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

CASE NO: 2024-018488

In the application between:

1. Reportable – No
2. Of interest to other Judges – No
3. Revised

Signature.

Date

TUKELA NINGIZA

First Applicant

LONA PANTSHWA

Second Applicant

and

ESTATE LATE N[...] P[...]

First Respondent

A

MASTER OF THE HIGH COURT

Second Respondent

ABSA BANK LIMITED

Third Respondent

JUDGMENT

PRETORIUS AJ

INTRODUCTION

[1] This is the reserved judgement on the merits, and ancillary aspects pertaining thereto, in regard to the above matter, and as arising from the papers filed of record and further during the hearing and argument before me.

[2] The minor child around whom this Application centres, and in whose best interests same has been brought, is a girl, who was born on **24 July 2007**, who is presently 16 years of age, and to whom I shall simply refer in this Judgment as “**SFN**”, by virtue of her minority.¹

[3] **SFN’s** biological mother, N[...] P[...], passed away on **26 April 2021**, at the age of 42,² and to whom I shall, for ease of reference, refer to herein as “**the deceased**”.

[4] The First Applicant is **SFN’s** biological father and surviving parent. **SFN** was born out of a romantic relationship between **the deceased** and the First Applicant.³ The First Applicant has brought this Application on behalf of **SFN**, as her guardian, and in her best interests.⁴ He deposed to both the Founding and Replying Affidavits in support of the Application.

[5] The Second Applicant is **the deceased’s** sister,⁵ **SFN’s** maternal aunt, and the nominated Executrix in respect of the Estate of **the deceased**. It is common cause that the Second Applicant did not depose to any Affidavit in respect of this matter, be it a Supporting or a Confirmatory Affidavit.

[6] The First Respondent is the Estate Late of **the deceased**, (“**the deceased’s Estate**”) which is cited as being in the care of the Master of the High Court, pending the appointment of an Executor and/or Executrix for the due winding-up of **the**

¹ Founding Affidavit: par 4, CaseLines 02-9; par 9, CaseLines 02-10

² Founding Affidavit: par 9, CaseLines 02-10 and annexure “G9” to Founding Affidavit, CaseLines 02-54

³ Founding Affidavit: par 4, CaseLines: 02-9, read with par 9, CaseLines 02-10

⁴ Replying Affidavit: par 7, CaseLines: 06-22

⁵ Founding Affidavit: par 5, CaseLines 02-9

deceased's Estate.⁶ A copy of the Application was served on First Respondent, care of the Second Respondent, on **22 February 2024**.⁷

[7] The Second Respondent is the Master of the High Court, Johannesburg ("**the Master**"). A copy of the Application was served on **the Master** on **22 February 2024**.⁸ **The Master** has not opposed this Application. Albeit that the Second Applicant is the nominated Executrix to **the deceased's Estate**, for the reasons which I deal with more fully hereunder, it is common cause that no Executor and/or Executrix has, as yet, been appointed to **the deceased's Estate**. There was no opposition to the Application by the First Respondent, or by the Second Respondent on its behalf.

[8] The Third Respondent is ABSA Bank Limited. A copy of the Application was served on the Third Respondent on **20 February 2024**.⁹ As stated above, the Third Respondent opposed the Application.

[9] It is common cause that prior to her passing, **the deceased** had held a bank account with the Third Respondent. In the Founding Affidavit, the First Applicant states, *inter alia*, that he has brought this Application, "*quintessentially*" on behalf of **SFN**, for her school fees to be paid by **the deceased's Estate (First Respondent)**,¹⁰ and that in order to enable the aforesaid relief, in the absence of an Executor/Executrix to **the deceased's Estate**, the Third Respondent be ordered to effect payment from the funds held in **the deceased's** bank account, on presentation of invoices and/or vouchers, directly to the service provider/s of **SFN's** schooling needs.¹¹

[10] The crisp issue for determination in this matter is whether it is competent for me to make an Order in terms whereof the Third Respondent is ordered to effect payment from the funds in **the deceased's** bank account held with the Third Respondent, directly to the service provider/s in regard to **SFN's** school fees,

⁶ Founding Affidavit: par 6, CaseLines 02-9

⁷ Sheriff's Return of Service: CaseLines 03-2

⁸ Sheriff's Return of Service: CaseLines 03-3; Founding Affidavit: par 7, CaseLines 02-10

⁹ Sheriff's Return of Service: CaseLines 03-4; Founding Affidavit: par 8, CaseLines 02-10

¹⁰ Founding Affidavit: par 13, CaseLines 02-11

¹¹ Founding Affidavit: par 14, CaseLines 02-12

boarding and related educational costs, in circumstances where it is common cause that ***the deceased's Estate*** (*First Respondent*) is without an Executor/Executrix,¹² and pending the appointment of an Executor/Executrix. By extension, if it is competent for me to make such an Order, what should the terms thereof be. In addition, and ancillary to the foregoing, I am required to consider a purported amendment by the Applicants to the Notice of Motion, as well as the aspect of costs in regard to this Application.

[11] Purely for context, it bears mention that prior to me, sitting in the Family Court, becoming seized of the matter during the late morning of Wednesday, **06 March 2024**, the matter had initially come before his Lordship Vally J, sitting in Urgent Court, on Tuesday, **05 March 2024**, and thereafter before her Ladyship Crutchfield J, also sitting in Urgent Court, on Wednesday, **06 March 2024**, at 10h00. It is common cause that her Ladyship Crutchfield J transferred the matter to the Family Court, having expressed the view that the matter was in the wrong Court.¹³

[12] Pursuant to her Ladyship Crutchfield J's aforesaid directive, the Applicants and Third Respondent's representatives then approached me in Chambers late during the course of the morning on Wednesday, **06 March 2024** and when I stood the matter down to 14h00 in order to afford me an opportunity to consider the papers.

[13] Given that the Third Respondent (*being the only Respondent which has opposed this Application*), opposed the Application on three counts, being urgency, the raising of two points *in limine* and on the merits, I heard full argument on the aspect of urgency at 14h00 on **06 March 2024**. It is common cause that I was persuaded that the matter was urgent and further that the matter concerns the best interests of **SFN**. I thereafter proceeded to hear argument in respect of the two points *in limine* which had been raised by the Third Respondent. I reserved judgment in regard to the points *in limine*.

¹² Applicants' Heads of Argument: par 12, CaseLines 19-10

¹³ Applicants' Heads of Argument: par 64, CaseLines 19-31 to 19-32

[14] Initially, it was anticipated that the matter would proceed by way of MS Teams on Friday, **08 March 2024**, at 10h00. Given, however, that neither of the parties had filed Heads of Argument, I requested my Secretary to communicate with the parties' representatives seeking that Heads of Argument be filed by the morning of Monday, **11 March 2024**, and to advise them that the matter would proceed on Tuesday, **12 March 2024** at 10h00. Heads of Argument were duly uploaded on behalf of the Applicants to CaseLines on Sunday, **10 March 2024** at 06h03 and on behalf of the Third Respondent on Monday, **11 March 2024** at 08h10.

[15] On **12 March 2024**, I handed down judgment in regard to the points *in limine*. It is common cause that I did not uphold either of the points *in limine*, with the aspect of costs being reserved for determination once argument on the merits had been heard. I thereafter proceeded to hear argument on the merits and reserved judgment.

[16] In terms of the Notice of Motion, the matter would be enrolled for hearing on Tuesday, **05 March 2024**. The Notice of Motion prescribed the time periods for the filing of a Notice of Intention to Oppose and Answering Affidavit as being **22 February 2024** and **26 February 2024**, respectively.¹⁴ The Third Respondent electronically served its Notice of Intention to Oppose on the Applicants' attorneys on **01 March 2024** at 14h46,¹⁵ and its Answering Affidavit on **04 March 2024** at 11h36, both of which were served outside of the time periods as prescribed in the Notice of Motion.¹⁶ By virtue of the late filing of the Third Respondent's Answering Affidavit, as aforesaid, the Applicants served and filed a Replying Affidavit during the morning of **05 March 2024**,¹⁷ being the date upon which the matter had been enrolled in Urgent Court and had been allocated to His Lordship Vally J, as detailed above.

