17(4)(a) of Act 56 of 1996 (as amended) with regard to the undertaking referred to in paragraph 3 of the Court Order issued in the above Honourable Court on 25 May 2018; and

2.5.3 invest or re-invest any monies of the patient which become available from time to time for investment, and which are not immediately required for the purposes defined in section 82 (c) of the Administration of Estates Act no 66 of 1965 (as amended).

3. The Master brought a report and an addendum before the Court in terms of section 96(2) of the Administration of Estates Act[1] wherein a number of legal difficulties are raised which apparently inhibit the Master from performing its functions, efficiently and effectively. This is in relation to matters requiring the necessary attention and oversight, of that office, in terms of the Administration of Estates and Trust Property Control Acts respectively. The concerns raised by the Master also relate to the difficulty experienced by the Master in complying with and implementing Orders granted by the High Court of the Gauteng Division in relation to these matters.

4. The objective of the Master's report is:

(a) to request the intervention and direction of the Court in the interpretation and practical application of the Administration of Estates and Trust Property Control Acts,

[1] 66 of 1965. Section 96(2) reads –
"(2) Whenever in the course of his duties the Master finds it necessary to lay any facts before the Court otherwise than upon formal application or motion, he may do so by a report in writing: Provided that the Court may refer any such report back to the Master and direct him to proceed by way of formal application or motion."

(b) the efficient implementation of Court Orders granted by the Courts in relation to matters initiated in such Courts arising from RAF, medical negligence and others,

(c) to request possible directives to the difficulties encountered by the Master as outlined in the report; and lastly

(d) to abide the decision of the Court.

5. The Master makes the point that it has to deal with Road Accident Fund (RAF) matters wherein:

5.1 Applicants to these proceedings recommend to the Court the creation of trusts for the administration of funds awarded to persons 'incapacitated' as a result of a road accident, and in the related trust instruments, subjecting some of the powers of the trustees to the authority of the Master of the High Court in terms of the Administration of Estates Act, and

5.2 resulting in the Court granting 'ambiguous' Court Orders which, on the one hand, order the creation of trusts and the appointment of trustees in terms of the Trust Property Control Act; yet, subjecting the powers of such trustees under the authority of the Master in terms of the Administration of Estates Act, specifically concerning the approval of trustee fees, administration costs, investment of beneficiary funds, to name but a few.

6. The Master outlines a number of practical difficulties experienced in implementing Court orders issued in the Gauteng Division in relation to RAF, medical negligence claims and other related matters. In this regard the Master makes the point that the practical difficulties its office has experienced, arise from what it describes as the disregard of the principles of trust laws as well as what

it views as the unorthodox development of trust law. This the Master states has resulted in a number of 'ambiguous' Court orders.

6.1 The creation of Trusts and the appointment and remuneration of trustees

6.1.1 The Master takes the view that, given that the Master of the High Court is a creature of statute, there is no statute that empowers it to invoke the provisions of sections 71, 72, 77-78 and 84 of the Administration of Estates Act in respect of trustees who are appointed in terms of the Trust Property Control Act.[2] Put simply, the Master is essentially of the view that because trustees are appointed in terms of the Trust Property Control Act, there is no authority in law that would empower it to require compliance from trustees with sections of the Administration of Estates Act and to generally subject such trustees to this Act.

6.1.2 the Master further raises a difficulty that pertains to the remuneration of trustees in terms of the Trust Property Control Act.

6.1.3 The Master submits that issues such as the intricacy of trust administration; the number of trustees involved; the expertise required to conduct such administration; the operational period and purpose of trusts in general are all factors to be considered

[2] Section 71 of the Act provides –

"71. Certain persons not to administer property as tutor or curator without letters of tutorship or curatorship.—

(1) No person who has been nominated, appointed or assumed as provided in section seventy-two shall take care of or administer any property belonging to the minor or other person concerned, or carry on any business or undertaking of the minor or other person, unless he is authorized to do so under letters of tutorship or curatorship, as the case may be, granted or signed and sealed under this Act, or under an endorsement made under the said section.

(2) Any letters of confirmation or certificate granted or issued under the Administration of Estates Act, 1913 (Act No. 24 of 1913), or under section sixty-two of the Mental Disorders Act, 1916 (Act No. 38 of 1916), and in force at the commencement of this Act, shall be deemed to be letters of tutorship or curatorship, as the case may be, granted under this Act."

Section 72 of the Act concerns letters of tutorship and curatorship to tutors and curators nominate and endorsement in case of assumed tutors and curators.

Section 77 of the Act concerns security by tutors and curators.

Section 78 of the Act concerns inventories by tutors and curators.

Section 84 of the Act concerns remuneration of tutors and curators.

when reasonable remuneration of such trustees is to be fixed. This, according to the Master, must be clearly spelt out in the trust instrument and failure to do so must result in the Court refusing to grant the relief sought.

