51/95

IN THE SUPREME COURT OF SOUTH AFRICA

Saak no: 565/93

APPELLATE DIVISION

In the matter between:

SANTAM INSURANCE LTD **Appellant**

and

MPITIZELI BOOI **Respondent**

Coram: **JOUBERT, E M GROSSKOPF, STEYN, F H GROSSKOPF et HOWIE JJA**

Heard: 20 March 1995
Delivered: 18 Mei 1995

JUDGMENT

JOUBERT JA

On 9 November 1988 a motor vehicle collided with the respondent

("Booi") who was at the time working as a member of a road construction team on the road between Plettenberg Bay and The Craggs. The appellant ("Santam") was the appointed agent for the insured motor vehicle within the meaning of the Motor Vehicle Accidents Act 84 of 1986 ("the Act"). As a result of the collision Booi sustained severe bodily injuries, including a serious head injury. He was hospitalised from the date of the collision until 17 February 1989 when he was discharged to the care of his relatives. A medical report optimistically expected him to resume his work within a year.

During January 1990 Booi, accompanied by his brother-in-law Maxin Yoli, consulted attorney Dullabh in Grahamstown through an interpreter. Acting on Booi's instructions Mr Dullabh took the necessary steps to enforce his claim against Santam. He caused an action under case no. 5234/91 to be instituted in Booi's name in the Cape Provincial Division against Santam as defendant for the recovery of damages in consequence of the injuries sustained by him in the collision. The summons was issued on 17 April 1991.

In its plea dated 1 July 1991 Santam, save for the collision, disputed and

placed in issue most of the allegations on which Booi's action was founded.

On 28 June 1991 Mr Keely, a neurosurgeon, made available his report of the neurological examination by him of Booi . In his report he described the nature of the serious brain injury sustained by Booi as "an extensive, severe, shirring-force type brain injury which left Mr Booi demented and moderately incoordinate."

At the request of Santam, Booi was examined on 23 and 24 February 1993 by a psychiatrist, a neurosurgeon and a clinical psychologist. From their respective reports it appeared inter alia that Booi as a result of the collision suffered from a marked post-traumatic dementia, which rendered him unable to manage his own affairs and to understand and appreciate the nature, effect and implications of legal proceedings instituted on his behalf. They recommended the appointment of a curator ad litem to assist Booi in the conduct of the legal proceedings instituted in his name against Santam.

Santam amended its plea by the inclusion of a special plea which challenged Booi's locus standi in judicio owing to his reduced mental capacity

when the legal proceedings were introduced. The institution of the action was claimed to be null and void ab initio. On 2 March 1993 service of the amended plea was effected on Booi's attorneys of record.

On 19 April 1993 Mr Dullabh applied in the Cape Provincial Division for the appointment of Adv Kotze as curator ad litem to Booi in order to assist him in the conduct of his action against Santam. The latter did not oppose the application. On 12 May 1993 KING J granted the relief sought in the following terms:

"1 Advocate Hendrik Kotze is appointed as curator ad litem to Mpitizeli Booi for the following purposes:

1.1 To assist him in the conduct of legal proceedings instituted in the Supreme Court of South Africa, Cape of Good Hope Provincial Division, under case number 5234/91, which action was brought to recover damages under the Motor Vehicle Accidents Act, No 84 of 1986, arising out of injuries sustained in a collision with a motor vehicle which occurred on 9 November 1988 and further to assist him in considering, and where appropriate accepting, offers of settlement;

1.2 To assist him in determining whether the action referred to in paragraph 1.1 hereof ought to be proceeded with or whether the action ought to be withdrawn;

1.3 In the event of it being determined that the action under case number 5234/91 be withdrawn and thereafter reinstituted, to assist him in all things necessary in instituting such action and bringing the matter to a

conclusion."

I may add that counsel of the parties to the present appeal "were agreed that the effect of the order appointing Adv Kotze as curator ad litem could not have been to empower the curator to proceed with the trial action without further ado, but was only to authorise him to investigate the legal question raised in the Special Plea and to decide how to proceed with the conduct of the litigation." That was the effect of the order granted by KING J on 12 May 1993.

Accordingly on 19 May 1993 Adv Kotze in his capacity as curator ad litem applied in the Cape Provincial Division for the following order:

"(a) Declaring that the ratification and confirmation by HENDRIK KOTZE, in his capacity as curator ad litem to MPITIZELI BOOI, of all steps taken in the action instituted against the Respondent under case number 5234/1991 is of full force and effect;

(b) Granting applicant leave to amend the summons and particulars of claim accordingly to reflect Applicant as Plaintiff in his capacity as curator ad litem to MPITIZELI BOOI;

(c) Declaring that the action instituted against the Respondent under case number 5234/1991 may proceed on the pleadings under case number 5234/1991 as amended in terms of paragraph (b) hereof;

(d) Granting the Applicant the costs of his application only in the event of the Respondent apposing same."

