KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

CASE NO. AR 118/10

In the matter between**:**

Z. H. MBHELE	APPLICANT

and

Z.M. MBHELE	RESPONDENT
STANDARD BANK	SECOND RESPONDENT
MASTER OF THE HIGH COURT	THIRD RESPONDENT

SPECIAL REVIEW JUDGMENT Delivered on 03 June 2010

SWAIN J

[1] It is necessary to briefly set out the history of this matter in order to place in context, the issues which this Court is asked to decide.

[2] This matter originated as long ago as 14 May 2003 in the Maintenance Court for the District of Pietermaritzburg, when an order was granted by consent directing the first respondent to pay

maintenance for his minor child S, a minor born on 22 July at the rate of R200.00 per month.

[3] On 29 April 2008 the applicant in her capacity as the Guardian of S, applied for and was granted a *rule nisi* returnable on 19 May 2008, with interim relief in terms of which:

[3.1] The second respondent, the Standard Bank, was interdicted on an interim basis from paying out any pension benefit to the first respondent. The amount of R677,891.00 was held by the second respondent in an account of the first respondent, being the proceeds of a pension benefit due to the first respondent. In terms of the *rule nisi* the second respondent was called upon to show cause why it should not be ordered to determine the net amount owing to the first respondent and to pay this amount to the third respondent, being the Master of the High Court, to be held in the Guardian's Fund, for the future maintenance of S who, it was alleged, was disabled. It appears that the only evidence placed before the Maintenance Court in this regard was a letter from Kwa Thintwa school for the deaf dated 30 November 2007, stating that outstanding fees in respect of S were R720.00 and that the fees payable for 2008 would be R2,500.00. It therefore appears that S's disability is that of deafness.

[3.2] The third respondent was ordered to show cause why the Master should not be ordered to make payments out of this fund, according to orders issued by a competent court, which may be a Maintenance Court or the High Court.

[3.3] The first respondent was ordered to immediately commence paying maintenance to the applicant for S in the amount of R200.00 per month.

[4] In this application the applicant alleged that the first respondent was in arrears in the amount of R2,343.86 in respect of the maintenance payable. From the birth date of S it is apparent that S was a major at the time the application was brought.

[5] On the return date the *rule* was extended to 09 June 2008, however according to a report compiled by M/s P.S. Joubert, Senior Magistrate, Pietermaritzburg, which accompanied the papers when this matter was sent on special review to this Court, the matter was enrolled before the Maintenance Court on 02 June 2008 "in the presence of both parties". By this I understand the Magistrate to mean that the applicant as "Guardian" of S and the first respondent as the father of S, were present. Whether the Standard Bank and the Master were given any notice of this hearing is not clear.

[6] In any event, at this hearing the Magistrate discharged the *rule* and granted an order in terms of which the first respondent was interdicted from using the sum of R50,000.00 for his benefit and ordered to pay this amount to the Master, to be held in trust in the Guardian's Fund and payment thereof to be made to S in accordance with any order of the Maintenance Court "or any competent court".

[7] It is at this stage of the proceedings that problems arose:

[7.1] The Master refused to accept a cheque from Standard Bank for payment into the Guardian's Fund, on the ground that S was a major.

[7.2] The cheque was forwarded to the Magistrates' Court and on 17 December 2008 a substitute order was granted, in terms of which the cheque was to be paid in at the office of the Magistrates' Court, Pietermaritzburg.

[7.3] The cheque was paid into the trust account at the Magistrates' Court, but the Area Court Manager then advised that the Department of Justice had no accounting system that allows for the receipt of lump sums of money, to be dispensed monthly to third parties. It appears that the sum of R50,000.00 still languishes in this account, without S having any access to this money .

[8] At this juncture the solution to this impasse was perceived by the Magistrate to be a reference of the problem to the High Court, by way of a special review, to resolve the issue of how provision could be made for the retention of money in a fund, and the periodical payments there from, to provide for the maintenance of a major.

[9] The Magistrate drew the attention of the High Court to the decisions in

Mngadi v Beacon Sweets & Chocolates Provident Fund & others
2004 (5) SA 388 (DCLD)

and the unreported decision of

Government Employees Pension Fund
v
Bezuidenhout & another
(Appeal No. 2113/04) - a decision of a Full Bench of the Gauteng High Court

[10] In Mngadi's case, Nicholson J held that the respondent's pension fund was obliged to retain such amount of the withdrawal benefits payable to the third respondent, for the maintenance of the third respondent's minor children.

