



**THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 34959/2015

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: Yes
(3) REVISED.

.....**13 May 2016**.....
DATE

.....
SIGNATURE

In the matter between:

L. P.

Applicant

And

J. C. P.

First Respondent

JUDGMENT

RATSHIBVUMO AJ:

1. **Introduction:** This is an application whereby the applicant seeks an appointment of Advocate M Feinstein as curator *ad litem* of J. D. P. (the child), a minor boy, born on [.....] 2008. The Applicant is the mother of the child. The child's primary residence was awarded to the Respondent by this court on 07 December 2010. The said court order was made pursuant to a settlement agreement between the Applicant and the Respondent. The Applicant's primary aim in applying for the appointment of a curator *ad litem* is for her to be able to bring a further application (referred to as Part B application), for the primary residence to be awarded to her. Part B application is however not before the court at this stage and it will be subject to a report and/or a recommendation by the *curator ad litem*. If granted, the role of a curator would however not be limited to Part B application as elaborated hereunder.

2. **Background:** The Applicant and the Respondent met in December 2006 and later moved in together. From their relationship, the child was born as indicated above. As the joy of falling in love is often accompanied by the two hearts, chained in music of romance in the name of love; breaking the chains can always result in bruising the innocent hearts, whose only fault was to fall in love. And so it was that when that came to pass, the Applicant walked out of the common home shared with the Respondent together with the child, never to return. The Applicant's heart, now freed from the chains of love that bound it to the Respondent, found itself falling for new love with D. O. From this relationship, a baby girl named C. was born on [.....] 2010. Soon thereafter, the Respondent initiated court proceedings seeking an order that would grant him primary residence of the child. Although this was

initially opposed by the Applicant, she eventually signed a settlement agreement that paved the way for a court order referred to above.

3. The child has been residing with the Respondent since 2010 while the Applicant retained reasonable access as agreed. Five years is a long time so much that personal circumstances of both parties have been evolving over this period. The Applicant has moved on to marry E. P. whereas the Respondent married A. P.; who are their current partners – or at least they were on the date this application was heard. At the same time, the child has developed characters that are displeasing to both parents. It is common cause that the child has a tendency of throwing tantrums. It is further common cause that he took or kept pictures of his naked sister, C. in his cell phone. The Applicant further alleges that the child has on several occasions stolen some cash when visiting her.
4. The salient allegations by the Applicant are that the undesirable characters that have since developed in the child can be traced to lack of parental guidance and discipline. The Respondent does not dispute this but he puts the blame on the Applicant. The blame game between the Applicant and the Respondent precede the birth of the child and has gone on unabated to this day. Sadly, when the child finds himself in the middle of the warring bulls it may get to a point of affecting him negatively, if it has not done so already. The communication between the Applicant and the Respondent often ends with unnecessary bitter exchanges between them as exhibited by the several *Whatsapp* messages between them. The creation of a *Whatsapp* group in which the Applicant, the Respondent and their spouses are copied each time they communicate, does not seem to have eased the tensions.
5. Failure to have a meaningful conversation between the Applicant and the Respondent impacts negatively on the wellbeing of the child. When

Respondent took the child to a psychologist for treatment over his tantrums, both parents were required to play a role as recommended in a report prepared by Ms. Du Plessis.¹ From the correspondence between the Applicant's attorneys and Ms. Du Plessis it is apparent that the Applicant was not involved; but an impression was created to the psychologist by the Respondent that she was.² Equally, when the Applicant requested that her time spent with the child be increased, that request was met with threats by the Respondent that he would only allow her supervised access to the child.³ The attempts by the Applicant to involve a Family Advocate in respect of the best interests of the child in terms of sec 4 of the Mediation in Certain Divorce Matters Act 24 of 1987 were thwarted without any alternative suggestion. That suggestion was however ill-advised since the said provision is only applicable to parties who are divorced or in the process of divorcing – and the parties to this application were not married and as such never divorced.

6. **The applicable law:** The Constitution of the Republic of South Africa provides that every child has a right to have a legal practitioner assigned to him or her by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result.⁴ Legislation was enacted to give effect to this right in the Children's Act 38 of 2005 (the Children's Act), which provides,

“every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.”⁵

¹ See Annexure B (p. 106 of the bundle).

² See LP 3 & LP 4 (p. 212 & 216)

³ See LP 5 B (p. 60), being a letter from the Respondent's attorney.

⁴ See sec 28 (1) (h) of Act 108 of 1996.

⁵ See sec 10 of Children's Act.

7. This right was confirmed by the Constitutional Court in *J v National Director of Public Prosecutions and another (Childline South Africa and others as amici curiae)* when it emphasised the protection of this right.⁶ It appears as though this right found its way into our domestic law from Article 12 of the Convention on the Rights of the Child,⁷ which obliges State parties to ensure that a child who is capable of forming his or her own views enjoys the right to express those views in matters affecting him or her and that those views should be given due weight.

8. In *Centre for Child Law v The Governing Body of the Hoerskool Fochville*⁸ the Supreme Court of Appeal held that in all matters concerning children – including any litigation concerning them – their best interests are of paramount importance. Section 28(2) (of the Constitution) must be interpreted so as to promote the foundational values of human dignity, equality and freedom. The reach of section 28(2) extends beyond those rights enumerated in section 28(1): it creates a right that is independent of the other rights specified in section 28(1). Section 28(2), read with section 28(1), establishes a set of rights that courts are obliged to enforce.⁹

9. Sec 7 of the Children’s Act sets *inter alia* the following as the standard for the best interests of the child:

“Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely -

⁶ 2014 (7) BCLR 764 (CC) at para 40. See also *Justice Alliance of South Africa and another v Minister of Social Development, Western Cape and Others* [2015] 4 All SA 467 (WCC) at para 32.

