

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

CASE NO: 2024/061371

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

Date: 17 July 2024

In the matter between:

B[...] **S[...]**

Applicant

and

M[...] **J[...]** **J[...]** **D[...]** **J[...]**

First Respondent

D[...] **D[...]** **J[...]**

Second Respondent

Summary: care-givers need not obtain consent for medical treatment in terms of section 32(2) read with section 129(4) of the Children's Act 38 of 2005 for children under the age of four years – consent by guardian unreasonably refused

JUDGMENT

DE VOS AJ

[1] The applicant seeks the appointment of a *curator ad litem* over a young child ("D[...]"). D[...] is a four-year-old child with special medical needs. The respondents are currently addressing D[...]’s medical needs, with Dr Phelps, a paediatrician, at the helm. The Children's Court has approved Dr Phelps' position as D[...]’s paediatrician. The applicant has concerns about D[...]’s medical treatment and has urgently approached the Court for relief.

[2] The applicant is D[...]’s biological mother. The respondents are D[...]’s current temporary caregivers. They have applied to become D[...]’s foster parents and

indicated their willingness to adopt him. The foster application proceedings are pending before the Children's Court, with a return day in August 2024. In the context of the foster care proceedings, the Children's Court has approved Dr Phelps as young D[...]’s paediatrician.

- [3] The Court has considered the nature of the relief sought. Whilst phrased as the appointment of a curator, a closer investigation of powers the applicant wishes the curator to exercise reveals the genuine dispute. Once these powers are considered, it is apparent that the appointment of the curator is the relief being sought in form only. In substance, the applicant asks the Court that medical decisions regarding D[...] be subjected to written consent from the applicant, the curator or the Court. This is apparent from paragraph 4 of the notice of motion, which reads:

“No medical decisions shall be taken by the respondents in the absence of written consent of the biological mother, which consent shall not be unreasonably withheld, and if after the intervention by the curator, the respondents may approach the Court for the required consent.”

- [4] This is further apparent from the applicant's founding affidavit, which laments, at its core, the applicant’s concern regarding her exclusion from these medical decisions and the nature of the decisions.

- [5] The consideration commences with D[...]’s medical needs.

D[...]’s medical needs

- [6] The applicant gave birth to D[...] whilst she was placed in a rehabilitation centre for the use of methamphetamines. Before being admitted to the clinic, whilst she was pregnant with D[...], the applicant inadvertently exposed him to narcotics in utero. On the applicant’s version, she "admits to exposing D[...], inadvertently, to drugs at the beginning" of her pregnancy. The applicant places this exposure to the first six weeks of her pregnancy, whilst the social workers place the exposure up to three months into her pregnancy. Whilst the duration of exposure to drugs in utero may be in dispute, the exposure itself is not disputed.

- [7] D[...] is, based on all the doctor's reports before the Court, a child with special needs. Five weeks after his birth, Dr Voges, a paediatrician, reported that D[...] has "problems with being inconsolable, especially in the early evening hours when he presents with severe crying episodes, clenching fists and arching over backwards." These crying spells typically last for "4 to 5 hours". These crying spells have subsequently been diagnosed as symptoms consistent with drug withdrawal.
- [8] A second specialist, Dr Phelps' reports that "D[...] has special needs, he has severe behavioural issues with sensory integration problems and mild developmental delay." Dr Phelps' full report is that "maternal drug abuse played a role in D[...]’s condition." For these needs, Dr Phelps has prescribed "risnia 0.5 mg, epilim and rescue drops if D[...] is having a bad day".
- [9] The applicant is concerned with the medications that D[...] is being prescribed. The concern appears to have been that D[...] was prescribed Valium before he visited with the applicant but is more broadly at the general medications given to D[...]. The applicant indicates that she believes this results from discrimination against her. The applicant believes that the respondents, in giving effect to the prescriptions by Dr Phelps, are breaching their duties as carers. In this regard, the applicant seeks an order that no medical decisions are to be taken by the respondents without the applicant's written consent, and if she does not give such consent, the respondents have to approach the Court for such consent. The provisions of the Children's Act must be considered when considering the applicant's claim.