[11] In the Government Employees Pension Fund case, Hartzenberg J, in whose Judgment Bosielo J and Ledwaba J agreed, held that the Fund could not be ordered to administer part of the pension benefit of its erstwhile employee, as a service to the dependents of such employee. It was held that a solution would be for a portion of the pension benefit to be paid into the Guardian's Fund, where it could be administered for the benefit of the minors. The distinguishing feature is of course that in the present case S is a major.

[12] When the matter came before Kruger J on special review, he referred the issue to the Full Bench and requested the Chairman of the Pietermaritzburg Bar to appoint a member as an *amicus curiae* to assist this Court. That role has been fulfilled by Mr. I. A. Sardiwalla, who submitted a report and appeared before us at the hearing of the matter. We are indebted to him for his kind assistance in this matter.

[13] In my view however, the solution to the present impasse lies in the common law, rendering it unnecessary and inappropriate to decide whether the Guardian's Fund is the appropriate, or permissible, receptacle for the receipt of monies to provide for the needs of a major, who is in need of maintenance. This is particularly so in this case in the absence of any report by the Master in this regard, the absence of notice to any of the respondents of this hearing, as well as the absence of evidence in the respects set out below.

[14] It is trite law that a major "child" who is incapable of supporting him or herself, is entitled to support from a parent who is able to do so

Kanis v Kanis 1974 (2) SA 606 (RAD) at 611

[15] In addition if such a major "child" is incapable of managing his or her affairs, a *curator bonis* can be appointed to administer such

affairs and provide the necessary maintenance from funds made available to the *curator.*

[16] There is a total absence of any evidence to indicate whether S is unable to manage his own affairs to the extent of being able to administer any funds to provide for his own maintenance, other than the fact that he suffers from deafness. In addition, there is no evidence to establish whether he is totally unable to provide for himself, or only partially unable to do so.

[17] The applicant should therefore launch an application in the appropriate forum for the appointment of herself, or a suitable person, as a *curator bonis* to S if the evidence reveals that S is unable to administer his own affairs. In such an application evidence would *inter alia* have to be placed before the Court of the nature and extent of S's disability, whether S is able to administer his own affairs, the extent to which S is unable to support himself, the maintenance which he is consequently in need of, as well as the capital amount needed to provide for such maintenance.

[18] As pointed out above it is apparent that none of the respondents were given notice of this hearing. I will therefore not grant any order which affects the present *status quo.* The object of the order I make will however be to preserve the sum of R50,000.00 pending further steps to be taken, which will solve the present impasse and regularise the position.

[19] I wish to emphasise that the order granted in this matter has been dictated by the particular facts of this case. It cannot be regarded as a binding precedent requiring the appointment of a *curator bonis*, in all cases concerning the provision of future maintenance to a major, in need of periodical maintenance.

The order I make is the following:

a) The applicant, if so advised, is to launch an application for the appointment of a *curator bonis*, to administer the affairs of S M with such ancillary powers as may be deemed appropriate by the court granting such order.

b) The Area Court Manager for the Magistrates' Court for the District of Pietermaritzburg is directed to retain the sum of R50,000.00 in trust, pending the appointment of the *curator bonis* referred to in paragraph a) or the grant of any order by a competent court directing payment of the sum of R50,000.00 to be made directly to S M.

c) On appointment of the *curator bonis* the Area Court Manager is directed to make payment of the sum of R50,000.00 to the *curator bonis* to be administered for the benefit of S M, alternatively, the Area Court Manager is to make payment of the sum of

R50,000.00 directly to S M in accordance with any court order to that effect.

d) A copy of this order is to be served on the first, second and third respondents.

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K. SWAIN J

I agree

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K. PILLAY J

I agree

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P. KOEN J

Appearances /

Appearances:

For the Appellant	**:**	I. A. Sardiwalla (as amicus curiae)
For The Director of Public Prosecutions Kwa Zulu-Natal :	**:**	M/s S. Erasmus
Date of Hearing	**:**	21 May 2010
Date of Judgment	**:**	03 June 2010