¹⁴ Notice of Motion: CaseLines 02-4

¹⁵ CaseLines: 04-1 to 04-3

¹⁶ E-mail of service from Third Respondent's Attorneys, Tim Du Toit Attorneys: 04 March 2024 at 11h36, CaseLines 05-3

¹⁷ Filing Notices for Applicants' Replying Affidavit, CaseLines 06-1 to 06-2, being in respect of the unsigned version uploaded onto CaseLines at 09h14 on 05 March 2024, and CaseLines 06-27 to 06-28, being in respect of the signed version, uploaded onto CaseLines at 10h50 on 05 March 2024

[17] The Third Respondent, in its Answering Affidavit, sought condonation for the late filing thereof.¹⁸ The Applicants did not oppose the condonation sought and I accordingly condoned the late filing of the Third Respondent's Answering Affidavit at the hearing on Wednesday, **06 March 2024**.

[18] It was submitted in the Heads of Argument filed on behalf of the Applicants that when this Application was drawn, it was not anticipated that the Application would be opposed.¹⁹ That no opposition was envisaged is borne out by:

18.1. the description of the founding papers in the matter, being the Notice of Motion and Founding Affidavit, in Section 02 of CaseLines, where same are described as "*Unopposed Application*";

18.2. the Practice Note uploaded on behalf of the Applicants to CaseLines on **01 March 2024**, wherein the matter is described as "*Unopposed*";²⁰

18.3. no Heads of Argument initially being filed on behalf of the Applicants;

18.4. apart from, in the Notice of Motion, making the costs of this Application in the administration of ***the deceased's Estate***, no costs were sought;

18.5. the fact that ***the Master*** did not oppose the Application; and

18.6. the Third Respondent's opposition and Answering Affidavit being filed well outside the time periods prescribed in Notice of Motion for doing so (*as dealt with above*).

[19] By virtue of the Third Respondent's opposition to the matter, the terms of the Order initially sought by the Applicants in the Notice of Motion, and associated Draft Order, changed to the point where further Draft Orders were uploaded to CaseLines as the matter progressed and culminated in the Applicants serving and filing an

¹⁸ Answering Affidavit: paras 107 to 108, CaseLines 05-21 to 05-22

¹⁹ Applicants' Heads of Argument: par 16, CaseLines 19-13 to 19-14

²⁰ Applicants' Practice Note: CaseLines 16-1

Amended Notice of Motion on Saturday, **09 March 2024**. I will deal with the aspects of the Third Respondent's opposition, the various Draft Orders and the Amended Notice of Motion, more fully later on in this judgment.

Best interests of the child principle

[20] Before I venture further into this judgment, it is important to emphasise that I was persuaded during the argument in regard to urgency, that this matter directly impacts the best interests of **SFN**.

[21] The First Applicant states that this Application is brought in the best interests of **SFN**, in terms of Section 28(2), Section 28(1)(c) and Section 29 of the Constitution of the Republic of South Africa, 2 of 1996 ("**the Constitution**"), as read with Sections 7 and 9 of the Children's Act, 38 of 2005 ("**the Children's Act**"), for a *mandamus* directing that the Third Respondent be authorised to effect payments from **the deceased's** bank account (*First Respondent*) towards the educational needs of **SFN**.²¹

[22] The Third Respondent, in the Answering Affidavit filed on its behalf, in the one breath "*notes*", the aforesaid allegations, but in the next breath it denies, by way of a bare denial, that the Applicants are entitled to the relief sought in terms of these sections of **the Constitution**, **the Children's Act**, or at all.²² In the Heads of Argument filed on behalf of the Third Respondent it is conceded that the best interests of minor children are paramount and that this Court is the upper guardian of all minor children, but that notwithstanding this, there exists legislation regulating the administration and/or winding-up of deceased estates and that I should rather, and *in casu*, only have regard to such legislation which it is alleged protects minor children during the process of the administration and/or winding-up of deceased estates.²³ For the reasons which appear below, I disagree with this contention.

²¹ Founding Affidavit: par 12, CaseLines 02-11 and par 59, CaseLines 02-23

²² Answering Affidavit: paras 41 and 42, CaseLines 05-11, and paras 95 and 96, CaseLines 05-19

²³ Third Respondent's Heads of Argument: par 70, CaseLines 19-64

[23] The best interests of the child principle is the lens through which I, in my role as the upper guardian of all children and, in the performance of my common law duties as such, must consider the relief sought in this matter and the submissions made in support, and in opposition, thereof. The provisions of Section 28(2) of **the Constitution**, read together with Sections 7 and 9 of **the Children's Act** further impel me to do so.

[24] Section 28(2) of **the Constitution** provides as follows:

“A child's best interests are of paramount importance in every matter concerning the child.”

[25] This constitutional imperative in regard to the best interests of the child principle is underscored in Section 9 of **the Children's Act** which provides as follows:

“In all matters concerning the care, protection and well-being of a child the standard that the child's best interests is of paramount importance, must be applied.”.

[26] Section 7 of **the Children's Act** further states that whenever a provision of **the Children's Act** requires the best interests of the child standard to be applied, there are certain factors which must be taken into account when doing so, and proceeds to list those factors.

[27] There is also a plethora of case authority which expounds upon the role of a Judge as the upper guardian of all minors in determining the best interests of minor children and the orders which can be made pursuant thereto. I shall refer herein to but a few of these authorities to emphasise the point.

[28] In the matter of **P and Another v P and Another**,²⁴Hurt J held as follows:

²⁴ 2002 (6) SA 105 (N): paras C-D, page 110

“But the Court does not look at sets of circumstances in isolation. I am bound, in considering what is in the best interests of G, to take everything into account, which has happened in the past, even after the close of pleadings and in fact right up to today. Furthermore, I am bound to take into account the possibility of what might happen in the future if I make any specific order.”[Emphasis added]

[29] In **Girdwood v Girdwood**,²⁵ Van Zyl J stated the following:

“As upper guardian of all dependent and minor children this Court has an inalienable right and authority to establish what is in the best interests of children and to make corresponding orders to ensure that such interests are effectively served and safeguarded.”

[30] In **J v J**²⁶, Erasmus J, held that the Court, as upper guardian is empowered, and under a duty to consider and evaluate all relevant facts placed before it when deciding the issue, which is of paramount importance, being the best interest of the child.²⁷

[31] In the **J v J** matter, the Court also referred to the decision of **AD and DD v DW and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)**²⁸ where the Constitutional Court endorsed the view of the minority in the Supreme Court of Appeal that the interests of minors should not be “*held to ransom for the sake of legal niceties*” and determined that in the case before it, the best interests of the child “*should not be mechanically sacrificed on the altar of jurisdictional formalism.*”²⁹

[32] In **B v B**³⁰ it was stated that:

²⁵ 1995 (4) SA 698 (C): 708J to 709A

²⁶ 2008 (6) SA 30 (C)

²⁷ Ibid: para 20

²⁸ 2008 (3) SA 183 (CC)

²⁹ J v J: 2008 (6) SA 30 (C), at para 20

³⁰ 2008 (4) SA 535 (W) at 541F to 543E

"The Court has inherent common law powers as upper guardian of all minors to make any order which it deems fit in the best interests of the minor child." [Emphasis added]

[33] In following the reasoning of the above authorities, I simply cannot ignore any facts and circumstances, be they past, recent or present, when considering what is in the best interests of **SFN** and I must furthermore take into account the possibility of what might happen in the future if I make any specific order.

[34] It therefore goes without saying that the best interests of the child principle will permeate and underpin any Order I make herein.

FACTUAL BACKGROUND

[35] Before I deal with the issue for determination, incorporating an analysis of the relief sought, the opposition thereto, and the applicable law, I believe it is important to briefly have regard to the factual background of this matter as canvassed predominantly in the papers and, to a lesser extent, during argument before me.

