

LEGAL POSITION OF PERSONS INCAPABLE OF MANAGING THEIR OWN AFFAIRS



JUSTICE COLLEGE

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PERSONS INCAPABLE OF MANAGING THEIR OWN AFFAIRS: GENERAL

1. INTRODUCTION

- 1.1 Making decisions is an important part of our lives. We make decisions relating to matters such as where we live, health care, education, employment, social contacts and financial affairs¹ (to mention but a few). The exercise of choice in matters such as these is one of the ways in which we express our individuality, and having our decisions acknowledged and acted upon by others is one of the ways in which we exert control over our own lives.²
- 1.2 The capacity to enter into legal transactions and to litigate independently is very closely related to a person's mental condition. For a legal transaction to be valid the law requires that the parties be able to understand the nature, purpose and consequences of their actions. Where these requirements are absent the law attaches no consequences whatever to the expressions of will by the person who purported to engage in the legal transaction. This restriction is however not meant as a punitive measure but should be seen as a measure to protect the mentally ill person against exploitation.³
- 1.3 Some people cannot make legally effective decisions because of diminished mental capacity. Diminished capacity may result from a number of causes such as mental illness, intellectual disability, brain injury or disease, a stroke, dementia or incapacity related to ageing in general. Decision-making impairment affects mostly the mentally disabled and the elderly.
- 1.4 As far as the elderly are concerned one of the major causes of diminished mental capacity is Alzheimer's disease. According to an Alzheimer's Disease Fact Sheet

¹ SALRC Discussion Paper 105 on *Assisted Decision-Making: Adults with Impaired Decision-Making Capacity* (January 2004) on 6.

² SALRC Discussion Paper 105 *supra*, on 6, footnote 14 with reference to Ashton and Ward 3-7; Queensland Law Reform Commission Draft Report 1995 1.

³ Cronjé & Heaton: *The South African Law of Persons*, 109.

on the U.S. National Institutes of Health, National Institute on Aging, published on the internet under reference <http://www.nia.nih.gov/alzheimers/publications/alzheimers-disease-fact-sheet> on 22 February 2016, “*Alzheimer’s disease is an irreversible, progressive brain disorder that slowly destroys memory and thinking skills, and eventually even the ability to carry out the simplest tasks... Alzheimer’s disease is the most common cause of dementia among older adults. Dementia is the loss of cognitive functioning – thinking, remembering, and reasoning – and behavioral abilities, to such an extent that it interferes with a person’s daily life and activities. Dementia ranges in severity from the mildest stage, when it is just beginning to affect a person’s functioning, to the most severe stage, when the person must depend completely on others for basic activities of daily living.... The causes of dementia can vary, depending on the types of brain changes that may be taking place.*”

- 1.5 The general rule is that majors are presumed mentally and legally competent to manage their own affairs until the contrary is proved. The onus of proving that a transaction is invalid for want of mental capacity normally rests on the party alleging it.⁴ However, where the court has declared a person to be of unsound mind, and incapable of managing his or her own affairs, such certification creates a rebuttable presumption of incapacity, shifting the burden of proof to the party who wants to hold the certified person bound by the transaction.⁵
- 1.6 Making a finding as to the mental capacity of someone is however not a simple matter and should not be taken lightly. **B Hoggett**⁶ makes the following statement:

“Defining mental disorder is not a simple matter, either for doctors or for lawyers. With a physical disease or disability, the doctor can presuppose a state of perfect or ‘normal’ bodily health (however unusual that may be) and point to

⁴ *Pheasant v Warne* 1922 AD 481; *Vermaak v Vermaak* 1929 OPD 13 at 15, 18; *Raulstone v Radebe* 1956 (2) PH F85 (N); *De Villiers v Espach* 1958 (3) SA 91 (T).

⁵ *Prinsloo’s Curators Bonis v Crafford and Prinsloo* 1905 TS 669.

⁶ Mental Health London: 1976.

the ways in which the patient's condition falls short of that. A state of perfect mental health is probably unattainable and certainly cannot be defined. The doctor has instead to presuppose some average standard for normal intellectual, social or emotional functions, and it is not enough that the patient deviates from this, for some deviations will be in the better-than-average direction; even if it is clear that the patient's capacities are below that supposed average, the problem still arises of how far below is sufficiently abnormal, among the vast range of possible variations, to be labeled a disorder."

- 1.7 Many people, when they get older and frailer, give a general power of attorney to a trusted person, usually a family member, or their attorney, accountant or financial advisor (their agent) to transact business on their behalf. This business normally includes banking and investments, but could also include the power to buy and sell shares or immovable property. It can also include the incurrance of expenditure relating to the day-to-day living of the person who grants the general power of attorney (the principal) and his or her family. In this way the older person is saved the trouble of having to go to the bank, or having to go to the attorney's or stockbroker's office, or having to do their own shopping etc. An agent has to act in good faith and in the best interests of the principal, and is accountable to the principal for his or her actions.
- 1.8 Although the power of attorney is a handy instrument for assisting the elderly and the frail in the administration of their estate, it can only validly be used in those instances where the principal is still mentally competent of making his or her own decisions and has contractual capacity. In South Africa the power of attorney remains valid only for as long as the principal is still capable of appreciating the concept and consequences of granting another person his or her power of attorney. The moment a person becomes mentally incapacitated and is no longer capable of managing his or her own affairs, the power of attorney lapses⁷. The problem of a power of attorney ceasing on incapacity has been resolved in various

