IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/ NO
(3) REVISED.
_____ _____/_____/_____ SIGNATURE DATE

CASE NO: 35182/2016

In the matter between:

MASTER OF THE HIGH COURT	APPLICANT
and	
THE PRETORIA SOCIETY OF ADVOCATES	FIRST *AMICUS CURIAE*
UBERRIMA PHOENIX (PTY) LTD	SECOND *AMICUS CURIAE*
W F BOUWER	THIRD *AMICUS CURIAE*
THE SOUTH AFRICAN MEDICAL MALPRACTICE LAWYERS' ASSOCIATION (SAAMLA)	FOURTH *AMICUS CURIAE*
FIDUCIARY INSTITUTE OF SOUTHERN AFRICA (FISA)	FIFTH *AMICUS CURIAE*

PRETORIA ATTORNEY'S ASSOCIATION SIXTH *AMICUS CURIAE*

ABSA TRUST LIMITED SEVENTH *AMICUS CURIAE*

In re: Matters involving a report and addendum of the Master of the High Court in terms of section 96(2) of the Administration of Estates Act 66 of 1965

In re:

CASE NO: 28304/2014

ADV M VAN ROOYEN N.O OBO N NTZOKHE APPLICANT

v

ROAD ACCIDENT FUND RESPONDENT

and

CASE NO: 44200/2018

ADV LANGUAGE N.O RAPHULU APPLICANT

v

ROAD ACCIDENT FUND RESPONDENT

and

CASE NO: 17258/2015

ADV N RAUBENHEIMER N.O OBO JH BRIAN APPLICANT

v

ROAD ACCIDENT FUND RESPONDENT

and

CASE NO: 40258/2021

SA SEGOBA OBO NJ SEKWANE AND L SEKWNE APPLICANT

v

ROAD ACCIDENT FUND RESPONDENT

and

CASE NO: 35182/2016

WENTZEL, MC APPLICANT

v

ROAD ACCIDENT FUND RESPONDENT

JUDGMENT

The Court (KEIGHTLEY & MILLAR JJ and VALLARO AJ):

Introduction

1. A well-established feature of the civil trial roll in this Division is the high number of personal injury claims for damages arising out of motor vehicle accidents, or 'RAF' claims, and, albeit a smaller number, arising from medical negligence. The damages awarded in these matters can be substantial, often exceeding R1 million or R2 million Rand in RAF cases. The quantum for loss of future earnings is frequently what drives up a typical personal injury damages award, particularly in RAF matters. These damages are awarded on the basis that the amount will compensate the plaintiff for the salary she would have earned but for their injury in an accident. In principle, therefore, the damages award should be available as an ongoing source of financial support for the remainder of the plaintiff's lifetime. In medical negligence matters, in addition to damages based on loss of future

earnings, the care costs associated with incapacitated victims increases the overall award exponentially.

2. In most cases, once a lump-sum award has been made, a court has no further legal interest in the matter. It is open to a plaintiff to spend the entire capital amount awarded as she sees fit. The fact that it is public money that might not be used for its intended purpose may be irksome, but neither the court nor the RAF has any legal basis on which to interfere: a plaintiff is entitled to use her money for whatever purpose she wishes.

3. However, there are certain categories of cases in which the court retains a legal oversight role in ensuring that damages awards are protected. These are cases in which minors are recipients of damages awards, or where an adult plaintiff suffers some incapacity which inhibits her ability properly to manage the financial sum awarded. Many of the latter cases occur where the accident or other act of negligence caused a traumatic brain injury (TBI) to the plaintiff. TBI's vary in degree and in their neurocognitive effect. Not everyone who has suffered a TBI will require the protection of her damages post-award. One of the functions of the court is to make a determination as to whether such protection is necessary, and if so, what form of protection would be appropriate.

4. It is against this background that the present application arises. In this Division, two legal mechanisms are generally employed to protect funds awarded as damages in cases where the plaintiff has suffered a form of cognitive incapacity as a consequence of the accident or other negligent act. The first is the appointment of a curator *bonis* following the procedures outlined in rule 57 of the Uniform Rules of Court. The second is the creation of a trust into which the damages award is paid. The formation of the trust is directed in terms of an order of court.

5. Typically, both mechanisms are designed to ensure that the protected funds are used for the benefit of the plaintiff's maintenance, care and other needs. In both instances, the curator *bonis* or trustee have fiduciary duties, and they are subject to supervision by the Master of the High Court, and the court itself. The position of

curators *bonis* is governed by the Administration of Estates Act, 66 of 1965 (the Estates Act), and that of trusts and trustees is governed by the Trust Property Control Act, 57 of 1988 (the Trust Act) and the common law.[1] Significantly, for purposes of the present application, the scope of the supervisory powers of the Master under the Estates Act differs from that under the Trust Act.

6. It is this latter legislative feature that sparked the Master's decision to approach the court under section 96(2) of the Estates Act. That section provides:

> 'Whenever in the course of his duties the Master finds it necessary to lay any facts before the Court otherwise than upon formal application or motion, he may do so by a report in writing. Provided that the Court may refer any such report back to the Master and direct him to proceed by way of formal application or motion.'

7. Under the hand of the Deputy Master of the High Court, Ms Moshidi, the Master submitted a report to the Judge President of this Division (the Report) seeking guidance on certain identified issues involving the Master's supervisory powers over trustees and curators *bonis* in matters where damages have been awarded by courts. The Master also identified five cases where specific guidance was sought. In view of this, the interests of the parties involved in these five matters were necessarily implicated. They are cited as parties in this application and actively participated in the proceedings.

8. The Judge President issued a directive on 31 August 2021 (the Directive) under s 14(1)(a) of the Superior Courts Act, 10 of 2013 referring the five matters identified in the Report, and the issues raised in the Report to a Full Court for consideration. In addition to the Master and the parties in the identified matters, seven individuals or associations sought admission as *amici curiae*, which admission was granted. These are the Pretoria Society of Advocates (PSA); Uberrima Phoenix (Pty) Ltd (Uberrima); W F Bouwer (Mr. Bouwer); the South African Medical Malpractice Lawyers' Association (SAMMLA); the Fiduciary Institute of South Africa (FISA); the Pretoria Attorneys Association (PAA); and Absa Trust Limited (ATL).

9. The Directive requires us to consider and determine certain questions arising from the general issues raised by the Master in the Report. In addition, it requires us to grant appropriate orders in the five identified cases referred, viz. Wentzel v RAF

[1] *Wilkinson v Crawford & Others* 2021 (4) SA 323 (CC) at para 72

(Case number: 35182/2016); Van Rooyen N.O. on behalf of Nomvuyiso Ntozakhe v RAF (Case number:28304/2016); Segoba on behalf of Minors v RAF (Case number: 40258/2021); Language N.O. (as Curator ad Litem) Raphulu v RAF (Case number 44200/2018); Raubenheimer N.O. (as Curator ad Litem) James v RAF (Case number 17258/2015).

10. We deal first with the general issues raised by the Master, whereafter, and in light of the findings we make in their regard, we deal with the above identified cases.

11. Before doing so, we note that the Directive was also served on a number of other public bodies, including the Road Accident Fund, the State Attorney, the South African Law Reform Commission, the Legal Practice Council, Gauteng and Legal Aid South Africa. None of these bodies participated in the hearing. No criticism can be levelled at them for so electing, save for the RAF. As the entity entrusted with discharging the legal liability for paying many of the damages awards that are the subject matter of the Master's concerns, we hoped that they would have appreciated that they had a responsibility to assist the court by making submissions on the issues raised. Some parties made factual averments relating to the s 17(4) undertakings provided by the RAF and the difficulties trustees have had in recovering their administration costs under these provisions. These were issues in respect of which the RAF could and should have provided crucial input. It is concerning indeed that it saw fit to remain disengaged from the proceedings.

Issues raised

12. In her report and in her submissions to the court the Master raised two broad areas of concern. The first pertained to what she described as practical difficulties the Master experiences in implementing court orders that are ambiguous in that, while they are aimed at establishing trusts in personal injury matters, they appear to confuse the powers extended to the Master under the Estates Act and those under the Trust Act. It was in respect of this first area of concern that the Master referred the five identified cases to the Court as what she described as test cases which demonstrated the ambiguity in court orders that are sought or have been granted.

13. The second was an overarching concern that the Master expressed as being a developing practice among legal professionals to circumvent, indeed, to evade, the checks and balances afforded the Master under the Estates Act by establishing

trusts for the protection of damages awarded to vulnerable plaintiffs rather than proceeding via the curator *bonis* route.

14. The Master expressed the view that it was the function of her office to protect the interests of minors and others who may be incapable of managing their affairs. In her opinion, this is best done through the appointment of a curator *bonis*, over whom the Master has more extensive supervisory powers, rather than through the establishment of a trust, in respect of which the Master has less extensive supervisory control. According to her, to continue to permit the untrammeled use of the vehicle of trusts to protect damages awards would have the detrimental effect of diminishing the effective protection of vulnerable victims.

15. In light of the concerns expressed in the report, the Directive identified a list of questions to be determined by this Court. They are the following:

> '(a) Appointment of Trustees and Curators Bonis in RAF/Medical Negligence Matters
>
> (i) Does the Administration of Estates Act sanction the creation of a trust and the appointment of a trustee(s) in terms of the Trust Property Control Act for the purpose of administrating funds awarded to minors and persons under curatorship who have been incapacitated as a result of road accidents and/or incapacitated due to medical negligence and if so under what specific instances;
>
> (ii) Alternatively, is it legally permissible that a trust be created, and a trustee(s) be appointed in relation to funds awarded to minors and persons who have been incapacitated due to road accidents, medical negligence and other related matters instead of appointing a Curator Bonis in such circumstances?
>
> (iii) What is the legal authority, if any, of subjecting trustees appointed in terms of the Trust Property Control Act to the authority of the Master in terms of the Administration of Estates Act, in relation to minors and persons incapacitated due to road accidents, medical negligence and other related matters?
>
> (iv) Is the Master competent to appoint a trustee(s) in terms of section 7 of the Trust Property Control Act, in relation to minors and to persons

incapacitated as a result of road accidents, medical negligence and other related matters?

(v) If so, is the Master authorised to insist that trustees appointed in terms of the Trust Property Control Act, should comply with the provisions of the Administration of Estates Act and if so which provisions?

(vi) Would a Court Order to this effect alone be sufficient authority to empower the Master to insist on such compliance?

(vii) In the event of a trust being created and trustee(s) appointed, in relation to funds awarded to minors and persons incapacitated through road accidents, medical negligence and other related matters should the drafters of the trust instrument include either express or implied provisions for a trustee's remuneration?

(viii) Should the fees and administration costs of a trust be determined on the basis of the directives pertaining to curator's or trustee's remuneration and the furnishing of security in accordance with the provisions of the Administration of Estates Act, as amended from time to time and include but not be limited to disbursements incurred and collection commission calculated at a percentage on the amounts recovered from the Defendant in respect of the section 17(4)(a) undertaking?

(ix) Can the monthly premium that is payable in respect of the insurance cover, which is to be taken out by a trustee, serve as security in terms of the trust instrument?

(x) Should the Defendant be liable for costs associated with the yearly audit of the trust by a chartered accountant as determined in the trust instrument?

(xi) Should the Defendant effectively be liable for all costs pertaining to the administration of the trust?

(b) <u>The Guardian's Fund and RAF Matters</u>

(i) Should the Guardian's Fund be utilised to administer RAF awards of R500 000 and less in respect of a minor or person incapable of managing his/her own affairs or should such RAF awards be

administered through the appointment of a Curator Bonis, tutor, or a trustee?

(c) Declarations of Partial Incapability

(i) Should a Curator *Bonis* be appointed in matters where a recommendation is made by a Curator ad litem or medical expert for a person to be declared partially incapable of managing his/her affairs and for the protection of funds awarded by the Court?'

16. Broadly speaking, the questions identified under paragraphs (a)(i) and (ii) of the Directive fall within the overarching concern of the Master that the establishment of trusts to protect damages awards does not serve the interests of vulnerable plaintiffs. Those identified under paragraphs (a)(iii) to (xi) relate to the Master's concern regarding ambiguities common in court orders establishing trusts for the protection of damages awards and the practical impediments the Master faces in implementing such orders. The question under paragraph (b)(i) relates to minors specifically. That under paragraph (c)(i), while purporting to deal with 'partial incapacity', is linked to both the overarching issue of trust versus curator *bonis*, as well as to the Master's practical concerns.

17. We received helpful written and oral submissions from all the parties and the *amici curiae*. From these it became apparent to us that a rigid determination on each of the questions posed in the Directive would not serve a useful purpose. It was also apparent that all of the parties, and indeed the court, share a common interest in a clear statement of the principles underpinning the legal mechanisms established to protect damages awarded in RAF and medical negligence cases to vulnerable persons, and the procedure in terms of which a court sanctions the use of one or the other of these mechanisms. This judgment is aimed at achieving this objective. To this end, we deal thematically with the issues that became clear during the submissions we heard, rather than dealing with the issues identified in the Directive question by question. We do not ignore the questions raised and will deal with them where appropriate. We also provide guidelines for the adoption of a Consolidated Practice Directive to regulate the procedure legal practitioners should follow in cases in which the court is requested to grant an order establishing a trust to protect damages awards is sought.