⁷ November 20, 1989, 1577 UNTS 3; 28 ILM 1456 (1989),

⁸ [2015] 4 All SA 571 (SCA) at para 24.

⁹ Section 28 (2) provides, “A child’s best interests are of paramount importance in every matter concerning the child.”

- (a) the nature of the personal relationship between the child and the parents, or any specific parent; and [...]; the attitude of the parents, or any specific parent, towards – and the exercise of parental responsibilities and rights in respect of the child [...]
- (d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from -
 - (i) both or either of the parents; or
 - (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;
- (e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
- (f) the need for the child - to maintain a connection with his or her family, extended family, culture or tradition;
- (g) the child's - age, maturity and stage of development [...]
- (h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development [...]
- (k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;
- (l) the need to protect the child from any physical or psychological harm..."

10. The role of a curator is different from that of a legal representative. A legal representative appointed to represent the child takes instructions from the child as a client and represent the child's views.¹⁰ This should be distinguished from a curator *ad litem* who assists the court and the child by advancing the child's best interests.¹¹

11. I now turn to consider if the best interests of the child require the appointment of a curator *in casu*. It is necessary to take note that this is not

¹⁰ *Legal Aid v R* 2009 (2) SA 262 (D).

¹¹ See *Du Plessis N.O. v Strauss* 1988 (2) SA 105 (A) at p 146B.

an application for the variation of the court order that contains a provision for the primary residence of the child and access by both parents. Should Part B application be proceeded with, the court would then be faced with an application for the variation. The Respondent is opposed to the appointment of the curator because there is an existing order which should be left as it is. The reason for this submission is that the Applicant did not demonstrate the change in circumstances or a good cause for the order to be revisited. This submission however misses the subject before the court as it attempts to deal with Part B application which is not before the court. This view implies that since there is a court order, the door is shut for any consideration for a variation. Counsel for the Respondent rightly conceded that this would be a wrong approach; for the order can always be reconsidered for variation. Unfortunately no alternative is suggested as to how that process can be set in motion.

12. Five years is a long time to pass without any consideration on whether the circumstances that prevailed in 2010 still exist today, especially given the fact that the child was only 2 years old then. The appointment of a curator needs not be interpreted as implying the variation of the 2010 court order. It is a step that allows the child to have a voice on any possible reconsideration of the order and any other litigation that involves or affects him. The courts have been approached several times in respect of this child including when the order was made in 2010. Recently, the Maintenance Court was also approached by the Respondent on 29 June 2015 for a maintenance claim against the Applicant. Given the battles that have always marred the communication between the Applicant and the Respondent, chances of the child being caught in-between and to have his voice drowned are very real. With no curator appointed, the court will always be deaf to his cries.

13. The Court is therefore satisfied that it would be in the best interests of the child to have a curator *ad litem* appointed to act on his behalf.

14. For the reasons stated above, the following order is made:

14.1 That Advocate M Feinstein of the Johannesburg Society of Advocates is appointed as curator *ad litem* of the child.

14.2 That as *curator ad litem* of the child, Advocate M Feinstein is authorised and empowered:

14.2.1 To always act and do anything that a curator is expected to do on behalf of the child, whenever there is litigation between the Applicant and the Respondent that involves or affects him or his interests.

14.2.2 To determine the child's best interests from time to time in relation to the application that may be brought by the Applicant and/or the Respondent, *viz-a-viz*, primary residence, care and contact.

14.2.3 To investigate the child's living circumstances insofar as they relate or may relate to the present and future care and contact arrangements, including primary residence.

14.2.4 To interview the applicant and respondent and any other person or official who has any relevant information pertaining to the present care and contact arrangements, including primary residence, of the child.

- 14.2.5 To have unrestricted access to the child.
- 14.2.6 To have access to any and all documentation or records (including official documentation or records) that directly or indirectly pertains to the present care and contact arrangements including primary residence, of the child.
- 14.2.7 To engage any professional person who has the necessary expertise to assist in the determination of the child's best interest as they pertain to the present arrangements regarding care and contact, including primary residence. The person may include a psychologist, psychiatrist, and/or a social worker.
- 14.3 To act as the child's legal representative in any legal process that is or may be instituted that relates to him, including but not limited to possible application relating to his care, contact, and primary residence.
- 14.4 To approach, on notice to both the Applicant and the Respondent, a JUDGE in chambers of this DIVISION for an order clarifying and/or expanding upon any power necessary in order to promote and protect the child's best interests.
- 14.5 That Advocate M Feinstein is directed to compile a report in respect of the care, contact and primary residence of the child with this Court within SIXTY (60) days from date of this order or as soon thereafter as directed by this Court.

14.6 That both the Applicant and Respondent shall be jointly liable, in equal shares, for the costs of any expert engaged by the *curatrix ad litem*, provided that such an engagement shall take place in consultation with them. Such costs to be paid within 30 (THIRTY) days of date of invoice or any such period granted by *the curatrix ad litem* after consultation with all the parties.

14.7 Court makes no order as to costs.

T.V. RATSHIBVUMO
ACTING JUDGE OF THE HIGH COURT

Date Heard: 03 May 2016

Judgment Delivered: 13 May 2016

For the Applicant: Adv. R Morgan Courtenay
Instructed by: DR Wooley Attorneys
Johannesburg

For the Respondent: Adv. CB Garvey
Instructed by: Leeuwner Maritz Attorneys
Johannesburg