[36] As stated in the **Introduction** above, **SFN's** biological mother, **the deceased**, passed away on **26 April 2021**, at the age of 42.³¹ The First Applicant avers that **the deceased** suddenly collapsed and became unresponsive, following dinner on **26 April 2021**, and passed away to the grave shock of all those who were present at the time, which included **SFN** and the First Applicant.³² These allegations are not disputed by the Third Respondent.³³

[37] When **the deceased** passed away, she was not married and was accordingly not survived by a spouse.³⁴ **The deceased** was survived by one minor child, being **SFN**, she having no other children.³⁵ **The deceased** died intestate.³⁶ In terms of the

³¹ Founding Affidavit: par 9, CaseLines 02-10 and annexure "G9" to Founding Affidavit, CaseLines 02-54

³² Founding Affidavit: par 21, CaseLines 02-14

³³ Answering Affidavit: par 64, CaseLines 05-15 and wherein it is stated on behalf of the Third Respondent that these allegations are "noted"

³⁴ Replying Affidavit: par 4.3.1, CaseLines 06-18

³⁵ Replying Affidavit: par 4.3.2, CaseLines 06-18

provisions of the Intestate Succession Act, 1 of 1987, and more specifically Section 1(1)(b) thereof, if a person dies intestate, either wholly or in part, and is survived by a descendant, but not by a spouse, such descendant shall inherit the intestate Estate. In the premise **SFN** is the sole heir of **the deceased's** Estate.³⁷

[38] It is apparent from the Founding Affidavit, together with the annexures thereto, that on **10 May 2021**, **the deceased's** surviving brother, Siphesihle Pantshwa signed a Nomination of Executrix Form, in terms whereof he nominated the Second Applicant to be the Executrix of **the deceased's Estate**,³⁸ It furthermore appears that **the deceased's** other surviving sister, Siphokazi Pantshwa, similarly nominated the Second Applicant to be the Executrix of **the deceased's Estate**, she having signed a Nomination of Executrix Form in this regard on **12 May 2021**.³⁹ These allegations are not disputed by the Third Respondent.⁴⁰

[39] *Ex facie* the Nomination of Executrix Forms, they appear to have been lodged with **the Master** on **24 May 2021**, as they bear **the Master's** date stamp to that effect, said date being just over a month after the passing of **the deceased**.⁴¹ It is furthermore averred by the First Applicant that the Second Applicant accepted her nomination as Executrix of **the deceased's Estate** on **24 May 2021**, being the date when the nominations were lodged with **the Master**,⁴² and that **the Master** accordingly allocated a reference number to **the deceased's** Estate, being 014542/2021,⁴³ the "**2021**" representing the year that **the deceased's** Estate was so reported to **the Master**. The aforesaid allegations are either noted by the Third Respondent and/or it is stated that the Third Respondent bears no knowledge of the allegations and accordingly same cannot be either admitted or denied.⁴⁴ In the premise, these allegations cannot be said to be disputed by the Third Respondent.

³⁶ Replying Affidavit: par 4.3.3, CaseLines 06-18

³⁷ Replying Affidavit: par 4.3.4, CaseLines 06-18

³⁸ Founding Affidavit: par 43, CaseLines 02-20 and annexure "G10" thereto, CaseLines 02-56

³⁹ Founding Affidavit: par 43, CaseLines 02-20 and annexure "G10" thereto, CaseLines 02-57

⁴⁰ Answering Affidavit: par 74, CaseLines 05-16: and wherein it is stated on behalf of the Third Respondent that these allegations are "*noted*"

⁴¹ Founding Affidavit: annexure "G10" thereto, CaseLines 02-56 to 02-57

⁴² Founding Affidavit: par 44, CaseLines 02-10

⁴³ Founding Affidavit: par 11, CaseLines 02-11 and par 43, CaseLines 02-10, annexure "G1", CaseLines 02-27 to 02 - 28

⁴⁴ Answering Affidavit: par 40, CaseLines 05-10; paras 74 and 75, CaseLines 05-17 to 05-17

[40] It further appears that **the Master** accepted the nomination of the Second Applicant as the Executrix in **the deceased's Estate** because, on **08 September 2023**, more than 2 years after **the deceased's Estate** was reported to **the Master**, **the Master** required the Second Applicant to furnish a Bond of Security in the sum of R860 827.39 (*eight hundred and sixty thousand eight hundred and twenty seven rand and thirty nine cents*) for the proper performance of her duties as such.⁴⁵ These averments are not disputed by the Third Respondent.⁴⁶

[41] It is common cause, as referred to in the **Introduction** above, that no Executor and/or Executrix has been appointed to **the deceased's Estate** as yet,⁴⁷ it being averred on behalf of the Applicants that **the Master** has refused to issue Letters of Executorship to the Second Applicant by virtue of it first requiring the Second Applicant to furnish the Bond of Security, as stated above, and that consequently there has neither been any movement, nor any activity in respect of the winding-up of **the deceased's Estate (the First Respondent)**.⁴⁸ The Third Respondent states that the foregoing allegations do not fall within its knowledge and accordingly same can neither be admitted nor denied. In, however, so doing, the Third Respondent states that it is evident that the Second Applicant has failed, refused or neglected to obtain the required Bond of Security or to the extent applicable and/or permissible, to approach the Honourable Court for an order dispensing with the finding and/or furnishing of the security as requested by **the Master**.⁴⁹

[42] From the argument presented before me on behalf of the Applicants during the hearing of this matter, it seems that the Second Applicant is unable to provide the security required by **the Master** for the due winding-up of **the deceased's Estate**. The security required by **the Master** is also described in the Founding Affidavit as being "*burdensome*".⁵⁰ I shall return to this aspect later in this Judgment.

⁴⁵ Founding Affidavit: par 10, CaseLines 02-11 read with annexure "G1" thereto, CaseLines 02-27 to 02-28

⁴⁶ Answering Affidavit: par 38, CaseLines 05-10: and wherein it is stated on behalf of the Third Respondent that these allegations are "*noted*"

⁴⁷ Founding Affidavit: par 10, CaseLines 02-11

⁴⁸ Founding Affidavit: par 46, CaseLines 02-20

⁴⁹ Answering Affidavit: par 77, CaseLines 05-17, read with par 52, CaseLines 05-12 to 05-13

⁵⁰ Founding Affidavit: par 10, CaseLines 02-11

[43] **SFN** is currently a grade 11 pupil and is in boarding school at the private school known as R[...] H[...], H[...], M[...], Province of Gauteng (“**R[...] H[...]**”).⁵¹ According to the First Applicant, **SFN** has been a pupil at **R[...] H[...]** for the past three years, including the year of **the deceased’s** passing (2021). He further states that **R[...] H[...]** was jointly chosen as **SFN’s** school by both **the deceased** and the First Applicant.⁵² The Third Respondent either notes the foregoing allegations or avers that they do not fall within its knowledge and can accordingly neither be admitted nor denied.⁵³ The nett effect is therefore that these averments are also not disputed by the Third Respondent.

[44] Prior to **the deceased’s** untimely passing, the First Applicant and **the deceased** jointly contributed to **SFN’s** maintenance requirements, including her educational needs.⁵⁴ Subsequent to **the deceased’s** passing on **26 April 2021**, the First Applicant avers that he has been solely responsible for **SFN’s** maintenance requirements including, but not limited to, the costs of her education and further that **the deceased’s Estate** has not contributed to **SFN’s** needs since the passing of **the deceased**.⁵⁵ The Third Respondent avers that all of the aforementioned allegations do not fall within its knowledge and can neither be admitted nor denied.⁵⁶ The effect of the foregoing is that these allegations are not disputed by the Third Respondent.

[45] In addition to **SFN**, the Applicant has two other children, both of whom are sons, one is a minor, who is still in high school and the other, ostensibly being a dependent major, is a student at the University of Fort Hare.⁵⁷ The First Applicant states that he shoulders the sole responsibility towards the upkeep and educational needs of these two children and cannot turn to their mothers as they cannot afford to contribute.⁵⁸ The Third Respondent avers that the foregoing allegations do not fall

⁵¹ Founding Affidavit: par 9, CaseLines: 02-10, read with par 53, CaseLines 02-22

⁵² Founding Affidavit: par 60, CaseLines 02-24

⁵³ Answering Affidavit: par 37, CaseLines 05-10, par 90, CaseLines 05-19, and par 103, CaseLines 05-21

⁵⁴ Founding Affidavit: par 32, CaseLines: 02-17

⁵⁵ Founding Affidavit: par 32, CaseLines: 02-17; par 46, CaseLines 02-20

⁵⁶ Answering Affidavit: par 69, CaseLines 05-15; par 77, CaseLines 05-17

⁵⁷ Founding Affidavit: paras 29 and 30, CaseLines 02-16 to 02-17

⁵⁸ Founding Affidavit: paras 29 and 31, CaseLines 02-16 and 02-17

within its knowledge and can neither be admitted nor denied by it.⁵⁹ Accordingly, the allegations are not disputed.

