

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, EAST LONDON)**

Case No: EL785/2009

ECD2685/2009

In the matter between:

NOKILIMUSI CHRISTINE SILO

Applicant

And

NOMPOZOLO & GABELANA INCORPORATED

First Respondent

LINDILE BRIAN NOMPOZOLO

Second Respondent

MZINGAYI GQOMO

Third Respondent

JUDGMENT

BESHE J:

[1] This is an application for an order in the following terms:

- (i) Declaring one Siyabulela Mananga to be incapable of managing his own affairs.

(ii) Appointing Advocate Charles Barry Wood as Curator – ad – Litem to take care of Siyabulela Mananga's interest.

[2] This appears to be an application in terms of *Rule 57 (13)* because this court is not required to declare **Siyabulela** to be of unsound mind.

[3] Applicant in this matter is **Ms Nokilimusi Christine Silo**, who alleges that she is an aunt to **Siyabulela**. She goes on to state that she was the plaintiff in the action on behalf of **Siyabulela** against the Road Accident Fund (fourth respondent). The said action was settled.

[4] The applicant is in the process of instituting a claim against *inter alia* first, second and third respondents concerning the manner in which the action against the Road Accident Fund that is referred to *supra*, was handled.

[5] According to **Ms Mananga** as a result of injuries sustained in 1996 by **Siyabulela** from a motor vehicle accident at the time when he was a pedestrian, he is not able to manage his own affairs; least of all understand legal proceedings.

[6] The application is further supported by the following reports:

- (i) Clinical Psychologis, **Ms Luyanda Mapekula**; and that of
- (ii) Occupational Therapist, **Ms Rynette Fryer**.

Both reports appear to have been compiled circa 2002 at the request of the first respondent. At the time **Siyabulela** was said to be attending Masizame School for the intellectually handicapped. In her first report, **Ms Mapekula** concludes that – based on what was reported by **Siyabulela's** paternal aunt and tests she conducted, these lend support to the view that **Siyabulela's** pre-trauma functioning was in the low average range and he suffered severe traumatic brain injury in the alleged motor vehicle accident on 11 March 1996. In assessing **Siyabulela**, **Ms Fryer** found *inter alia* the following problems:

- Complicated family environment and support.
- Inadequate start to schooling carrier and post-accident ability
- Unrealistic future dreams.
- Severe psychological inadequacies as described by other professionals.
- Severe perceptual and cognitive delays.
- Dependence in care and self-help tasks of daily living.
- Inadequate personal management and presentation.

[7] The application is opposed by first, second and third respondents. The latter only filed a notice to oppose.

[8] The application is resisted on *inter alia* the following grounds:

The said **Siyabulela Mananga** has since attained the age of majority;

The applicant lacks the *locus standi* to pursue the application;

The application is based on outdated medical reports;

The medical reports are not in affidavit form as required by *Rule 57*.

[9] *Rule 57* governs applications for the appointment of curators in respect of persons under disability. The rule provides that:

“(1) Any person desirous of making application to the court for an order declaring another person (hereinafter referred to as ‘the patient’) to be of unsound mind and as such incapable of managing his affairs, and appointing a curator to the person or property of such patient shall in the first instance apply to the court for the appointment of a curator *ad litem* to such patient.

(2) Such application shall be brought *ex parte* and shall set forth fully–

- (a) the grounds upon which the applicant claims *locus standi* to make such application;
- (b) the grounds upon which the court is alleged to have jurisdiction;
- (c) the patient’s age and sex, full particulars of his means, and information as to his general state of physical health;
- (d) the relationship (if any) between the patient and the applicant, and the duration and intimacy of their association (if any);

(e) the facts and circumstances relied on to show that the patient is of unsound mind and incapable of managing his affairs'

(f) the name, occupation and address of the respective persons suggested for appointment by the court as curator *ad litem*, and subsequently as curator to the patient's person of property, and a statement that these persons have been approached and have intimated that, if appointed, they would be able and willing to act in these respective capacities.

