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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 056992/2024

(1) REPORTABLE: YES/**NO**

(2) OF INTEREST TO OTHER JUDGES: YES/**NO**

(3) REVISED:

DATE: 13/6/2024

SIGNATURE

In the matter between:

K[...] T[...]

First Applicant

H[...] T[...]

Second Applicant

C[...] T[...]

Third Applicant

and

J[...] N[...] T[...]

First Respondent

MASTER OF THE HIGH COURT, PRETORIA

Second Respondent

In re:

The appointment of a curator *ad litem* for the minor

JUDGMENT DELIVERED ON 13 JUNE 2024

CP WESLEY AJ

1. It is trite law that this court, in its inherent jurisdiction, is the upper guardian of all minor children with authority to determine what is in their best interest. Section 28(2) of the Constitution, 108 of 1996 ("Constitution") provides that "[a] *child's best interests are of paramount importance in every matter concerning the child.*" The Constitution accordingly makes it clear that in matters concerning a child the court must adopt a child-centred approach. This urgent application concerns a minor child by the name of A[...] T[...] ("A[...]"). In determining the outcome of the application, this court is guided, first and foremost, by what is in A[...]’s best interests.
2. The applicants are A[...]’s three elder siblings. The first respondent is their mother. The applicants seek an order that Advocate DA de Kock, a member of the Pretoria Society of Advocates, be appointed as curator *ad litem* for A[...], in order to assist her in arbitration proceedings that the applicants are instituting against the first respondent, as well as in other litigation that may follow.
3. The first respondent opposes the application. The first respondent does so on the bases, first, that the application is not urgent and, second, that the applicants have not made out a case on the merits for the grant of the relief that they seek. The second respondent has not opposed the application and has played no part in the proceedings before this court.

4. The applicants have outlined the circumstances that render the matter urgent. A pre-arbitration meeting in the arbitration was already held on 5 May 2023, obviously without A[...] being represented, and the arbitration is set to proceed. Presently the arbitration will proceed without A[...] being represented thereat. Considering the subject matters of the arbitration, which is discussed herein below, it cannot be allowed to be held over for the time that it would take for the present application to be heard on the normal opposed roll, which could be in six months' time. One of the issues that was discussed at the pre-arbitration meeting was A[...]’s position, but no agreement could be reached between the parties on the issue, whether at the pre-arbitration meeting or in the weeks thereafter. A[...] has an interest in the subject matter of the arbitration and she should be represented thereat at the earliest time. It is not in A[...]’s best interests that the arbitration should proceed without the input of her representative. This court is in agreement with the foresaid.
5. The first respondent argues that the applicants have impermissibly delayed the launching of this application, thus creating their own urgency, and that they allowed the first respondent an impermissibly short period of time to consider the application, give notice of opposition and then prepare and deliver an answering affidavit. The applicants can be critiqued for not bringing the application sooner. They can also be critiqued for not affording the first respondent more time to oppose same. In the end, however, these shortcomings are not sufficient to render the application not urgent. The administration of justice has not been brought into disrepute by the applicants, and the first respondent has been able to adequately present her case in the time available.
6. Ultimately, it is also in A[...]’s best interests that the application is heard on an urgent basis.

7. This court is accordingly of the view that the circumstances render the matter urgent and that substantial redress will not be afforded at a hearing in due course. The matter thus stands to be heard on an urgent basis.
8. The arbitration concerns the administration of the T[...] Family Trust (“the Trust”). The Trust was established in 1998, with Mr. P[...] T[...] and the first respondent being the trustees. Mr. T[...] was the erstwhile husband of the first respondent, and is the father of the applicants and A[...]. The beneficiaries of the Trust are the applicants, A[...] and the first respondent. Mr. T[...] passed away in 2021. After Mr. T[...]’s demise, the first respondent appointed Mr. Petri de Clerq as a trustee of the Trust. Mr. De Clerq’s appointment as a trustee of the Trust is being challenged by the applicants in the arbitration.
9. On 14 of February 2024 the first respondent and Mr. De Clerq, acting as trustees of the Trust, passed two resolutions. They resolved, first, that the immovable property that was owned by the Trust was to be sold and, second, that the proceeds of the sale were to be paid into the Trust’s nominated bank account and thereafter were to be distributed to the first respondent. These resolutions are also being challenged by the applicants in the arbitration.
10. It is beyond doubt that A[...], as a beneficiary of the Trust, has an interest in the subject matter of the arbitration. It is also beyond doubt that A[...]’s interest in the subject matter of the arbitration is in conflict with the interest that the first respondent has therein. This conflict is present in circumstances where A[...], as a minor, would ordinarily be represented in the arbitration by the first respondent, who is her mother and natural guardian. This conflict accordingly means that the first respondent cannot represent A[...] at the arbitration.
11. In *Legal Aid Board in re Four Children* [2011] JOL 27159 (SCA), the Supreme Court of Appeal addressed the legal considerations concerning the appointment of a curator *ad litem* in the following terms (references excluded):