6.1.4 Related to the assertion regarding the perceived lack of authority of the Master (as outlined above), the Master further emphasises that section 22 of the Trust Property Control Act neither makes provision for nor makes reference to the remuneration of trustees being regulated by or subjected to the approval of the Master in terms of the Administration of Estates Act.

6.1.5 The Master states that in terms of the Trust Property Control Act, the main purpose of a trust is to be a vehicle for the efficient management of assets that have been set aside for the benefit of the beneficiaries.[3] The Master points out that the trustees must always act to the advantage of the beneficiaries, including decisions regarding the investment, the management of the income stream from the trust, as well as the timing and manner in which assets are distributed and payments to the beneficiaries are made. The Master's point is that in considering the advantages to beneficiaries, consideration must also be given to the tax implications for undistributed income.

6.1.6 The Master asserts that a trustee cannot act unless he/she has been duly appointed by the Master of the High Court in terms of section 6 of the Trust Property Control Act, as set out in *Lupacchini NO and Another v Minister of Safety and Security*.[4]

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[3] In *Land and Agricultural Bank of South Africa v Parker and Others* Cameron JA stated that:

> "[A trust] is an accumulation of assets and liabilities. These constitute the trust estate, which is a separate entity. But though separate, the accumulation of rights and obligations comprising the trust estate does not have legal personality. It vests in the trustees, and must be administered by them – and it is only through the trustees, specified as in the trust instrument, that the trust can act . . . ."

[4] 2010 (6) SA 457 (SCA). Note that trustees will also, for Financial Intelligence Centre Act (FICA) purposes, need to supply financial institutions with the letters of authority or master's certificate.

6.2 Creation of an *Inter-Vivos* Trust instead of the appointment of a *Curator Bonis* in RAF, medical negligence and related matters:

6.2.1 The Master is of the view that Legal Professionals approach the Court in these matters to create an *inter-vivos* trust rather than appointing a *Curator Bonis* for a variety of reasons, with the two most common being:

a) the (incorrect) view that the creation of a trust in an estate where a small amount is awarded is more cost effective; and

b) the degree of protection required is not such that a *Curator Bonis* should be appointed as the legal consequences of the appointment of a *Curator Bonis* constitute a significant deprivation of an individual's rights. The Master asserts that this view is also incorrect in that if a person is incapable of managing his/her own affairs, his/her status does not change. It is only when a person is declared of unsound mind or mentally ill that his/her status changes. Reference in this regard is made to the matter of *Pienaar v Pienaar*[5].

6.2.2 The Master is of the view that these reasons have no legal basis and are used to circumvent compliance with the requirements for the submission of proper reports by persons appointed as *Curators* and to remove the Master's oversight in these matters.

6.2.3 The Master submits that the function of that office is also to protect the interests of minors and has oversight in the protection of persons incapable of managing their own affairs,[6] and this is

[5] 1930 OPD 171 at 174-175.

[6] The Master submits that there is a difference between declaring a person incapable of managing his own affairs and declaring him of unsound mind - see Rule 57 (1) and (13) of the Uniform High Court Rules.

The Master provides that the question usually argued by Counsel in these matters is that although the injured person has some form of mental impairment due to the accident, his or her injuries are not of such a severe nature that he or she should be declared

done best if a *Curator Bonis* is appointed under the Master's supervision as guided by the provisions of the Administration of Estates Act[7].

6.2.4 The Master further submits that owing to its required service regarding minors and persons incapable of managing their own affairs, it has transpired that trusts have become an ideal vehicle to evade supervision by the Master. The Master states that trusts create logistical and administrative challenges whereas in curatorship matters, the Master acts independently and has certain controls/supervisory measurements in place to hold *Curators* accountable.

6.2.5 The Master asserts that if complaints of non-compliance with Court Orders or abuse of funds by trustees are lodged with the Master, that office can invoke its powers as set out in section 16 of the Trust Property Control Act. However, the Master submits that its powers in terms of section 16 are far less effective as compared to the powers bestowed on the Master in curatorship matters, as prescribed by the Administration of Estates Act. In curatorship matters, the Master has extensive powers and apart from removing the *Curator*, the Master may also reduce or disallow the fee of the *Curator*; claim from the Insurance Company in the case of maladministration of funds; refer the matter to Court to compel such *Curator* to address issues or comply with applicable requirements to name but a few.

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incapable or of unsound mind. They usually agree that the person is a vulnerable individual, whose award should be protected and that the brain injury has impaired his cognitive functions. Counsel then requests that a trust should rather be created.

The Master submits that the Court may appoint a curator to any person on the ground that he or she is by reason of some disability, mental or physical, incapable of managing his affairs. In other words, without necessarily declaring the person of unsound mind, the court can appoint a curator to a person's property if it is satisfied that for one or other reason, he is incapable of managing the property in question.

[7] It is not far-fetched to have a parent or relative appointed as a trustee who may not have the necessary commercial skills to be a trustee in the true sense and can then be overruled by the two other independent trustees

6.2.6 Additionally, the Master states that owing to the practice of creating *inter-vivos* trusts rather than appointing a *Curator Bonis* in RAF and in the other matters referred to, that office has received numerous complaints wherein *inter-vivos* trusts were created, much to the dissatisfaction of the incapacitated beneficiaries and/or disgruntled family members.

