Estate curatorship: Is this a demeaning western construct?

By Kaamilah Paulse and Loraine Strydom

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What should happen when someone unexpectedly comes into a large sum of money, but is found incompetent to manage the funds? If the person is functionally illiterate, and being leaned on by relatives for financial handouts, should the courts intervene? Or are they supposed to say that such concerns are ‘western’ constructs, anathema to both ubuntu and the African way of doing things?

What, in essence, is the job of a curator supposed to achieve?

Image source: Jakub Jirsak – 123RF.com

A dispute raising these questions arose in the Western Cape High Court recently, related to a woman seriously injured in an accident, and our family law and estate departments explain more.

Read the judgment here

Carmelita Cornelius (referred to by the courts as ‘the patient’), was seriously injured in an accident during 2008. An advocate was appointed to litigate on her behalf, and in 2017 he succeeded in obtaining R2.28m for her from the Road Accident Fund. But the advocate had concluded that she wasn’t able to manage her own affairs, and so he recommended the appointment of a curator of her property ("*curator bonis*").

A few months later, the high court officially declared that the patient wasn't capable of managing her affairs and appointed Leon Jansen van Rensburg as a *curator bonis* of her property. The court came to the conclusion that she needed the help of a *curator bonis* after receiving two specialists' reports, one from a psychiatrist and the other from a neuropsychologist. Among other findings, the court heard that Cornelius was functionally illiterate, while her score for 'conceptual reasoning' was 'profoundly low'.

Then, in February 2022, the patient's daughter, Candice Cornelius, successfully applied to the high court for a declaration that her mother was 'no longer ... incapable of managing her own affairs'.

Assess the situation by clinical neuropsychologist

The daughter wanted the *curator bonis* removed and full control of her finances given back to her mother. The daughter produced a report from Dr Naz Daniels, a psychiatrist who said the mother had 'sufficiently recovered from the accident' to be able to take charge of her own affairs and supported the removal of the curator.

By agreement between both sides, the advocate who had originally acted for the patient drew up a report on the question of whether a *curator bonis* should continue to manage her property.

His recommendation was that a clinical neuropsychologist should assess the situation and give some guidance on whether release from curatorship was a good idea. In his view, if the patient refused the reassessment, then it would be in her best interests that she should remain under curatorship.

Implication of donations tax

The *curator bonis* himself, opposed the application by Candice for the curatorship to end, saying there was no change in the reasons that had initially justified imposing a curator.

He said the patient would be 'at risk' if the curatorship were ended. She was 'unable to read, understand or interpret financial advice' and he pointed to several examples where she had wanted to give large sums of money to her family directly or indirectly.

For example, she had wanted to give away more than R1m to family and friends – without any concept of the implication of donations tax. She said she wanted to 'invest' R1.2m for herself and her young child, but she couldn't explain how she would do this when the person on whom she said she would rely for advice about the matter was deceased. And when he asked her about certain documents she had brought to him, 'she became upset and incontinent'.

Pressured by family members

The *curator bonis* also contested several aspects of the report by Daniels. She didn't give any reasons for her view that the curatorship should end, nor had she found that the patient would be able to understand financial advice and invest large sums of money.

He also pointed to errors in the Daniels report. For example, the specialist had written that the patient 'had not sustained a head injury' in the original accident, when all the medical records indicated that she had.

According to the *curator bonis*, the patient became unhappy when he turned down what she had proposed to contribute to her mother's funeral and 'there was clear evidence that [she] had been pressured by family

members to incur large expenses.'

The patient, along with others that he didn't know, 'demanded' that he pay R50,000 from her funds towards the funeral, when a relative was the undertaker and the coffin was said to cost R35,000. Since the Master of the court had a policy to allow R10,000 towards funeral costs of close family members, that is the amount that the curator paid out.

Strained relationship

According to him, the patient in this case remains a vulnerable person and that status would continue even if the curatorship was ended. He supported the proposal that she should be re-assessed by a neuropsychologist for advice on whether her circumstances had in fact changed. But pending that assessment, he believed curatorship should continue, even if someone else took over from him since he accepted that the relationship between the two of them had 'become strained.'