“[11] The immediate hurdle to be overcome was that a minor is not generally competent to engage in litigation without the assistance of his or her guardian. In this case their guardians were obviously disqualified from doing so because they would have had a conflict of interest.

[12] The law in this country has always been conscious of such a difficulty and it provides a ready and simple mechanism to overcome it. It confers upon the courts a wide discretion to appoint a person to substitute the guardian – commonly known as a curator *ad litem*, meaning, if the Latin term is intimidating, no more than a person to conduct litigation in the name and in the interests of the minor. As early as 1902 the subject was dealt with comprehensively by the author of *The Judicial Practice of South Africa*:

‘Such curator is appointed by the court upon the petition of the minor, or, if he is too young to understand it, of some relative or friend or some one who can shew a reasonable interest in him, setting forth that he has no guardian, and is about to institute, or defend, an action at law, and stating also briefly the nature of the case, and praying the court to appoint a *curator ad litem* to represent him.

...

A minor may have a *curator ad litem* appointed for him even against his will, or without his knowledge, if it can be shewn to the court that the application will be for his benefit and to his interest.

...

As a general rule a near relative is appointed *curator ad litem*, but this is discretionary with the court, and frequently the advocate or attorney employed for the minor has been appointed as such.

From the time of the appointment of the *curator ad litem*, the action is to be conducted in the name of the minor, duly assisted by his curator

The duty of a *curator ad litem* is to represent the minor in the particular case then pending, and to watch and protect his interest in the case as a good and prudent father would have done. ...’

[13] The discretion that a court has is as broad as is required to meet every exigency and, if necessary, the court is capable of supplementing or altering the ordinary authority of a curator so far as the occasion requires. Its sole guide in exercising its discretion is the best interests of the minor.”

12. Taking all of the facts and circumstances of the matter into account, it is this court’s view that a curator *ad litem* must be appointed for A[...], to represent her in the arbitration as well as in other litigation that may follow. It brooks no argument that this is in the best interests of A[...].
13. The first respondent has not challenged the powers that are sought to be granted to the curator *ad litem*, nor the competence or appropriateness of Advocate de Kock to act as curator *ad litem* for A[...].
14. Regarding costs, both sets of parties seek punitive cost orders against the other. This court is of the view that costs should follow the cause and the applicants are thus entitled to a cost order against the first respondent. This cost order will, however, be on the party and party scale. In the court’s view, although the first respondent’s opposition to the application has not succeeded,

her opposition to the application cannot be typified as being of the kind that would otherwise attract a punitive cost order.

15. In the circumstances of this matter, the party and party cost award to the applicants stands to awarded on Scale C in terms of Rule 69A

16. In the result I make the following order:

16.1 Prayers 2, 3 (3.1 to 3.3) and 4 of the notice of motion dated 23 May 2024 are granted.

16.2 The first respondent is to pay the applicants' costs in the application, on the party and party scale, and on Scale C in terms of Rule 69A.

CP WESLEY

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances

For applicants: Adv G Jacobs

instructed by B Verster Attorneys Incorporated

For the respondent: Adv DH Hinrichsen

instructed by Couzyn, Hertzog & Horak Attorneys

Date heard: 05 June 2024

Date of Judgment: 13 June 2024