Acting without Letters of Curatorship? Not so fast

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The case of *Harper v Absa Trust Limited N.O. and Others [2023]* dealt with the duties of a *curator bonis* in terms of the Administration of Estates Act 66 of 1965 (the Act). At the outset of the case, the court took the opportunity to emphasise why it is important that legal practitioners familiarise themselves with the practice directives of the division in which their matter is being heard.

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In this case, the applicant failed to comply with the practice directives relating to practice notes, and the court proceeded to express its displeasure with such failure by the applicant's counsel. [Note to practitioners: it is best not to start off your matter on the wrong foot with the judge presiding over your matter.]

Facts of the Harper case

The applicant lived on the immovable property with the deceased, who cared for her from the approximate age of 12 years until she completed her studies. After closing his business in 2011 and after multiple assessments by medical specialists, the deceased was diagnosed with dementia, and on 4 September 2015, the fifth respondent, Robert Peter Green, was appointed by the court as *curator bonis* of the deceased, subject to the fifth respondent holding a valid Fidelity Fund certificate. Prior to the appointment of a curator, the applicant alleged that she paid for many of the deceased's expenses out of pocket, from his shopping to a live-in nurse. However, the applicant failed to provide proof of these out-of-pocket expenses she claimed she had paid for on behalf of the deceased.

Subsequent to his appointment as *curator bonis*, the fifth respondent failed to apply to the Master of the High Court in terms of section 72 of the Act for the issuing of Letters of Curatorship to him. The fifth respondent, a practicing attorney, however, alleged that he was unaware that he needed to apply for Letters of Curatorship, and upon realising that, he sought to do so after the deceased had passed away on 3 June 2021.

Between 2014 and 2021, the deceased was moved to various care facilities, which the applicant allegedly paid for. On 31 May 2016, the applicant concluded a written agreement of purchase and sale with the fifth respondent, in which she sought to purchase the immovable property owned by the deceased.

The purchase price for the immovable property in terms of the agreement was R1,361,000 less the purported value of a usufruct in favour of the deceased valued at R726,223.61, leaving a cash portion of R634,776.39. The applicant is alleged to have paid R150,000 of the remaining cash portion as of the date of execution of the agreement, leaving an outstanding balance of R484,776.39.

On 16 October 2021, the fifth respondent signed a letter stating that the applicant had paid the full purchase price of R634,776.39. The applicant alleged that she had paid the full purchase price over a number of years, from 2009 until 2021, by paying certain expenses on behalf of the deceased. Once again, no proof of this was provided by the applicant.

The agreement of sale was subject to a suspensive condition, which provided that the agreement was subject to the Master approving the purchase of the immovable property by the purchaser. Clause 3.6 of the suspensive conditions clause provided that the said conditions were for the benefit of the purchaser, who could waive such conditions prior to their fulfilment.

The applicant alleged that she tacitly waived compliance with the suspensive conditions; however, transfer of the immovable property was never effected at the Deeds Office. A general power of attorney was allegedly given to the applicant by the deceased on 17 May 2013. The court, however, pointed out that at the time the power of attorney was granted, the deceased was not of sound mind, and once that fact became apparent to the applicant, she should not have proceeded in terms of the power of attorney.

Applicable Law

Section 71(1) of the Act provides:
“(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 authorised 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.”

Section 72(1)(d) provides that:
“(1) The Master shall, subject to the provisions of subsection (3) and to any applicable provision of section 5 of the Matrimonial Affairs Act, 1953 (Act 37 of 1953), or any order of court made under any such provision or any provision of

the Divorce Act, 1979, on the written application of any person-
...
(d) who has been appointed by the Court or a judge to administer the property of any minor or other person as tutor or 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; and... grant letters of tutorship or curatorship, as the case may be, to such person"

Section 80 (1) of the Act provides as follows:
" 80 (1) No natural guardian shall alienate or mortgage any immovable property belonging to his minor child, and no tutor or curator shall alienate or mortgage any immovable property which he has been appointed to administer, unless he is authorised thereto by the Court or by the Master under this section or, in the case of a tutor or curator, by any will or written instrument by which he has been nominated."

Bouwer case

In *Bouwer NO v Saambou Bank Bpk 1993*, in the discussion of the purpose of section 71(1) of the Act, the court found that the purpose of the section is not to protect innocent third parties who have no knowledge of the true position of the curator who has not been issued with Letters of Curatorship, but to protect the interests of the de cujus (the patient). In *De Wet NO v Barkhuizen and Others [2021]*, the court supported the finding of the court in *Bouwer* that any act that is contrary to the provisions of section 71(1) of the Act is null and void. The court, however, acknowledged that these two cases were not binding as they were in different divisions and were persuasive at best.

In light of section 85 of the Act, sections 24, 26, 28 and 36, subsection (2) of section 42, sections 46 and 48, subsection (2) of section 49, and sections 52, 53 and 54 of the Act, the court provided that the purpose, role, and function of a curator is to protect the interests of the patient and that they must do so with utmost good faith and act in the interests of the patient only.

Curator did not fulfil his statutory obligations

The court found that the way in which the fifth respondent "dealt with the immovable property, his subsequent letter declaring the full purchase price to have been paid without any reasons or evidence provided in support therefor, his failure to open a separate bank account and to take control of the property of the *de cujus*, and his willingness to act in accordance with the interests of the applicant as opposed to the interests of the deceased, he did not fulfil his statutory obligations in terms of the Act, nor can the applicant be considered to be an innocent third party who had no knowledge of the fact that the fifth respondent did not discharge his duties as aforesaid."


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Oversight by the Master of High Court

Section 80(1) protects the interests of the de cujus by giving the Master or the court oversight before immovable property can be alienated. The court, in its interpretation of the suspensive condition, provided that the relevant clause in the agreement made no grammatical sense unless the intention was to provide the seller with the benefit of having an election to cancel the agreement should approval by the Master not have been granted within 30 days.

The applicant contended that the clause was for her benefit as the purchaser; however, the court quickly pointed out that parties cannot prescribe new laws to the courts in their agreements. In its analysis of clauses 3.2 to 3.7, the court concluded that the provisions of these clauses were either for the benefit of the seller or both parties but not solely for the benefit of the purchaser.

The court noted that the agreement was not an arm's length transaction because, as the applicant stated, she was inherently involved in the financial affairs of the deceased, and he had cared for her from the age of 12 as if she were his own child.

The crux of the court's summary of the fifth respondent's actions was that he failed in his duties as a curator in that he did not apply for the issue of Letters of Curatorship, he did not open a bank account in his capacity as curator, and he did not take control of the deceased's assets, which was his ultimate role as curator.
The fifth respondent did not appreciate his role as curator and failed to establish the correct value of the property, as well as the value of the usufruct and whether the applicant did indeed pay the full purchase price. He certainly did not act with any good faith, nor with the utmost good faith towards the estate of the patient.

Conclusion

The court consequently ordered that the first respondent, Absa Bank Limited N.O., conduct an audit of the financial affairs of the deceased for the period 1 January 2009, until the date of death and report any misappropriations to the police. The application was dismissed.

Aside from the disturbing and truly unfortunate manner in which the deceased was clearly taken advantage of by the applicant in the midst of his declining health, the concerning part was that her accomplice in committing such abuses of the deceased's estate was facilitated by a legal practitioner. This case is an important reminder to those purporting to act as curator to always act in the best interests of the patient, in good faith, and to be mindful of the duties defined in terms of the Act when performing any such acts.

ABOUT THE AUTHOR

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