Structure of the judgment

18. Our judgment is structured as follows:

(a) The legal position in respect of curators *bonis* and trusts under the Estates Act and the Trust Act respectively. (Paragraphs 18 – 30)

(b) Can the interests of vulnerable plaintiffs be properly protected via the mechanism of a trust, or is the appointment of a curator *bonis* necessary? (Paragraphs 31 – 59)

(c) Remuneration of trustees and curators and eradicating ambiguities in court orders. (Paragraphs 60 - 89)

(d) The powers of the Master in terms of the Administration of Estates Act and the Trust Property Control Act and precedents of prior consent and approval of the Master. (Paragraphs 90 -125)

(e) The function of the Guardian's Fund. (Paragraphs 126 - 133)

(f) Summary of Findings on the Judge President's Directive (Paragraphs 134 – 151)

(g) Guidelines for a consolidated Practice Directive. (Paragraphs 152 - 161)

(h) The appropriate order in each of the test cases. (Paragraphs 162 – 171)

Legal framework

Curators *bonis*

19. The procedure for the appointment of a curator *bonis* is outlined in Uniform Rule 57. A curator *bonis* may be appointed either on a declaration by the court that a person is of unsound mind and thus incapable of managing her affairs,[2] or on a declaration that she is by reason of some disability, mental or physical, incapable of managing her affairs.[3] In either case, the process requires, as a first step, an application to court for the appointment of a curator *ad litem*. The procedural requirements of such an application are quite stringent. For example, they include the requirement that

[2] Rule 57(1)
[3] Rule 57(13)

the application be supported by at least two medical practitioners attesting to the patient's disorder or disability and that she is incapable of managing her affairs.[4]

20. The curator *ad litem* interviews the patient and makes whatever other inquiries she deems necessary and reports to court on the patient's mental condition, means and circumstances and other relevant considerations.[5] The duty of the curator *ad litem* is to make these inquires with a view to ensuring that the proprietary and other interests of the patient are adequately protected by the terms of the court order that is sought.[6] The curator *ad litem* may, for example, recommend the appointment of a curator *ad personam* to the patient's person, or a curator *bonis* in respect of her property. The Master must be served with a copy of the report and other documents[7] and is required to report to the court on the patient's means and general circumstances and the suitability or otherwise of appointing a curator to the patient's person or property. The Master also reports on the suitability of the person identified as a potential curator, and on may make recommendations on, among other things, the powers to be conferred on him or her.[8]

21. After her appointment, a curator *bonis* is subject to the supervision of the Master under the Estates Act. Section 71(1) provides that a person appointed as curator *bonis* by a court may not take care of or administer property without letters of *curator*ship granted by the Master. The statutory powers of a curator *bonis* are broadly stated to be the power to perform any particular act as regards the property in question; the power to take care of the property; the power to administer the property, and the power to carry on business associated with the property.[9]

22. However, a curator *bonis* may not alienate or mortgage immovable property without authorisation from the court or the Master.[10] In addition, any purchase of property shall be void unless it has been consented to or confirmed by the court or the Master.[11]

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[4] Rule 57(3)(b)
[5] Rule 57(5)
[6] *Ex parte Campher* 1951 (3) SA 248 (C) at 252
[7] Rule 57(6)
[8] Rule 57(7)
[9] Section 76
[10] Section 80
[11] Section 81

23. The Master has further additional supervisory powers over curators. She may apply to court for their removal if they breach their functions and duties[12] and authorise payment of curators' fees.[13] Curators are required, within 30 days of their appointment, to lodge with the Master inventories of the property under curatorship.[14] Thereafter, they must lodge annual accounts with the Master.[15]

24. Section 84 deals with the remuneration of curators. It provides that they may receive remuneration from the income of the property under curatorship as provided for in the instrument in terms of which they are appointed, failing which, in terms of the prescribed tariff.[16] The remuneration is subject to taxation by the Master. The Master may also reduce or increase a curator's remuneration if there are special reasons for doing so in a particular case, or she may disallow the remuneration in whole or in part if the curator has failed to discharge her duties or has done so in a dissatisfactory manner.[17]

Trusts and trustees

25. The rules of South African trust law draw on a mixture of English, Roman-Dutch and distinctively South African rules, but in its nature our trust law is a 'genuinely South African' product.[18] It has developed largely through our common law, with statutory provisions regulating the administration of trusts. Under the Trust Act, the Master has some supervisory oversight over trustees. This Act reflects the public-law dimension of trusts.[19] However, the underlying principle of the Trust Act is that state control of trusts should be limited to a minimum, and where existing procedures and common-law controls function effectively, the Trust Act does not seek to regulate trusts further.[20]

26. As the Master pointed out in her submissions, a legislative attempt was previously made in chapter III of the Estates Act to subject trusts to tighter bureaucratic control under the Master. Had this chapter been put into effect, it would have placed

[12] Section 54
[13] Section 84
[14] Section 78
[15] Section 83
[16] Section 84(1)
[17] Section 84(2)
[18] Cameron et al Honore's South African Law of Trusts (5 ed) p23-4 (Cameron)
[19] Cameron, p180
[20] Cameron, p181

trustees in a similar position to that of curators *bonis*. Instead, the South African Law Commission decided, after investigation, to retain the principle of a 'light rein' over trusts and trustees, and chapter III was never put into force. Instead, the Trust Act was passed, which retains a lighter rein for the Master over trusts and trustees compared to the powers the Master exercises under the Estates Act.[21]

27. Nonetheless, like curators *bonis*, trustees hold office in a fiduciary capacity. The Trust Act obliges trustees to act with the care, diligence and skill which may reasonably be expected of a person who manages the affairs of another.[22] They are required to hold trust funds in a separate trust account with a bank.[23] Trust property does not form part of the personal estate of the trustee.[24] Trustees have various obligations to ensure that trust property is identifiable as such.[25]

28. Under the Trust Act the Master exercises important supervisory powers over them. Trustees have a duty to lodge the relevant trust instrument in terms of which they are appointed with the Master before the trustee may assume control of the trust property.[26] A trustee may only act in that capacity if authorised in writing by the Master,[27] and only once security has been furnished to the satisfaction of the Master, or the Master has exempted the trustee from providing security.[28] The Master also retains the power to reduce or cancel security; order a trustee to furnish additional security; or order a trustee who has been exempted under the trust instrument from providing security nonetheless to provide security. The Master may appoint a person as trustee if the position falls vacant and may even appoint a co-trustee of her choice if the Master considers this to be necessary.

29. The Master may call on a trustee to account for her administration and disposal of trust property, and may call on the trustee to deliver to the Master any books, records, accounts or other documents relating to the administration or disposal of trust property.[29] The Master is aided in the exercise of these powers by the obligation placed on any person who audits the accounts of a trust to report

[21] See the discussion in Cameron, p20
[22] Section 9
[23] Section 10
[24] Section 12
[25] Section 11
[26] Section 4
[27] Section 6(1)
[28] Section 6(2)
[29] Section 16(1)

irregularities to the Master.[30] The Master may also appoint a fit and proper person to carry out an investigation into a trustee's administration of trust property.[31] If a trustee fails to comply with a request by the Master, or to comply with any duty imposed on the trustee, the Master may apply to court for an order directing compliance.[32] The Master may even remove a trustee from office if she fails to perform satisfactorily any duty imposed on her under the Act, or she fails to comply with a lawful request of the Master.[33]

30. If a trustee's remuneration is not fixed in the trust instrument, in the event of a dispute, the Master may fix the remuneration.[34]

31. These provisions of the Trust Act demonstrate that while the Master is perceived as holding 'light reins' of bureaucratic control over trusts and trustees, her powers are nonetheless extensive. This is particularly so in circumstances where a trustee fails to comply with her statutory duties, or commits irregularities, or fails to comply with an order or request of the Master. It is important to recognise that the Master is fully empowered under the Trust Act, should circumstances require it, to undertake a range of actions in order to protect the interests of vulnerable trust beneficiaries. In this regard, it is something of a misnomer to describe the Master as having less power than she has in respect of curators *bonis*. We expand on this point in the section that follows.

Can and should courts permit damages awards to be protected via the mechanism of a trust as opposed to the appointment of a curator *bonis*?

32. This question addresses the overarching concern raised by the Master that legal practitioners were using trusts, rather than the appointment of curators *bonis,* as mechanisms to protect damages awarded to vulnerable litigants to evade the greater powers of control she exercises in respect of the latter. The question is encapsulated in paragraph (a)(ii) of the Directive, read, to some extent with paragraph (a)(i), although, on closer inspection, the latter question appears to be based on a misunderstanding of the legal situation.

[30] Section 15
[31] Section 16(2)
[32] Section 19
[33] Section 20(2)(e)
[34] Section 22

33. The Master initially raised the question whether it was legally permissible for courts to sanction the establishment of a trust to protect damages awards in RAF and medical negligence cases, where the plaintiff suffers some form of incapacity. Her original line of submission was that it was not permissible or, at the very least, it was undesirable to sanction the establishment of a trust in circumstances where 'it would be logical to have a curator appointed'. This is because the Master is vested with powers of oversight in respect of the protection of the interests of persons incapable of managing their own affairs. Her concern was, and remains, that because she has less extensive supervisory powers under the Trust Act, the use of trusts to manage damages awarded to incapacitated persons does not serve their best interests.

34. The Master accepts that the office of a trustee is a fiduciary one, and that under the common law and the Trust Act, trustees have fiduciary duties that, to some extent, are subject to the Master's supervisory control. However, she says that these powers are minimal compared to those under the Estates Act. Furthermore, while she has proactive powers under the Estates Act, her powers under the Trust Act are reactive in nature. To illustrate, the Master points out that unlike curators *bonis*, trustees are not required to lodge with her an inventory of trust property, nor are they required to account annually to her office. She says that she has no power to appoint a trustee of her own volition, nor to provide input as to the suitability of the trustee appointed under the trust instrument or to make recommendations as to what powers he or she should be granted. As we have indicated, the rule 57 process provides for the Master's input in this regard before a court appoints a curator *bonis*.

35. The Master's point here is that because the establishment of a trust to protect a damages award generally does not trigger the rule 57 process, her role prior to the appointment of the trustee is much reduced. She says that this is a matter of serious public concern because the damages awarded in RAF matters and in medical negligence matters emanate from state coffers and it is vital that she be empowered to exercise effective supervision over the administration and management of the funds. Her view is that this is better achieved through the appointment of a curator *bonis*, and not the establishment of a trust. In this respect, the Master's view is based on a misunderstanding of her statutory function. It is to exercise effective supervision over the administration of funds falling within her remit, regardless of the source of those funds. She has no special duty to protect public funds.

36. By the time oral argument was advanced at the hearing, the Master had accepted that there was nothing in law to prevent a court from granting an order establishing a trust to protect damages awarded to plaintiffs who suffer some form of incapacity that renders it necessary to place the funds under protection. However, her submission was that the default position ought to be that courts should insist on the appointment of a curator *bonis* via rule 57 unless the plaintiff consents to the establishment of a trust, or there are other special circumstances justifying the latter route. The Master submitted that it should only be in exceptional cases that courts sanction the establishment of a trust.

37. The issue of consent may be dealt with briefly. In our view, it is a misdirected line of argument. There may be some cases where a vulnerable plaintiff is able to understand and to give proper consent to the establishment of a trust to protect her damages award. However, in cases where the form of incapacity is cognitive (which is the vast majority of cases that arise in this Division), it would be unrealistic to assume that such consent could or would be given. In the *Modiba* judgment, discussed below, Bertelsmann J expressed the view that in the absence of a declaration of incapacity the consent of the plaintiff is necessary for the creation of a trust to protect an award of damages.[35] The view appears to have been *obiter*, and no authority was cited in its support. Legally, the establishment of a trust does not require the consent of the beneficiary. Some *inter vivos* trusts may be in the form of a *stipulatio alteri*, but not all are of that nature. As Cameron points out, trusts that are established by order of court are not bilateral but unilateral acts:[36] this suggests that the only consent that would be required in such a case would be the trustee's consent to be appointed as trustee. For these reasons, in our view, the absence of consent by the beneficiary of the damages award should not be the determining factor in the mechanism of protection directed by the court. Having said this, however, courts must remain vigilant to ensure that, where appropriate, a curator *ad litem* is appointed for someone with reduced capacity. The curator can then provide the court with her views as to how best to protect the damages award.

[35] *Modiba obo Ruca v RAF* [2014] ZAGPPHC 1071 (27 January 2014)
[36] Above, at p138

38. Should the court only sanction the establishment of a trust in exceptional cases, as the Master suggests? The Master relies on the *Modiba* judgment in support of her submission. In that case the court noted:

> 'This matter is one of a number of similar cases, all involving road accident victims who suffered significant head and brain injuries, which were heard by the court during the last weeks of the fourth term of 2013. They share most, or all, of the features that will be addressed infra. These features represent a practice that appears to have developed over the past few years which avoids or circumvents the provisions of Rule 57 of the Uniform Rules of Court and the common law relating to individuals who are, or may be, unable to look after their own affairs. By avoiding or circumventing the provisions of the Rule and the common law principles established over decades, these matters are prevented from coming to the Master's attention, avoiding the latter's supervision and scrutiny while the potential need to appoint a curator bonis or curator bonis et personae to the individual concerned is not considered properly or at all. This practice may cause irreparable harm to the road accident victims concerned and leaves the door open to other abuses of the Road Accident Fund litigation.'[37]

39. The court identified several problems associated with the protection of damages awards via the mechanism of a trust as opposed to the appointment of a *curator bonis*. Many of them were echoed by the Master in her submissions to this court. They include:

(a) The absence of input from the Master to the court on whether the establishment of a trust is in the best interests of the plaintiff and on the suitability of a trustee before her appointment;[38]

(b) The fact that a trust with a financial institution avoids the conditions that accompany the appointment of a curator *bonis*, with the resultant diminution in the effectiveness of the protection of the funds for the benefit of the plaintiff;[39]

(c) Trustees are not required to report to the Master annually;[40]

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[37] Paras 1-2
[38] *Modiba*, para 40
[39] para 40
[40] para 40

(d) The fees charged by the plaintiff's legal representatives is not subject to the scrutiny of the Master as they are with a curator *bonis*;[41]

(e) The details of investments and fees charged by the trustee and other financial advisors are not disclosed, and no comparison is made with similar charges under a curatorship;[42]

(f) The absence of details of the plaintiff's monthly expenses and the income that the trust investments might render for her.[43]

40. The court in *Modiba* also highlighted that in some cases, even though the experts had recommended the appointment of a curator, this was not done. The effect was that the plaintiff did not have the capacity to give meaningful instructions to his legal representatives. The judgment notes the necessity to ensure that where necessary a curator *ad litem* should be appointed under rule 57, and that this should be done as soon as possible.[44]

41. In our view the court in *Modiba* correctly identified certain pitfalls that can be associated with the establishment of trusts to protect damages awards. However, this does not mean that trusts ought to be sanctioned only in exceptional cases, as submitted by the Master.

42. It is important to appreciate that in principle curators *bonis* and trustees hold very similar offices. In *Land and Agricultural Bank of South Africa v Parker & Others* the Supreme Court of Appeal noted that:

> 'The core idea of a trust is the separation of ownership (or control) from enjoyment. Although a trustee can also be a beneficiary, the central notion is that the person entrusted with control exercises it on behalf of and in the interest of another. … It may be said, adopting the historical exposition of Tony Honoré, that the English law of trust, and the trust-like institution of the Roman and Roman-Dutch law, were designed essentially to protect the weak and to safeguard the interests of those who are absent or dead.'[45]

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[41] para 40
[42] para 41
[43] para 41
[44] paras 37-9 and 46
[45] 2005 (2) SA 77 (SCA) at para 19

43. These features of the trust and trustees chime closely with those of the curator *bonis*. Indeed, Cameron, in the later edition of Honore's text, while noting that the two legal institutions are different, states that in the broadest sense of the word, a curator *bonis* is a 'trustee'.[46]

44. In principle, then, we can see no reason why a court ought not, in any appropriate case, to direct the establishment of a trust to protect an award of damages where such protection is indicated due to the plaintiff's incapacity. Our view is that the default position ought not necessarily to be the appointment of a curator *bonis*.