⁷ *Pheasant v Warne* 1922 AD 481; *Tucker's Fresh Meat Supply (Pty) Ltd v Echakowitz* 1957 (4) SA 354 (W) confirmed on appeal in 1958 (1) SA 505 (A).

jurisdictions elsewhere in the world by means of the introduction of the enduring power of attorney. In countries, such as the United Kingdom, Canada, the United States of America, New Zealand and Australia, it is possible for a person who is still mentally capable, to grant another person an enduring power of attorney, which will remain valid and effective should the person who granted the power lose his or her mental capacity at any stage after the power has been given. This means that decisions can continue to be made without major disruption or expense. Unfortunately the enduring power of attorney does not currently form part of the South African body of law despite the fact that the South African Law Commission recommended in 1988 that the enduring power of attorney should be introduced into our law.⁸ Frequently family and caregivers of mentally incapacitated persons are under the impression that the power of attorney signed by a person in their care will be effective until that person dies and they continue to act on behalf of such person, even after such person has become incapacitated.⁹ The risk of delictual liability in such a situation may arise and is often unknown to the agent acting in good faith.

- 1.9 When a person becomes incapable of managing his or her own affairs, especially the administration of his or her estate, it is imperative that someone be legally appointed to assist the person who has become incapable. In terms of our current legal system no person may manage the affairs of another person without the required authority to do so.
- 1.10 At present there are two legal procedures in terms of which someone can be appointed to administer the affairs of a person who is found to be incapable of managing his or her own affairs. These procedures are the common law procedure for the appointment of a curator that requires an application to the High Court,

⁸ Article by Carol Neumann in De Rebus, June 1998 Page 61, under the title “*A test of endurance*”. Also refer to the article by Bobby Bertrand in the De Rebus, 2011 (May) DR 38, under the title “*The need for enduring powers of attorney for older persons with impaired decision-making capacity*”.

⁹ Van Dokkum 1997 *Southern African Journal of Gerontology* 18 as referred to in SALRC Discussion Paper 105 *supra*, on 10, footnote 36.

and the procedure for the appointment of an administrator as set out in the Mental Health Care Act, 17 of 2002, which came into operation on 15 December 2004.

1.11 In terms of our common law the High Court may declare a person incapable of managing his or her own affairs, and may appoint a **curator** to the person and/or property of such person. The procedure for this application is set out in Rule 57 of the Rules of the High Court and includes an application to court in respect of the following persons:

- a) Mentally ill or mentally deficient persons;
- b) Persons, who owing to physical infirmity cannot manage their own affairs;¹⁰ and
- c) Persons declared prodigals.¹¹

1.12 The curator appointed to administer the **estate** of a person declared incapable of managing his or her own affairs is known as a *curator bonis*, while the curator appointed to take decisions as to the care, custody and welfare of the person, or to consent to medical treatment on behalf of such person is called a *curator personae*. As the appointment of a *curator personae* involves a serious curtailment of a person's rights and freedoms, the court will not lightly make such an appointment.¹²

1.13 It should be noted that acts that are considered to be too personal in nature cannot be performed by a *curator*. For example, a *curator* has no *locus standi* to institute an action for divorce on behalf of a person declared to be mentally ill.¹³ Nor can

¹⁰ *Boberg's Law of Persons and the Family* 132 – 133 and the cases cited there.

¹¹ *Delius v Delius* 1960 (1) SA 270 (N); Also refer to *Boberg's Law of Persons and the Family* 148 to 160 for a discussion on prodigality.

¹² *Martinson v Brown* 1961 (4) SA 109 (C); *Gray v Armstrong* 1961 (4) SA 107 (C); *Ex parte Powrie* 1963 (1) SA 299 (W); *Ex parte Hill* 1970 (3) SA 411 (C).

¹³ *Spangenberg and another c De Waal* 2008 (1) ALL SA 162 (T).

- a *curator* make a Will (Testament) or exercise parental authority on behalf of such person.¹⁴
- 1.14 In terms of the Mental Health Care Act the Master of the High Court may, on consideration and processing of the prescribed application, appoint an **administrator** to manage the property of a person who has been positively diagnosed as mentally ill or a person with severe or profound intellectual disability. The Act does not make provision for the appointment of someone to take decisions on behalf of the personal welfare of such person.
- 1.15 The Mental Health Care Act, 17 of 2002 came into operation on 15 December 2004 and repealed the whole of the Mental Health Act, 18 of 1973, with the exception of Chapter 8 which deals with Hospital Boards, and which has no bearing on the appointment of curators. Current estates which were administered under the Mental Health Act of 1973 will continue to be administered as if placed under administration in terms of the Mental Health Care Act, 2002.
- 1.16 In view of the fact that no High Court application is required for the appointment of an administrator, the procedure for the appointment of an administrator is far less costly than the common law appointment of a *curator bonis*. The applicant can lodge the application directly with the Master of the High Court in whose area of jurisdiction the person in respect of whom an administrator is to be appointed, resides. The applicant does not need to work through an attorney, although in practice applicants often call upon their attorneys for assistance with the lodging of the application with the Master. There are also no application fees charged by the Master in processing the application. However, if the value of the person's capital assets is above R200 000 and the income is above R24 000 per annum, or there are certain allegations in the application that require confirmation, or further information is required to support the application, the Master is obliged to cause

