

NOTES / AANTEKENING

OLD AGE, LEGAL CERTAINTY AND *CURA DEBILIIUM PERSONARUM*

1 Introduction

Increasing medical costs justify themselves by the success of medical science in assuring greater longevity. We are all aware of the range of socio-economic problems this longer lifespan causes. This paper intends to address a more latent, concomitant strain on the legal system. A few years ago this problem manifested itself in the Supreme Court of Appeal, but passed virtually unnoticed. It is ironic that this instance, that is, the *Saayman* case (*Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* NO 1997 4 SA 302 (HHA)) will be long remembered on account of the minority judgment by Olivier JA. The enlightened approach by the late judge was rejected by the majority of the court in its endeavour to safeguard legal certainty. While legal certainty is indeed one of the important foundations of a legal system as it embodies the fundamental principle of equality before the law and provides predictability, which is an essential characteristic of science and facilitates planning, it should not be the ultimate objective at the expense of justice. Moreover, by virtue of the law of unintended consequences, the Supreme Court of Appeal dealt a vicious blow to legal certainty as well as to the legal capacity of senior citizens in this decision, which clearly set out the law applicable to this increasing segment of the population.

It is with gratitude to the editors of *Obiter* that I dedicate this essay to the memory of Lappies aka Professor JMT Labuschagne, who was for over 30 years my colleague at the University of Pretoria. The wide range of his intellectual curiosity and his deep humanity not only made him a prolific author, but a friend whose comments were always characterised by wisdom and kindness.

2 The *Saayman* case

The facts were as follows: Mrs M was the proverbial rich widow with an artistic son, who had gone into business. As the years passed, both her health and mind deteriorated and the son's business debts increased. From the age of 68 Mrs M became increasingly hard of hearing, at 71 Ménière syndrome was diagnosed, at age 82 she became blind in one eye and developed cataracts in the other eye. She read with a magnifying glass. From age 76 she complained to her daughter with great regularity that she felt very ill. Her general practitioner testified that she suffered from extreme high blood pressure, Ménière syndrome, vertigo, pain in her legs, tinnitus, neuralgia, anaemia of the brain, fainting spells, as well as stress and depression. In 1988, when she was 84 years old, she was attacked in the street and from then onwards refused to go shopping and asked her daughter to do this for her. She lived on her own and looked after herself. She lived frugally, threw nothing away and paid in

cash for purchases (*Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO supra 307C-308I*).

This brings us to the question of whether Mrs M was still capable of looking after herself and her financial interests adequately. In the event of a negative response, the next question is what relief should be available and on which ground should such assistance be provided? Diminished legal capacity is dealt with under the common law.

This question had become acute for the following reason. From 1982 onwards Mrs M had stood surety and ceded shares in surety to financial institutions with increasing frequency and volume for a number of her son's companies: in 1982 a deed of suretyship for R120 000 in favour of Volkskas and a cession of shares to secure the debts of Oewerpark (Pty) Ltd; in 1985 and 1986 three unlimited deeds of suretyship in favour of Volkskas for Franken Investments (Pty) Ltd, Kenmerk Bouers (Pty) Ltd and Oewerpark (Pty) Ltd; in 1987 an unlimited deed of suretyship in favour of Nedbank and a cession of shares to secure the debt of Dalsig Minerale (Pty) Ltd or her son, who as a director of the company also stood surety; in 1988 an unlimited deed of suretyship in favour of Trust Bank to secure the debts of Dalsig Diamante (Pty) Ltd, while Mrs M also signed a number of blank forms for the cession of shares (*Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO supra 309B-309J*). Both Dalsig companies (there appears to be some mix-up (309J), where Dalsig Mynbou (Pty) Ltd suddenly makes an appearance) sent letters to the effect that the companies undertook "to return the ceded shares on thirty days notice". ("Ons erken hiermee dat u bogenoemde goedgegunstigheid beskikbaar gestel het om te dien as sekuriteit vir lenings wat Dalsig Mynbou Bpk mag aangaan. Die maatskappy onderneem om: (a) Bogenoemde aandeesertifikate aan u terug te besorg na dertig dae kennisgewing. (b) Binne sewe dae na verklaring u bankrekening te krediteer met die ekwivalent van dividende of ander voordele wat u mag verbeur indien bogenoemde effekte gedurende die leningsperiode tydelik vervreem word" (*Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO supra 310A-C*.) Nevertheless, the shares ceded in order to secure the debts of the one company were sold in December 1988. From the diary of Mrs M it became clear that she was well aware of the loss, for which she blamed her son. The diary also shows that she was extremely angry, despised his ethics and was conscious of his fraudulent behaviour, but decided to keep quiet to avoid a scandal or worse (*Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO supra 310E-I*). Moreover, her son came to see her, promised to "place back" the shares in question and reimburse any loss in dividends (*Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO supra 311A*). Thus Mrs M ended up in the offices of First National Bank (hereinafter "FNB") during 1989 and stood surety for R1 500 000 for the debts of Dalsig Mynbou (Pty) Ltd and ceded the shares which would come from Nedbank to FNB. In terms of the deed of suretyship Mrs M stood surety as well for the approximate R3-million debt to FNB, taken over by Dalsig Mynbou from a certain Keegan in consideration for his shares in Worcester Gold Mining Ltd. However, FNB did not intend that this should be the case (*Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO supra 311C-E*). Nedbank was not prepared to grant further credit facilities to Dalsig Minerale. Dalsig Minerale paid its debt of R1 050 000 to Nedbank with a cheque drawn on Dalsig Mynbou's newly opened current account at FNB. Nedbank delivered