45. What of the misgivings highlighted by the Master and in *Modiba* about the establishment of trusts as a vehicle to protect damages awards? Some of them rest on the assumption that the trust route, as opposed to the curator *bonis* route, necessarily excludes the appointment of a curator *ad litem* under rule 57. This is not so. Where the incapacity of a plaintiff is such that curator *ad litem* is advisable for protection of the plaintiff's interests, then this should be done. If the legal representatives overlook the need for curator *ad litem*, the court should order the process to commence, and the Master's participation is a given. The important point is that it does not necessarily follow that if curator *ad litem* recommends the protection of the funds this must be done through the appointment of a *curator bonis*. The curator *ad litem* may recommend instead that the plaintiff's interests will be effectively protected by the establishment of a trust. There is no reason why, if the court is satisfied that the plaintiff's interests will be protected through the mechanism of a trust, it ought not to be so ordered.

46. The concerns raised by the Master and in *Modiba* also overlook the fact that the powers of a trustee are effectively established in the trust deed. In the case of court-established trusts, this means that it is the court that directs the extent and limitations of those powers. It is incorrect to assume that a trust established by order of court gives a trustee *carte blanche* to disregard their fiduciary duties. Unfortunately, the practice of protecting damages awards via the mechanism of a trust has developed incrementally and *ad hoc*. This has given rise to the problems highlighted by the Master and in *Modiba*. However, many of these problems can be properly managed and avoided.

[46] Cameron, above, p3

47. There are also pragmatic reasons why the establishment of trusts as a protective mechanism for damages awards should not be restricted to only exceptional cases. Submissions made by many of the other parties pointed out that the trend towards the establishment of trusts as opposed to the appointment of curator*s bonis* can be attributed to a number of practical difficulties that beset the latter as an option.

48. We were told that the fees for curators *bonis* are so low that it is difficult to find practitioners who are willing to take on the role. Mr. Kriel, on behalf of the *amicus*, Uberimma Phoenix, demonstrated in his affidavit how an award of R1 million, on the present Estates Act tariff, provides a curator with approximately R225 per month as remuneration. The curator is expected to pay for her administration costs from this amount. Mr. Kriel submitted that it is virtually impossible to find a curator *bonis* who will be willing to administer an award that involves an investment amount of less than R3 million.

49. A further limitation referred to by Mr. Kriel is that a curator *bonis* requires the prior approval of the Master to invest funds. The Master will only approve investments in secure guaranteed instruments, such as fixed deposits. These investments yield relatively low interest rates, and hence income for the beneficiary. Consequently, curators tend to keep funds in income generating investments, as this forms the basis for their remuneration. This is often not in the best interests of the beneficiary.

50. Mr. Kriel stated that in the fiduciary practitioner industry, the professional fees of practitioners appointed as trustees is most often determined on the basis of a percentage per annum of assets under administration, combined with the application of a sliding scale in terms of which the percentage is lowered commensurate with the increased value of assets. On his example of an award of R1 million, a trustee would recoup approximately R833.33 per month. If the costs of administration of the funds was identified as a separate head of damages, then those costs would not be deducted from this fee.

51. What Mr. Kriel's submissions demonstrate is that the trust as a mechanism of protection can work to the benefit of the vulnerable plaintiff. We should add that many of the other parties echoed very similar sentiments as those expressed by Mr. Kriel.

52. It was also submitted that another factor driving the trend towards the establishment of trusts as protective mechanisms was the problem of widespread inefficiencies in the Master's office caused by an under-capacitation in the staff complement, and problematic communication channels. Mr. Bouwer, who was admitted as an *amicus curiae*, has been appointed as a trustee in a number of matters, including the David Nkuna matter, highlighted by the Master in the Report as giving rise to ambiguities. Mr Bouwer attested to the following difficulties in the Master's office:

(a) Funds administered by a curator *bonis* require the prior approval of the Master.

(b) The officials in the Master's office are generally inaccessible.

(c) Before an official will assist, the file must be ordered and obtained. Attendance at the Master's office to apply for a file takes at least three hours. The average time taken to obtain the file is three months.

(d) Only thereafter, can a curator proceed to approach the official designated in the file as having responsibility for the matter. An appointment must first be made with that person. However, one cannot do so telephonically because telephones are not answered. E-mails are not responded to or are referred to someone else. Since the Covid pandemic, matters have become much worse.

53. Mr. Bouwer stated that recently curators and other legal practitioners have had to resort to approaching the High Court for orders in the form of a mandamus against the Master before the relevant officials will do what they are ordinarily required to do under the Estates Act. He acknowledged that much depends on the official concerned, and that there are some who respond timeously. Where there is a delay, however, this is prejudicial to the beneficiary, particularly where the Master must pre-approve any expenditure. This includes expenditure on items essential for the care of the patient. Mr. Bouwer's averments were also echoed by many of the other parties.

54. Most of the parties who made submissions were adamant that the trend towards the application for the establishment of trusts, as opposed to the appointment of curators *bonis* was not motivated by *mala fides* or an attempt to circumvent the

authority of the Master. The underlying sentiment was that the development was driven by pragmatism. Practitioners accepted that the Master plays an important role in protecting the interests of vulnerable persons in the funds held on their behalf. However, their view was that the micromanagement by the Master which accompanies the appointment of a curator *bonis* was not necessary and, because of the practical problems in the Master's office, the office of curator is often not effective in protecting the interests of the beneficiary of the funds. The overwhelming view of the practitioners who made submissions to us was that the Master has sufficient supervisory powers to ensure that trusts were managed in the best interests of the beneficiary. They pointed out that inevitably trustees are required to lodge security which guards against financial loss for the beneficiary arising from any mismanagement of trust funds.

55. The Master denied in general terms that there were problems of efficiency in her office, but she did not respond to the individual averments made by the various parties in this regard. We cannot ignore the difficulties attested to by the practitioners who filed affidavits. It is equally beyond our power to fix them.

56. It seems to us that the Master's submission that trusts should be sanctioned only in exceptional cases ignores the realities on the ground. In reality, the appointment of a curator *bonis* will not always inure to the benefit of the vulnerable litigant who is awarded damages requiring protection. Practically, if this court were to agree to the Master's submission, the effect would be to place an even greater bureaucratic burden on the Master's office and in all probability cause greater inefficiencies and prejudice to the persons who most require efficient administration of their affairs by others.

57. The Master has extensive powers under the Trust Act to ensure accountability and oversight in respect of trustees. There is no reason why the Master cannot use the existing powers proactively to enable her to meet her statutory obligation to protect the funds held on behalf of vulnerable beneficiaries when these are held in a trust as opposed to under the control of a curator *bonis*.

58. We conclude therefore that for both principled and pragmatic reasons practitioners representing vulnerable plaintiffs in RAF and medical negligence matters (including curators *ad litem* where appropriate) should be permitted to apply to court for either

the appointment of a curator *bonis* or for the establishment of a trust to protect the damages awarded. In each case it should be open to the court to determine whether the proposed protective mechanism will properly and effectively manage the award in the plaintiff's interests.

59. However, we are mindful of the pitfalls that have been highlighted arising from the ad hoc development of the trust route practice. In order to minimise these pitfalls, a court should be placed in a proper position to enable it to make a determination in each case as to whether the proposed protective mechanism is appropriate. This will require practitioners to provide the court with all information relevant to enable the court to make a proper determination as to whether it is proper to sanction the establishment of a trust rather than the appointment of a curator *bonis*. In addition, a court can, and should ensure that the powers and duties of the trustee are spelled out fully in the order and trust deed. Where appropriate, the court may impose additional obligations on a trustee to ensure that supervision by the Master is effective in terms of the Trust Act.

60. The factors relevant to a court's determination, and the proposed directive as to the procedure that should be followed in these cases are dealt with later in our judgment.

Ambiguity in court orders

61. The Master submitted that one of her overriding difficulties with the establishment of trusts to protect damages awards is that court orders often contain ambiguous terms which are difficult to implement. She included certain examples of ambiguous provisions in her report. They all pertain to orders in which a trustee was appointed rather than a curator *bonis*. They included the following:

(a) 'The fees and administration costs shall be determined on the basis of the directives pertaining to curator's remuneration and the furnishing of security in accordance with the Administration of Estates Act 66 of 1965, as amended from time to time and shall include but not be limited to disbursements incurred and collection of commission calculated at 6% on all amounts recovered from the defendant in respect of the Section 17(4)(a) Undertaking.'

(b) 'The Trustee shall be entitled to the normal fees as prescribed in the regulations to the Administration of Estates Act 66 of 1965, as amended from time to time relating to the fees of a curator bonis appointment'.

(c) '. . . the powers of the trustees be exercised subject to the approval of the Master of the High Court.'

(d) 'In terms of this court order a trust is created in terms of the provisions of the Trust Property Control Act 57 of 1988 and this order serves as the trust instrument incorporating the trust provisions as provided for in this order." And "The trustee shall be entitled to the normal fees prescribed in the regulations to the Administration of Estates Act 66 of 1965 as amended from time to time relating to the fees for a Curator Bonis appointment.'

(e) ' . . . the powers of the trustees…are to be exercised subject to the approval of the Master of the High Court." And "…the defendant pays the costs of the appointment of the trustee(s) as well as the costs of the administration of the estate of the patient by the trustee(s) at each financial year end subject to Section 84 of the Administration of Estates Act, Act 66 of 1965' (our underlining)

62. The Master's main concern with provisions like these is that they confuse her powers under the Estates Act with those under the Trust Act. Consequently, she says that she does not know how to exercise her powers, and requires the guidance of the court.

63. There appear to be two categories of ambiguity in the examples cited above. The first, demonstrated in paragraphs (a), (b) and (d), is that the fees of the trustee are set with reference to the Estates Act. The second, as demonstrated in paragraphs (c) and (e) above, is that the orders purport to render the exercise of the powers of the trustees subject to the approval of the Master. Being a creature of statute, the Master cannot exercise powers not accorded by relevant legislation. From our discussion of the Master's powers under the Trust Act, it is clear that the Master has no general statutory authority to approve the exercise of the powers of a trustee.

64. The Master states correctly that the trustees are appointed in terms of the Trust Property Control Act 57 of 1988 and curators are appointed in terms of the Estates Act. As such, the provisions of section 84 of the Estates Act, dealing with the remuneration of curators and tutors, often invoked in court orders, cannot be made applicable to trustees and nor can trustees be subjected to the authority of the Master in terms of this Act.

65. The context within which these ambiguities arose was that, with the creation of trusts, came the practice of providing that the trustee's remuneration should be the same as that of a curator *bonis* and hence the references in court orders to the Estates Act, when dealing with trustees. The obvious reason for doing this was to limit or cap the remuneration of the trustee in the interests of the beneficiary of the trust. Additionally, defendants who are liable for the costs of a curator *bonis* where

the circumstances of the claim necessitate the appointment of one, would ordinarily not object to the creation of a trust provided that the costs thereof did not exceed those of a curator *bonis* – this practice effectively removed the other party's financial and effective interest in participating in the determination of the best mechanism for the protection of person concerned.

66. What the parties in these matters, and the courts granting the orders have overlooked, is that from a regulatory point of view, one cannot extend to the Master powers over trustees as if the trustees were curators *bonis*. It appears that the attempt to restrict the trustees' remuneration has led to court orders which not only conflate two Acts but are in fact contrary to the provisions of the Estates Act.

67. The Master gives the example of the David Nkuna Trust to demonstrate the practical problems her office has faced with orders containing these types of provisions. In that matter, the order establishing the trust provided that 'the fees and administration costs shall be determined on the basis of the directives pertaining to curator's remuneration … in accordance with the provisions of the Administration of Estates Act.' The RAF subsequently refused to pay to the trustee expenditure he had incurred for treatment covered by the RAF's s 17(4) undertaking on the basis that the Master was required under s 22 of the Trust Act to vet and approve these costs. As the Master correctly points out in her report, neither Act empowers her to determine the fees and administration costs of trustees. The Master only has the power under s 22 to consider what the 'reasonable remuneration' of a trustee should be if the trust deed is silent on the matter. Furthermore, according to the Master, unlike the situation with curators *bonis*, where a tariff is provided under the Estates Act, none is provided under the Trust Act. The Master says she does not have the means to determine what would be a 'reasonable remuneration' in these matters.

68. As we discuss later, in our view, provisions of the type contained in paragraphs (a), (b) and (d) are not acceptable. They do nothing but sow confusion for the parties and the Master, and do nothing to advance the underlying interests of the plaintiff. However, the answer, in our view, is not to outlaw the establishment of trusts as a protective mechanism for funds awarded to victims of road accidents and medical negligence cases. Instead, where it is clear to the court that it is appropriate to order the establishment of a trust, the court order must make specific provision, based on

evidence presented to court, as to the fees and costs payable to the trustee in each case. This should be done without any reference to the Estates Act.

69. As to orders that make the exercise of a trustee's powers subject to the approval of the Master, they are also not acceptable. A court can direct how a particular statutory power should be exercised by the Master in a particular case, but it cannot extend the Master's powers beyond that accorded by statute. Thus, it cannot purport to give the Master powers over a trustee akin to those she has in respect of a curator *bonis* under the Estates Act.

70. In our view, provisions such as those cited in paragraphs (c) and (e) above are invalid because they give the Master powers beyond those provided for in the Trust Act. Parties ought not to seek, nor courts grant such provisions in future cases. Where necessary, in existing cases, affected trustees may approach the court to amend the relevant order so as to provide clarity as to the extent of the Master's powers over them, in accordance with the Trust Act. Similarly, if necessary, the courts may provide clarity as regards what a trustee is entitled to claim as reimbursements from the RAF by way of expenses incurred by the trustee for medical costs. The RAF cannot insist that these be approved by the Master, and a trustee would be entitled, in a properly motivated application, to recoup these expenses by way of a court order.

71. In summary, then, in order to avoid these types of ambiguity in future:

(a) The trustee should be appointed in terms of the Trust Act and in the interests of clarity, the court should desist from making any reference to the Administration of Estates Act, thus obviating the Master's authority over the trustee in terms of this Act.