In para 6 of his supporting affidavit he stated that he had considered the reports of the experts who had examined Booi. He then proceeded as follows:

"It would appear to me that it cannot be disputed that at the time the legal proceedings were instituted in the name of Booi by DULLABH, BOOI lacked the necessary mental capacity to litigate in this matter and therefore lacked the necessary locus standi. It is for this reason that I have ratified all steps taken in this matter prior to my appointment as curator ad litem." (My underlining).

The application which was opposed by Mr Blommaert on behalf of Santam was heard by the Court a quo, constituted by FOXCROFT and CONRADIE JJ. In a very well reasoned judgment on 6 August 1993 FOXCROFT J (CONRADIE J concurrente) granted prayers (a), (b) and (c) of the Notice of Motion. This judgment has been reported as Kotze NO v Santam Insurance Ltd 1994 (1) SA 237 (C). Applicant (Booi) was to bear the costs of the application on an unopposed basis and respondent (Santam) was ordered to

pay such of applicant's costs as were occasioned by respondent's opposition to the application.

With leave of the Court a quo Santam now appeals to this Court against the orders granted and those parts of the judgment relating to them.

In this Court Mr Smit contended on behalf of Santam that the action which Mr Dullabh purported to institute in the name of Booi was null and void ab initio because Booi, who was captus mente or non compos mentis, lacked the necessary mental capacity to authorise him to litigate on his behalf. Consequently, so it was argued, the void "authorisation", and also the litigation which followed, together constituted a nullity which was in law incapable of ratification. The contention that Booi's purported authorisation was void is based on trite law. See the judgment of the Privy Council in Molyneux v Natal Land Colonization Co Ltd reported in (1905) 26 NLR 423 at p.429-430; and also LAWSA vol 20 s.v. Persons para 230. The litigation instituted by Mr Dullabh, however, stands on a different footing. There is no basis on which it can be said to have been void. It was merely unauthorised.

Our common law distinguishes between a verus procurator who holds a valid mandate (qui mandatum habet) and a falsus procurator who lacks such mandate (qui nullum mandatum habet). Mr Dullabh obviously qualifies as a falsus procurator. Our common law sources abound in references to the falsus procurator. See D 5.1.56 (Ulpianus), D 46.8.3.1 (Papinianus), D 48.8.12.1 (Ulpianus), Cod 2.12.24, Damhouder (1507-1581) Practycke in Civile Saken, 1660, cap 92 nr 1, Merula (1558-1607), Manier van Procederen, 1741, lib 4 tit 18 cap 8 nr 4, Gail (1526-1587) Practicae Observationes, 1634, obs 47 nr 1; Voet (1647-1713) 3.3.10.

The jurists recognised an important legal principle which permitted a principal (dominus or meester), to ratify before judgment the litigious acts performed on his behalf by a falsus procurator. They held divergent views on the question of ratification by a principal after judgment was given. The views of the following jurists are relevant on the subject, viz.:

1 Damhouder, loc.cit.
para 2: "Ende mach den Meester 't doen van soodanigen Procureur

ratificeeren ende approberen tot de conclusie in Rechten toe, ghelijck't gedaen wordt, ende tot noch toe gedaen is geweest in de grooten Raedt van Mechelen".

para 3: "Maer na de sententie en gelt die approbatie van den Meester niet, ten ware tot sijn eygen schade ende prejudicie." (My underlining)

Ratification after judgment was to no avail unless it was to the principal's own detriment and prejudice.

2 Van Zutphen (obit 1685) Practijcke der Nederlantsche Rechten, 1680, s.v. Procureurs en Procuratie

para 8: "Indien een valsch Procureur sonder Procuratie heeft gecompareert, en in den processe yet gedaen heeft, soo mach den Meester voor de geweesene sententie ratificeeren al het geene by sodanigen Procureur gedaen is; ja dat meer is, kan ook na de sententie, na het gevoelen van sommige Doctoren, ratificatie gedaen werden". (My underlining).

Ratification could take place before judgment. According to some Commentators ratification could follow after judgment.

3 Gail, loc citato

para 3: ... & Doctores in Cod 2.12.24, Cod 2.40.4, D 46.7.3.1 distinguunt, utrum sententia contra dominum, an vero in eius favorem lata sit: ut primo casu ratificatio domini valeat: ut si a sententia contra falsum procuratorem lata appellaverit: nam eo ipso censeetur sententiam ratam habere, per text. in D 46.7.3.1, gl in Cod. 7.58.2 & in eo omnes Doctores conveniunt, in locis allegatis. Secundo vero casu, nullius sit momenti domini ratificatio, ne via malitiis aperiatur: nam dominus eventum sententiae semper expectaret, non aliter sententiam

ratificaturus, nisi in sui favorem prolata sit: idque pluribus rationibus confirmat Salicetus in Cod 2.40 nr 4 & 5 & ita se Farrariae consuluisse dicit, aliosque eiusdem opinionis Doctores citat.

The Commentators distinguish whether judgment was given against the principal or in his favour. In the former instance his ratification would be valid, e.g. if he appealed against a judgment adverse to the falsus procurator. In the second instance the ratification of the principal would be null and void.