The Children's Act

- [10] The applicant relied on section 18 of the Children's Act, 38 of 2005, as support for the submission that a parent who acts as a guardian must give or refuse consent required by law. The applicant contends that her rights have not been terminated, particularly sections 18(c) and 19. As such, her consent is required for D[...] to receive medical treatment.

- [11] However, this section must be read with section 32 of the Act, which is the dedicated section dealing with caregivers. Section 32 deals with child care by a person not holding parental responsibilities and rights. Section 32(1) sets out the duties of care-givers. Section 32(1) provides that such a person – including a caregiver who otherwise has no parental responsibilities and rights in respect of a child - “must, whilst the child is in that person's care safeguard the child's health, well-beingwell-being and development; and protect the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation, and any other physical, emotional or mental harm or hazards”. Section 32(1) creates specific duties for caregivers.
- [12] Section 32(2) then empowers the caregivers with the authority to comply with these duties. Section 32(2) provides that a caregiver “may exercise any parental responsibilities and rights reasonably necessary to comply with their duties including the right to consent to any medical examination or treatment of the child if such consent cannot reasonably be obtained from the parent or guardian of the child.” Section 32(2) requires consent but disregards the need for consent if it cannot reasonably be obtained.
- [13] The consent requirement in section 32(2) is subject to section 129. Section 129(4) finds application and provides that the “caregiver of a child may, consent to the medical treatment of the child if the child is under 12 years.” Section 129(4) does not have the same requirement of obtaining consent from the guardian. It therefore appears that where the child is at D[...]’s age, section 129(4) finds application, and the requirement to obtain consent does not apply. Section 129(4) was enacted specifically to deal with instances where ,a young child needs medical treatment and empowers the caregivers to comply with their duties.
- [14] To the extent there is any dissonance between sections 18 and 19, the more specific sections 32 and 129 find application. Sections 18 and 19 are general provisions. Sections 32 and 129 are specific provisions dealing with caregivers and medical decisions. The general must yield to the specific.

[15] On this basis alone, the relief sought is to be denied.

[16] The caregivers do not require the applicant's consent to make medical decisions regarding medical treatment of D[...]. They must care for D[...]'s health and are empowered by section 129(4).

[17] On this basis alone, the Court would dismiss the application. However, the respondents have also submitted that, in the specific circumstances of the case, the applicant's reasonable consent cannot be obtained. This requires a consideration of the facts of the case.

Factual context

[18] The applicant entered a rehabilitation clinic in February 2020. The placement was an alternative to a criminal sanction for the theft of a motor vehicle. At about the same time, the applicant's mother had sought a protection order against her. The protection order was supported by the applicant's stepfather and her sister. The basis of the protection order was that the applicant had threatened her mother. In addition, the applicant's family feared the extent of the applicant's drug abuse.

[19] Before D[...]'s birth, his biological¹ grandparents (the applicant's parents) requested assistance from Ms Morgenrood, a social worker. The family requested that D[...], once born, be placed in temporary safe care. The family's request was motivated by the applicant's placement at a rehabilitation centre for the use of crystal methamphetamine. In addition, the applicant's first child, A, had been removed from the applicant's care.

[20] The day after D[...]'s birth, Ms Morgenrood called the respondents and asked whether they would be willing to take D[...] in as he needed a place of safety. The respondents agreed on the same day and have taken care of D[...] since birth. Ms Morgenrood knew the respondents as they had previously provided such temporary safe care to other children in need. The respondents have also formally and legally adopted two other children.

¹ Although the grandfather is a stepfather, he is referred to as a biological grandfather for ease of reference.