(b) Section 84(1)(b) of the Administration of Estates Act makes provision for the determination of remuneration of a curator *bonis* by the Master. This does not apply to trustees, and as such the taxation and approval by the Master of trustee's fees, disbursements or administration fees and expenditure should not be incorporated in court orders.

(c) The Master is not generally empowered in terms of the Trust Act to determine the reasonableness of expenditure on the part of a trustee. Orders should not imply that this is the case, nor may the RAF refuse to reimburse a trustee without the Master's approval.

(d) Critically, as we discuss immediately below, it is imperative that orders establishing trusts should set out in detail how trustees are to be remunerated in terms of their fees and costs.

Remuneration and all administration costs must be set out explicitly and comprehensively

72. The remuneration of curators *bonis* is provided for in Section 84 of the Estates Act which provides that :

> '(1) Every tutor and curator shall, subject to the provisions of subsection (2), be entitled to receive out of the income derived from the property concerned or out of the property itself-
>
> (a) Such remuneration as may have been fixed by any will or written instrument by which he has been nominated; or
>
> (b) If no such remuneration has been fixed, a remuneration which shall be assessed according to a prescribed tariff and shall be taxed by the Master.
>
> (2) The Master may –
>
> (a) if there are in any particular case special reasons for doing so, reduce or increase any such remuneration; or
>
> (b) if the tutor or curator has failed to discharge his duties or has discharged them in an unsatisfactory manner, disallow any such remuneration, either wholly or in part.'

73. It was argued before us that the remuneration payable to curators *bonis* was not commensurate with the responsibility and amount of work that had to be done in respect of the majority of estates involving particularly seriously injured or disabled persons. It appears that under s 84(1)(a), a court order appointing a curator *bonis* may specify the remuneration payable to a particular curator. This does not necessarily mean it should be limited to the prescribed tariff. Thus, if the circumstances of the case are such it is anticipated that a remuneration greater than the statutory remuneration provided for in Section 84(1)(b) is appropriate, the court can consider ordering a higher remuneration. Unfortunately, in none of the matters that are presently before us do any of the curators *ad litem* deal with this aspect at all in their reports and similarly the Master also fails to deal with this aspect. In our view, the power of the court to direct what remuneration is appropriate for a curator in any case underlines the importance of the need for courts to be placed in possession of all relevant facts so that a proper determination on remuneration can be made. This is a point we reiterate below.

74. In regard to an increase in the remuneration after the curators appointment, neither the Master nor any of the parties placed any information before the Court to indicate whether or not in the case of existing curatorships, any applications have been made in terms of Section 84(2) for the variation and increase in the curator's remuneration and whether or not such applications have met with approval. In the circumstances, we make no findings in this regard.

75. The Trust Act provides in Section 22 that:

> 'A trustee shall in respect of the execution of his official duties be entitled to such remuneration as provided for in the trust instrument or, when no such provision is made, to a reasonable remuneration, which shall in the event of a dispute be fixed by the Master.'

76. Unlike the position with curators, there is no fall-back statutory tariff that applies to trustees. Nor does the Master have the statutory power to fix the fees of trustees unless no provision for remuneration is made in the trust instrument and a dispute arises as to a reasonable trustee fee. As we noted earlier, this was one of the issues on which the Master sought clarity from the court.

77. As noted earlier, with reference to the difficulties experienced by the Master in trying to implement existing court orders, the attempt to subject the remuneration of trustees to the supervision of the Master is not working practically, nor, indeed, is it sanctioned under s 22 of the Trust Act (save for the situation identified immediately above).

78. The solution therefore lies in greater care being taken in deciding on the appointment of either a curator *bonis* or the establishment of a trust in considering, *inter alia*, the question of remuneration. In circumstances where a trust is established, the remuneration and administration costs must be dealt with explicitly and comprehensively in the court order and/or trust instrument incorporated into the order of court. If this is done correctly, it will deal with the Master's complaint that trustees 'set their own fees'.

79. Ordinarily, the reasonable remuneration of the trustee will vary from trustee to trustee according to the complexity, quality, time and amount of work done in the administration of the trust funds. The court in the matter of *Klopper v the Master of the High Court*[47] noted in this regard that:

> '…time and effort together with the degree of complexity of one's duties have to be taken into account. It is accordingly clear that the time factor cannot be considered in isolation nor can it be an overriding factor. The other factors must be taken into account as well.'

80. The method and basis of calculation of the remuneration of the curator (in the event there is an application for an increase or decrease from the prescribed amount, or for an amount of remuneration above the prescribed tariff[48]) or trustee, and the administration costs, must be set out clearly, unambiguously and comprehensively in the application for the appointment of a curator *bonis* or the proposed trust deed. The Master recommends that failure to do so should result in the Court refusing to grant the relief sought. We do not agree. However, it is incumbent on the parties to

[47] 2009 2 All SA paragraph 16

[48] Section 84(1)(a) of the Estates Act permits the Court to fix the amount of the remuneration of a curator. It is only in circumstances where no specific provision has been made for the amount of the remuneration that in terms of section 84(1)(b) the prescribed tariff is applicable.

place sufficient evidence before the court to enable it to include appropriate provisions in the court order. The remuneration must be commensurate with the complexity, time and effort required to discharge her duties and must perforce include the effort required in the administration of a Section 17(4)(a) Undertaking where the action lies against the RAF.

81. In the matter of *AD and Another v MEC for Health and Social Development, Western Cape Provincial Government*,[49] the parties were *ad idem* on the creation of a trust for the benefit of a severely disabled child. The court dealt with many issues relating to the creation of trusts. An alarm was raised with respect to the remuneration of the trustee being 'unchecked'. The court held that 'the problem can be addressed as has been done here, by specifying the fees in the Trust Deed (an ad valorem charge, not hourly fees).' The cost of administering the trust was agreed at 1% per annum of capital under administration and 2% of residual capital on termination of the trust. The capital under administration was not to include the value of administering the trust.

82. By way of further example, Absa Trust Limited testified before us that it charges a standard 1% plus VAT management fee of the total amount under administration per annum. This management fee decreases year on year. For the drafting of the documents necessary to create a Trust, ATL charges a once-off amount of R4 900.00. A once-off fee of 0.5% on the amount of the award is charged on the acceptance of a Trust, and a once-off termination fee percent of 2% of the remaining capital under administration is charged upon the termination of the Trust. These fees are readily determinable and there is little guesswork.' This is a very convenient formula and the percentages could be altered in accordance with the evidence and specific requirements of each case.

83. Further evidence submitted to us was to the effect that the custom in the fiduciary industry is for trustees to charge 1 to 1,5% of the value of the assets under administration with a sliding scale in which the charge is lowered with increasing value of assets.

84. These examples illustrate that in practice, trustee's fees can be easily determined and vetted by the court in every case.

[49] [2016] ZAWCHC 116

85. In RAF matters, the curator *bonis* or trustee, the RAF Undertakings Department, as well as the Master, appear to have an ongoing problem in terms of current court orders. That the costs of the curator *bonis* or trustee fall to be recovered in terms of the Undertaking was confirmed in *Reyneke N.O. v Mutual and Federal Insurance Company*.[50] This should be expressly stated in each court order.

86. In matters against the RAF, it may be necessary for the plaintiff to adduce evidence regarding the remuneration of the curator *bonis* or trustee, particularly in relation to the Undertaking, which will entail evidence as to the expectations regarding complexity, time and expertise required to administer such Undertaking. Much will depend on the facts of each case and the court must be provided with sufficient evidence to endorse a remuneration structure that is appropriate in each case.

87. In *Marine and Trade Insurance Company Limited v Katz NO*[51] the costs of the curator *bonis* were paid in the amount of R1 152.85, although an Undertaking in terms of Section 21(c) of the Compulsory Motor Vehicle Insurance Act 56 of 1972[52] had been furnished by the defendant. This upfront lump sum payment of the costs of the trustee, once established, could be a solution to the ongoing problems of remuneration of trustees under the Undertaking.

88. It will be incumbent on the parties to adduce evidence regarding the proposed remuneration and administration fees for which provision must be made. The evidence should cover the particular circumstances of the administration of the estate or trust, as the case may be. The structure of the fees and remuneration permitted must then be delineated clearly in the court order and trust instrument.

89. In regard to out of pocket costs incurred, the curator *bonis* or trustee is necessarily entitled to incur costs on behalf of the estate or trust, which may include inter alia:

    (a) Premiums for the security bonds.

    (b) Rates, taxes, the costs of repair and maintenance of property.

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[50] 1992 (2) SA 417 (T)
[51] 1979 (4) SA 961 (A)
[52] Section 21(c) of the Compulsory Motor Vehicle Insurance Act was amended by the Compulsory Motor Vehicle Insurance Amendment Act 69 of 1978 to introduce the concept of the undertaking to pay in the future by the wrongdoer.

(c) Accounting fees in relation to audited financial statements.

(d) Costs properly incurred in employing expert assistance, such as financial advisers or medical experts.

(e) Resources required to ensure that there is proper care and maintenance of the beneficiary.

(f) Travelling costs incurred in attending meetings or conducting trust business[53].

90. The remuneration and out of pocket costs, and a basis for their calculation, must be specifically set out in the court order or trust instrument. Once the remuneration provisions have been made subject to the court's scrutiny and are approved, the ambiguities discussed earlier are overcome. Approval by the court of the remuneration places a necessary safeguard in place which ensures that the fees paid are commensurate with the particular responsibilities and work undertaken and will allay the Master's concern that the trustees 'set their own fees'. The annual approval of curators' accounts and audit of the trusts ensure that no untoward behaviour of either a curator or a trustee remains undetected.

The trust instrument must be available for consideration and scrutiny by the court and the defendant.

91. The trust instrument should be considered by the Court.

92. It is equally important that the defendant has a proper opportunity to consider and if necessary, make submissions to the court on the provisions of the trust instrument. The defendant stands to be materially affected by the provisions of the remuneration and administration costs in so far as it incurs a liability to pay such costs.

[53] According to *Roper & Bryce v Cannock* 1954 (1) SA 65 (W), the court held that the travel costs cannot be claimed by a trustee if he is remunerated for holding office. Honoré's South African Law of Trusts 6th edition states that the preferable view is that trustees should be indemnified for out of pocket expenses but that the trust instrument should make specific provision for the reimbursement of travel expenses.

93. The Master, with her consent, may be consulted on the terms of the trust instrument, providing that this does not cause unnecessary delays. In *AD and Another v MEC for Health and Social Development Western Cape Provincial Government*[54] the parties were in agreement that the Master was to be invited to comment on the wording of the Trust Deed. This was also suggested to us by Mr Maleka SC on behalf of the Master. However, we do not consider it practicable for the Master's comment to be sought as a matter of routine in every case. If the parties or the court consider it appropriate in a particular case, then her comments may be sought. To require this as a matter of course would, in our view, lead to unnecessary delays not only for the parties but also for the court system as a whole.

94. The trust instrument should also expressly state that any amendment to the trust instrument shall be subject to the approval of the High Court which will ensure that any amendments dealing with remuneration of the trustees will be brought to the attention of the Court.

95. Mr Louw SC on behalf of the Pretoria Society of Advocates suggested that court orders which have provisions subjecting the actions and remuneration of trustees to the Master in terms of the Administration of Estates Act ought to be referred back to the High Court to be amended. Each particular matter where a curator *bonis* has been appointed or a trust established will have to be considered on its own merits. If it is considered necessary to amend any court order or trust deed by the curator *bonis* or the trustee as the case may be, then they should take such steps as they consider necessary in order to do so in order to have such amendments effected.

What is the extent of the Master's oversight role?

96. One of the problems identified by the respondents and *amici* with the appointment of curators *bonis* was that under the terms of their appointment the exercise of their powers is subject to prior approval by the Master. It was submitted that this was one of the reasons why plaintiff's representatives elect instead for the establishment of a trust as a mechanism to protect damages awards. We were told that all expenditure by curators, even when necessary for the continued well-being of the plaintiff, must await approval. Alternatively, the curator runs the risk that the

[54] [2016] ZAWCHC 116

Master's office will refuse to permit a recoupment of expenses that were not pre-approved.

97. Section 72(1)(d) deals with the granting of letters of curatorship by the Master following an appointment by order of court: The powers of a curator *bonis* are provided for in Section 72(1)(d) of the Estates Act. It provides (in relevant part):

> 'The Master shall . . .on the written application of an person …who has been appointed by the Court or a judge to administer the property of any … person … as curator and to take care of his person or, as the case may be, to perform any act in respect of such property or to take care thereof or to administer it … grant letters of … curatorship … to such person'.

98. Section 76 deals with the powers to perform acts in relation to property under curatorship. It provides (in relevant part):

> '(1) The Master may –
>
> (a) …
>
> (b) By any letters of curatorship granted by him, authorize the curator to do any one or more of the following, namely-
>
> (i) To perform any particular act in respect of the property of the person concerned;
>
> (ii) To take care of the said property;
>
> (iii) To administer the said property; and
>
> (iv) To carry on, subject to any law which may be applicable, any business or undertaking of the person concerned.
>
> (2) The Master shall, by any such letters granted by him -
>
> (a) in any case referred to in paragraph (d) of sub section (1) of section seventy two, confer upon the … curator such powers as will give effect to the terms of the appointment by the Court or the judge; and
>
> (b) . . .'

99. The origin of the problem regarding prior approval appears to be an annexure that the Master routinely attaches to her report to court on the appointment of a curator *bonis*. The Master's report routinely makes a recommendation based on a list of 12 separate powers to be bestowed on a curator. The terms of the individual powers are not in issue. What is in issue is that all of these powers, notwithstanding that the Estates Act does not specifically provide for it, are made 'subject to the prior consent

and approval of the Master'. It is this condition and its consequences which it was argued before us militate against the appointment of curators *bonis* and recommend, in the best interests of the persons concerned, that trust be established.

100. It was argued before us that the imposition of the prior consent and approval condition, which at the request of the Master is a term of every single Order in which a curator *bonis* is appointed, has as a result rendered the utilisation of the institution of a curator *bonis* cumbersome, time consuming and, given the particular nature of the needs of the persons who are to be protected, unsuitable.