¹⁴ Cronjé & Heaton 113 and the cases cited there; *Boberg's Law of Persons and the Family* 116 to 118.

an investigation to be conducted before an administrator is appointed¹⁵ and the costs of the investigation will be borne by the estate of the person placed under administration.¹⁶ The Master may, however, appoint an interim administrator pending the outcome of the investigation.¹⁷

2. MENTAL ILLNESS AND INTELLECTUAL DISABILITY

2.1 Mental incapacity is primarily the result of either mental illness (which includes acquired organic brain syndromes such as dementia of which the most common form is Alzheimer's disease) or intellectual disability. Mental incapacity may however also be related to the process of ageing in general.¹⁸

2.2 "Mental illness" can take many forms but can be distinguished from "intellectual disability" in that the mental illness can usually be treated and a recovery may be possible, although not in all circumstances. In the case of Alzheimer's a single definitive cause is still unknown¹⁹ and there is no cure although certain drugs are modestly effective. Mental illness covers both neurosis (a functional derangement due to disorders of the nervous system, e.g. depression and obsessive behaviour), and psychosis (a severe mental derangement involving the whole personality e.g. schizophrenia and bipolar disorder [also known as manic depression]). According to medical criteria "mental illness" is an acquired condition.²⁰ This implies that mentally ill people previously acquired normal ability, and then subsequently lose it, either temporarily or permanently.

¹⁵ Section 60(5) of the *Mental Health Care Act, 17 of 2002*

¹⁶ Section 60(14) of the *Mental Health Care Act*.

¹⁷ Section 60(4)(a) of the *Mental Health Care Act*.

¹⁸ SALRC Discussion Paper 105 on *Assisted Decision-Making: Adults with Impaired Decision-Making Capacity* 7.

¹⁹ Internet article: "Alzheimer's Disease Fact Sheet: What Causes Alzheimer's" sourced from the internet on 26 February 2016 at <http://www.nia.nih.gov/alzheimers/publications/alzheimers-disease-fact-sheet>.

²⁰ SALRC Discussion Paper 105 on *Assisted Decision-Making: Adults with Impaired Decision-Making Capacity* 6, footnote 18.

- 2.3 The Mental Health Care Act defines “mental illness” in section 1 as “*a positive diagnosis of a mental health related illness in terms of accepted diagnostic criteria made by a mental health care practitioner authorised to make such diagnosis*”.
- 2.4 According to the World Health Organisation Report on Aging and Intellectual Disabilities²¹ “*intellectual disability may have a biological, genetic, or environmental basis and must be distinguished from mental illness. It is generally accepted that ‘intellectual disability’ encompasses any set of conditions resulting from genetic, neurological, nutritional, social, traumatic or other factors occurring prior to birth, at birth or during childhood up to the age of brain maturity (normally taken as 18 years), that effect intellectual development. These conditions result in a lifetime of lower than average overall capability for self-determination and general independent functioning and performance in vocational, social and personal functions. In some instances these conditions may occur in conjunction with physical, sensory or psychiatric impairments of varying degree. Such conditions have variable impact on the individual, from minimal to severe.*”
- 2.5 In terms of the Mental Health Care Act, “*severe or profound intellectual disability means a range of intellectual functioning extending from partial self-maintenance under close supervision, together with limited self-protection skills in a controlled environment through limited self care and requiring constant aid and supervision, to severely restricted sensory and motor functioning and requiring nursing care*”
- 2.6 To sum up the major difference between mental illness and intellectual disability it can be said that persons who are mentally ill, had previously attained full mental ability and then lost it due to some or other disorder of the nervous system or severe mental derangement involving the whole personality. Mental illness can

²¹ WHO Report on Ageing and Intellectual Disabilities 2000 as referred to in SALRC Discussion Paper 105 on 7, footnote 20.

usually be treated and a cure may be possible. On the other hand persons suffering from intellectual disability have never attained full mental ability due to a range of factors either prior to birth, at birth or during childhood up to the age of brain maturity, affecting intellectual development. There is generally no medical treatment for intellectual disability.

3. LEGAL STATUS OF A PERSON INCAPABLE OF MANAGING HIS OR HER OWN AFFAIRS

3.1 Common Law perspective

3.1.1 In terms of our Common Law the general principle is that if a person is not able to fully understand or interpret all the consequences of his actions due to a mental illness or intellectual disability, it is said that such person lacks capacity to perform a specific act and the act is consequently void. It makes no difference whether the person has not yet been declared mentally ill and a curator appointed to him or her, or that the other party to the transaction was unaware of the person's mental condition.²²

3.1.2 It is important to note that the mere fact that a person has been declared mentally ill and that a curator has been appointed to administer his or her estate does not mean that such person loses all capacity to act.²³ In *Pienaar v Pienaar's Curator*²⁴ Judge President De Villiers stated:

“The mere fact that such a person has been declared insane or incapable of managing his affairs, and that a curator is appointed to such person, does not deprive him of the right of administering his own property and entering into contracts and other legal dispositions to the extent of which he may de facto be capable, mentally and physically, of so doing. Such mental or physical capacity

²² Boberg's *Law of persons and the Family* 106; *Molyneux v Natal Land & Colonization Co Ltd* (1905) AC 555 (PC) at 561.