6.3 The Guardian's Fund and RAF Matters

6.3.1 According to the Master, some *Curators ad Litem* argue that if the RAF award to a minor or person incapable of managing his/her own affairs is less than R500 000, those funds should be paid into the Guardian's Fund. The Master submits that this recommendation is based on an incorrect view that it will not be cost effective for the estate to appoint a *Curator Bonis*, tutor, or a trustee.

6.3.2 The Master submits that the Guardian's Fund does not have the legislative authority or capacity to oversee the administration of RAF undertakings and further provides the following disadvantages of utilising the Guardian's Fund in RAF matters:

a) If the natural guardian (in respect of a minor) is not available, someone has to be appointed to request funds for the minor or person if he/she is incapable of managing his/her own affairs. If such an application for the appointment of a guardian is lodged, it will mean that the estate will again have to incur the costs to apply to Court. The Master submits that a tutor, however, can be appointed in terms of section 73 of the Administration of Estates Act;

b) If the person receiving the award is not declared incapable of handling his/her own affairs, he/she would be entitled to

withdraw the full amount from the Guardian's Fund which would defeat the purpose of protecting the funds awarded in the first place;

c) The Master asserts that funds are paid from the Guardian's Fund on an annual basis and would result in the appointed person handling large sums of money which would also defeat the purpose of protecting the funds.

6.4 Declaring a person partially incapable

6.4.1 The Master states that, that office receives applications in which medical experts and *Curators ad Litem* recommend that a person be declared "partially incapable" or that only the funds should be protected.

6.4.2 The Master submits that there is no provision for a person to be declared partially incapable and states that the question is whether a person needs assistance to manage his/her affairs. If he/she does, the Master submits that a *Curator Bonis* should be appointed to assist him/her.

6.4.3 The Master further avers that to declare a person incapable of managing his/her own affairs does not adversely affect the status of that person as was held by the Court in *Pienaar v Pienaar*.

Issues for determination by the Full Court:

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[8]

[8] 57 of 1988.

for the purpose of administrating 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? and

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?

Directive: -

1. Therefore, in terms of section 14(1)(a) of the Superior Courts Act 2013, Act 10 of 2013, I hereby constitute a Full Court for purposes of hearing and disposing of the issues referred to above as well as any other issue that may be raised for determination by the Full Court.

2. The matters of Raphulu I E vs Road Accident Fund (Case number: 2018/44200) and James Hendrik Brian vs Road Accident Fund (Case number: 17258/2015) are transferred to the Gauteng Division of the High Court, Pretoria.

3. This Directive is issued by service via electronic email communication on:

   a) The Parties involved in the matters referred to the Full Court
   b) The Master of the High Court, Pretoria
   c) The Master of the High Court, Johannesburg
   d) The Solicitor General/State Attorney
   e) The South African Law Reform Commission
   f) The Road Accident Fund
   g) The Personal Injury Plaintiff Lawyers Association
   h) The South African Medico-Legal Association
   i) South African Medical Malpractice Lawyers Association
   j) Legal Practice Council – Gauteng
   k) The Law Society of South Africa
   l) The CEO, Legal Aid SA

4. For purposes of service and filling of any process envisaged in this Directive such service and filing shall be by electronic email communication provided that the appropriate proof of delivery shall be provided and through uploading to the electronic file on CaseLines.

5. Access to the documents already filed in the matter referred to the Full Court will be provided to any party requiring such, but such request should be communicated to the Office of the Judge President via the email address provided in this Directive by no later than 14:00 on 10 September2021.

6. Any interested party who wishes to be admitted as *amicus curiae* in this matter, is directed to serve and upload their applications, setting out the basis why they wish to be so admitted as well as the legal arguments/ heads of argument, they intend to advance in support of their applications by 14:00 on 17 September 2021.

7. The Applicants shall indicate their consent/objection to any application for admission as *amicus curiae* on or before 23 September 2021. In the event of an opposition/objection, the basis thereof must be provided as well as such legal argument as the Applicants wish to advance in this regard. Consent or objection in this regard should be uploaded to the electronic file on CaseLines.

8. The Applicants and the Master of the High Court must serve and upload their heads of argument, on or before 01 October 2021. Other parties, who shall have received consent as well as granted consent to be admitted as *amici*, must serve and upload their legal argument/heads of argument by 14h00 on or before 08 October 2021.

9. Thereafter, the further conduct of the matter shall be case managed by a Judge to be designated by the Judge President. The case management shall include the hearing of any objections, if any, to any application for admission as *amicus curiae*.

10. The date on which the Full Court will hear the matter referred to it is 01 November 2021 and 02 November 2021.

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JUDGE PRESIDENT OF THE GAUTENG DIVISION OF THE

HIGH COURT OF SOUTH AFRICA

Electronically submitted therefore unsigned