IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION

CASE NO: 32307/2004
DATE: 18/2/2005
NOT REPORTABLE

In the matter:

Ex Parte: URSULA DOBSON 1ST APPLICANT
ARTHUR JOHN DOBSON 2ND APPLICANT

JUDGMENT

WEBSTER J

The applicants seek an order that:

1.1 The appointment of MARIA ADRIANA MAGDELENA TALJAARD and THOMAS GEORGE NELL as the joint *curators bonis* of the minor BRADLEY JANSE VAN RENSBURG appointed as such under case no. 13760/2003 be uplifted;

1.2 MARIA ADRIANA MAGDELENA TALJAARD and THOMAS GEORGE NELL pay into the trust account of the applicant's Attorney DE WET after accounting for all fees and disbursements as *curators bonis* all funds being administered and held by them on behalf of the minor BRADLEY JANSE VAN RENSBURG;

1.3 That the joint *curators bonis* aforesaid account fully to the satisfaction of the Master of the High Court on the financial affairs of the said minor;

1.4 The 1st and 2nd applicants establish a trust in which the said minor will be the sole beneficiary;

1.5 The DE WET Attorneys retain the funds on behalf of the said minor in their trust account until the trust has been established and to pay such funds into the account of the trust to be formed.

The application is unopposed.

The background to this application is a sad if not poignant one. BRADLEY JANSE VAN RENSBURG to whom I shall refer to as "the minor" was born out of wedlock. The applicants allege that his natural father failed to honour his paternal obligations and duties. On the 30th November 2001 the minor and his mother, LINDIE JANSE VAN RENSBURG were injured in a motor vehicle collision. Both of them sustained injuries. His mother succumbed to her injuries. The minor has been cared for thereafter by his maternal grandmother, the first applicant.

The first applicant duly instituted a claim in accordance with the provisions of the Road Accident Fund Act 95 of 1996 on behalf of the minor. That claim was for damages suffered by the minor as a result of the injuries he sustained in the said collision and for the loss of maintenance and support that he received from his deceased mother during her lifetime. The second claim for loss of maintenance was settled at R238 054.00 and paid to the *curators bonis* MARIA ADRIANA MAGDELENA TALJAARD and THOMAS GEORGE NELL.

Before her death the late Lindie Janse Van Rensburg and the minor resided with the first and the second applicants. Since the death of his mother the minor has been cared for by the two applicants. The second applicant has been extremely supportive and financed the claims against the Road Accident Fund. From my reading of the papers he has, in addition, financed various court applications that had to be brought before this court, namely, the appointment of a *curator-ad-litem;* the application for the appointment of *curators bonis,* the application that custody of the minor be awarded jointly to the applicants and the current application.

The applicants aver that since his birth on 21 April 2000 the minor has lived with them. Shortly after being awarded custody of the minor the applicants who had lived together for about seven years got married to each other - on 2 August 2003.

The applicants are concerned about the amount recovered from the Road Accident Fund for the maintenance and support of the minor. Whilst it is administered by the *curators bonis* there are administration costs to be paid. They are of the view that it will be possible to invest the money for the benefit of the minor. They consider immovable property to be the safest and the most interest generating form of investment. In addition, they aver, the property will provide a home for the minor.

Reports have been filed by all the parties concerned, that is Adv. Teessen the *curator bonis,* Mrs. M. Hattingh, a social worker attached to the Christian Social Council North, the Master of the High Court, the *curators bonis* Mr. T. G. Nell and Ms. M. A. M. Taljaard.

The memorandum by Adv. Teessen is a document of 27 paragraphs. It deals pertinently with all the issues from the time that he was appointed *curator ad litem* to investigate and report on the appointment of the *curators bonis.* He is aware of the intentions of the applicants should this application succeed, namely that the funds of R237 120.95 will be used as partial payment towards the purchase price of immovable property the parties desire to purchase under a trust for the benefit of the minor. He interviewed the applicants, Mr. G. Nell one of the *curators bonis,* Mrs. Hattingh the Social worker and Ms. A. Kritzinger of the firm De Wet Attorneys.