²³ Cronjé & Heaton, *The South African Law of Persons*, 113.

²⁴ 1930 OPD 171 at 174-175 1930.

may vary from day to day, but at all times it remains a question of fact. The object of appointing a curator is merely to assist the person in question in performing legal acts to the extent of which such assistance is from day to day, in varying degrees, necessary. Thus even a person who has been declared insane and to whose estate a curator has been appointed can dispose of his property and enter into contract whenever he is mentally capable of doing so.”

- 3.1.3 Accordingly, someone who has been placed under curatorship because of a mental illness and a subsequent inability to manage his or her own affairs, can enter into a valid legal transaction with its normal consequences if, at that particular moment, he or she was physically and mentally capable of doing so.²⁵ Thus, for example, it has been held that such person may make a Will,²⁶ enter into a contract,²⁷ and litigate.²⁸ However, the person who alleges that the person under curatorship had full capacity to enter into the legal transaction must prove that fact.
- 3.1.4 If it is found that the person lacked the capacity to understand the nature or consequences of the transaction when he or she entered into it, he or she is not bound by it²⁹ and it is void for want of capacity.
- 3.1.5 Taking into account what was said in *Pienaar v Pienaar’s Curator*³⁰ it is clear that the capacity of a person placed under curatorship as a result of a mental illness may differ from day to day but always remains a question of fact.³¹
- 3.1.6 Despite the principles laid down in the *Pienaar* decision persons who have been placed under common law curatorship or administration in terms of the Mental Health Care Act are often seen and treated as being totally incapable of making

²⁵ Cronjê & Heaton 125.

²⁶ *Spies v Smith* 1957 (1) SA 539 (A).

²⁷ *Ex parte De Bruin* 1946 OPD 110.

²⁸ *De Villiers v Espach* 1958 (3) SA 91 (T).

²⁹ *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* 1997 (4) SA 302 (SCA).

³⁰ 1930 OPD 171 174-175.

³¹ Cronjê & Heaton 125.

any decisions that affect the administration of their estate. The tendency among many modern day curators and administrators is to take all decisions on behalf of the person in respect of whose estate they have been appointed, and very often without consulting the person him- or herself before such decisions are made. Curators often lose sight of the fact that their function is merely to assist the person in question in performing legal acts to the extent in which such assistance is from time to time, and varying degrees, necessary.

- 3.1.7 Having briefly explained the common law legal position of persons who cannot manage their own affairs, it can be said that many people are unprepared to deal with the legal and financial consequences of a serious illness such as Alzheimer's disease. Legal and medical experts encourage people recently diagnosed with a serious illness – particularly one that is expected to cause declining mental and physical health – to examine and update their financial and health care arrangements as soon as possible. Basic legal and financial instruments, such as a will, a trust, and advance directives are available to ensure that the person's late-stage financial and health care decisions are carried out.³²

3.2 Convention on the Rights of Persons with Disabilities (CRPD)

- 3.2.1 The United Nations Convention on the Rights of Persons with disabilities (CRPD) is a groundbreaking treaty, which promotes and protects the rights and dignity of persons with disability. South Africa signed and ratified the CRPD in 2007, and is obligated under the convention to fulfill its commitments in terms of implementation and reporting.

- 3.2.2 The legal status of persons with disabilities is set out in Article 12 of the Convention and provides as follows:

³² Internet article: "*Legal and Financial Planning for People with Alzheimer's Disease Fact Sheet*" sourced from the internet on 26 February 2016 at <http://www.nia.nih.gov/alzheimers/publication/legal-and-financial-planning>.

“Article 12 – Equal recognition before the law

1. *State Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.*
2. *State Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.*
3. *State Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.*
4. *State Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the persons, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests.”*

3.2.3 According to an article on the implementation of the CRPD published on the internet by Ubuntu Centre South Africa, article 12 guarantees the right to enjoy legal capacity, including both the capacity to have rights and the capacity to act (to exercise rights and responsibilities and make decisions in everyday life).³³

3.2.4 Article 12(4) of the Convention referred to above requires governments to provide access to support in exercising legal capacity for those who may need it. Any measures of support must however be proportional and tailored to the person’s circumstances, apply for the shortest time possible, respect a person’s rights, will and preferences, and be free of conflict of interest and undue influence.

³³ Ubuntu Centre South Africa on the Convention of the rights of persons with disabilities, under the title “*Implementation manual for the United Nations Convention on the Rights of Persons with Disabilities*” (February 2008) p16 sourced on the internet at <http://ubuntucentre.wordpress.com/crpd>.

Governments must ensure that effective safeguards are put in place to prevent abuse.

3.2.5 In becoming a party to the CRPD South Africa accepted the obligations and responsibilities contained therein. In terms of its unreserved ratification of the CRPD, South Africa is bound by the Convention on the international plane and failure to observe the provisions of the Convention may result in South Africa incurring responsibility towards other signatory States. However, the CRPD only formally becomes part of South African law once it has been enacted into law, which, according to the writer's knowledge has not been done as yet. In the mean time, section 231 of our Constitution states "*that a treaty binds South Africa after approval by the National Assembly and the National Council of Provinces, unless it is self-executing, or of a technical, administrative or executive nature*" In addition, section 233 of the Constitution provides that every court, when interpreting legislation, "*must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.*" To this end, any law implemented in South Africa should be consistent with the human rights principles in the CRPD.³⁴ Thus, even if the CRPD is not directly incorporated into South African law, or while it has not yet been incorporated, its provisions will have to be taken into account in the sense that it will have interpretative value.