4 Voet, loc.cit., as translated by Gane:

"[If such attorney admitted his acts null, and judgment in his favour incapable of ratification]
But if, though he lacked a mandate, and such failure of mandate was clear, he has none the less been admitted as attorney for a plaintiff, then whatever has been done by the false attorney is ipso jure void (Cod. 2.12.12 (13),24), nor is a judgment confirmed by the ratification of one in whose favour it was given, inasmuch as such a person cannot by his ratification destroy the right of objecting to the nullity of the judgment when such right has once accrued to his opponent. Although ratification is deemed to be like a mandate, and is drawn right back and confirms things already done (Cod 4.28.7, D.50.17.60), yet that result does not take place if an accrued right is taken away by it from a third party, but only when a person by his ratification prejudices himself above.

.....

"[A judgment against a false attorney however may be ratified]
Clearly if a judgment had been given against a false attorney, nothing would stand in the way of the principal being able to confirm it by his ratification, since thus he renounces his own right only. And it would be allowable also to infer such a ratification from the fact that the principal appealed to a higher tribunal from the judgment pronounced against the false attorney (D 46.8.3.1).

[And so may acts done prior to judgment]
In the same way too a principal can before judgment ratify acts done by a false attorney while the result of the suit is still pending in uncertainty; for as yet no right has accrued to anyone, and thus nothing can appear to be taken away from the opponent by a ratification then taking place (D 5.1.56). It follows also that there may be a sufficient tacit ratification when the principal further pursues a suit which an attorney has begun (D 46.8.5 . . .)"

Gane provided his translation with sub-headings of his own which do not feature in Voet's Latin text. I have placed these sub-headings in square brackets.

In the above passage Voet distinguishes between three categories viz.

(i) First Category where the principal's ratification of the acts of his falsus procurator is effected before judgment has been given i.e. the matter is still re integra et tempore congruo, since the result of the suit is still pending and accordingly uncertain. No party to the suit has at that stage

acquired any vested rights to the result thereof.

(ii) Second Category where the principal ratifies the acts of his falsus procurator after judgment in his favour such ratification is null and void since it would deprive his opponent to the suit of his right to object to the nullity of the judgment.

(iii) Third Category where judgment has been given against the falsus procurator his principal may ratify the acts performed on his behalf by the falsus procurator. He would even be entitled to appeal against the judgment to a higher tribunal.

In the present case the matter is still re integra et tempore congruo since judgment in the action instituted by Mr Dullabh is still pending. The matter therefore falls within the first category (supra) of Voet. Had Booi as principal been compos mentis he could according to our common law authorities have ratified on his own the acts performed on his behalf by Mr Dullabh as his falsus procurator. Unfortunately Booi is non compos mentis and therefore incompetent to ratify Mr Dullabh's acts on his behalf.

KING J, as I mentioned supra, appointed Adv Kotze curator ad litem to assist Booi in the legal proceedings instituted by Mr Dullabh. The Court a quo granted Adv Kotze the necessary authority to amend the summons and particulars of claim to reflect him as plaintiff in his capacity as curator ad litem and to proceed with the action on the amended pleadings. The question now falls to be decided whether or not the Court a quo could grant Adv Kotze as curator ad litem the relief set out in the order granted by it.

A Court has inherent jurisdiction to appoint a curator ad litem in order to avoid a negation of justice where there is no other proper or legal way in which a plaintiff can vindicate his rights. I fully agree with the following dictum by REYNOLDS J in Ex Parte Phillipson and Wells NNO and Another 1954(1) SA 245 (EDL) at p.246F:

"The principle underlying these cases would appear to be that the Court has power to appoint, and will appoint, a curator ad litem to assist persons to vindicate rights where there is no other suitable means in the ordinary way and will do so by appointing a curator ad litem either to the proper plaintiff or to the defendant, for where there is a claim of right there should be a means of vindicating it."

On the strength of the common law authorities quoted above the Court a quo was competent to grant Adv Kotze as curator ad litem the powers set out in its order. Adv Kotze therefore became Booi's duly appointed representative with power, inter alia, to ratify the steps taken by Mr Dullabh. Such ratification was indeed legally competent.

Mr Smit raised a further argument on behalf of Santam. He contended that the sanctioning of the ratification by the curator ad litem would be prejudicial to Santam since the latter had an accrued right to raise a defence of prescription by the time when Adv Kotze's ratification took place. The answer to this submission, it seems to me, is as follows. The curator's ratification and the concomitant amendment of the claim to substitute him as plaintiff, will not alter the identity of the true claimant. In other words it will not introduce a new claim or a new party. The possibility of Santam being prejudiced by losing the opportunity to plead prescription therefore does not arise: Boland Bank Ltd v Roup Wacks Kaminer and Kriger 1989(3) SA 912 (C) at 914 B-I and earlier cases there cited. In view of this conclusion I need

not consider whether the Court a quo was correct in holding, at 246 F - 248 I of its judgment, that a plea of prescription could in any event not have succeeded. There is therefore no substance in this contention by Mr Smit.

In my judgment the order granted by the Court a quo was entirely correct.

In the result the appeal is dismissed with costs.

C.P. JOUBERT JA

CONCUR
E M GROSSKOPF JA
STEYN JA
F H GROSSKOPF JA
HOWIE JA