Mrs M's shares, which it had held as security, to FNB at Mrs M's request (*Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO supra* 311B-D). During 1990 Mrs M handed over shares to Dalsig Minerale, which company undertook to return them before 1 November of that year. ("Bogenoemde maatskappy erken hiermee ontvangs van ondergenoemde aandeelsertifikate en onderneem om hulle laastens op 1 November 1990 aan u terug te besorg" (*Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO supra* 311 H-I).) During 1991 Dalsig Mynbou went into liquidation. This sad and rather common story serves to sketch the relationship between Mrs M, her son and his various companies and the banks during the period 1982-1991.

The variety of companies and banks was confusing. (Cf *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO supra* 309D-310E where the court refers to the unlimited deeds of suretyship in favour of Nedbank for the overdraft of Dalsig Minerale Bpk and the same in favour of Trustbank for the debt of Dalsig Diamante (Edms) Bpk, but Dalsig Mynbou Bpk and Dalsig Minerale Bpk acknowledged the above.) The events also confirm the importance of family, keeping things within the family and the lengths to which parents will go to help their children as well as the consequent power children have over their parents. Since *cura's* objective is to protect persons incapable of looking after their affairs in their societal context, son Willem appeared a better candidate for *cura* than his mother. Nevertheless, this is what happened to Mrs M. Her daughter was alerted when Trust Bank attached the house Mrs M owned in Cape Town. She obtained a general power of attorney and a subsequent court order appointing her *curator bonis* of her mother. During August 1991 the daughter heard about the attachment of the house; the power of attorney was dated 14 August 1991 and during September of the same year the court found that Mrs M was incapable of managing her affairs and appointed her daughter as *curator bonis* (*Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO supra* 312H-J). In this capacity she went to court in order to have the deed of suretyship and the cession of the shares transacted in favour of First National Bank during 1989, declared null and void on the ground of lack of mental capacity. To support this contention four medical experts were consulted during 1991 and 1993. Two psychiatrists, Mrs M's general practitioner and a clinical psychologist testified. The first psychiatrist had a consultation with Mrs M during 1991. He diagnosed dementia and was of the opinion that she was incapable of understanding legal documents. He held that it was possible that she had already suffered from dementia during 1989. The second psychiatrist had two consultations with Mrs M during March and April 1993. His diagnosis was that Mrs M suffered from pseudo-dementia, which entails that a person manifests the symptoms of dementia as the result of depression. He testified that he was unable to state whether this was the case when the documents in question were signed and doubted whether she suffered from dementia during 1989. The general practitioner testified that during the 20 years that she had been his patient, her capacity of understanding, insight and judgment had deteriorated and that he thought it highly unlikely that she had acted rationally when, influenced by other parties, she had stood surety and provided security for bank loans. The psychologist performed certain psychometric tests and concluded that she could not form a concept of, or understand the implications of the relevant documents (*Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO supra* 313A-G). The bank