[46] The First Applicant is an admitted attorney of the High Court of South Africa, and the co-owner of the firm Ningiza Horner Attorneys Incorporated.⁶⁰ The First Applicant derives his livelihood from practising as an attorney at the aforesaid firm.⁶¹ The First Applicant states that in and during **2020**, unrelated to the Covid-19 Pandemic, his firm had to down size and retrench some of its employees as a result of changes which had been effected by the Road Accident Fund and the work in relation to which had constituted a significant portion of the firm's revenue. Thereafter, Covid-19 soon followed. In the result, work volumes decreased significantly.⁶² The First Applicant states that the foregoing has had an impact on his ability to earn a living as the firm has had to prioritise its employees and running costs before any monies can be drawn from the firm. He says the effects "*are fully settling in*" and are being felt by him, especially this year.⁶³ Insofar as all of the allegations contained in this paragraph are concerned, the Third Respondent again avers that same do not fall within the Third Respondent's knowledge and can neither be admitted nor denied. Again, the nett effect of the foregoing is that these allegations are in fact not disputed by the Third Respondent.⁶⁴

[47] The First Applicant states that **SFN's 2024** tuition fees are R189 026.00 (*one hundred and eighty nine thousand and twenty six rand*) per annum and that her boarding fees are R134 168.00 (*one hundred and thirty four thousand one hundred and sixty eight rand*) per annum. He further states that the total fees and boarding costs in relation to **SFN** for the **2024** academic year, is the sum of R323 194.00 (*three hundred and twenty three thousand one hundred and ninety four rand*), and which amount excludes other costs, such as uniform, stationery, lunches, laundry

⁵⁹ Answering Affidavit: par 69, CaseLines 05-15

⁶⁰ Founding Affidavit: paras 1 and 39, CaseLines 02-8 and 02-18 to 02-19

⁶¹ Founding Affidavit: par 39, CaseLines 02-18

⁶² Founding Affidavit: par 39, CaseLines 02-18

⁶³ Founding Affidavit: par 40, CaseLines 02-19

⁶⁴ Answering Affidavit: par 73, CaseLines 05-16

and school trips.⁶⁵ The foregoing averments are noted by the Third Respondent and are thus not disputed.⁶⁶

[48] According to the First Applicant, he has to budget for an amount in the range of R400 000.00 (*four hundred thousand rand*) per child per annum, being a total amount of R1 200 000.00 (*one million two hundred thousand rand*) per annum, in respect of the educational and related costs for **SFN** and his other two children referred to above.⁶⁷ The Third Respondent states that these allegations do not fall within its knowledge and accordingly can neither be admitted nor denied by it which again translates to these allegations not being placed in dispute by the Third Respondent.⁶⁸

[49] The First Applicant says that whilst, over the past three years since the passing of **the deceased**, he has been able to meet this obligation, not without taking credit here and there, he has tried to shoulder the responsibility in respect of all of his children, and taking into consideration that he and **the deceased** used to contribute jointly to **SFN's** upkeep, in this current year, he simply cannot afford to do so.⁶⁹ He presently cannot afford to make payments towards **SFN's** school fees because of his obligation towards his other two children.⁷⁰ The Third Respondent states that these allegations do not fall within its knowledge and can neither be admitted nor denied by it.⁷¹ This again translates into these allegations not being placed in dispute by the Third Respondent

[50] Albeit that, as at the hearing of this Application, **SFN's** school fees and boarding costs were due and payable, certainly for the first term of the **2024** academic year, and further that the First Applicant had not paid the same, there was no question of **SFN** being suspended and/or excluded from her school as a result.

⁶⁵ Founding Affidavit: par 54, CaseLines 02-22; read together with annexure "G6" thereto, being **SFN's 2024** fee structure, CaseLines 02-43; par 58, CaseLines 02-23, read together with annexure "G7" thereto, being the statement of account from **SFN's** school, dated 25 January 2024, CaseLines 02-46 to 02-50; Founding Affidavit: par 37, CaseLines 02-18 (in the latter paragraph the amount is referred to as R323 192.00, i.e. R2.00 less. Nothing turns on this.)

⁶⁶ Answering Affidavit: par 90, CaseLines 05-19; par 94, CaseLines 05-19

⁶⁷ Founding Affidavit: par 38, CaseLines 02-18

⁶⁸ Answering Affidavit: par 73, CaseLines 05-16

⁶⁹ Founding Affidavit: par 32, CaseLines 02-17; and par 38, CaseLines 02-18

⁷⁰ Founding Affidavit: par 29, CaseLines 02-16

⁷¹ Answering Affidavit: par 69, CaseLines 05-15; par 73, CaseLines 05-16

The First Applicant, however, avers that given his inability to pay **SFN's** fees and boarding costs this year, that there is the possibility of **SFN** being suspended and eventually excluded from her school.⁷² The First Applicant states that this could be catastrophic for **SFN**, who is in grade 11, and her studies during this academic year are extremely important for **SFN's** preparation for grade 12 (*matric*), next year.⁷³ Save to deny, by way of a bare denial, the possible exclusion of **SFN**, and further to deny that there is no indication that **SFN's** Grade 11 results could be catastrophic and that from the **SFN's 2023** Grade 10 academic report, it is evident that **SFN** achieved good results, these allegations are noted by the Third Respondent.⁷⁴

[51] The First Applicant says that **SFN** has been tremendously affected by the ordeal of losing her mother, and in the manner that she did (*as described above*), and that it would serve her best interests that she is not exposed to possible humiliation "*of the kind that financial exclusion tends to bring.*"⁷⁵ This allegation is noted by the Third Respondent.⁷⁶ The First Applicant further avers that in the circumstances it would be a nightmare for him and **SFN** to have to embark on an exercise of having to look for, and identify a new school, and especially at this late juncture, being the most crucial year of **SFN's** studies.⁷⁷ In the Answering Affidavit, the Third Respondent does not really deal with this specific allegation as its response thereto is clumped together with a response to paragraphs 22 to 28 of the Founding Affidavit and there is a blanket denial in regard to same.⁷⁸ Accordingly, I do not deem these allegations to have been placed in dispute by the Third Respondent.

[52] The First Applicant states that where the Court does not grant the relief as sought, this may impact upon whether **SFN** is able to continue at her present school, **R[...]** **H[...]**, and critically, the First Applicant says that he would have to consider downgrading all of the children's education and which would not be ideal as he would rather have them obtain the best education that there is available to them. The First Applicant further avers that downgrading all of the children's schooling would

⁷² Founding Affidavit: par 17, CaseLines 02-12

⁷³ Founding Affidavit: par 20, CaseLines 02-13

⁷⁴ Answering Affidavit: par 60, CaseLines 05-14; paras 64 and 65, CaseLines 05-15

⁷⁵ Founding Affidavit: par 21, CaseLines 02-14

⁷⁶ Answering Affidavit: par 64, CaseLines 05-15

⁷⁷ Founding Affidavit: par 26, CaseLines 02-15 to 02-16

⁷⁸ Answering Affidavit: par 66, CaseLines 05-15

not be in their best interests as enshrined in ***the Constitution***, as read with the ***Children's Act***.⁷⁹ The Third Respondent states that these allegations do not fall within its knowledge and can neither be admitted nor denied by it. The Third Respondent further notes that Section 29(1) of ***the Constitution***, *inter alia*, affords everyone a right to basic education.⁸⁰ The First Applicant further submits that the only thing that is required to be done to preserve the children's education is that he be assisted by the First Respondent, being ***the deceased's Estate***, so that it would cover ***SFN's*** fees and he would cover the remaining fees in respect of the other children. In so doing, all of the children would remain in the same quality private schooling.⁸¹ The Third Respondent simply denies these allegations by way of a bare denial.⁸²

[53] As stated in the ***Introduction*** to this judgment, it is common cause that ***the deceased*** had a banking account, being a current account, which was held with the Third Respondent.⁸³ As at ***03 June 2021***, the "*current balance*" of ***the deceased's*** bank account was the sum of R733 741.51 (*seven hundred and thirty three thousand seven hundred and forty one rand and fifty one cents*) and the "*available balance*" was the sum of R813 741.51 (*eight hundred and thirteen thousand seven hundred and forty one rand and fifty one cents*).⁸⁴