[21] After D[...]’s birth, the applicant returned to a rehabilitation centre. The applicant spent seventeen months in the rehabilitation centre. After her release, Ms Morgenrood conducted a surprise visit on 12 October 2021. The applicant willingly took a narcotics test after admitting that she was using narcotics. The results of the test indicated a positive test for methamphetamines. A summary of the subsequent events appears in Ms Morgenrood’s report:

“The applicant was released from Break Free Rahab in Pretoria at the end of May 2021. She relapsed almost immediately. She missed two scheduled visits with D[...]; 20 October and 20 November 2021.”

[22] In the meantime, D[...] has regularly seen Dr Phelps. At one stage, the visits appear to have been weekly. Dr Phelps’ report is as follows –

"From the information I have, my opinion is that maternal drug abuse played a role in D[...]’s condition. I did not evaluate D[...] at birth, and no drug testing was performed on him, but the following points led me to the diagnosis:

1. The history is given of maternal drug abuse
2. 6-week evaluation by Dr Voges, which could suggest withdrawal.
3. Behavioural problems
4. Sleep problems
5. Speech and language problems

I will continuously evaluate him, as explained, as things might change as he grows and develops.”

[23] Dr Phelps recommended extensive occupational and psychological therapy. On 22 November 2023, the Children's Court ordered that Dr T Phelps be appointed D[...]’s paediatrician in light of Dr Phelps' longstanding relationship with D[...].

[24] The respondents have ensured that D[...] receives occupational therapy. However, the therapy was halted as the therapist would not accede to the applicant's demands. The applicant's demands were that the therapist give evidence in Court. The therapist was unwilling to continue the treatment based on these requests. When the therapist did not meet the applicant's demands, the applicant refused the treatment.

[25] The applicant visited D[...] under the supervision of a social worker. D[...] did not respond well to these visits. Valium was prescribed to calm down D[...] during these visits. After one of the visits, he had to be hospitalised due to the emotional trauma. Dr Phelps report at the time was that the visits were to be halted, stating that putting D[...] through these visits amounted to child abuse. On 26 July 2023, the Children’s Court prohibited these visits from continuing.

[26] The applicant requested to meet with Dr Phelps. Dr Phelps met with the applicant. However, after this meeting, Dr Phelps’ report regarding D[...] remains unaltered. Dr Phelps's report of this visit was as follows:

“The applicant wanted to find out why I said D[...]’s behavioural issues were as a result of drug abuse. She was very defensive about not being on drugs and being in rehab during her pregnancy, she also stated that she reports with her proving she was in rehab for that period along with second and third opinions from other trained doctors. However, the documents she handed me only included her file from Cormed during delivery and a paediatrician visit to Dr Voges when D[...] was 6 weeks of age. In my opinion, if she required 9 months stay in rehab then she had an addiction problem. She hardly enquired about D[...]’s health and well-being well-being or his medication or how he may be in the future.”

[27] It does not appear from this report or the applicant's pleaded case that she refused to consent to the treatment or the medicine proposed by Dr Phelps.

Consent reasonably refused?

[28] The experts have stated that D[...]s behavioural issues may be ascribed to in-utero drug exposure. There is nothing to counter these doctors' reports and the objective evidence. In addition, it aligns with the applicant's version. The applicant notes that Dr Phelps believes that maternal drug use played a role in D[...]s condition, but "I cannot unscramble the egg". The applicant has not and cannot dispute Dr Phelps' finding.

[29] The high-watermark of the applicant's case is that the prescribed medications are strong. The allegation is, "I am not a medical person, but I have been informed that Valium and Tripilen are strong medications to be prescribed to an adult, let alone a child at D[...]s age". The applicant's case is that "it would appear that Dr Phelps, acting on the information provided by the respondents, is prescribing strong medications to D[...], at the respondents' request".

[30] This is the subjective view of the applicant, who is not a doctor. These medications are being prescribed by a specialist doctor who has seen D[...] for an extended period. The Children's Court has approved the specialist doctor, and the applicant has not applied to set aside this decision or sought to obtain a different one. The applicant has presented no primary facts or evidence that the medical decisions regarding D[...] are not in D[...]s best interests. Both paediatricians who have seen D[...] have reached the same diagnosis regarding D[...]. At six weeks, Dr Voges reported, "D[...] is hypersensitive to sensory stimulation. Due to the maternal drug abuse history, the possibility of neonatal abstinence exists. I advised the parents to get an occupational therapist involved." This echoes the findings of Dr Phelps years later. There is nothing presented to counter these findings.