101. We were provided with examples of reports submitted by the Master to courts on the appointment of curators. A common passage in them reads as follows:

> 'I wish to recommend that the Curator Bonis should be clothed with the powers as laid down in *Ex Parte Du Toit: In re* Curatorship *Estate Schwab* 1968 1 SA 33 (T) and confirmed in *Ex Parte Hulett* 1968 4 SA 172 (D). These powers have been summarized in Annexure "A" to this report and I humbly request the Honourable Court to order that the powers 2 to 12 in Annexure "A" <u>be exercised subject to my prior consent and approval as such an order will strengthen my ability to protect the interests of the patient considerably</u>, especially in cases where the Curator Bonis is exempted from furnishing security.' (our underling)

102. The origin of the restrictive condition which the Master seeks to be imposed in cases where a curator *bonis* is appointed is not found in either of the abovementioned cases upon which the Master refers to in the reports that she submits to the Court. In neither of the cited cases were the powers conferred upon those curators *bonis* subject to either prior consent or prior approval.

103. The specific powers with which the Master recommends curators *bonis* be clothed are:

> '1. to receive, take care of, control and administer all the assets of the Patient;
>
> 2. to carry on or discontinue, subject to any law which may be applicable, any trade, business or undertaking of the Patient;
>
> 3. to acquire, whether by purchase or otherwise, any property, movable or immovable, for the benefit of the Patient;
>
> 4. to let, exchange, partition, alienate and for any lawful purpose, to mortgage or pledge any property belonging to the Patient, or in which the

Patient has an interest;

5. to perform any contract relating to the property of the Patient, entered into by him before he was declared incapable of managing his own affairs;

6. to exercise any power, or give any consent required for the exercise of such power, where the power is vested in the Patient for the Patient's own benefit; or is in the nature of a beneficial interest to him;

7. to raise money by way of mortgage or pledge or any of the movable or immovable property of the patient, for the payment of the Patient's debts or expenditure incurred or to be incurred for the Patient's maintenance or otherwise for the Patient's benefit, or provision for the expenses of the Patient's future maintenance; or the improvement or maintenance of the Patient's property;

8. to apply any money for the maintenance, support or towards the benefit of the Patient;

9. to incur expenditure in respect of the improvement of any property of the Patient by means of building or otherwise;

10. to expend any moneys belonging to the Patient on the maintenance, education or advancement of any relative of the Patient, or any other person, wholly or partially dependent on the Patient. To continue such other acts of bounty or charity exercised by the patient as the Master having regard to the circumstances and the value of the estate of the Patient considers proper and reasonable.

11. to invest or re-invest any moneys of the Patient which become available from time to time for investment, and which are not immediately required for the purposes defined in Section 82(c) of the Administration of Estates Act, No. 66 of 1965, (as amended);

12. to institute proceedings which may be necessary in the interest of the Patient, or for the due and proper administration of his estate.'

104. Section 80 of the Estates Act requires the authorisation of the Master for the alienation or mortgaging of property belonging to a patient where the value of that property exceeds R250 000.00.[55] Having regard to the powers set out in paragraph 102 above, it is only the powers referred to in paragraphs 4, 7 and 10 which require the approval of the Master. It follows, particularly in regard to the alienation or mortgaging of immovable property but also in respect of the continuance of any act of bounty or charity on behalf of the Patient, that the consent of the Master must be obtained beforehand. If it were otherwise, the curator *bonis* would be acting contrary to the provisions of Section 80 and to the empowering Court Order.

[55] GN R920 in GG 38238 of 24 November 2014

105. Save for these three specific powers, all the other powers are exercised for the benefit of the Patient by the curator *bonis* in the ordinary course of the administration of the estate and do not require the prior approval or consent of the Master. The Master's control over the curator *bonis's* administration of the estate is exercised in the consideration and approval or not of the annual curatorship account. The security furnished by the curator in terms of Section 77 of the Estates Act, has as its very intention, the protection of and the indemnification of the estate of the Patient against any loss occasioned in consequence of maladministration. The furnishing of security obviates the need for the Master to exercise 'prior consent and approval' of every single transaction undertaken by the curator *bonis* in the discharge of their duty.

106. The removal of this condition in respect of powers 1 to 3, 5 to 6, 8 to 9, and 11 and 12 seems to us to be desirable, there being no prejudice to the estate of the Patient or the Master in its oversight role. In our view, the prior approval condition in respect of these powers ought not to be included in court orders appointing curators *bonis* as a matter of routine. It is not the function of the Master's office to micro-manage the exercise of a curator's powers. Indeed, the Master submitted to us that this is not what she wishes to do. Unfortunately, the practice has created an environment that lends itself to micro-management of curators, resulting in an increase of the bureaucratic burden on the Master's office. This is not a desirable situation.

107. If there are valid reasons, based on the particular facts of a case, to impose such a condition, a court ought to do so. However, the current practice, in terms of which the Master seeks the inclusion of the condition as a matter of course in each case, must be discontinued. In cases where an existing order is creating difficulties for the curator in performing her functions, there should be no reason why an application could not be made to court for a suitable amendment to the terms of appointment.

108. As far as trusts are concerned, the *amici* submitted that they provide far more flexibility in that the prior approval condition affecting curators does not affect trustees. This does not mean that trustees are free to exercise their powers unfettered. The powers of a Trustee are circumscribed in the Trust Deed. Section 9 of the Trust Act, provides:

'(1) A trustee shall in the performance of his duties and the exercise of his powers act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another.

(2) Any provision contained in a trust instrument shall be void insofar as it would have the effect of exempting a trustee from or indemnifying him against liability for breach of trust where he fails to show the degree of care, diligence and skill as required in sub section (1)'

109. Unless the trust deed or court order establishing the trust specifically provides therefor, a trustee is not required to seek the prior approval or consent of the Master to enter into a particular transaction. The Master contended that this was an undesirable characteristic of trusts as a protective mechanism for damages awards in that it weakens her ability to exercise oversight over trusts. Once again, we emphasise that it is not the function of the Master to micro-manage the exercise of powers by either curators or trustees. Unless a trustee is exempted from doing so, she is required in terms of Section 6 of the Trust Act, to provide security for the administration of the trust. Furthermore, the trustee is required to submit the affairs of the trust to an annual trust audit and the auditor is required in terms of Section 15 of the Trust Act to notify the trustee of any material irregularity, which if not rectified within one month is to then be reported in writing to the Master who may then call the trustee to account in terms of Section 16.

110. Accordingly, the Master is able to exercise sufficient oversight over both curators *bonis* and trustees – in the case of the former through the provisions of Section 72(1)(d) read together with Sections 77 and 80 of the Estates Act and with the review of the annual curators account. In the case of the former, through the provisions of Section 6 read together with Sections 9 and 15 of the Trust Act.

111. In summary, then, there is no warrant for the Master to insist that the exercise of all the curator's powers should be subject to her prior approval in every case. Nor is the fact that no such approval is required in respect of trustees a valid reason to be critical of the trust as a potential mechanism for the protection of damages awards. Again, we stress that the question of whether a curator should be appointed or a trust established is one for a court to consider based on all the facts before it and the motivations that are made for the mechanism proposed by the parties.

Security by trustees and family members as co-trustees

112. The Directive required us to consider the question of whether the monthly premium that is payable in respect of the insurance cover which is to be taken out by a trustee can serve as security in terms of the trust instrument. A broadly-related question regarding trustees and security was highlighted by some of the parties in their submissions. This is the question of whether it is advisable for family members to be appointed as co-trustees and, if so, whether they should be absolved of the need to provide security.

113. As to the first issue, none of the parties suggested that it should be answered in the affirmative. We agree. Insurance and security do not necessarily serve the same purpose. The provision of security, quite apart from any insurance that a trustee may wish to obtain, is an important statutory buffer against malperformance by a trustee. While the Master has the power to release a trustee from the obligation to pay security in a particular case, the fact that the trustee has insurance cover should not, as a general rule, serve as a basis for doing so.

114. As to the second issue, in *Dube N.O. v Road Accident Fund*,[56] this court held that in trusts established to protect damages awards granted to minors, 'unless it is undesirable, a guardian should participate as co-trustee'. One can understand why the court felt the need to include a minor's guardian in the decision-making structure of the trust: she is the person closest to the minor in terms of her day-to-day life and one would assume therefore well-placed to understand the minor's needs and how the funds should be used.

115. On the other hand, some parties before us submitted that problems have arisen in practice when family members are appointed as co-trustees with decision-making powers. The lack of objectivity of family members can create friction with the independent trustee and lead to an impasse in decision-making, which is not in the interests of the beneficiary. The case of *Crowder*, referred to in the section below, is an example of how the interests of family members do not necessarily coincide with those of the beneficiary of a trust. In that case, while Mr Crowder's mother was

[56] 2014 (1) SA 577 (GSJ) at para 26

not a trustee, the background facts painted a picture of dissatisfaction on the part of Mr Crowder about his mother's requests for dispensing trust funds. Moreover, Mrs Crowder was not satisfied with the trustee's decision to refuse certain of her requests for funds. Had Mrs Crowder been a co-trustee, this would in all probability have led to an impasse between the trustees.

116. It was submitted to us that if family members are appointed as co-trustees with decision-making powers, they should have to provide security. Alternatively, family members could be appointed as co-trustees in a limited capacity, with consultative, but not decision-making powers.

117. Once again, in our view, these different positions illustrate that the establishment of a trust to protect damages awards is not a one-size-fits-all exercise. In each case, a court should consider whether it is practicable to appoint a particular guardian or family member as a co-trustee and, if so, what her powers should be, and whether she should be required to provide security. In addition, if a family member is appointed as a co-trustee, the trust instrument must make provision for a mechanism to break any deadlock between the co-trustees so that the interests of the plaintiff are not undermined.

So-called 'partial incapacity'

118. In her Report the Master raised concerns about what she referred to as 'partial incapacity' cases. These are cases in which the opinion of the medical experts is that the plaintiff is not incapable of managing her affairs, but that nonetheless the damages to be awarded to her will require protection. The Master correctly pointed out that there is no legal provision in the Uniform Rules for a procedure in terms of which a person is declared to be 'partially incapable of managing her affairs'. However, in our view, this does not mean that courts cannot grant orders providing for such protection in cases of this nature.

119. In reality, it is not a rarity, particularly in RAF matters, for medical experts to recommend protection of funds despite the fact that the plaintiff does not meet the threshold of 'incapacity' outlined in Rule 57. In cases like this, the requirements for the appointment of a curator *bonis* under either subrules 57(10) or (13) are not met. This is because under both subrules, the court must be satisfied that the person

concerned is incapable of managing (her affairs) either because of being 'of unsound mind' (subrule (10) or because she suffers from some form of disability (subrule (13)).

120. The obvious mechanism for the protection of funds in these cases is through the mechanism of a trust. The trust mechanism also gives the court the flexibility to tailor make the powers of the trustee so as to avoid infringing on the rights of the plaintiff any more than is necessary. Depending on the circumstances, a plaintiff, could retain powers, for example, to deal with her own day-to-day expenses, while reserving to the trustee the power to make the bigger investment and expenditure decisions. Each case should be determined on its own facts and on the particular needs of the plaintiff. Of crucial importance is that the court must be guided by expert medical evidence to establish whether, even though the plaintiff is not incapacitated within the meaning of Rule 57, protection of her funds is still recommended, and the nature of the protections required appropriate to her cognitive functioning.

121. It is also critical in cases where the establishment of a trust, as opposed to the appointment of a curator *bonis* is ordered to protect a plaintiff's damages award, that the trust instrument and order are clear as to when the trust will terminate. The recent case of *Crowder v Absa Trust Limited*[57] illustrates the pitfalls that can occur if the court order or trust instrument is not sufficiently clear in this respect. Mr Crowder was injured in a motor vehicle accident when he was 12 years of age. He was awarded some R4 million in damages, and the funds were placed in a trust under a court order granted when he was still a minor. After he reached his majority, he applied to court for the trust to be terminated. Mr Crowder contended that the trust objective was to protect his funds while he was still a minor and that it was not intended for it to operate indefinitely. Accordingly, he argued that he was within his rights to demand that the trust be terminated so that he could take control of the funds.

122. The court order establishing the trust provided that it would terminate on Mr Crowder's death. This, among other factors, led the court to find that it had never been intended to operate as a simple minority trust, and Mr Crowder failed in his

[57] Unreported judgment of the Full Court of the Gauteng Division, Johannesburg under Case no. A5044/2021, dated 14 April 2022

application. Had the court order and the trust instrument explicitly stated that the purpose of the trust was to protect the damages award because of the TBI suffered by Mr Crowder in the motor vehicle accident, resort to the court might have been avoided. It is for this reason that in our view, the objective of the trust must be expressed.

123. We make two important further points about cases in which the medical experts find that the plaintiff is not incapacitated to the extent that she cannot manage her affairs, but nonetheless recommend the protection of the damages awarded.

124. The first is that, strictly speaking, if the medical experts are of the opinion that a plaintiff is not suffering a disability such as to impinge on her ability to manage her affairs, an application for the appointment of a curator *ad litem* under Rule 57(1) is not required. It almost goes without saying that despite this, courts should be astute to make their own determination in this regard, guided, but not dictated to by, medical opinion. If it appears that the appointment of a curator *ad litem* would be in the best interests of the plaintiff, and of further assistance to the court, in a particular case, then the Rule 57(1) path should be followed.

125. The second point is that the trust instrument and court order should expressly include provision for the termination of the trust by court order. Under s 13 of the Trust Act:

> 'If a trust instrument contains any provision which brings about consequences which in the opinion of the court the founder of a trust did not contemplate or foresee and which-
>
> (a) hampers the achievement of the objects of the founder; or
>
> (b) prejudices the interests of beneficiaries; or
>
> (c) is in conflict with the public interest;
>
> the court may, on application of the trustee or any person who in the opinion of the court, has a sufficient interest in the trust property, delete or vary any such provision or make in respect thereof any order which such court deems just, including an order whereby particular trust property is substituted for particular other property, or an order terminating the trust.'

126. As a matter of law, then, a plaintiff who retains her legal capacity to litigate may approach the court for an order terminating the trust. If the medical experts were incorrect in their opinion, and it later transpires that the plaintiff's funds no longer

require protection, she may approach the court for the requisite amendment or termination. All we are suggesting is that the court order and trust instrument makes express reference to this right, so that it is drawn to the attention of the plaintiff.

The Guardian's Fund and awards to minors

127. In circumstances involving persons who receive awards of R500 000 or less and which are not deemed commercially viable for either the appointment of a curator *bonis* or the establishment of a Trust, can the Guardian's Fund be utilised to afford protection of funds?