[54] Mr Mvubu, on behalf of the Applicants, submitted during argument that ***the deceased*** had a facility with the Third Respondent in the amount of R80 000.00 (*eighty thousand rand*). This is evident from the difference between the "*current balance*" versus the "*available balance*", as at ***03 June 2021***, in respect of ***the deceased's*** said bank account. At ***01 March 2024***, the current and available balance in respect of ***the deceased's*** bank account was the sum of R745 920.89 (*seven hundred and forty five thousand nine hundred and twenty rand and eighty nine cents*).⁸⁵ By virtue of the foregoing, Mr Mvubu submitted that the Third

⁷⁹ Founding Affidavit: par 61, CaseLines 02-24

⁸⁰ Answering Affidavit: paras 103 to 105, CaseLines 05-21

⁸¹ Founding Affidavit: par 62, CaseLines 02-24

⁸² Answering Affidavit: par 106, CaseLines 05-21

⁸³ Founding Affidavit: par 52, CaseLines 02-21 to 02-22, and annexure "G12" thereto, CaseLines 02-61; Answering Affidavit: annexure "AA3" thereto, CaseLines 05-30

⁸⁴ Founding Affidavit: par 52, CaseLines 02-21 to 02-22, and annexure "G12" thereto, CaseLines 02-61

⁸⁵ Answering Affidavit: annexure "AA3" thereto, CaseLines 05-30

Respondent was clearly no longer a creditor in respect of **the deceased's** bank account as the facility was no longer in place. Mr Mvubu also submitted that the balance in **the deceased's** bank account has in fact increased since **03 June 2021**, from R733 741.51 (*seven hundred and thirty three thousand seven hundred and forty one rand and fifty one cents*) to R745 920.89 (*seven hundred and forty five thousand nine hundred and twenty rand and eighty nine cents*), as at **01 March 2024** and that, by logical deduction, no debit orders were coming off **the deceased's** account.

[55] During argument, Mr Mvubu mentioned that **the deceased** also had properties and a pension fund. These assets are not dealt with in the papers before me but it is fair to say that, at the very least, **the deceased's Estate** comprises of the money in **the deceased's** bank account as held with the Third Respondent.

[56] As can be seen from that which is stated hereinabove, almost all of the facts referred to, have not been placed in dispute by the Third Respondent.

[57] It is averred on behalf of the Applicants that the Third Respondent has not raised any dispute and that consequently this matter stands to be resolved on the facts, as set out by the Applicants, particularly the First Applicant. It is further submitted on behalf of the Applicants that I am accordingly impelled to accept the version of the Applicants and to resolve this matter based on that version.⁸⁶

[58] The facts, which the Applicants submit are common cause, are that:-

58.1. **the deceased** and the First Applicant are the biological parents of **SFN**;⁸⁷

58.2. **the deceased** died on **26 April 2021**;⁸⁸

58.3. during **the deceased's** lifetime, **the deceased** and the First Applicant jointly cared for **SFN**;⁸⁹

⁸⁶ Applicants' Heads of Argument: par 11, CaseLines 19-10

⁸⁷ Applicants' Heads of Argument: par 17, CaseLines 19-14

⁸⁸ Applicants' Heads of Argument: par 18, CaseLines 19-14

58.4. following **the deceased's** demise, the First Applicant shouldered this entire obligation on his own and has done so for the last three years (*being 2021, 2022 and 2023*);⁹⁰

58.5. the First Applicant has two other children whom he is putting through school and university respectively, and is the sole provider in respect of these children as the mothers of these children cannot afford to put them through school;⁹¹

58.6. the First Applicant does not have sufficient resources to cover all of the children's educational needs and consequently turns to **the deceased's** Estate (*First Respondent*) for assistance insofar as **SFN** is concerned, and given that if **the deceased** was still alive, she would have "*chipped in*", as it were, in the preceding three years;⁹²

58.7. **the deceased's Estate**, being the First Respondent, has the funds available and which are presently lying in **the deceased's** bank account which is held with the Third Respondent and that any order of this Court would be capable of execution and that there is no impediment thereto;⁹³

58.8. **SFN** is the only heir to **the deceased's Estate** and thus there would be no prejudice suffered by any heir(s) and/or beneficiaries;⁹⁴ and

58.9. **SFN** is a pupil at **R[...]** **H[...]** and **SFN's** school fees and related expenses must be paid directly into the bank account of **R[...]** **H[...]**.⁹⁵

[59] The Applicants further submit that I must accept the common cause facts as proven by virtue of:-

⁸⁹ Applicants' Heads of Argument: par 19, CaseLines 19-14

⁹⁰ Ibid

⁹¹ Applicants' Heads of Argument: par 20, CaseLines 19-15

⁹² Applicants' Heads of Argument: par 21, CaseLines 19-15

⁹³ Applicants' Heads of Argument: par 22, CaseLines 19-15

⁹⁴ Applicants' Heads of Argument: par 23, CaseLines 19-15

⁹⁵ Applicants' Heads of Argument: par 24, CaseLines 19-16

59.1. the provisions of Section 15 of the Civil Proceedings Evidence Act, 25 of 1965, which provides that it shall not be necessary for any party in any civil proceedings to prove, nor shall it be competent for any such party to disprove, any fact admitted on the record of such proceedings. Or, put differently, there is no legal requirement for leading evidence to prove a common cause fact; and

59.2. that, in any event, the facts narrated as being common cause, are in the form of a sworn statement, being an Affidavit under Oath, by the First Applicant and that, as such, these facts indeed constitute evidence before me and that, in the absence of contrary evidence, I am impelled to accept those facts.⁹⁶

[60] I am persuaded, and thus inclined, to accept the aforesaid submissions on behalf of the Applicants insofar as the common cause facts are concerned. I further reiterate what I have stated above in regard to the Third Respondent not placing most of the facts, as dealt with by me in detail hereinabove, in dispute.

EVOLUTION OF RELIEF SOUGHT BY VIRTUE OF THIRD RESPONDENT'S OPPOSITION TO APPLICATION

[61] For the sake of completeness, and as same is relevant to the determination of this matter, as well as in relation to costs, and as stated in the ***Introduction*** above, by virtue of the Third Respondent's opposition to the matter, as it was not initially anticipated that the matter would be opposed, the terms of the Order sought by the Applicants in the Notice of Motion, and associated Draft Order, changed to the point where further Draft Orders were uploaded to CaseLines as the matter progressed, culminating in an Amended Notice of Motion being uploaded to CaseLines on Saturday, **09 March 2024**. I will not deal with the purported amendment here, but later in this judgment, under a separate heading.

⁹⁶ Applicants' Heads of Argument: paras 25 and 26, CaseLines 19-16

[62] In terms of the Notice of Motion which accompanied the Founding Affidavit, and to which I shall refer as the initial Notice of Motion (“***the initial Notice of Motion***”), read together with the accompanying Draft Order (“***first Draft Order***”), the Applicants sought, *inter alia*, an Order to the effect that:-

62.1. the Third Respondent, through its bankers, make payments from ***the deceased’s*** (*First Respondent*) bank account (*bank account number: 4[...]*), as held with the Third Respondent, in respect of ***SFN’s*** educational needs, including:-

- 62.1.1. school fees;
- 62.1.2. boarding fees;
- 62.1.3. extra-curricular activities;
- 62.1.4. transportation needs;
- 62.1.5. school uniform and stationery; and
- 62.1.6. such other costs necessary for ***SFN’s*** educational needs;

(*paragraph 2 of ***the initial Notice of Motion****)

62.2. the Third Respondent pay directly to service providers, and on presentation of vouchers and/or invoices which vouchers and/or invoices must be accompanied by proof of banking account (*paragraph 3 of ***the initial Notice of Motion****);

62.3. the Applicants are ordered to lodge with ***the Master*** all expenses incurred by the First Respondent, including the invoices and/or vouchers as well as proof of payments from the Third Respondent (*paragraph 4 of ***the initial Notice of Motion****);

62.4. the costs of this Application be paid by ***the deceased's Estate*** (*the First Respondent*) (*paragraph 5 of the initial Notice of Motion*);⁹⁷

62.5. further and/or alternative relief (*paragraph 6 of the initial Notice of Motion*).