[31] In addition, the applicant met with Dr. Phelps. Dr. Phelps obtained the applicant's version and history and considered the information she provided. The papers do not

support the submission that the medicine is being provided at the respondents' request.

[32] The reasonableness of the applicant's refusal must be seen in a context where the respondents are not preventing the applicant from obtaining second opinions. To the contrary, they have expressly been open to such a request. However, Dr Phelps has indicated that "D[...] does not travel well and the stress alone of him travelling to Pretoria for visits is enough to cause distress. If visitations are decided upon then I suggest it be within his current living area." Due to D[...]’s difficulties with travel, such visits must occur close to where D[...] lives. The applicant did not take up this offer.

[33] Based on the undisputed facts, Dr. Phelps, a specialist, is making the medical decisions. The applicant has met with Dr. Phelps, but she has not taken up her opportunity to obtain a second opinion regarding D[...]’s treatment. This renders the refusal to provide consent unreasonable.

[34] As for the issue of occupational therapy, the treatment was suggested by two specialist doctors. The basis on which the applicant refused consent for this treatment was not based on any consideration of D[...] but on whether the sessions could be useful to the applicant in a report for court purposes. The specific allegation by the applicant is as follows: "I did not consent as [the therapist] was unprepared to assist the court proceedings". The focus of the refusal is premised on the court proceedings, not D[...]’s health. The respondents re-enrolled the treatment "as D[...] desperately needs the therapy". The respondents are footing the bill for this treatment. The reports of this treatment have been submitted to the parties and indicate progress on D[...]’s part. In these circumstances, the applicant's refusal of this, was unreasonable.

[35] Assuming the respondents required the applicant’s consent, in light of the history of the matter, the unreasonable refusal of occupational therapy treatment and Dr Phelps’ engagement with the applicant, the Court concludes that the applicant’s refusal of consent is unreasonable.

[36] Aside from the legal and factual context above, other concerns exist in appointing the curator. The powers that the applicant seeks to provide for the curator would involve interviews, investigations, and reports to the Court regarding the , which willchild's best interests be presented to the Children's Court. This would amount to running a parallel process.

[37] The Children's Court, particularly the Court dealing with the foster care application, is in the best position to determine the need, if any, for additional interviews or reports. At this stage, the applicant has already attended interactional analysis, and reports have been filed in this regard. It also weighs with the Court that any further interviews and reports may delay the foster care application to be heard in August 2024. Delays in this process cannot be in D[...]s best interests.

[38] In addition, D[...] is four years old. It does not appear that the applicant has considered the specific qualifications needed by a curator to conduct interviews with a child of this age. The Children's Court has already ordered that the applicant meet with the expert and acquaint herself with the treatment. The Children's Court has also signed off on Dr. Phelps being the medical practitioner. The relief sought is not appropriate in these circumstances.

Urgency

[39] The case involves the best interests of D[...], a special needs child. The complaint from the applicant was essentially that he was receiving strong medications. If there is a concern regarding the medical treatment of a four-year-old special child put in temporary safe care, the Court will be slow to point the applicant to the normal motion roll. These allegations weighed with the Court to hear the matter urgently. Of course, considering these allegations for purposes of urgency does not mean the Court accepts the allegations to determine their merits.

Costs

[40] The applicant is being represented pro bono. The applicant seeks punitive costs against the respondents. No basis for these costs has been provided. This position was not persisted in the written submissions. In the written submissions, the position

made out is that the respondents be responsible for disbursements. Having concluded that no basis in law or fact has been laid for the relief sought, the applicant is not entitled to her costs.