128. Section 86(1) of the Estates Act provides that the Guardian's Fund is to consist of moneys:

> '(b) received by the Master under this Act or under any other law or in pursuance of an order of Court; or
>
> (c) accepted by the Master in trust for any known or unknown person.'

129. The Estates Act also prescribes that money held in the Guardian's Fund will accrue interest (Section 88) and that payment of moneys held in the Guardian's Fund can be made to natural guardians, tutors and curators or for and behalf of minors and persons under curatorship (Section 90).

130. Section 90(1) provides:

> '(1) The Master may, subject to subsection (2) and subject to the terms of any will or written instrument disposing of the money or, in the case of a tutor or curator, by which the tutor or curator has been nominated, pay to the natural guardian or to the tutor or curator, or for and behalf of the minor or other person concerned, so much of any moneys standing to the credit of the minor or other person in the guardian's fund as may be immediately required for the maintenance, education or other benefit of the minor or other person or an of his dependants, or for any purpose referred to in subparagraph (i), (ii) or (iv) of paragraph (c) of the proviso to section 82, or for any investment in immovable property within the Republic or in any mortgage over such immovable property on behalf of the minor or other person, approved by the

> Master: Provided that, subject to the terms of any such will or instrument, the aggregate of the payments made in the case of any minor or other person for purposes of maintenance, education or other benefit shall not, without the sanction of the Court, exceed the amount determined by the Minister from time to time by notice in the Gazette of the capital amount received for account of the minor or other person concerned.'

131. While the Estates Act does provide that funds can be deposited with the Guardian's Fund, there were no submissions before us as to whether or not the Guardian's Fund has the capacity to accept payments and then deal with them in terms of Section 90(1) in an expeditious manner, however it is probable that this would mirror the situation currently experienced by curators *bonis* and would not provide an effective mechanism for meeting the needs of the persons concerned expeditiously. In the event that the Guardian's Fund is considered suitable for awards of R500 000 or less, this would need to be properly dealt with in the report of both the curator *ad litem* as well as the report of the Master in guiding the Court particularly with regards the likely amount of any payment that may have to be made in excess of the amount referred to in Section 90(1)[58].

132. Where a minor plaintiff's award is more substantial, it may be appropriate for the court to order that the award is paid to the child's parent/guardian if, on all the facts of the case, this is in the child's best interests. This may be so where, for example, the parents/guardians of the child are capable of administering the funds in the interests of the child and where the child suffers no impediment that would require protection beyond her reaching the age of majority.

133. However, it cannot be assumed, without more, that the parents will be best-placed to manage the funds. The child may, in addition, suffer a cognitive impairment as a result of the injury, or there may be factors pertaining to her family circumstances that warrant independent protection of the damages award either by way of a curator *bonis*, or by the establishment of a trust.

134. Essentially, the same principles apply as with the protection of any other damages award, save that the court will also give consideration to whether the funds should

[58] R250 000.00 in terms of GN R920 in GG38238 of 24 November 2014

be paid to the parents of the child on her behalf. Practitioners will be required to place all relevant facts before the court so that the court is placed in a position to determine the kind of protection that will be in the child's best interests. In addition, and as the court is the upper guardian of all minors, it is advisable that the default position should be that a curator *ad litem* be appointed to represent the child's interests in each case, unless a departure from this practice can be justified in a particular case.

Summary of findings on issues identified in the Judge President's Directive

135. We return now to the issues identified in the Judge President's Directive. Our summarised findings, drawn from the discussion and analysis in the body of our judgment, are set out below.

Re Paragraphs (a)(i) – (vi): appointment of trustees and curators bonis in RAF/medical negligence matters

136. The Estates Act does not sanction the creation of a trust in terms of the Trust Act. The question posed is somewhat misdirected. The correct legal position is that there are two separate options available to protect funds awarded as damages in RAF/medical negligence matters. The one option, favoured by the Master, is the appointment of a curator *bonis*. The other option is the establishment of a trust by order of court and trust deed. Both protective mechanisms are legally tenable and there is no basis to conclude that a trust ought to be permitted only in exceptional circumstances. The flexibility of the trust as a mechanism for protecting damages awards may in many cases be beneficial to the plaintiff's interests. However, each case must be considered on its facts. The court should be placed in a proper position to be able to make a determination as to whether the chosen option is an appropriate means of protecting the plaintiff's interests. This will require an amendment to the current practice directives of this Division to ensure that a procedure is in place to assist the decision-making process.

137. If a curator is appointed, the Estates Act applies, and if a trust is established, it is the Trust Act and not the Estates Act that is applicable. The court has the authority for establishing a trust in circumstances where the court considers this to be

appropriate. The provisions of the Estates Act have no application to the establishment of a trust.

138. A trustee appointed under an order of court is not subject to the powers of the Master under the Estates Act. In that case the Master's powers reside under the Trust Act. Court orders establishing a trust should not make reference to the Estates Act. Orders that purport to subject the trustee to the Master's powers under the Estates Act are invalid. The court cannot give to the Master powers beyond those accorded under statute.

139. In matters that are currently being administered under orders purporting to give the Master Estates Act powers over trustees, applications may be made to court for a suitable variation of those orders.

Re Paragraphs (vii) – (xi): Fees and administration costs of curators and trustees

140. The court order and trust instrument must include express and specific provisions for the remuneration of the trustee, which must cover fees and administration costs and other disbursements. Reference should not be made to the scale of fees provided for curators as a means of calculating trustees' remuneration. Again, the court must be satisfied, on the basis of information provided by the parties, that the remuneration structure proposed is appropriate on the facts of the case.

141. Trustees should be required to provide security in terms of the Trust Act unless there are particular reasons why this is not warranted in a specific case.

142. The fact that a trustee has insurance cover should not, as a general rule, absolve her from the need to provide security.

143. Whether or not guardians or family members should be appointed as co-trustees is a question to be considered on the facts of each case. If a guardian or family member is appointed as a co-trustee, the court should also determine whether she will have decision-making capacity; whether she should provide security; and the trust instrument should provide a mechanism for dealing with any deadlocks in decision-making between the co-trustees.

144. The defendant should be liable for the costs associated with the yearly audit of the trust, the provision for security by the trustee and all other administration costs. The amount should be quantified in the court order and included in the amount awarded as special damages.

Re Paragraph (b): The Guardian's Fund and awards to minors

145. Damages awarded to minors may be paid into the Guardian's Fund. However, save for small awards, where another form of protection is not cost effective, this may not be ideal.

146. Alternative forms of protection for awards made to minors are payment to the child's parents/guardians to manage on her behalf until majority; the appointment of a curator *bonis* to manage the funds; or the establishment of a trust. Practitioners must place all relevant facts before the court to enable to court to decide which form of protection is in a particular child's best interests.

147. In all cases, unless a departure from the practice can be justified, a curator *ad litem* should be appointed to represent the child and to make recommendations to the court as to which form of protection is in her best interests.

Re Paragraph (c): 'Partial incapacity'

148. So-called 'partial incapacity' cases are those in which the medical experts conclude that the plaintiff does not suffer from an incapacity such as to manage her affairs, but that the funds to be awarded by way of damages require some form of protection. In these matters, trusts may be used to provide the necessary protection.

149. It is important in these matters that sufficient medical evidence is placed before the court to support an order of this nature. Courts must be guided, but not be bound by the opinion of the experts on this score. Consideration should be given to whether, despite there being no medical evidence of incapacity for purposes of Rule 57(1), the appointment of a curator *ad litem* would nonetheless be in the interests of the plaintiff and/or of assistance to the court.

150. Trust provisions can be tailor made to suit the needs and interests of each plaintiff in such cases.

151. Court orders and trust instruments should:

(a) specify the objective of the trust in each case;
(b) expressly provide for termination of the trust by order of court.

Guidelines for the development of a Practice Directive

152. There are currently practice directives in force in both courts of this Division relating to the appointment of a curator *ad litem*. These deal primarily with the form and procedural matters relating to such applications.

153. In Johannesburg the directive[59] provides:

> '10.7 CURATOR AD LITEM
>
> 1. Where the appointment of a curator ad litem is sought to assist a litigant in the institution of conduct of litigation, the applicant must establish the experience of the proposed curator ad litem in the type of litigation which the litigant wishes to institute or conduct.
>
> 2. A consent to act by the proposed curator ad litem must be annexed to the application.
>
> 3. In order to preclude giving notice of the application to the prospective defendant, the applicant should seek that the costs of the application be reserved for determination in the contemplated trial.
>
> 4. The order sought should only permit the proposed curator to settle the action with the approval of a Judge.
>
> 5. Where the curator ad litem requires the approval of the court to settle the action, the curator ad litem and plaintiff's counsel may approach

[59] Introduced with effect from 1 July 2012

the deputy Judge president for the allocation of a Judge in chambers to approve the settlement.

6. Where an application is made for the appointment of a curator ad litem.

7. In preparing the report the curator ad litem must have regard, inter alia, to the provision of Rule 57(5) and to the judgments in and to the judgments in *Ex parte Campher* 1951 (3) SA 248 (C) at 252; *Ex parte Glendale sugar Millers (Pty) Ltd* 1973 (2) SA 653 (N) at 659-660; *Steyn v Steyn* 1972 (4) SA 151 (NC) at 152; and *Modiba obo Ruca; in re: Ruca v Road Accident Fund* (12610/2013; 73012/130 [2014] ZAGPPHC 1071 (27 January 2014)'

154. In Pretoria the directive[60] provides:

'15-9 CURATOR AD LITEM

1. Where the appointment of a curator ad litem is sought to assist a litigant in the institution or conduct of litigation, the applicant must establish the experience of the proposed curator ad litem in the type of litigation which the litigant wishes to institute or conduct and also of the curator bonis who is proposed to attend to the patient's affairs and person.

2. A consent by the proposed curator ad litem must be annexed to the application

3. In order to preclude giving notice of the application to the prospective defendant, the applicant should seek that the costs of the application be reserved for determination in the contemplated trial.

4. The order sought should only permit the proposed curator to settle the action with the approval of a judge.

5. Where the curator ad litem requires the approval of the court to settle the action, the curator ad litem and plaintiff's counsel may approach

[60] ibid

the Deputy Judge President for the allocation of a judge in chambers to approve the settlement.'

155. There is also a practice directive for the Pretoria court relating to the appointment of a curator *bonis*[61] which provides:

'15.8 CURATOR BONIS

1. At the first hearing of the application for the appointment of a curator bonis, the only relief granted is the appointment of a curator ad litem. All other relief is postponed sine die pending receipt of the curator ad litem's and the master's report.

2. The application is re-enrolled after the aforementioned reports have come to hand.

3. Save in exceptional circumstances, which must be established on affidavit, an application for the appointment of a curator bonis will not be heard if the aforementioned reports have not been filed in the court file.

4. The consent of both the curator ad litem and the proposed curator bonis must be annexed to the application'.

156. The practice directive for the appointment of a curator *ad litem* in Johannesburg provides that the report of the curator *ad litem* must have regard to the provisions of Rule 57(5)[62] and the judgments of the court in a number of cases[63] – pertinently that

[61] Introduced with effect from 1 July 2012

[62] Rule 57(5) reads as follows:

'Upon his appointment the curator ad litem (who shall if practicable be an advocate, or failing such, an attorney), shall without delay interview the patient, and shall also inform him of the purpose and nature of the application unless after consulting a medical practitioner referred to in paragraph (b) of subrule (3) he is satisfied that this would be detrimental to the patient's health. He shall further make such inquiries as the case appears to require and thereafter prepare and file with the registrar his report on the matter to the court, at the same time furnishing the applicant with a copy thereof. In his report the curator ad litem shall set forth such further facts (if any) as he has ascertained in regard to the patient's mental condition, means and circumstances and he shall draw attention to any consideration which in his view might influence the court in regard to the terms of any order sought.'

[63] It is well established that the curator *ad litem* must be furnished with as much information as is available in order to properly discharge his duty in reporting to the court – see *Ex Parte Campher* 1951 (3) SA 248 (C) at

of *Modiba* which has been referred to elsewhere in this judgment.

157. The practice directive for Pretoria contains no such direction and so this may result in inconsistent practice on the part of curators *ad litem* when it comes to the submission of their reports. Axiomatically such inconsistency only serves to perpetuate the perception that one or other form of protection is preferable to the other and to the subsequent recommendations which conflate the Estates and Trust Acts and lead to the conflicting orders which the Master has identified.

158. Apart from these concerns, and save for the reference in the Johannesburg practice directive to the *Modiba* judgment, there is no practice directive dealing specifically with the procedure to be followed, and the factors a court should consider in ordering either the appointment of a curator *bonis*, or the establishment of a trust specifically to protect damages awarded to plaintiff's in RAF and medical negligence matters. All parties before us expressed the desirability for the development of a practice directive dealing with this specific situation. This will probably also require an amendment to the existing practice directives dealing generally with the appointment of curators where there is an overlap.

159. In our view it is desirable that a practice note be developed in this Division specifically dealing with the procedure to be followed by parties who approach the court for an order aimed at protecting damages awarded to plaintiffs in RAF and medical negligence matters. Such a directive would provide the Master, parties and the courts with certainty in regard to the matters of conflict and concern dealt with in this judgment. We should add that although the Report and Directive were directed at the position of these two categories of cases, there is no reason to limit the proposed practice directive in the same manner. In other words, there seems to us to be no reason why it cannot also be applicable to any other matter in which a plaintiff is awarded damages in circumstances where the protection of the award is required.

160. Furthermore, it would be salutary if the practice directives for both Courts of the Division were the same, save for minor necessary practical adjustments.

252, *Ex Parte Glendale Sugar Millers* 1973 (2) SA 653 (N) at 659 -660, *Steyn v Steyn* 1972 (4) SA 151 (NC) at 152.

161. What follows are our proposed guidelines for the development of the practice directive and, where necessary, revision of the existing directives dealing with the appointment of curators *ad litem* and curators *bonis*.

(a) The directive should recognise that both the appointment of a curator *bonis* and the establishment of a trust are valid mechanisms for the protection of damages awarded to plaintiffs in RAF and medical negligence matters where such protection is required.

(b) Each case should be decided on its own facts, with the court ultimately being required to determine whether the proposed mechanism is appropriate and in the best interests of the plaintiff.

(c) Each application must be supported by evidence from relevant medical experts on the following questions:

(i) Whether the plaintiff is of unsound mind, or suffering from a form of disability rendering her incapable of managing her affairs;

(ii) If the opinion of the medical experts is that the plaintiff is not so incapable, whether there is nonetheless a need to protect the damages award.