[63] Pursuant to the Third Respondent's opposition, the Applicants uploaded a second Draft Order ("***second Draft Order***") onto CaseLines on ***05 March 2024*** and wherein the relief sought was identical to the relief sought in the ***first Draft Order***, but for the prayer in respect of costs, which was changed to state that the costs of the Application are to be paid for by ***the deceased's Estate*** (*First Respondent*), but that the Third Respondent is to bear its own costs.⁹⁸

[64] Following the appearance before the Honourable Vally J on ***05 March 2024***, and when he referred the matter to the Honourable Crutchfield J for hearing on ***06 March 2024*** at 10h00, the Applicants uploaded a third draft Order ("***third Draft Order***") onto CaseLines.

[65] The relief sought in the ***third Draft Order*** in regard to the payment of ***SFN's*** educational costs, differed from prayers 2 and 3 of the ***First Draft Order*** and the ***Second Draft Order***, in that the Applicants now sought, in prayers 2 and 3 of ***third Draft Order***, the payment of a specified sum, and to the effect that:-

65.1. the Third Respondent be directed, through its bankers, to make payment in the amount of R323 194.00 (three hundred and twenty three thousand, one hundred and ninety four rand) from ***the deceased's*** (*First Respondent*) bank account (*bank account number: 4[...]*), held with the Third Respondent, in respect of ***SFN's*** school and boarding fees, said payment to be made directly to the bank account of ***SFN's*** school, being Reddam House Helderfontein, the banking details of which are stipulated in prayer 2 of the ***third Draft Order***;⁹⁹

⁹⁷ Notice of Motion: paras 2 to 5, CaseLines 02-3

⁹⁸ Second draft Order: prayers 5 and 6, CaseLines 21-6

⁹⁹ Third Draft Order: prayer 2, CaseLines 21-8

65.2. the Applicants are to lodge with **the Master** all expenses incurred by **the deceased's Estate** (*the First Respondent*), including a copy of the Order to be made, together with proofs of payment effected by the Third Respondent within 10 (*ten*) days from receipt of proof of payment from the Third Respondent.¹⁰⁰

[66] The relief sought in the **third Draft Order** insofar as the aspect of costs is concerned, was the same as that sought in the **second draft Order**, and as referred to in paragraph 63 above, being that the costs of the Application are to be paid for by **the deceased's Estate** (*First Respondent*), but that the Third Respondent is to bear its own costs.¹⁰¹

[67] The Applicants uploaded a fourth draft Order ("**fourth Draft Order**") to CaseLines on **08 March 2024**, being after the first appearance before me on **06 March 2024**. The **fourth Draft Order** was identical to the **third Draft Order**, but for prayer 2 thereof, which pertained to the dismissal of the Third Respondent's points *in limine*, on the one hand, and prayer 5 thereof, in respect of costs, on the other hand, in terms whereof it was sought that the Third Respondent be ordered to pay the costs of this Application.¹⁰²

BASIS OF RELIEF SOUGHT BY APPLICANTS AND OF THIRD RESPONDENT'S OPPOSITION THERETO

[68] In pursuance of the relief sought in this matter, and as dealt with in detail hereinabove, **SFN's** best interests were raised as a basis for the said relief: in terms of Section 28(2) (*best interests of the child paramount*), Section 28(1)(c) (*right of child to, inter alia, social services*) and Section 29 (*right to basic education*) of **the Constitution**, as read with Section 7 (*best interests of child standard*) and Section 9 (*best interests of the child paramount*) of **the Children's Act**, for a *mandamus* directing that the Third Respondent be authorised to effect payments from **the**

¹⁰⁰ Third Draft Order: prayer 3, CaseLines 21-8

¹⁰¹ Third Draft Order: prayers 4 and 5, CaseLines 21-9

¹⁰² Fourth Draft Order: prayers 2 and 5, CaseLines 21-11 and 21-12

deceased's bank account (*First Respondent*) towards the educational needs of **SFN**.¹⁰³

[69] It is further averred on behalf of the Applicants that it is competent for me to grant the relief sought, by virtue of the provisions of Section 11(1)(b) of the Administration of Estates Act, 66 of 1965 ("**the Act**"), notwithstanding the fact that no Executor/Executrix has, as yet, been appointed to **the deceased's Estate**.¹⁰⁴

[70] The Third Respondent has, insofar as the merits of the Application are concerned, opposed the relief sought by the Applicants on various grounds. The basis of the Third Respondent's opposition to the relief sought can be summarised as follows:

70.1. the effect of the relief sought is to circumvent the proper administration or winding-up of **the deceased's Estate**, potentially to the detriment of other interested parties, including creditors of **the deceased's Estate**,¹⁰⁵ and as provided for by various provisions of **the Act**, including but not limited to:

70.1.1. Section 13 (*Deceased Estates not to be liquidated or distributed without Letters of Executorship or direction by Master*), it being common cause that no Executor/Executrix has been appointed to **the deceased's Estate**;¹⁰⁶

70.1.2. Section 23 (*Security for liquidation and distribution*) in terms of which **the Master** is entitled, *inter alia*, to require the Second Applicant to find or furnish security to the satisfaction of **the Master** in the amount that was determined by it, as referred to hereinabove, for the proper performance of the Second Applicant's functions, which amount is in the discretion of **the Master**, but is generally to the value

¹⁰³ Founding Affidavit: par 12, CaseLines 02-11 and par 59, CaseLines 02-23

¹⁰⁴ Applicants' Heads of Argument: paras 13 to 14, CaseLines 19-11 to 19-13; paras 37 to 38, CaseLines, 19-22

¹⁰⁵ Third Respondent's Heads of Argument: par 51, CaseLines 19-58

¹⁰⁶ Third Respondent's Heads of Argument: par 21, CaseLines 19-51, read with par 47, 19-57

of the assets in ***the deceased's Estate***.¹⁰⁷ The Second Applicant has failed, refused or neglected to obtain the required Bond of Security, or to the extent applicable and/or permissible, to approach this Court, as envisaged in Section 23(2)(d) of ***the Act***, for an order dispensing with the finding and/or furnishing of security, as requested by ***the Master***,¹⁰⁸

70.1.3. Section 26 (*Executor charged with custody and control of property in estate*), more specifically Section 26 (1A), which provides that the Executor/Executrix may, before the Liquidation and Distribution Account has lain open for inspection in terms of Section 35(4) of ***the Act***, with the consent of ***the Master***, release such amount of money and such property out of the Estate as, in the Executor/Executrix's opinion, are sufficient to provide for the subsistence of the deceased person's family or household. As no Executor/Executrix has been appointed, *in casu*, no claim has been made in terms of Section 26(1A);¹⁰⁹

70.2. the main relief sought by the Applicants in prayers 2 to 4 of ***the initial Notice of Motion***, does not set an end date, e.g. until an Executor/Executrix has been appointed, the amount in ***the deceased's*** bank account has been depleted, or ***SFN*** has attained the age of majority and further that, should I grant the aforesaid relief, the available funds in ***the deceased's*** bank account would be depleted in just over a period of two years, solely taking into account the annual fees for tuition and boarding in respect of ***SFN***;¹¹⁰

70.3. the relief sought by the Applicants in prayers 2 and 3 of ***the initial Notice of Motion*** would place an unreasonable and/or unlawful administrative burden upon the Third Respondent to make payments from ***the deceased's*** bank account directly to service providers on presentation of

¹⁰⁷ Third Respondent's Heads of Argument: par 49, CaseLines 19-57 to 19-58

¹⁰⁸ Third Respondent's Heads of Argument: par 49, CaseLines 19-57 to 19-58, read with Answering Affidavit: par 52, CaseLines 05-12 to 05-13

¹⁰⁹ Third Respondent's Heads of Argument: par 53, CaseLines 19-59 to 19-60, read with par 60, CaseLines 19-61

¹¹⁰ Third Respondent's Heads of Argument: par 54, CaseLines 19-60

vouchers and/or invoices,¹¹¹ and further that there would be no way for the Third Respondent to verify the vouchers and/or invoices and to ensure that the banking details appearing thereon, are correct. As no Executor/Executrix has been appointed to **the deceased's Estate**, the proposed payments would be made without **the Master's** consent and not in accordance with the provisions of **the Act** or the law ;¹¹²