[41] The respondents' costs must be considered. As they are successful they are entitled to their costs. In addition, the manner in which the case has been presented is to be considered. The first consideration is the timelines employed in this matter. The cause of concern appears to have arisen with the use of Valium. Valium was used to calm D[...] when the applicant visited. These visits were halted in July 2023 after D[...] was admitted to the hospital for three days for a seizure he suffered after a visit with the applicant. The applicant's concern has been long-standing. The applicant then approached the urgent court a year later. The Court will be willing to hear a case on an urgent basis if the best interest of the child is being raised. However, in this case, that basis of urgency was not used for the power's purpose, nor are the timeframes justifiable.

[42] The applicant's handling of the matter has to be weighed. The applicant filed a 400-page founding affidavit, raising extraneous matters and allegations that were contradicted by objective evidence.

[43] The applicant's cause of action appears to be nothing more than an unfounded fear that D[...] is being overmedicated. This fear must be seen in light of Dr Phelps's consultation with the applicant and the applicant's failure to avail herself of the option of obtaining a second opinion.

[44] In addition, the applicant came to urgent court without sending a letter of demand before launching these proceedings. It is not a mere formality; it potentially prevents the need for the hearing in its entirety. The respondent's affidavit reads "the applicant never requested me, or my legal representative, for consent to appoint a curator. The parties could have dealt with the matter, and a mutual agreement could have been reached". From the answering affidavit, it is apparent that the respondents offered the applicant to see Dr Phelps and obtain a second opinion.

Despite this, the applicant has approached this Court urgently, based entirely on conjecture and speculation.

[45] The applicant submits that the respondents complying with their duties somehow evinces an entitlement to David. This is not apparent from the pleaded facts. Before these proceedings were launched, the respondents understood their role and were committed to the rules. They are aware, as they have been through the process before, of the legal parameters of their role. They state that D[...] has “very bad sleeping habits to such an extent that he will be awake up to ten times an evening. This is bad for his daily life and we had to seek medical advice to ensure healthy sleep. We are working closely with the paediatrician to find the best health treatment for D[...]’s challenges.” The respondents have done no more than comply with their duties as caregivers to protect D[...].

[46] In any event, the relief being sought would either not be effective or would interfere with the ongoing litigation. The relief would not be effective as the foster care application is set down in a month. It is not clear what would be achieved effectively in a month. Alternatively, it would interfere with the finalisation of the foster care application.

[47] The respondents have had to defend against this application. They explained they did not wish to spend the costs on litigation as they would rather spend that money to care for their family, which includes caring for D[...]. Part of these costs, the Court notes, is spent on D[...]’s medical treatment and includes an offer to share costs to ensure the applicant and D[...] can attend bonding therapy. However, they did brief counsel to appear on the day and did incur costs in opposing this relief. They are successful and are entitled to their costs.

[48] The applicant cannot avail herself of the Biowatch rule as both parties contend they are acting in the best interest of the child. However, for the reasons set out below the Court concludes that the present application was an abuse of the court process. The applicant has approached this Court on unjustifiably shortened timeframes to seek relief parallel to an existing process. The basis on which the relief is sought is

speculation, and the entire proceedings could have been avoided had the applicant taken the opportunity to take D[...] to another specialist.

[49] The application raises a host of other allegations and legal points. For fear of treading on the terrain of the Children's Court, this Court will not deal with these allegations.

[50] As to the scale of costs, the sheer volume of the pleadings in this matter, the intricacies involved in the Children's Care Act and the extended history of this matter, entitles counsel to costs on Scale B.

Conclusion

[51] The Court orders that:

- a) The application is dismissed.
- b) The applicant is to pay the respondents' costs on Scale B.

I de Vos
Acting Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be emailed to the parties/their legal representatives.

Counsel for the applicant:	R Orr
Instructed by:	Jenkins Incorporated Attorneys
Counsel for the respondents:	In person – at the hearing represented by J Nel
Instructed by	In-person
Date of the hearing:	25 June 2024
Date of judgment:	17 July 2024