On the issue of relieving the *curators bonis* of their office his view is that being the adoptive parents of the minor they are no different in law than the biological parents of any minor. The need for the *curators bonis* has become redundant, he states.

Mr. Teessen is of the view that the applicants have demonstrated their love and affection for the minor and are committed. He stated that he raised the question of whether the applicants could be motivated by the fact that the minor is the

recipient of R238 054.00 in wanting to relieve the *curators bonis* of their office. He has been unable to gain access to the report drawn up by the Christian Social Workers Board and presented to the Commissioner of Child Welfare during the adoption procedure. He has annexed a letter from Mrs. Hattingh confirming that this issue was discussed with the applicants.

On the question of the trust Mr. Teessen has established that the proposed trustees will be the applicants, their current Attorney of record and the first applicant's brother. He regards the arrangement of having the funds retained in the applicants Attorney's trust account and then utilising it in part-payment of the purchase price as a safe option. The applicants re-assured Mr. Teessen that they will pay the monthly bond payments on the property. I take this to mean that they will utilise their own funds in this regard. Mr. Teessen regards the applicants as being well-suited to handle the funds of the minor. He supports the application in his memorandum as well as in argument before me.

The two *curators bonis* have accounted fully for the funds that were paid to them by De Wet Attorneys. No fees have been debited to the account for the services rendered by them as yet. In my view they have dealt with the funds correctly and responsibly.

The Master of the High Court does not oppose the relieving of the *curators bonis* of their duties of office but does not

recommend the payment of the funds to the applicants. The Master's view is that the existence of better returns on the funds does not constitute adequate reason to prefer such an investment in preference to the Guardians Fund even though the interest rate is 7.5%. In the alternative the Master strongly recommends that if the funds are to be released for the intended investment in immovable property then the applicants should furnish security in accordance with the provisions of section 43 of the Administration of Estates Act 66 of 1965.

There can be no doubt regarding the *bona fides* of the applicants. The fact that they accepted the minor's mother before the minor was born and assumed *de facto* custody of the minor from the death of the minor's mother, sought and obtained a court order for his joint custody, married each other on 2 August 2003 and legally adopted the minor on 11 March 2004 constitute irrefutable proof of their commitment to raising the minor in a stable home with devoted parents. The question to be answered is whether that is adequate or not.

The applicants concede, and correctly in my view, that the amount of R237 120.95 will only be adequate as a part-payment for immovable property. This means that the applicants will have to secure a bond over the property. The applicants have undertaken to pay-off the bond utilising their own incomes for that purpose. This raises various problems if not immediately but either in the near or distant future. These, *inter alia,* are:

(i) The applicants have not disclosed their avocations or their incomes. The first applicant is 45 years of age and the second respondent is 50 years of age. How stable their sources of income are cannot be assessed. This raises the problem of evaluating their ability to meet and keep up with bond instalments.

(ii) The applicants have not mentioned anything about their state of health. This can impact on the success in obtaining a bond or keeping up with payments even in the case of one or either of them losing their employment or source of income or becoming indisposed.

(iii) Nothing has been said regarding the contribution in the form of bond payments that will be made by the applicants. Will these be a loan to the trust or will they be donated to the estate of the minor and be not reclaimable by either or both of them?

(iv) What will happen in the event of a break-down in the marriage resulting in a separation or divorce where one or the other spouse decides not to continue with the bond payments, or decides to claim a refund of payments made by him or her?

In addition there are the provisions of section 82 of Act 66 of 1965 (the Act) that reads as follows: **"Payment to Master of certain** moneys.-Every tutor and curator shall, whenever he receives any money belonging to the minor or other person concerned, from any person other than the Master, forthwith

pay the money into the hands of the Master: Provided that the foregoing provision of this section shall not apply-

(a) if the Court appointing the tutor or curator or if the Master otherwise directs; or

(b) if any will or written instrument by which the tutor or curator has been nominated or by which the money has been disposed of, otherwise provides; or

(c) to so much of the money as is immediately required-

(i) for the payment of any debt of the minor or other person; or

(ii) for the preservation or safe custody of any property of the minor or other person; or

(iii) for the maintenance or education of the minor or other person or any of his dependants; or

(v) to meet any current expenditure in any business or undertaking of the minor or other person carried on by the tutor or curator."