³⁴ South African Human Rights Commission's submission to the portfolio Committee and Select Committee on Women, Children and People with Disabilities on the Implementation of the Convention on the Rights of Persons with Disabilities (CRPD) dated 25 July 2012.

4. APPLICATION FOR APPOINTMENT OF A *CURATOR BONIS* IN TERMS OF THE COMMON LAW

4.1 In terms of our common law the High Court may appoint a *curator bonis* to administer the property of a person who has been declared incapable of managing his or her own affairs, and to supplement such person's lack of capacity to act.³⁵

4.2 In view of the fact that the appointment of a *curator bonis* involves a High Court application, this procedure is relatively expensive, with the average costs ranging between R40 000 and R60 000. These costs are usually borne by the estate of the person in respect of whom the *curator bonis* is appointed.

4.3 The procedure to apply to court is set out in **Rule 57 of the Rules of the High Court**. It can be summarised as follows:

4.3.1 The application is brought to court by way of notice of motion. The application to court must contain:

- a) Full particulars of the *locus standi* of the applicant;
- b) Jurisdiction of the court;
- c) The patient's age and sex, full particulars of his/her means, and information as to his/her general state of physical health;
- d) The relationship between the "patient" and the applicant, and the duration and intimacy of their association (if any);

³⁵ Note that mental illness is not the only reason for placing a person under curatorship. A curator may also be appointed to attend to the affairs of any person incapacitated from doing so him- or herself by reason of a physical handicap, serious illness, old age, etc. Refer to *Boberg's Law of Persons and the Family* 131 to 135.

- e) The facts and circumstances relied on to show that the patient is of unsound mind and incapable of managing his/her affairs; and
 - f) The name, occupation and address of the respective persons suggested for appointment by the court as *curator ad litem*, and subsequently as curator of the patient's person or property, and a statement that these persons have been approached and have indicated that, if appointed, they would be able and willing to act in these respective capacities.
- 4.3.2 Two (2) recent medical reports by medical doctors, one of whom shall (where practicable) be a psychiatrist, must be attached to the application.
- 4.3.3 The court will then appoint an official *curator ad litem*, (who is usually an advocate of that court) to investigate the matter fully and to report to the court and the Master [Rule 57(4) & (5)].
- 4.3.4 The Master also compiles a report after he/she has received the report of the *curator ad litem*, making recommendations to the court regarding the merits of the application, the suitability of the nominated curator, his powers and security [Rule 57(7)].
- 4.3.5 Upon consideration of the application, the reports by the *curator ad litem* and the Master, and any such further information as the court may have taken into account, the court may issue such order as it deems necessary [Rule 57(10)].
- 4.3.6 When the High Court appoints a curator to administer the estate of a person declared incapable of managing his or her own affairs, such person may not act on that appointment until he or she is formally authorized by the Master of the High Court to do so.

4.3.7 Section 71 of the Administration of Estates Act 66 of 1965 provides that no person who has been nominated, appointed or assumed as curator may take care of or administer any property belonging to the person in respect of whom he has so been appointed unless he is authorised to do so under letters of curatorship. In *Bouwer NO v Saambou Bank Bpk*³⁶ it was held that any act performed by a nominated or appointed curator, before he is authorized to act by the Master in terms of Section 71, is null and void.

5. **APPOINTMENT OF A *CURATOR PERSONAE* IN TERMS OF THE COMMON LAW**

5.1 Although a person may be declared mentally ill or incapable of managing his or her own affairs in terms of the common law, or found to be mentally ill or a person with severe or profound intellectual disability in terms of the Mental Health Care Act, 17 of 2002, such person does not lose the right to make his or her own decisions regarding **his or her person**.

5.2 If however, there are sound reasons to believe that the mentally ill person or person declared incapable of managing his or her own affairs is incapable of making decisions as to his or her care, custody and personal welfare, the court may appoint a *curator personae* in respect of that person. Such appointment may be either generally or for a specified purpose.³⁷ Only the court may appoint a *curator personae* to the person of someone.

5.3 The appointment of a *curator personae* over the person of someone places a serious restriction on such person's legal capacity and therefore such appointments are only considered by the court in exceptional circumstances.³⁸

³⁶ 1993 (4) SA 492 (T).

³⁷ *Boberg's Law of Persons and the Family* supra 116 and cases cited there.

³⁸ *Martinson v Brown* 1961 (4) SA 109 (C) and *Ex parte Hill* 1970 (3) 411 (C).