(d) Where the view of the medical experts is that the plaintiff is incapable of managing her affairs, the procedure for the appointment of a curator *ad litem* under Rule 57(1) must be followed.

(e) Any application for the appointment of a curator *ad litem* must be instituted as soon as practically possible. Consideration should be given to whether the current practice directives dealing with "Y' matters in this Division need to be amended to ensure that matters are not deemed to be trial ready without the appointment and report of a curator *ad litem* in cases where this is indicated.

(f) In cases where the medical opinion is that despite the plaintiff not

being incapable of managing her affairs, the damages award requires protection, courts should nonetheless consider whether an application for the appointment of a curator *ad litem* is appropriate and direct the parties to do so.

(g) In an application for the appointment of a curator *ad litem*, the draft order sought should set out the specific powers that are to conferred upon the curator *ad litem* both in respect of the conduct of any litigation and in respect of further reporting and recommendations with regards to the proposed mechanism for the protection of any damages award.

(h) It should be a requirement that where a curator *ad litem* is appointed with the power to conduct litigation on behalf of the plaintiff, she must make full disclosure to the court of the terms of the fees mandate given by her to the attorneys acting on the plaintiff's behalf. A copy of any proposed fee agreement (including a contingency fee agreement) with the attorneys must be laid before the court for its consideration as soon as reasonably possible. Courts should be vigilant to ensure that proposed fee agreements are in the interests of the plaintiff. In granting powers to a curator *ad litem*, the court should consider whether the power of the curator to enter into any fee agreement between with the plaintiff's attorneys should be subject to authorisation by the court.[64]

(i) In particular, the curator *ad litem* should be required to report to the court on whether the appointment of a curator *bonis*, or the establishment of a trust is the most appropriate mechanism for the protection of the plaintiff's damages award.

[64] The need for courts to exercise vigilance in respect of contingency fee agreements entered into or ratified by curators *ad litem* on behalf of minors was highlighted in at least two recent cases. See *Bouwer v Road Accident Fund* 2021 (5) SA 233 (GP); *Mucavele v MEC for Health Mpumalanga* (3352/2016) [2022] ZAMPMBHC 32 (17 March 2022). In *Bouwer*, the court made the point that in a case where the plaintiff is a minor child who was a passenger in a motor vehicle, a contingency fee agreement could never be in her best interests: there was no risk assumed by the plaintiff's attorney and thus a success fee, which is the underlying rationale for a contingency fee arrangement, was not warranted. The court ultimately found that the contingency fee agreement was invalid because the child's grandmother, who was not her legal guardian, could not enter into a valid agreement on her behalf. Consequently, the curator ad litem, who was subsequently appointed to act for the child, could not ratify an invalid agreement.

(j) The recommendation by the curator *ad litem* should be supported by the following information:

(A) The plaintiff's current living and family circumstances.

(B) Whether the plaintiff is married and, if so, the relevant marital regime. The effect of an order on the estate of a plaintiff's spouse may be a relevant consideration.

(C) A statement of the assets and liabilities of the plaintiff, excluding the damages award. Again, the effect of an order in respect of the broader estate of the plaintiff may be a relevant consideration.

(D) A comprehensive consideration of the patient's future educational, medical, social and other needs.

(E) Based on (D), the nature of the anticipated expenditure the curator *bonis* or trustee may be expected to undertake from the damages award to ensure that the plaintiff's maintenance and other needs are met. This is an important information for purposes of a court later determining what the powers of the curator *bonis* or trustee should be.

(F) Whether the curator *ad litem* discussed with the plaintiff the form of protection proposed for the damages award; whether the plaintiff was able to comprehend the proposal; and, if so, what the plaintiff's views are in this regard and whether she consents to the protection of the damages award.

(G) Where the plaintiff is a minor, the curator *ad litem* should include in her report her recommendation as to whether a guardian or other family member should be appointed as a co-trustee, and their suitability for such appointment. This may have to be discussed with, and consented to by, the proposed

trustee The curator should also make a recommendation as to whether that co-trustee should be required to provide security.

(k) In cases where a curator *ad litem* is not appointed, but the protection of the damages award is still advisable, the plaintiff's attorney must ensure that the information referred to in paragraph (A) – (G) is placed before the court. In such cases, it is important that the views of the plaintiff are properly canvassed and relayed, particularly to ascertain her consent to the establishment of a trust.

(l) In every case in which it is sought to appoint a curator *bonis* in respect of a damages award, the court must be provided with sufficient information to determine an appropriate level of remuneration, including recoupment of expenses and disbursements.

(m) The order appointing the curator *bonis* must deal specifically with the rate of remuneration, taking into account the complexity of the curatorship, the time that is estimated will be involved in carrying out the curator's duties, and the anticipated expenses. As a general rule, Court orders ought not simply to cross-refer to the statutory tariff provided for under the Estates Act as the basis for calculating the remuneration.

(n) The same considerations apply in dealing with the remuneration of trustees. The court must be provided with sufficient information to determine whether, taking into account the aspect of cost, the establishment of a trust is in the interests of the plaintiff. While this is not the only consideration, it is a relevant one.

(o) In particular, no court order should direct that the fees and other remuneration of a trustee is to be determined with reference to the Estates Act. A fee and expenses structure must be determined in each case. The Estates Act has no application in respect of trustees.

(p) Similarly, no court order should direct that a trustee is subject to the

Estate's Act powers of the Master, for the same reason.

(q) As a general rule, the appointment of a curator *bonis* should not include a provision that the exercise of all the curator's powers are subject to the prior approval of the Master. Unless there are specific reasons to extend the Master's prior approval beyond those provided in s 80 of the Estate's Act, the requirement of prior approval should be restricted to the statutory limit.

(r) The court should be provided with sufficient information to enable it to determine whether the manner in which the proposed curator *bonis*, or trustee, as the case may be, may invest and otherwise deal with the funds awarded by way of damages, promotes the interests of the plaintiff. The qualifications and experience of the proposed curator *bonis* or trustee should be set out in the curator *ad litem's* report.

(s) Where the establishment of a trust is sought, the trust instrument must be provided to court. A draft trust instrument is not sufficient unless it is vetted and marked 'X' with a directive that the trust will be established on the terms approved by the court.

(t) It is not advisable to use generic trust instruments for the establishment of protective trusts for damages awards. The drafters of the trust instrument in each case must ensure that before it is presented to court it contains all the provisions necessary and appropriate to ensure the promotion of the plaintiff's interests. Superfluous provisions, drawn from generic trust instruments not focused on protecting damages awards should be excluded.

(u) The objective of the trust must be clearly stated in both the court order and the trust instrument.

(v) In cases where a protective trust is justified despite the plaintiff not being incapable of managing her affairs within the meaning of Rule 57, consideration should be given to ensuring that the terms of the

trust instrument do not unduly limit the powers and interests of the plaintiff. A balance should be struck between the need for protection at the same time as providing the plaintiff with adequate independence.

(w) Unless required under Rule 57 or the Trust Act, the Master does not as a general rule require to be given notice and joined in proceedings in which an application is made to establish a protective trust. The joinder of the Master in all such cases may cause unnecessary delays and a burden on the administration of the Master's office. Of course, if it is desirable in a particular case to given notice to the Master, the court may direct that this be done.

(x) The court order establishing a trust and the trust instrument must expressly include provision for the amendment or termination of the trust by order of court.

(y) In RAF cases, attention should be given to the effect that any Undertaking provided under s 17(4)(a) of the Road Accident Fund Act will have on the exercise of the trustees and curator's powers and duties and on her remuneration.

(z) A defendant is liable for the administration costs and expenses of a curator and trustee. These costs and expenses can form part of the Undertaking given by the RAF. The Master has no general power to vet and approve the claimed costs and expenses, and the RAF cannot insist that the Master does so before honouring the undertaking. It may be advisable to make specific provision for this in the court order to avoid disputes and delays in the future.

(aa) In addition, consideration may be given to the recommendations made by Fisher J in paragraph 26 of *Dube* as to what additional provisions should be included in a trust instrument in matters of this nature. This is subject to our views on the appointment of family members as co-trustees, expressed earlier.

(bb) Where the injured party is a child, unless circumstances exist justifying that it is not necessary to do so, a curator *ad litem* should be appointed to represent the child's interests and to make a recommendation to the court as to the form of protection that will best serve her interests.

(cc) In cases where a trust is established to manage a minor's award of damages, particular care must be taken in the court order and the trust instrument to state the objective of the trust. If the trust is not intended as a simple minority trust, but is to operate beyond the child reaching majority, this must be expressly recorded. In addition, it must be recorded that the trust may be terminated with the approval of the High Court. Conversely, if the trust is indeed intended as a simple minority trust, then this should be stated in clear terms, with the termination date being the majority of the minor.

Specific matters before the court

Van Rooyen N.O on behalf of Nomvuyiso Ntozakhe v RAF (case number: 28304/2016)

162. This is a matter in which the *curator ad litem* recommended protection of the patient's award of damages for serious injuries sustained in a motor collision. Besides serious orthopaedic injuries, the patient also sustained a head and brain injury with sequelae which have resulted in impairments.

163. The patient was consulted on a number of occasions by the curator in regard to the establishment of a trust to manage her funds and afford her protection. The patient objected, contending that her award should be paid to her and went to far as to deny that she had suffered a head injury – the primary injury which resulted in the award made – an amount in excess of R5 million.

164. The curator in her report to court considered the evidence of all the experts who examined the patient and concluded, notwithstanding what is set out in paragraph (b) above, that although the patient has indeed suffered severe head injuries, she is able to manage her day to day affairs. It is on this basis that the curator recommended that a trust be established rather than a curator *bonis* be appointed

to the patient.

165. Notwithstanding service of the application on the Master, no report has been filed in this matter on behalf of the Master.

166. The notice of motion in this matter seeks an order for the establishment of a trust with the first proposed trustee being a representative of Standard Trust and refers to a proposed trust deed which is annexed to the notice of motion. The terms of the proposed trust deed, save as set out hereunder, are not contentious although neither the order nor the proposed trust deed provide, as they should, that the trust deed cannot be varied without an order of court.

167. In regard to the costs for the creation and administration of the trust, the proposed trust deed provides :

> '5.4 The trustees are authorized to recover from the Road Accident Fund the remuneration of and reasonable costs incurred by the trustees:
>
> 5.4.1 in the establishment of the trust and appointment of the trustee;
>
> 5.4.2 in respect of the administration of the trust, including the costs of an annual audit by a chartered accountant;
>
> 5.4.3 The costs of furnishing security to the satisfaction of the Master and the annual retention thereof;
>
> 5.4.4 The above-mentioned costs shall be in accordance with the prescribed tariff applicable to a curator bonis.'
>
> And
>
> '11.1 The costs and charges relating to the administration of the trust fund and the costs and charges incidental to the formation thereof shall be borne by the Road Accident Fund.
>
> 11.2 While the corporate trustee acts as trustee it shall be entitled to recover its full fees of office in accordance with its tariff in

> force from time to time during the subsistence of the trust fund. Any co-trustees in office from time to time shall act in an advisory capacity only and without remuneration.'

168. The order sought by the curator *ad litem* provides only that the proposed trustee be ordered to furnish security to the satisfaction of the Master and that the costs of appointing the trustee will be costs in the main action. It would appear from the construction of the two paragraphs referred to above that it is anticipated that such costs would be recoverable from the Road Accident Fund in terms of the Undertaking to pay future medical hospital and associated medical expenses undertaken by it in terms of s 17(4)(a) of the Road Accident Fund Act 56 of 1996.

169. Paragraph 5.4 of the trust deed is clear in its terms as to the costs. However, paragraph 11 is unclear. It refers to a tariff which does not form part of any of the papers before the court although such tariff is referred to as an annexure in the consent to act as trustee. Perhaps more telling as to the costs regime that would be applicable to this particular proposed trust is paragraph 3 of the consent which states:

> 'Standard Trust Limited only acts on the basis that it recovers its full tariff and fees for the administration of the Trust as per the attached pricing structure'

170. The basis upon which the proposed trustee is to be remunerated is unclear – at best upon the basis set out in paragraph 5.4 which would result in a full recovery of administration costs and at worst upon the basis set out in paragraph 11.1 and 11.2 – an unspecified cost to be borne by the RAF. Even on a benign consideration of paragraph 5.4 and 11.1 and 11.2, with the fees payable to curators *bonis* and other charges referred to in paragraph 5.4 recoverable as a contribution, there would still be an unspecified additional charge to the Trust.

171. There is another matter which has not been dealt with in the papers before the court. The action for damages was brought in this Division of the High Court. The patient presently resides in the Eastern Cape and the court ordered case manager (ordered as part of the settlement) practices in Pretoria. If the proposed trust were to be registered, even assuming it was registered at the office of the Master closest to

where the patient resides, would still involve a proposed trustee with its principal place of business in Johannesburg.

172. Neither the RAF nor the Master have filed any report or made any submissions in regard to this matter. Furthermore, practical considerations such as how the trust will be administered and how the patient's day to day life, access to care and access to the trustee must be placed before the court.

173. We are not satisfied that the order sought by the curator in this matter should be granted at this stage without the application being supplemented to include consideration of the factors set out above.

Language N.O. (as Curator ad Litem) Raphulu v RAF (case number 44200/2018)

174. This is a matter in which the curator *ad litem* recommended the appointment of a curator *bonis*. The Master delivered a report. There is nothing contentious in this application and we intend to grant the order sought save that, for the reasons set out above, only powers 4, 7 and 10 referred to in annexure 'A' to the Master's report will be subject to the prior consent and approval of the Master.

Raubenheimer N.O (as Curator *ad Litem*) James v RAF (case number 17258/2015).

175. This is a matter in which the curator *ad litem* recommended the appointment of a curator *bonis*. The Master delivered a report. There is nothing contentious in this application and we intend to grant the order sought save that, for the reasons set out above, only powers 4, 7 and 10 referred to in annexure 'A' to the Master's report will be subject to the prior consent and approval of the Master.

Segoba on behalf of minors v RAF (case number: 40258/2021)

176. This is a matter in which the curator *ad item* was appointed to act on behalf of minor children in a claim for loss of support. After the death of their mother the children had resided with an aunt who had cared for them. At some point after the settlement of the claim for loss of support, their absent father who had been divorced from their late mother made contact with them and took them from their aunt to live with him and his new family. The material circumstances of the minors as appears from the papers before us worsened as a result of their leaving the home of their aunt.