(vi) Mr. Teessen submitted that the provisions of the Act do not apply in this instance, regard being had to the fact that the applicants are on no different a footing than the natural parents of any minor and secondly that they will at no stage hold the funds under their control. This argument presents its own problems. Firstly it is based on the premise that once the minor was legally adopted the applicants acquired a right to manage his affairs without the need for any authority

> or sanction from any quarter. This view is attributable, to my mind, to the misapprehension that the Act does not apply to minors who are under curatorship.

The provisions of the section are peremptory. In my understanding the *curators bonis* were obliged to have paid the amount recovered from the Road Accident Fund to the Master. Section 82 deals with the property of minors under curatorship. The objectives of the Act include the " ... administration of the property of minors and persons under curatorship *…" (Vide* preamble to the Act). Accordingly the property of the minor will be subject to the provisions of section 82 of the Act until an order terminating the appointment of the two curators. The rights of the adopted parents do not automatically entitle them to administer such funds as was contended by Mr. Teessen.

I turn now to the question of whether the applicants may be granted the relief they seek. In as much as the intentions of the applicants are laudable it is the duty of this court to consider all the facts and observations mentioned above objectively. In doing so it is necessary to take cognizance of the fact that the quintessence of civil disputes is the failure of parties to honour their undertakings or vows taken with all solemnity and a genuine and real commitment to fulfil such undertakings. In a situation like the present one it is not a matter of whether the concerns I referred to above may occur but rather what will then happen to the minor's investment if the bond instalments are not met for

whatever reason. The prospect of the worst scenario occurring is a real one which must be considered.

The courts have been criticised fairly regularly for being conservative. Those who do so are usually the ones who have never sat in a divorce court or listened to business partners and associates once united and committed in a business investment or venture lash out mercilessly at each other. The court is obliged to consider this eventuality in deciding whether to grant the relief sought. This requires a weighing up of the benefits that may accrue to the minor if the order is granted as opposed to the negative consequences I have sketched out above.

The factors that lend themselves favourably to the intended investment are that the modest figure of R237 120.95 will appreciate in accordance with the current trends in property investments. The claim for the damages suffered by the minor may be substantial and could likewise be invested in the property the applicants may acquire making it easy to pay off the bond they consider taking.

The factors against the proposed investment are the human frailties, the vagaries of market forces, employment prospects, regard being had to the fact that the applicants are 50 and 45 years, respectively.

Against this background is the recommendation of the Master of the High Court. It affords an almost 100% risk-proof investment. Counsel for the applicant did not address me on the ability of the applicants to raise the security that the Master has recommended. I infer from this that the applicants may have difficulties in finding the required security. The situation before me calls for a closer examination of the office of the Master, its duties and consequently the weight - I should accord the recommendations from that office. Dealing with these issues in the case of *Ex Parte: Meyer N.O.* 1976(2) SA 95 [OPA] at page 98H to 99H, M.T. STEYN J stated: "Van vroegtyd af was die owerheid in die Westerse gemeenskap al besorg oor die lot van minderjariges en hul eiendom, en is stappe gedoen ter bevordering van hul belange en ter beskerming van hul goed wat uiteindelik by ons die instelling van die Meestersamp en die daarstelling van die Voogdyfonds tot gevolg had. Die Meester van die Hooggeregshof is ‘n hoë openbare beampte aan wie menigvuldige pligte, sommige waarvan ingewikkeld is en almal waarvan groot verantwoordelikhede meebring, opgedra is. Toesig oor minderjariges en hul eiendom is een van die maatskaplik belangrikste van daardie pligte. Dat die Meester inderdaad ‘n swaar las dra en ‘n veeleisende, en soms selfs vermoeiende, taak het, Iy geen twyfel nie. Dit is ‘n ongelukkig welbekende menslike verskynsel dat voogde of ouers soms die eiendom van hul beskermlinge of kinders misbruik en selfs verkwis. Daarom word in art. 43 (1) en (2) van die Boedelwet, 66 van 1965, bepaal dat die natuurlike voog van ‘n minderjarige sekerheidstelling tot

bevrediging van die Meester moet gee alvorens die eiendom van ‘n minderjarige onder sy voogdy aan hom oorhandig mag word.