- 5.4 The application to court is made by way of notice of motion and is usually made simultaneously with the application for the appointment of a curator over the property of a mentally ill person. The procedure that is followed is basically the same as that for an application for the appointment of a *curator bonis*.
- 5.5 If the court declares someone unfit to manage his own person and appoints a *curator personae* to such person the Master must issue the necessary letters of appointment, authorizing such *curator personae* to act.³⁹

6. APPOINTMENT OF AN ADMINISTRATOR IN TERMS OF THE MENTAL HEALTH CARE ACT, 17 OF 2002

- 6.1 The Mental Health Care Act came into operation on 15 December 2004 and has repealed the provisions of the Mental Health Act, relating to the appointment of a curator. Instead of the appointment of a curator, the new act provides for the appointment of an **administrator** to care for and administer the property of a person who is mentally ill or a person with severe or profound intellectual disability.
- 6.2 In terms of the Mental Health Care Act it is the Master of the High Court who has the authority to appoint an Administrator. The High Court may only make recommendations to the Master in this regard.
- 6.3 An administrator may only be appointed to administer the property of a mentally ill person or person with severe or profound intellectual disability. Because a positive diagnosis of mental illness or severe or profound intellectual disability is a prerequisite for the appointment of an administrator in terms of the Mental Health Care Act, persons who are incapacitated from managing their own affairs by reason of physical handicap, serious illness, old age (without any form of

³⁹ Section 72 (1)(d) of the *Administration of Estates Act*, 66 of 1965.

dementia such as Alzheimer's), etc. are excluded from the provisions of the Act, unless they also suffer from a mental health related illness or disability.

6.4 Whether or not a person suffers from a mental illness or a severe or profound intellectual disability is a medical question that will have to be confirmed by medical certificates or reports by a mental health care practitioner authorised to make such diagnosis. A “**mental health care practitioner**” is defined in the act to mean ‘*a psychiatrist or registered medical practitioner or a nurse, occupational therapist, psychologist or social worker who has been trained to provide prescribed mental health care, treatment and rehabilitation services.*’

6.5 The application procedure for the appointment of an administrator in terms of the *Mental Health Care Act* is set out in section 60 of the Act and provides as follows:

(1) *“any person over the age of 18 may apply to a Master of a High Court for the appointment of an administrator for a mentally ill person or person with severe or profound intellectual disability.*

(2) *The application must be made in writing, under oath or solemn affirmation and must-*

(a) *set out the relationship of the applicant to that person and-*

(i) *if the applicant is not a spouse or next of kin of that person, the reason why the spouse or next of kin did not make the application; and*

(ii) *if they are not available to make the application, what steps were taken to establish their whereabouts before making the application;*

- (b) *include all available mental health related medical certificates or reports relevant to the mental health status of that person and to his or her incapability to manage his or her property;*
 - (c) *set out the grounds on which the applicant believes that such person is incapable of managing his or her property;*
 - (d) *state that, within seven days immediately before submitting the application, the applicant had seen that person;*
 - (e) *state the particulars of that person and his or her estimated property value and annual income; and*
 - (f) *give the particulars and contact details of persons who may provide further information relating to the mental status of that person.*
- (3) *The applicant must attach proof that a copy of the application has been submitted to the mentally ill person”.*

6.5 Refer to annexure “A” for the application form provided in the Regulations to the Act and adapted by the Office of the Master of the High Court, to comply with the Master’s requirements.

6.6 The application must be submitted to the Master of the High Court in whose area of jurisdiction the mentally ill person, or person who suffers from a severe or profound intellectual disability, resides. A list of Masters’ Offices nationally and their particular contact details is attached at the end of this document.

- 6.7 Two aspects with regard to the application to the Master for the appointment of an administrator require further explanation, namely the medical evidence required to substantiate the fact that the person is mentally ill or suffers from a severe or profound intellectual disability, and secondly the requirement of proof that a copy of the application has been submitted to the mentally ill person.
- 6.8 Concerning the medical evidence (certificates and reports) which is to be submitted with the application to the Master, it is important to note that such evidence must clearly indicate or confirm that the person's inability to manage his or her own affairs is as a result of a mental illness or a severe or profound intellectual disability, as required by the *Mental Health Care Act*.
- 6.9 The appointment of an administrator to the affairs of another person is an infringement of that person's fundamental right to manage his or her own affairs independently, and consequently the *Mental Health Care Act* provides that a copy of the application must be given to the alleged mentally ill person. The Act further directs that proof that this requirement has been complied with must be submitted to the Master with the application. The reason for this requirement is to prevent malicious applications where the person in respect of whom the application is being made has no knowledge of the application and can therefore not protect his or her rights, if needs be. The Master will normally accept the following proof:
- Registered mail posting slip, where a copy of the application was posted to the person in respect of whom application is being made for the appointment of an administrator.
 - Signed acknowledgement by the alleged mentally ill person where the application has been hand delivered. Where the person is incapable of signing an acknowledgement of receipt, an affidavit by a responsible person who witnessed the delivery of the copy of the application to such alleged mentally ill person should suffice.

- Proper return of service by the sheriff or an official of the South African Police Services.