(3) The application shall, as far as possible, be supported by—

(a) an affidavit by at least one person to whom the patient is well known and containing such facts and information as are within the deponent's own knowledge concerning the patient's mental condition. If such person is related to the patient, or has any personal interest in the terms of any order sought, full details of such relationship or interest, as the case may be, shall be set forth in his affidavit; and

(b) affidavits by at least two medical practitioners, one of whom shall, where practicable, be an alienist, who have conducted recent examinations of the patient with a view to ascertain and reporting upon his mental condition and stating all such facts as were observed by them at such examinations in regard to such condition, the opinion found by them in regard to the nature, extent and probable duration of any mental disorder or defect observed and their reasons for the same and whether the patient is in their opinion incapable of managing his affairs. Such medical practitioners shall, as far as possible, be persons unrelated to the patient, and without personal interest in the terms of the order sought."

Subrule 13 provides that:

“Save to such extent as the court may on application otherwise direct, the provisions of subrules (1) to (11) shall, *mutatis mutandis*, apply to every application for the appointment of a *curator bonis* to any person on the ground that he is by reason of some disability, mental or physical, incapable of managing his own affairs.”

[10] In a bid to establish her *locus standi in judicio*, applicant states that she is **Siyabulela’s** aunt. That she was plaintiff in the main action against the Road Accident Fund under Case Number 295/2006. She does not give any details as to why in her view **Siyabulela** is incapable of managing his own affairs apart from referring the court to reports that were prepared by **Ms Fryer** and **Ms Mapekula**. She does not give any insight into **Siyabulela’s** means and state of health.

[11] In an apparent bid to cure the short comings that were pointed out in second respondent’s opposing affidavit, in her replying affidavit, applicant attached recent medical reports that were compiled by **Ms Mapekula** and **Doctor Makangee**. Both however are still not in affidavit form as required by *Rule 57 (3) (b)*. Applicant also stressed that first and second respondents went to great lengths to have her appointed as a *curator ad litem* for **Siyabulela** previously. It is common cause however that this did not materialise.

[12] First and second respondents deny that **Siyabulela** is incapable of managing his affairs. Pointing out to a sworn statement he purportedly made in relation to the complaint against the respondents regarding the conduct of his claim against the Road Accident Fund.

[13] Applicant is not in a position to shed any light as to how the sworn statement purportedly signed by **Siyabulela** came about.

[14] From what I have stated above, it is clear that the application does not meet the requirements set out in *Rule 57*. The applicant does not sufficiently spell out the grounds upon which she claims *locus standi in judicio* to make this application. All she states in the founding affidavit is that she is **Siyabulela's** aunt. It is only in the replying affidavit that she attempts to add some flesh to this allegation. It is trite that a case should be made in the founding affidavit. As to **Siyabulela's** means, it is only in reply that she states that he is in receipt of a disability grant. That **Siyabulela** has been staying with her for several years but also spends time with his brother and sister in Mdantsane. She does not tell us anything about his general state of physical health or day-to-day behaviour, which would give us insight as to why she feels **Siyabulela** is not capable of managing his own affairs. The application is not supported by affidavits by at least two medical practitioners.

[15] *Rule 57 (4)* allows the court to dispense with any requirements of the *Rule (57)*. This the court can do on good cause shown. No attempt has been made to explain the shortcomings in the application. Even in their current unsworn form, the medical reports, both outdated and recent do not talk to whether **Siyabulela** is capable of managing his affairs. In this regard, **Ms Mapekula** had this to say:

Siyabulela has severely compromised cognitive and adaptive skills, and is therefore not in a position to handle and act responsibly in managing large sums of money.

[16] I have already stated what conclusion **Ms Fryer** arrived at. **Doctor A Makangee**, a neurosurgeon expressed the view that **Siyabulela's** medical condition has remained unchanged since October 2005.

[17] For these reasons, I am not satisfied that the applicant has made out a case for the relief she seeks.

[18] For all the above reasons, the application is dismissed with costs.

NG BESHE

JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicant : Adv: Louw

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Date Heard : 21 February 2019

Date Reserved : 21 February 2019

Date Delivered : 5 March 2019