70.4. if the relief sought by the Applicants is granted, it will open the proverbial floodgates and/or set a precedent in terms whereof a party may approach the Court for an interim maintenance payment from a Bank directly from a deceased person's bank account, before an Executor/Executrix has been appointed and without the oversight and/or consent of **the Master**,¹¹³

70.5. **the deceased's Estate** is not solely liable for **SFN's** school fees and related academic and/or schooling needs and the First Applicant has not made out a case that he cannot afford to make payments towards **SFN's** school fees because of his obligations to his other children. An Executor/Executrix, with **the Master's** consent in certain instances, is the correct person to deal with any claim against **the deceased's Estate**, including a maintenance claim on behalf of **SFN**, and **the deceased's Estate** should be administered and wound-up in terms of the provisions of **the Act**,¹¹⁴

70.6. the Applicants are not entitled to the mandatory interdict (*mandamus*) sought against the Third Respondent.¹¹⁵

[71] The Third Respondent therefore submits that the relief sought in this Application is incompetent and/or bad in law and that the Applicants have other remedies available to them which include, but are not limited to:-

¹¹¹ Third Respondent's Heads of Argument: par 55, CaseLines 19-60

¹¹² Third Respondent's Heads of Argument: par 56, CaseLines 19-60

¹¹³ Third Respondent's Heads of Argument: par 61, CaseLines 19-61

¹¹⁴ Third Respondent's Heads of Argument: paras 62 to 67, CaseLines 19-62 to 19-63

¹¹⁵ Third Respondent's Heads of Argument: paras 68 to 78, CaseLines 19-63 to 19-65

71.1. approaching this Court to waive or reduce the amount of security required by **the Master** from the Second Applicant in terms of the provisions of **the Act**;

71.2. seek payments from the Executor, once appointed, and with consent of **the Master**, in terms of Section 26(1)A of **the Act**, in respect of **SFN's** educational needs;

71.3. the First Applicant may approach this Court as upper guardian of minor children (*even on an urgent basis*) in the event that the Executor, once appointed, fails to come to the First Applicant and/or **SFN's** assistance through the provisions of Section 26(1)A of **the Act**. Given, however, that no Executor has been appointed and no claim has been made in terms of Section 26(1)A of **the Act**, the Third Respondent avers that this Application is against the incorrect parties, and incompetent and/or bad in law¹¹⁶.

CONSIDERATION OF CRISP ISSUE FOR DETERMINATION

[72] As stated in the **Introduction** above, the crisp issue for determination in this matter is whether this Court has the power to Order that the First Respondent, in circumstances where the First Respondent is without an Executor/Executrix, be enabled to make payment in regard to **SFN's** educational needs, by ordering a third party, in this instance, the Third Respondent, to effect such payment, from the money in **the deceased's** bank account, held with the Third Respondent, as dealt with above, pending the appointment of an Executor/Executrix to **the deceased's Estate**.

[73] In the work entitled "*The Law and Practice of Administration of Estates and their Taxation*" by D. Meyerowitz (2010 edition),¹¹⁷ the learned author, in the Chapter which deals with the custody of Estates, says the following:-

¹¹⁶ Third Respondent's Heads of Argument: paras 57 to 60, CaseLines 19-61

¹¹⁷ Juta & Co: 2010 edition

“7.1 Some time, longer or shorter, must elapse between the death of a person and the appointment of an executor to administer the estate.”¹¹⁸
[Emphasis added]

[74] If regard is to the online **2023** edition of the same work, the wording in paragraph 7.1 has been somewhat altered to read as follows:

“Some time will elapse between the death of a person and the appointment of an executor to administer the estate.”¹¹⁹ [Emphasis added].

[75] *In casu*, “some time” has indeed elapsed since the death of **the deceased**. As dealt with hereinabove, it is common cause that **the deceased’s Estate** was reported to **the Master** by **24 May 2021**, being just over a month after **the deceased** passed away and that **the deceased’s Estate** is *sans* an Executor/Executrix by virtue of **the Master** having sought security from the Second Applicant on **08 September 2023**, more than two years after **the deceased’s Estate** was reported to **the Master**, with the security not having been provided.

[76] Section 11 of **the Act**, reads as follows:-

“Temporary custody of property in deceased estates

(1) Any person who at or immediately after the death of any person has the possession or custody of any property, book or document, which belongs to or was in the possession or custody of such deceased person at the time of his or her death-

(a) shall, immediately after the death report the particulars of such property, book or document to the Master and may open any such document which is closed for the purpose of ascertaining whether it is or purports to be a Will;

¹¹⁸ Ibid: Chapter 7 “Custody of Estates”, par 7.1, page 7-1

¹¹⁹ The Law and Practice of Administration of Estates and their taxation, Meyerowitz, D, Juta On-Line, 2nd edition, 2023, ISSN (On-Line) 2410-9584, Chapter 7: Custody of Estates, par 7.1

(b) shall, unless the Court or the Master otherwise directs, retain the possession or custody of such property, book or document, other than a document being or purporting to be a will, until an interim curator or an executor of the estate has been appointed or the Master has directed any person to liquidate and distribute the estate: **Provided that the provisions of this paragraph shall not prevent the disposal of any such property for the bona fide purpose of providing a suitable funeral for the deceased or of providing for the subsistence of his family or household or the safe custody or preservation of any part of such property;** [Emphasis added]

(c) shall, upon written demand by the interim curator, executor or person directed to liquidate and distribute the estate, surrender any such property, book or document in his possession or custody when a demand is made, into the custody or control of such executor, curator or person: *Provided that the provisions of this paragraph shall not affect the right of any person to remain in possession of any such property, book or document under any contract, right of retention or attachment.*

(2) Any person who fails to comply with the provisions of paragraph (b) of sub-section (1) shall, apart from any penalty or other liability he may incur thereby, be liable for any estate duties payable in respect of the property concerned.”

[77] It is clear from the wording of Section 11 of **the Act** that it pertains, *inter alia*, to the intervening period between the death of a person and the appointment of either an interim Curator (Section 12 of **the Act**), or an Executor/Executrix, to liquidate and distribute a deceased person’s Estate.

[78] From the wording of Section 11(1)(b) of **the Act** it is furthermore clear that the Section does not prevent the disposal of any of a deceased person’s property which is temporarily held in custody prior to the appointment of either an interim curator or an Executor, as the case may be, provided that such disposal falls within the ambit

of the *proviso* to Section 11(1)(b) of **the Act**, more specifically being a disposal for the bona fide purpose of:

78.1. providing a suitable funeral for a deceased person; or

78.2. providing for the subsistence of his/her family or household; or

78.3. providing for the safe custody or preservation of any part of such property.

[79] The Applicants' Counsel, Mr Mvubu, referred me to an unreported Full Bench decision of this Division, and by which I am, as such, bound, being the matter of **Errol Trevor Goss v Lennys Anne Bennet**¹²⁰ ("**Goss matter**"), handed down on **31 May 2023**, by the Honourable Twala J, with the Honourable Francis and Fisher JJ concurring. Albeit that the facts of the matter are distinguishable from the present matter and involved an Application for the removal of an Executor, this Court applied the provisions of Section 11, more specifically Section 11(1)(b) of **the Act**, and recognised instances where property in a deceased Estate may, by Court Order, and in the absence of an Executor, be moved and held by a party not being an Executor/Executrix i.e. in terms of one of the scenarios dealt with in the *proviso* to Section 11(1)(b), being the safe custody or preservation of any part of the property forming part of the deceased's Estate. The Court created a temporary regime in terms of which an asset in a deceased Estate, more particularly the deceased in that matter's laptop, was moved and given to a third party for safekeeping and custody, pending the appointment of a new Executor, the existing Executor having been removed.

[80] There is a veritable dearth of case authority in regard to Section 11 of **the Act**. Other than the aforesaid authority, I was unable to find any other relevant authorities. Mr Mvubu only referred me to the **Goss matter**. Mr Reyneke, on behalf of the Third Respondent, also informed me during the appearance on **12 March 2024**, that he could not find any authorities.