177. Initially the curator *ad litem* sought an order that R80 000 of the award be paid to the aunt and that R120 000 be paid to the father. Although it was not stated in the notice of motion, it was stated in the founding affidavit that the balance of the funds, some R535 000 would be paid into a trust.

178. During the hearing of the matter some of our concerns with this matter were raised and a supplementary affidavit was filed by the curator *ad litem.*

179. The supplementary affidavit raises a number of concerns – firstly, the assertion that the attorney refuses to tax his bill of costs for the work done unless specifically ordered to by the court and secondly, that the sum of R200 000 be paid to the aunt and father from the capital.

180. From the supplementary affidavit it is apparent that the award for damages in respect of the older child is R350 875 and for the younger child is R384 175. Neither amount is on its own or combined, once the taxed attorney's costs have been deducted sufficient to warrant the appointment of either a curator *bonis* or the establishment of a trust.

181. We intend to order that the damages recovered in respect of each of the children as set out in (e) above be paid into the Guardian's Fund for their respective credit.

182. It goes without saying that the attorney is to be ordered to tax his attorney and client bill of costs and to recover the RAF's party and party contribution towards costs. Having regard to the circumstances of the matter, it is our view that once those bills of costs have been taxed, the attorney must approach this court for an order for payment of the portion of the unrecovered costs, pro rata by the Guardian's Fund from each of the minor's funds.

Wentzel v RAF (case number: 35182/2016)

183. This is a matter in which the curator *ad litem* recommended the appointment of a curator *bonis* and curator *ad personam*. The Master delivered a report. There is nothing contentious in this application and an order as granted on 23 September 2021 appointing both a curator bonis and a curator *ad personam*. Certain parts of the order were suspended pending the outcome of the present application. We intend, besides uplifting the suspension to also grant the curator *bonis* leave to apply for an order that that only powers 2.4, 2.7 and 2.10 referred to in the order of 23 September 2021 will

be subject to the prior consent and approval of the Master.

IT IS ORDERED:-

184. In Van Rooyen N.O on behalf of Nomvuyiso Ntozakhe v RAF (case number: 28304/2016):

1. This matter is referred back to the curator *ad litem* in order for her to file a supplementary report in which the matters referred to in paragraphs 162 (a) to 161 (l) of the judgement of this court are addressed.
2. The curator *ad litem*, having filed the supplementary report is granted leave to enroll this matter for hearing afresh in open court or before a Judge in chambers.

3. Costs of the application to be borne by the Road Accident Fund on the scale as between party and party.

185. In Language N.O. (as curator *ad litem*) Raphulu v RAF (case number 44200/2018):

1. The patient is declared incapable of managing his own affairs and Mr. Willem Francois Bouwer is appointed as curator *bonis* for and on behalf of the patient, with the following powers:
   (i) To receive, take care, control and administer all the proceeds of the claimant referred to in the Court Orders in the above Honourable Court under the above case number on 10 September 2020;
   (ii) To receive, take care of, control and administer all the property constituting the estate of the patient;
   (iii) To take any action which may be necessary, in the interests of the patient, for the due and proper administration of his propert
   (iv) To carry on/or discontinue, subject to any law, which may be applicable, any trade, business or undertaking of the patient;
   (v) To invest and reinvest any monies which may become available from time to time for investment and which are not immediately required for the purposes found in Section 82(c) of the Administration of Estates Act, 66 of 1965, as amended;

(vi) To raise any money by way of mortgage or pledge or of any of the immovable or movable property of the patient for the payment of his debt, or the payment of any debt or expenditures incurred or to be incurred for his maintenance or his future maintenance, or otherwise for his benefit or the improvement or maintenance of any of the property;

(vii) To let, exchange, partition, alienate and for any lawful purpose to mortgage or pledge any property, movable or immovable, whether in whole or in part belonging to the patient;

(viii) To perform any contract relating to the property of the patient entered into by or before he was declared incapable of managing his own affairs;

(ix) To acquire, whether by purchase or otherwise, any property whether movable or immovable, for the benefit of the patient;

(x) To exercise any power or give any consent required for the exercise of any such power where such power is vested in the patient for his own benefit or in the nature or beneficial interest to him;

(xi) To apply any income or capital of the estate of the patient for maintenance, support or benefit, for the maintenance, education or advancement of any person dependent upon him, to the payment of any debt due by him and for the maintenance, preservation, safe custody or the improvement of an of his properties by means of building or otherwise;

(xii) To receive, administer and exercise any right the patient might have in terms of Section 17(4)(a) of Act 56 of 1996 (as amended) with regard to the undertaking referred to in paragraph 3 of the Court Order issued in the above Honourable Court under the above case number on 10 September 2020;

(xiii) To institute proceedings which may be necessary in the interest of the patient, or for the due or proper administration of the patient's estate;

(xiv) To, as far as possible, ensure that the patient is, by the payment of the capital sum awarded above and any other sum payable in terms of this order, and by the use to which that payment is put, protected from the consequences of the injuries sustained by the patient in the action in question and in as far as possible enabled thereby to obtain such financial wellbeing as the patient would have been, were it not for the injuries sustained and the *sequelae* thereof, have been able to obtain;

(xv) The powers of the curator *bonis,* as set out above, are extended to include the power to make investments of funds or monies of the patient by means of any reasonable investment vehicle other than only depositing such funds or monies in an interest-bearing account with a bank or similar registered financial institution.

2. The aforesaid appointment of the *curator bonis* is subject hereto that:
   2.1 The curator *bonis* furnishes security to the satisfaction of the Master of the High Court, South Gauteng Division, Johannesburg.
   2.2 The exercise of the curator *bonis* of his aforesaid powers will be subject to the control of the Master of the High Court, Gauteng Division, Johannesburg, provided however that only in respect of the powers set out in paragraphs (iv), (vii) and (x) above are the Master's prior consent or approval required prior to their exercise.
3. In the event that the curator *bonis* referred to above is unwilling or unable to take up such appointment or to furnish security or becomes disqualified from acting in such capacity, the Master of the High Court is authorized to appoint an alternative person as curator *bonis*, subject to the terms of this order.
4. The Road Accident Fund is to pay the costs of this application and the costs of the curator *bonis*, subject to the applicable statutory tariffs, as between party and party. The party and party costs will be costs in the action instituted under the above case number.

186. In Raubenheimer N.O (as curator *ad litem*) James v RAF (case number 17258/2015):

1. The patient is declared incapable of managing his own affairs and Mr. Jan Harm Steyn Maritz is appointed as curator *bonis* for and on behalf of the patient, with the following powers:
   (i) To receive, take care, control and administer all the proceeds of the claimant referred to in the Court Orders in the above Honourable Court under the above case number on 22 May 2020 and 6 November 2020;
   (ii) To receive, take care of, control and administer all the property constituting the estate of the patient;
   (iii) To take any action which may be necessary, in the interests of the patient, for the due and proper administration of his property;

(iv) To carry on/or discontinue, subject to any law, which may be applicable, any trade, business or undertaking of the patient;

(v) To invest and reinvest any monies which may become available from time to time for investment and which are not immediately required for the purposes found in Section 82(c) of the Administration of Estates Act, 66 of 1965, as amended;

(vi) To raise any money by way of mortgage or pledge or of any of the immovable or movable property of the patient for the payment of his debt, or the payment of any debt or expenditures incurred or to be incurred for his maintenance or his future maintenance, or otherwise for his benefit or the improvement or maintenance of any of the property;

(vii) To let, exchange, partition, alienate and for any lawful purpose to mortgage or pledge any property, movable or immovable, whether in whole or in part belonging to the patient;

(viii) To perform any contract relating to the property of the patient entered into by or before he was declared incapable of managing his own affairs;

(ix) To acquire, whether by purchase or otherwise, any property whether movable or immovable, for the benefit of the patient;

(x) To exercise any power or give any consent required for the exercise of any such power where such power is vested in the patient for his own benefit or in the nature or beneficial interest to him;

(xi) To apply any income or capital of the estate of the patient for maintenance, support or benefit, for the maintenance, education or advancement of any person dependent upon him, to the payment of any debt due by him and for the maintenance, preservation, safe custody or the improvement of an of his properties by means of building or otherwise;

(xii) To receive, administer and exercise any right the patient might have in terms of Section 17(4)(a) of Act 56 of 1996 (as amended) with regard to the undertaking referred to in paragraph 3 of the Court Order issued in the above Honourable Court under the above case number on 25 May 2018;

(xiii) To institute proceedings which may be necessary in the interest of the patient, or for the due or proper administration of the patient's estate;

(xiv) To, as far as possible, ensure that the patient is, by the payment of the capital sum awarded above and any other sum payable in terms of this order, and by the use to which that payment is put, protected from the consequences of the injuries sustained by the patient in the action in question and in as far as possible enabled thereby to obtain such financial wellbeing as the patient would have been, were it not for the injuries sustained and the *sequelae* thereof, have been able to obtain;

(xv) The powers of the curator *bonis,* as set out above, are extended to include the power to make investments of funds or monies of the patient by means of any reasonable investment vehicle other than only depositing such funds or monies in an interest-bearing account with a bank or similar registered financial institution.

2. The aforesaid appointment of the curator *bonis* is subject hereto that:
   2.1 The curator *bonis* furnishes security to the satisfaction of the Master of the High Court, South Gauteng Division, Johannesburg.
   2.2 The exercise of the curator *bonis* of his aforesaid powers will be subject to the control of the Master of the High Court, Gauteng Division, Johannesburg, provided however that only in respect of the powers set out in paragraphs (iv), (vii) and (x) above are the Master's prior consent or approval required prior to their exercise.
3. In the event that the curator *bonis* referred to above is unwilling or unable to take up such appointment or to furnish security or becomes disqualified from acting in such capacity, the Master of the High Court is authorized to appoint an alternative person as curator *bonis,* subject to the terms of this order.
4. The curator *bonis* is ordered to investigate the necessity for the appointment of a curator *ad personam* to the patient with the following powers:
   a. To exercise powers in regard to matters relating to the patient's person and physical and mental well-being;
   b. To determine where the patient is to live;
   c. To determine whether the patient has to have any particular medical, surgical or dental treatment, and to identify appropriate medical service providers;
   d. To engage the services of someone to look after the said patient should he consider it necessary to do so;

e. All such other powers as may be necessary to ensure the well-being and safety of the patient.

5. The curator *bonis* is granted leave to apply, if necessary, and on the same papers duly supplemented, for the appointment of a curator *ad personam* to the patient.
6. The Road Accident Fund is to pay the costs of this application and the costs of the curator *bonis*, subject to the applicable statutory tariffs, as between party and party. The party and party costs will be costs in the action instituted under the above case number.

187. In Segoba on behalf of minors v RAF (case number: 40258/2021):

1. Applicant's attorney of record is ordered to make payment of the sum of R350 875.00 into the Guardian's Fund held at the Master of the High Court Pretoria for the credit of Nhlakanipho Joy Sekwane (Identity No: 050316 0358 084).
2. The Applicant's attorney of record is ordered to make payment of the sum of R384 175.00 into the Guardian's Fund held at the Master of the High Court Pretoria for the credit of Lwazi Sekwane (Identity No: 060605 5104 081).
3. The Applicant's attorney of record is ordered to account to the Guardian's Fund after having:
   3.1 recovered the party and party costs due in respect of the action from the Road Accident Fund; and
   3.2 drawn and taxed an attorney and own client bill of costs.
4 In the event that the attorney and own client costs exceed the party and party costs recovered, the Applicant's attorney is authorized to approach the Guardian's Fund to obtain payment of the difference, *pro rata,* in respect of the amounts referred to in paragraphs 1 and 2 above.
5 Costs of this application to be borne by the Road Accident Fund on the scale as between party and party.

188. In Wentzel v RAF (case number: 35182/2016):

1. This matter is referred back to the curator *ad litem* in order for her to file a supplementary report in which the matters referred to in paragraphs 162 (a) to 162 (l) of the judgement of this court are addressed.
2. The curator *ad litem*, having filed the supplementary report is granted leave to enroll this matter for hearing afresh in open court or before a Judge in chambers.
3. Costs of the application to be borne by the Road Accident Fund on the scale as between party and party.

_____

R KEIGHTLEY
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

_____

I AGREE

A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

_____

I AGREE

C VALLARO
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

This judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and uploading it to the electronic file of this matter on CaseLines. The date of hand-down is deemed to be 20 May 2022.

HEARD ON: 2 & 3 NOVEMBER 2021
(Further written submissions received on 29 November 2021)
JUDGMENT DELIVERED: 20 MAY 2022
APPEARANCES:

1. Master of the High Court of South Africa

   Counsel for the Master: Adv V Maleka SC
   Adv C Makhajane
   Attorney for the Master: Mr NR Baloyi

2. Adv M van Rooyen N.O v Road Accident Fund - Case No: 28304/2014

   Counsel for Applicant: Adv JG Cilliers SC
   Adv DS Gianni
   Attorney for Applicant Mr M Bezuidenhout

3. Adv Language N.O Raphulu v Road Accident Fund - Case No: 44200/2018

   Counsel for Plaintiff: Adv Goodenough
   Attorney for Plaintiff Mr R Hattingh

4. Adv N Raubenheimer N.O v RAF - Case no: 17258/2015

   Counsel for Applicant: Adv D Goodenough
   Attorneys for Applicant: Mr R Hattingh

5. SA Segoba N.O v RAF - Case No: 40258/2021

   Counsel for Applicant: Adv RA Arcangeli
   Attorneys for Applicant Mr IT Mothibe

6. Wentzel, MC v Road Accident Fund - Case No: 35182/2016

   Counsel for Applicant: Adv L Schreuder
   Attorney for Applicant: Ms MC Wentzel

7. First *Amicus Curiae*

   Counsel: Adv A Louw SA
   Adv J Groenewald
   Attorney: Adams & Adams

8. Second *Amicus Curiae*

   Counsel: Adv. H Kriel.
   Attorney: Edeling van Niekerk Inc

9. Third *Amicus Curiae*

   Counsel: Adv A Coertze
   Attorney: W Bouwer Attorneys Inc

10. Fourth *Amicus Curiae*

    Counsel: Adv N Maritz SC

Attorney: Josephs Inc

11. Fifth *Amicus Curiae*
    Counsel: Adv J Lerm
    Attorney: Gascoigne Randon & Associates
12. Sixth *Amicus Curiae*
    Counsel: Adv A Coertze
    Attorney: VZLR Inc
13. Seventh *Amicus Curiae*
    Counsel: Adv B Manentsa SC
    Adv S Sindikolo
    Attorney: Webber Wentzel