brought another four medical opinions before the court, namely two psychiatrists, a clinical psychologist and a neurologist. However, none of these had been in a position to have a consultation with Mrs M. The first psychiatrist was of the opinion that there were not enough symptoms to diagnose dementia and held that the deterioration of her intellect might have been the result of pseudo-dementia, a secondary effect of depression. The second psychiatrist supported the latter diagnosis and added that it could not be stated that this was the case at the time of signature of the documents in question. Both the neurologist and the clinical psychologist questioned the value of the psychometric tests and were of the opinion that it is unwise to attempt to determine the cognitive functioning of an aged person two years after the facts. The neurologist added that he could not find clinical evidence of dementia in the reports of the expert witnesses and that the correct test, such as a brain scan, had not been applied, which might have shown multi-infarct dementia or arteriosclerotic dementia (*Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO supra* 313H-314C). There was no *communis opinio* among the medical experts and some advised caution in respect of retrospective diagnosis. The trial judge decided that it had been proved that Mrs M had so little insight into the consequences of the deed of suretyship and cession signed by her during 1989 that she should not be kept bound to the contract. (“Hy (die Verhoorregter) het gevolglik bevind dat bewys is dat Mev M op 2 Mei 1989, toe sy die borgkontrak en sessie geteken het, so min insig gehad het in die impak wat dit moontlik op haar eiendom kon hê, dat sy in billikheid nie aan die kontrak gebonde behoort te word nie.” (*Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO supra* 314F-G.)) The Supreme Court of Appeal came to the same conclusion on the basis of the medical evidence, the facts and its interpretation thereof, in particular the reasoning that standing surety without personal benefit is a sign of lunacy.

A remarkable aspect of the decision is the virtual lack of authority (Streicher AJA held that the legal position had been set out by Innes JA in *Phaesant v Wame* 1922 AD 481 488) and legal theory. As the appointment of curators is ruled by the common law, a brief survey thereof appears appropriate.

3 Roman law

Roman law (for a detailed discussion of the position in Roman law and Roman-Dutch law see Thomas “*Cura Debilium Personarum*” 2005 *De Jure* 59-69) recognised two categories of persons unfit to handle their own affairs, that is, the lunatic and the prodigal. (Cf Law of the 12 Tables 5 7; *D* 26 5 8 3; *Inst* 1 23 3. Buckland *A Textbook of Roman Law from Augustus to Justinian* (1963) 168; Jolowics *Historical Introduction to the Study of Roman Law* (1952) 250f; Van Oven *Leerboek van Romeinsch Privaatrecht* (1948) 510; and Kaser *Das Römische Privatrecht I* (1971) 85.) There were important differences between the two cases: the incapacity of the lunatic was absolute, while the prodigal could perform certain juristic acts; in terms of the 12 Tables curators were *ipso iure* “appointed” and dismissed respectively at the onset of lunacy and at the return of sanity (Van Oven 510), where the *cura prodigi* necessitated an act of the state. It was this *interdiction* (*Pauli Sententiae* 3 4a 7. *D* 26 5 12 pr), an order by a magistrate, which created the limited incapacity of the spendthrift and notified third parties of this fact. In later Roman law curators were also appointed by the *praetor* in cases of mental illness and it

remains unclear whether this form of *cura* completely replaced the automatic *cura legitima* of the agnates. (*D* 27 10 13. *Inst* 1 23 3 creates the impression this impression, but *C* 5 70 5 and 5 70 7 6 mention the *cura legitima* as living reality.) This development separated the moment of inception of *cura* from the onset of lunacy and brought the validity of juristic acts before the appointment of a curator into question. The *rescripta* on the *lucida intervalla* (*C* 5 70 6, 6 22 9) confirm that the insanity and not the intervention by the *praetor* created the legal incapacity. The praetorian order was a declaratory act and the juristic acts entered into by the lunatic before the magisterial intervention were null and void in contrast with the legal transactions of the prodigal before the *praetor's* decree (*inst* 2 12 2). This is confirmed by *Codex* V 70 3, where the petitioner is advised to ask for a curator for his *non compos mentis* father, so that if anything should be undone this could be applied for by the curator.

Finally, Roman law extended the protection of *cura* to other handicapped, such as the chronically ill, blind, deaf and mute, but it remains an open question whether a third form of *cura* developed or whether the existing forms were extended to deal with these cases. If the latter should be the case, the question remains whether the principles of the *cura furiosi* or the *cura prodigi* applied in these new instances of *cura*, in other words whether the incapacity was absolute or relative and whether the occurrence of the handicap or the interdict of the magistrate created such incapacity.

In view of the comparative late development of medical science, and in particular psychiatry, it must be kept in mind that only a blatant form of lunacy, easily observed by laymen, would have qualified for the commencement of curatorship and/or the appointment of a curator. Prodigality is not obvious to third parties. Thus, the intervention of the state had in the instance of insanity a declaratory character, but was in the case of prodigality a constitutive act. This distinction is essential in respect of the validity of juristic acts entered into by the *curandus* before the order: voidness in the case of lunacy, but validity for the spendthrift. Furthermore, the question whether a person is capable of looking after him/herself and his/her affairs, is a question of fact and to an extent dependent on the societal context rather than being a medical question.