Faced with these widely differing views on whether the curatorship should be lifted, the acting judge who heard the application Nolundi Nyathi, accepted that the patient's daughter who had brought the application, had her mother's interests at heart, and held that she had legal standing to bring the action.

But if the patient didn't want the curatorship to continue, was it fair to disregard her wishes, the judge asked. Was it fair to continue to 'subject [her] to the standards and expectations of people who are better educated or have higher levels of intelligence'? It was 'unpalatable', said the judge, to require her to undergo a psychiatric test to decide her 'sophistication level'. It was her right not to accept the benefits of curatorship, given that she was of sound mind and that there was 'no evidence' that she was unable to manage a large estate.

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5 Oct 2022

Cultural misplacement should not be allowed

Two paragraphs in that judgment stand out: 'To continue subjecting the patient to curatorship ... would be tantamount to endorsing the unfortunate and unfounded belief that only those who are sufficiently schooled in the Western ways of doing things have an inherent right and can be trusted to properly manage large estates. In our country ... where people have a culture of living communally, it would not be fair to condone this kind of attitude. A cultural misplacement should neither be allowed nor promoted.'

The judge added, 'The courts must be alive and adept enough to put a halt on pure commercial tendencies from undermining the working and established practices of people who do not conform to the popular Western expectations'.

She was critical of both the *curator bonis* and the Master for failing to 'be creative' in guiding the patient, and for not adopting 'less foreign ways of addressing their concerns about the patient's perceived inability to manage a large estate'. And she criticised them for 'castigating [the patient] as someone who will never be able to understand the management of her newly found riches according to the Western paradigm.'

Relying on Ubuntu

The court also found that the curator bonis had tried to force the patient to learn 'Western ways' without looking for middle ground such as might have been provided by relying on 'ubuntu' instead.

Keeping her under curatorship would amount to a grave affront to her dignity, said the judge. And if she had

been allowed to pay for the R35,000 coffin this would have been ‘a lasting token of her appreciation for her mother and the patient had the right to make such choice.’

There was no point in having any further medical assessment, said the judge, because the challenges the patient faced were ‘social’.

Trite legal principles not taken into account

Faced with this judgment, the curator appealed. What would the appeal judges find, after this damning decision?

First, they held that the patient’s daughter did not have legal standing to have brought the earlier application and that the judge didn’t take ‘trite legal principles’ into account in deciding the question of standing. On that issue alone, the original decision could not stand.

But even if the daughter had had legal standing to bring the case, the court below made findings that were ‘simply not borne out’ by the material before it, the judges said.

Risk being exploited by those around her

Daniels, who gave key evidence for the daughter’s case, had had to back down from her findings because she didn’t have all the reports she needed, the appeal judges pointed out.

She also recognised that the patient ‘risked being exploited by those around her’ and could be at financial risk in managing large amounts of money. Ultimately, Daniels conceded that she couldn’t continue to support a recommendation that curatorship be terminated.

But the crucial question for a wider readership lay elsewhere: what would the appeal judges make of the lower court’s view that curatorship was a means of ensuring that ‘Western ways of doing things’ would prevail?

Compelling reasons

That view was ‘unfounded’, said the appeal judges. There were ‘compelling reasons’ why courts put appropriate protections in place to ‘protect and preserve both the dignity and interests of vulnerable people from all walks of life, where this is necessary’. And such a system was used not only in South Africa, but in other countries around the world.

The suggestions by the acting judge in the court of first instance, that these protections ‘reflect the imposition of “Western ways” imposed on “people who do not conform to popular Western expectations”’ were ‘without merit’, the appeal judges said.

The patient was free to obtain a neuropsychological report, a move the curator recommended, and a suggestion that Daniels supported. If it turned out that that report supported releasing the patient from curatorship, then the court would have to be approached to make an order to that effect.

Firm restatement by appeal judges Le Grange ADJP, Savage J and Cloete J

The high court’s initial judgment had been a strong challenge to the very idea of curatorship as a means to protect the estate and affairs of vulnerable people, with the judge suggesting that it was merely to prop up ‘Western’ values. But the appeal judges put paid to that proposal, with their firm restatement that it was a system widely practised, to protect the most vulnerable ‘from all walks of life’.

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