- 6.10 If the Master is satisfied that the person is mentally ill or a person with severe or profound intellectual disability and the capital value of such person's assets is below R200 000 or income is below R24 000 per annum, the Master may appoint an administrator without any further investigation.
- 6.11 If the value of the person's capital assets is above R200 000 and the income is above R24 000 per annum, or there are certain allegations in the application that require confirmation or further information is required to support the application, the Master must appoint an interim administrator and must cause an investigation to be conducted before an administrator is appointed.
- 6.12 It is important to note that the Master's jurisdiction is **not limited** to those instances where a person's assets are below R200 000 or income is below R24 000 per annum. It is merely the procedure to be followed by the Master which differs when the threshold of the assets and income is higher than the stated amounts.
- 6.13 It should also be noted that, because no High Court application is required for the appointment of an administrator, the procedure for the appointment of an administrator is far less costly than the common law appointment of a *curator bonis*. The applicant can lodge the application directly with the Master of the High Court in whose area of jurisdiction the person in respect of whom an administrator is to be appointed, resides. The applicant does not need to work through an attorney, although in practice applicants often call upon their attorneys for assistance with the lodging of the application with the Master. There are also no application fees charged by the Master in processing the application. However, should it be necessary for the Master to cause an investigation to be

lodged as set out in paragraph 6.7 above, the costs of the investigation will be borne by the estate of the person placed under administration.

7. FUNCTIONS AND RESPONSIBILITIES OF CURATORS BONI AND ADMINISTRATORS.

7.1 A *curator bonis* appointment in terms of a court order must administer the estate of the person in respect of whom he or she is appointed in accordance with the powers and functions granted by the court.

7.2 In terms of section 63(3) of the *Mental Health Care Act*, 17 of 2002, the powers of an administrator are to take care of and administer the property of the person for whom he or she is appointed and to carry on any business or undertaking of that person, subject to any other law (if applicable).

7.3 A *curator bonis* or administrator may be called upon by the High Court or the Master to furnish security for the proper administration of the estate for which he or she has been appointed.⁴⁰ In such instances the curator or administrator is required to lodge a bond of security by an approved financial institution for the full value of the property which he or she is required to administer, with the Master of the High Court, before letters of authority are issued to the said curator or administrator.

7.4 The general responsibilities of a *curator bonis* or administrator can be summarized as follows:

- A *curator bonis* or administrator must always act in the best interest of the person for whom he or she has been appointed and with the highest degree of integrity.⁴¹

⁴⁰ s77 of the *Administration of Estates Act*, 66 of 1965 and s63 of the *Mental Health Care Act*, 17 of 2002.

⁴¹ *Ex parte Du Toit; In re Curatorship Estate Schwab* 1968 (1) SA 33 (T).

- A *curator bonis* or administrator must act in consultation with the person for whom he or she has been appointed, where reasonably possible.⁴²
- Assistance provided by a *curator* or administrator must be proportionate to the mental health status of the person concerned, and must be the least intrusive.⁴³
- The person, human dignity, privacy and autonomy of the person for whom the *curator bonis* or administrator has been appointed must be respected.⁴⁴
- The *curator bonis* or administrator must keep detailed records of his or her administration of the estate and must lodge administration accounts, together with proper vouchers and receipts for all entries in the account, with the Master of the High Court, annually.⁴⁵
- A *curator bonis* or administrator must invest the property of the person whose estate they are authorized to administer with safety and security and must not make uncertain or risky investments.⁴⁶

7.5 Both a *curator bonis* and the administrator carry out their duties under the supervision of the Master of the High Court and must comply with all relevant provisions of any court order and the *Administration of Estates Act*, 66 of 1965, which are applicable to curators and administrators.

⁴² *Pienaar v Pienaar's Curator* 1930 OPD 171 at 174-175 1930 and also s8(1) of the *Mental Health Care Act*, 17 of 2002 (by implication).

⁴³ s8(3) of the *Mental Health Care Act*, 17 of 2002.

⁴⁴ S8(1) of the *Mental Health Care Act*, 17 of 2002.

⁴⁵ S83 of the *Administration of Estates Act*, 66 of 1965, read with s65 of the *Mental Health Care Act*, 17 of 2002.

⁴⁶ *Ex parte Wagner NO: In re De Bie* 1988 (1) SA 790.

8. THE NEED FOR LAW REFORM

- 8.1 Both the procedures discussed above, namely the common law application to court for the appointment of a *curator bonis* or *curator personae*, and the application to the Master for the appointment of an administrator in terms of the Mental Health Care Act, 17 of 2002 are “all-or-nothing” procedures. This means that the person in respect of whom the application is lodged is either fully capable of managing his or her own affairs or is incapable of doing so. Neither procedure makes provision for fluctuating and temporary incapacity. Both the procedures are also generally seen as being paternalistic in nature and are strongly criticized by many disability activists.
- 8.2 The South African Law Reform Commission has been involved in an investigation into assisted decision-making for adults with impaired decision-making capacity since the end of 2001. The investigation was undertaken as a result of attention being drawn to the declining decision-making ability of persons with Alzheimer’s illness, in particular, and the outdated and inappropriate ways in which our law currently deals with this situation. The Commission published its initial findings in Discussion Paper 105 on *Assisted Decision-Making: Adults with Impaired Decision-Making Capacity* in January 2004.
- 8.3 The investigation and consultation process has been completed and the advisory committee assisting the Commission with the project is busy with its report and recommendations to the Commission.

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March 2016

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13. *Mental Health Care Act*, 17 of 2002.
14. *Administration of Estates Act*, 66 of 1965.



DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT
REPUBLIC OF SOUTH AFRICA

Master's ref: _____

DEPARTMENT OF HEALTH

MHCA 39

APPLICATION TO MASTER OF A HIGH COURT TO APPOINT ADMINISTRATOR
[Section 60(1) and (2) of the Mental Health Care Act 2002 (Act no. 17 of 2002)]

1. Surname of user in respect of whom application is made: _____
2. First name(s) of user: _____
3. Date of birth: _____ or estimated age _____
4. Gender: Male Female
5. Address of user: _____
6. Occupation: _____
7. Marital status: S M D W
8. If married, specify whether in or out of community of property: In Out
9. Name of applicant: _____
(Print initials and surname)
10. The above user has been admitted at: _____
(Name of health establishment)
11. Relationship of applicant to the user: _____
12. **If the applicant is not the spouse or next of kin:**
Give reasons why the spouse or next of kin are not making the application:

13. **If the spouse or next of kin are not available:**
What steps have been made to trace the whereabouts of the spouse or next of kin?

14. All medical certificates or relevant reports related to the mental health status and the ability of the user to manage his / her own property (enclose and list). **The medical certificates must clearly indicate that the person concerned suffers from a mental illness or severe or profound intellectual disability as defined in the Act.**

15. On what grounds do you believe that the user is incapable of managing his / her property?

16. Have you seen the user within seven days of this application: Yes No
Give details:

17. Give the particulars and estimated value of the property of the user:

18. What is the annual income of the user?

19. Who, in your opinion, would be most suited to be an administrator for the property of the user?

20. Provide further particulars of the person (e.g. relationship to user, occupation):

21. Give the name(s) and contact details of people who may be able to provide further information relating to the mental health status of the user:

22. Attach proof that a copy of this application has been given to or served on the person in respect of whom this application is made:

23. Name and surname of applicant: _____

Signature: _____
(Applicant)

Date: _____

Place: _____

24. Postal address of applicant: _____

25. *Domicilium citandi et executandi* address of applicant: _____

26. **Affidavit to be signed by a Justice of the Peace / Commissioner of Oaths**

26.1. I, the undersigned and applicant, hereby affirm that:

26.2. I am 18 years of age or older: _____

26.3. *I am a relative, being _____

26.4. *I am not a relative, being _____

Signature: _____

The above statements was solemnly declared or sworn before me at: _____

The respondent has acknowledged that he / she knows and understands the content of the affidavit which was sworn to / affirmed before me.

Print initials and surname: _____

Signature: _____
Justice of the Peace / Commissioner of Oaths

Date: _____

Place: _____

* *Delete whichever is not applicable.*

Address list of all Masters' Offices.

<p>Master of the Eastern Cape High Court, Bhisho Private Bag X 0002 BHISHO 5605 Tel: 040 639-2087 Fax: 040 639-2079</p>	<p>Master of the Free State High Court, Bloemfontein Private Bag X20584 BLOEMFONTEIN 9300 Tel: 051 411-5500 Fax: 051 447-6575</p>
<p>Master of the Western Cape High Court, Cape Town Private Bag X9018 CAPE TOWN 8000 Tel: 021 832 3000 Fax: 021 832 3332</p>	<p>Master of the KwaZulu-Natal High Court, Durban Private Bag X54325 DURBAN 4000 Tel: 031 306-0175 Fax: 031 306-0126/0176</p>
<p>Master of the Eastern Cape High Court, Grahamstown Private Bag X 1010 GRAHAMSTOWN 6140 Tel: 046 603-4000 Fax: 046 622-9990</p>	<p>Master of the South Gauteng High Court, Johannesburg Private Bag X5 MARSHALLTOWN 2107 Tel: 011 429-8000 to 8003 Fax: 011 429 3531/8035</p>
<p>Master of the Northern Cape High Court, Kimberley Private Bag X5015 KIMBERLEY 8300 Tel: 053 831-1942 Fax: 053 833-1586</p>	<p>Master of the North West High Court, Mahikeng Private Bag X42 MMABATHO 2735 Tel: 018 381-8585 / 4122 / 0005 Fax: 018 381-3617</p>
<p>Master of the Eastern Cape High Court, Mthatha Private Bag X6059 MTHATHA 5099 Tel: 047 531 2361 / 532 3201 / 531 2120 Fax: 047 532-2040 / 431 0980</p>	<p>Master of the High Court, Nelspruit Private Bag X11260 NELSPRUIT 1200 Tel: 013 752 2755 Fax: 086 507 1716 /086 515 1279</p>

<p>Master of the KwaZulu-Natal High Court, Pietermaritzburg Private Bag X9010 PIETERMARITZBURG 3200 Tel: 033 264-7000 Fax: 033 264 7106</p>	<p>Master of the North Gauteng High Court, Polokwane Private Bag X 9670 POLOKWANE 0700 Tel: 015 291 4300 Fax: 015 291 4320</p>
<p>Master of the Eastern Cape High Court, Port Elizabeth Private Bag X2 CENTRAHIL 6006 Tel: 041 403 5100 Fax: 041 403 5117</p>	<p>Master of the North Gauteng High Court, Pretoria Private Bag X60 PRETORIA 0001 Tel: 012 339-7700 / 7807/ 7999 Fax: 012 326-1977</p>
<p>Master of the North Gauteng High Court, Thohoyandou Private Bag X5015 THOHOYANDOU 0950 Tel: 015 962-1032 Fax: 015 962-1033</p>	

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