4 Roman-Dutch law

In Roman-Dutch law, guardians were appointed by an organ of the state, namely the court or the *weeskamer*.

De Groot (*Inleydinge tot de Hollandse Regts-geleertheit* 1 11 Van de Bejaerde Weesen) and Voet (*Commentarius ad Pandectas* 27 10 De curatoribus furioso & aliis extra minores dandis) adhered to the basic principles of Roman law. Both retain the distinction between visible, apparent defects and the latent vice of spending too freely. Voet unequivocally states that a court order is not necessary to be considered insane or to end this condition (27 10 3). He holds that the court order is declaratory and that the juristic acts of the afflicted before the appointment of a curator are *ipso iure* null and void as they lack consensus (27 10 3). Voet supports this argument with a reference to validity of acts undertaken during *lucida intervalla* (27 10 3; and Voet refers to Menochius *De praesumptionibus* L 6 pr 45 and Mascardus *De probationibus* concl 825ff) and contrasts the *cura furiosi* to the curatorship over prodigals with reference to the validity of the pre-court order contracts (27 10 7). Voet's thorough analysis teaches us that in spite of the disappearance of

the *cura legitima*, the dichotomy between the validity and non-validity of juristic acts performed before the appointment of a curator of the prodigal and the insane was retained in Roman-Dutch law; that *cura* was not required before a juristic act could be attacked on the basis of insanity, and that the concept of a limited *cura* adapted to the debility of the sufferer was accepted.

The forensic literature (Van Bijkershoek *Observationes Tumultuariarum* edd Meijers *et al* 4 vols (1926-62); and Pauw *Observationes Tumultuariarum Novae* edd Fischer *et al* 3 vols (1964-67)) shows that the Roman-Dutch authorities and courts had no reservations in extending the grounds for *cura* and devoted scant attention to the differences between the two original forms of curatorship. (Cf Van Leeuwen *Het Rooms-Hollands Regt* (1664), an adherent of the paradigm created by De Groot's *Inleydinge*. It is not surprising to find the topic dealt with in 1 12 3, where the author lumps deaf, mutes, retarded, insane as well as prodigals together under the heading minors.) The courts also assumed a wide discretion in respect of the consequences of curatorship as the plight of each case was addressed on an *ad hoc* basis. (Cf Van Bijkershoek 2068. A man was on account of drunkenness and ferocity placed in the custody of Delft. On appeal he agreed to a separation of table and bed and that a curator would administer certain aspects of his estate. He died and left a legacy to the daughter of his landlord. Van Bijkershoek vacillated on the question whether a prodigal could make a valid will. Van Bijkershoek 2209 deals with the validity of juristic acts performed before or without any *cura*.) Although no theory was developed in respect of the mentally retarded, the senile, the deaf, dumb and chronically ill, the court had a discretion to determine the scope of the *cura* according to the circumstances. Thus, in legal practice a *cura debiliū personarum* developed analogous to the *cura prodigi*.

5 South African common law

The legal capacity of the mentally ill as well as prodigals is determined by the common law in South Africa (Wille, Hutchinson, Van Heerden, Visser and Van der Merwe *Wille's Principles of South African Law* (1991) 225). However, the common law is a dynamic developing body of authorities, interpretations and decisions, whose development did not end around 1800. It therefore does not surprise that several important developments did take place during the last two centuries, which materially altered the common law.

The first important step was the decision by the Privy Council in *Molyneux v Natal Land and Colonization Company Ltd* (1905 A C 555), when Lord de Villiers brought the *mente capti*, which he translated as persons of unsound mind, clearly within the ambit of the insane. The Privy Council equated senile dementia to insanity and relied on Voet (27 10 3) to hold that every contract made by insane persons is null and void even before the appointment of curators (561).

This trend to take cognisance of the development of medical science was reinforced by the enactment of the Mental Disorder Act (38 of 1916). Although intended to deal with incarceration of the mentally ill, the seepage effect was that the various forms of mental disorders categorised by the act were equated with the *furiosus* of the common law.

Another development was that texts such as Gaius 3 106 (a lunatic is incapable of any transaction, because he does not understand what he is doing (de Zulueta translation)) and Voet (27 10 3; and all those things, which have been done, managed or settled by a madman before his receiving a curator are *ipso jure* void, as being bereft of consent (Gane translation)), which explained why the juristic acts of madmen were null and void, were under influence of the will theory (both Lord de Villiers in *Molyneux v Natal Land & Colonization Co Ltd* 1905 AC 555 (PC) and Innes CJ in *Phaesant v Warne supra* 481 relied on Grotius *De Jure Belli ac Pacis* 2 11 5), interpreted as stating that a person who does not understand the nature of the consequences of a juristic act cannot be held bound to that act. (*Phaesant v Warne supra* 488: “whether the person concerned was or was not at the time capable of managing the particular affair in question – that is to say whether his mind was such that he could understand and appreciate the transaction into which he purported to enter”.) Thus, the absolute incapacity of a blatant lunatic was developed into a case by case investigation, in which medical expertise became a deciding factor.