Die Voogdyfonds is ‘n Staatsinstelling wat onder toesig en beheer van die Meester administreer word, en wat bedoel is om ‘n veilige hawe te bied vir die eiendom van minderjariges. Dit is ‘n erkende beginsel van die Westerse sakelewe dat hoe veiliger ‘n beleggingsinstelling is, hoe laer die rentekoers is wat dit aanbied. Dit is juis omdat die Voogdyfonds so ‘n veilige instelling is en deur so ‘n verantwoordelike openbare beampte beheer word dat die rente wat op beleggings daarin betaal word laer is as die wat elders in die sakewêreld verkrygbaar is. Hoër winsgewendheid word hier prysgegee vir groter beleggingsveiligheid. Die Hof as oppervoog van alle minderjariges in sy regsgebied is weliswaar by magte om die onttrekking uit die Voogdyfonds van ‘n minderjarige se gelde wat daarin belê is, en die herbelegging daarvan elders, toe te laat sien *Ex parte Van Rensburg*, 1972 (2) SA 79 (0) - maar die Hof sal dit alleenlik doen as die betrokke gelde dan genoegsaam beskerm word om die behoorlike administrasie en die uiteindelike oorbetaling daarvan aan die minderjarige te verseker.

Daardie beskerming kan verkry word deur te gelas dat die herbelegging met die goedkeuring van die Meester moet geskied. ‘n Bykomstige las word egter daardeur aan die reeds swaarbelaaide Meester opgedra en die uitvoering van sy ander pligte word daardeur bemoeilik. Dit is juis die beswaar wat die Meester nou opper. Die doel van die Staatsinstellings hierby betrokke is om die eiendom van minderjariges in veilige bewaring te neem en te belê teen ‘n rentekoers wat nuttig is vir die betrokke

minderjariges sonder om die Staat te swaar met ‘n renteverpligting te belaai; dit is nie tans nie, en was nog nooit die doel van sulke Staatsinstellings om aan minderjariges die grootste doenlike mate van beveiliging en terselfdertyd die grootste moontlike beleggings winsgewendheid te bied nie. As daar vir ‘n minderjarige ‘n meer winsgewende gebruik van sy gelde verkry wil word as die wat die Voogdyfonds bied, behoort dit ten koste van die betrokke minderjarige en nie van die Staat nie verkry te word.

Die ander wyse waarop sulke gelde, wat buite die Voogdyfonds belê word, genoegsaam beveilig kan word, is deur te verg dat die betrokke voog wat die gelde uit die Voogdyfonds onttrek om aldus elders meer winsgewend te belê, sekerheidstelling ter bevrediging van die Weesheer moet verskaf. Daardeur verkry die betrokke minderjarige die verlangde groter winsgewendheid met genoegsame beskerming van sy geld en van sy regte daarin, sonder om die Meester met meer verantwoordelikhede te belaai. Dit is na my mening derhalwe die prosedure wat ten aansien van die aansoeke hier ter sprake gevolg behoort te word; en dit is wat in werklikheid in Van Rensburg se saak, *supra*, gedoen is."

It is my considered view that the circumstances call for caution. In the absence of answers to all the questions raised thus far it is better to lean in favour of lower returns guaranteed by the Guardians' Fund. If that is done it will relieve the *curators bonis* of their duties and obligations: the need for them to remain in office will become redundant. The pending claim of the minor is

being handled by a *curator ad litem* who was duly appointed by this court. An application to relieve such curator has not been raised in the papers before me and nothing more need be said there anent, at this stage in any event.

The following order is made:

1. The curators bonis, M.A.M. TALJAARD and T.G. NELL are ordered to pay the sum of R237 120.95 forthwith into the Guardians' Fund, in accordance with the provisions of section 82 of Act 66 of 1965.
2. The application is dismissed, with no order as to costs.

G. WEBSTER

JUDGE IN THE HIGH COURT

Date of hearing	25/01/2005
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