This development has been noted and accepted by legal academia. Thus, the leading textbook on the topic, *Boberg's Law of Persons and the Family* (Van Heerden, Cockrell, Keightly 2ed (general editors) and Heaton, Clark, Sinclair and Mosikatsana (1999)) states without demur that partial insanity or delusions acting on a mind otherwise sane may impugn the validity of an act (108f); that it is irrelevant that the other party to the transaction was unaware of the person's mental condition (106); and, that, medical testimony based on subsequent observation may be relied upon, since direct evidence of a party's condition at the time of the transaction is seldom available (109). As a result of this approach, it has on occasion been held that intoxication and the influence of drugs may impair a person's ability to appreciate the consequences of his juristic acts and vitiate legal capacity with the resulting voidness of a transaction (Cf Boberg 143ff for the authorities and case law). In this paradigm the debilitated from Roman and Roman-Dutch law have found a safe haven in the common law *cura* under the heading inability to manage affairs (Boberg 131ff). Although it has been held that a person who is mentally defective is not necessarily insane (Wessels JA in *Mitchell v Mitchell* 1930 AD 217 222), the debilitated are for all practical purposes subject to the same rules and principles as the insane. The practical consequence of this state of affairs is that Streicher AJA commented that Mrs M was brought into court more as a piece of evidence than as a witness (*Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO supra* 308F).

6 *Cura debilium personarum*

However, it should be argued that in Roman law and Roman-Dutch law a third form of *cura*, namely the *cura debilium personarum*, had gradually developed. Although no specific rules are to be found in this respect in Roman law, the Roman-Dutch courts enjoyed wide discretion in respect of *cura*, but showed understandable restraint in respect of retrospectively declaring juristic acts, performed before the date of the court order, void. Furthermore, both Roman and Roman-Dutch law required that lunacy or insanity must have been clearly noticeable by external symptoms. This was a *conditio sine qua non* for the *ipso iure* commencement of the incapacity, which incapacity was total. This

requirement safeguarded the interests of third parties dealing with the afflicted person and also protected legal certainty.

It is submitted that although medical science has made enormous progress, the question remains whether the person in question is capable of looking after herself and her affairs, which is a question of fact. The answer is more dependent on the societal context than on medical opinion.

Another important aspect of *cura furiosi* is that the incapacity is total. In the case in question the argument of the court was that Mrs M was unlikely to have understood the impact of the specific juristic act. An interesting side-issue is that the validity of the will subsequently made by her was apparently not contested.

This case clearly illustrates the necessity of drawing a distinction between lunacy and mental debilitation. In an era during which medical science manages to extend the lifespan of the well-to-do by an alarming number of years, the concomitant problem of failing mental powers should be addressed by the courts by recognition and development of the *cura debilium personarum*. Increasing numbers of persons who are, according to their children, not capable of adequately looking after themselves and their affairs as the result of physical and/or mental handicaps are fortified into retirement villages and homes. Only the lucky few have the means to have their failing minds diagnosed and their defects classified into the newest discoveries from the USA. This brings us to the question of what protection the law can offer the victims of these conditions, their families, as well as third parties dealing with them.

It is submitted that curatorship on the ground of mental illness or the euphemistic inability to manage affairs is the inappropriate solution. Not only on the grounds that external symptoms are often absent, but also in view of human dignity. In the instance of the *cura debilium personarum* the court should create a fitting incapacity. Certainly the strongest argument to distinguish between debility and insanity is that all juristic acts performed by a lunatic are null and void, while the incapacity of debilitated persons should be primarily in the field of their property affairs after the court order.

7 Conclusion

Thus, the *Saayman* case missed an opportunity to develop the common law and to fill the gap created by the progress of medical science. By looking to the same medical science for a solution, the court did a great disservice to the aged. Hence financial institutions will be reluctant to have dealings with old people, as they will suspect that benign senescence, dementia, pseudo-dementia and other chronic cerebral medical conditions may be lurking under their plausible exterior (Mrs M chatted with the bank manager about his wife, the gardening club and a street tea), which will in time retrospectively void their transactions. The latter possibility should be viewed as a dangerous threat to legal certainty.

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