¹²⁰ 2023 JDR 1988(GJ), case number: A5021/2022

[81] *In casu* the Applicants contend that their request for the Third Respondent, pending the appointment of an Executor/Executrix to **the deceased's Estate**, to effect payment of **SFN's** educational costs from the monies which, it is common cause belonged to **the deceased** and are in a bank account under the control of the Third Respondent, falls well within the ambit of the provisions of Section 11(1)(b) of **the Act**, and more specifically being that the payment of such educational costs is to provide for the subsistence of **the deceased's** family/household.¹²¹ The Applicants further contend that such payment will be in the best interests of **SFN** by providing for her educational needs.¹²²

[82] It is further submitted, in support of the foregoing, on behalf of the Applicants that:-

82.1. Section 11(1)(b) of **the Act** sets a test of *bona fides* as it relates to whether the request for subsistence is merited and should be granted, coupled with whether **the deceased's Estate** is in a position to afford the same;¹²³

82.2. the request for subsistence *in casu*, is *bona fide*, as the funds requested are intended for satisfying **SFN's** educational costs, and are to be paid directly to **Reddam Helderfontein**;¹²⁴

82.3. this matter is not concerned with the winding-up of **the deceased's Estate** but rather with the payment of certain monies for the subsistence of **SFN**;¹²⁵

82.4. a Court Order can regulate the regime in regard to the payment of these monies, which regime is intended to be temporary, pending the appointment of an Executor/Executrix to **the deceased's Estate**;¹²⁶

¹²¹ Applicants' Heads of Argument: par 14, CaseLines 19-13

¹²² Applicants' Heads of Argument: par 15, CaseLines 19-13

¹²³ Applicants' Heads of Argument: par 27.5, CaseLines 19-18

¹²⁴ Applicants' Heads of Argument: par 27.6, CaseLines 19-18

¹²⁵ Applicants' Heads of Argument: par 46, CaseLines 19-25 to 19-26

82.5. instead of resorting to self-help, the Applicants have approached this Court so that the regime can be determined by this Court, with the parameters of the regime being clearly defined and limited;¹²⁷

82.6. this Court may not simply sanction, with impunity, a regime that is clearly egregious and inimical to others' rights;¹²⁸

82.7. the payment of monies (*being a disposal as envisaged in Section 11(1)(b) of the Act*), must be properly documented and lodged with the Master.¹²⁹

[83] I am persuaded by the aforesaid submissions on behalf of the Applicants, as contained in paragraphs 81 and 82 above.

[84] It bears mention that the Applicants did not specifically refer to Section 11(1)(b) of **the Act** in either of the Affidavits filed herein and that the first time the Section was explicitly mentioned was in the Heads of Argument filed on behalf of the Applicants on the morning of Sunday, **10 March 2024**, at 06h03.¹³⁰

[85] The reason I refer to this is because Mr Reyneke, on behalf of the Third Respondent, during argument on **12 March 2024**, submitted that the first time Section 11(1)(b) of **the Act** was mentioned, was in the Applicants' Heads of Argument and that, for this reason, the Third Respondent had not dealt with Section 11(1)(b) in its Answering Affidavit.

[86] In response, Mr Mvubu, on behalf of the Applicants, submitted that it was not a requirement for the Applicants to have specifically mentioned Section 11(1)(b) of **the Act** in the Affidavits filed in support of the Application but that they were, however, obliged to make reference to **the Constitution**, which they duly did in the

¹²⁶ Applicants' Heads of Argument: par 46, CaseLines 19-25 to 19-26

¹²⁷ Applicants' Heads of Argument: par 48, CaseLines 19-26

¹²⁸ Applicants' Heads of Argument: par 27.4, CaseLines 19-17

¹²⁹ Applicants' Heads of Argument: par 42, CaseLines 19-24

¹³⁰ Applicants' Heads of Argument: par 13, CaseLines 19-11 to CaseLines 19-13

Founding Affidavit as, should they not obtain the redress sought in this Court, they would take the matter to the Constitutional Court.

[87] With respect to Mr Reyneke, given that the Applicants' Heads of Arguments were uploaded to CaseLines shortly after 06h00 on the morning of Sunday, **10 March 2024**, with the Heads of Argument on behalf of the Third Respondent being submitted shortly after 10h00 on Monday, **11 March 2024**, if he had not already done so, and without accepting Mr Reyneke's submission in paragraph 85 above, Mr Reyneke would most certainly have had sufficient time to consider the import of the reference to Section 11(1)(b) of **the Act**. Mr Reyneke would also have had ample opportunity to file Supplementary Short Heads of Argument, in the circumstances, on behalf of the Third Respondent, which he did not do. Other than to say that he had looked at Meyorowitz (*referred to above*), and that he could find no case authorities, let alone where a Bank was ordered to pay in terms of Section 11(1)(b), Mr Reyneke did not deal with, and/or address me in regard to Section 11(1)(b) of **the Act**.

[88] Instead, Mr Reyneke, on behalf of the Third Respondent, and notwithstanding the provisions of Section 11(1)(b) of **the Act**, persisted with opposing the relief sought on the same basis as referred to in paragraphs 70 and 71 above. Ironically, the Third Respondent, in its Answering Affidavit, has referred to various Sections of **the Act**, in broad terms, to the process of winding-up a deceased Estate, as envisioned in **the Act**, and to Section 26(1A) of **the Act**, which can be described as the mirror provision of Section 11(1)(b) of **the Act** and which applies after an Executor has been appointed, but he fails to deal with Section 11(1)(b) of **the Act**. The Third Respondent has, again respectfully, ignored Section 11(1)(b) of **the Act** at its own peril. The various authorities relied upon by the Third Respondent were aligned with the basis of its opposition to the matter and Mr Reyneke did not address me on the **Goss matter**.

[89] In the circumstances, I find myself in agreement with the submissions on behalf of the Applicants to the effect that the Third Respondent has "*misdiagnosed*

the essence of this Application", ¹³¹ and further that the Third Respondent "*does not even appreciate that section 11(1)(b) is invoked*".¹³²

[90] For the reasons set out above, I am not persuaded by the Third Respondent's argument, as dealt with in paragraph 70.1 above (*inclusive of the sub-subparagraphs thereto*), that the effect of the relief sought by the Applicants in this matter is to circumvent the provisions of **the Act** and the proper winding-up of **the deceased's Estate**. I am further not persuaded by the argument, as detailed in paragraph 70.4 above, that were I to grant the relief sought, it would open the proverbial floodgates and/or set a precedent in terms whereof a party may approach the Court for an interim maintenance payment from a Bank directly from a deceased person's bank account before an Executor/Executrix has been appointed and without the oversight and/or consent of **the Master**.

[91] In the context of the common cause facts of this matter which, as dealt with in detail hereinabove in this judgment, and which I do not intend repeating here, and based on the provisions of Section 11(1)(b) of **the Act**, coupled with the best interests of **SFN**, I am inclined to make an Order in terms whereof the Third Respondent is to effect payment directly to **SFN's** school, **Reddam Helderfontein**, in regard to her school fees and boarding costs for the **2024** academic year, in the sum of R323 194.00 (*three hundred and twenty three thousand, one hundred and ninety four rand*), subject thereto that:

91.1. prior to the payment being effected, the Applicants furnish the Third Respondent with a confirmation of banking details letter from the bankers of **Reddam Helderfontein**;

91.2. the Third Respondent will be entitled to raise its normal transactional fee/s associated with the payment of the sum, as aforesaid;

¹³¹ Applicants' Heads of Arguments: par 37, CaseLines 19-22

¹³² Applicants' Heads of Arguments: par 41, CaseLines 19-24

91.3. the Applicants are to lodge the invoice from **Reddam Helderfontein** in the aforesaid sum, together with the proof of payment by the Third Respondent thereof, with **the Master**.

The foregoing will address any of the practical concerns, as raised by the Third Respondent, in paragraphs 70.2 and 70.3 above.

[92] The Applicant's Counsel, Mr Mvubu, referred me to the Supreme Court of Appeal decision in the matter of **Oshry NO and another v Feldman**,¹³³ as authority for the proposition that a deceased Estate may be ordered to pay a lump sum as an appropriate and competent award.¹³⁴ I have considered the decision and agree that it is apposite to the matter at hand.

[93] In addition, but without in any way derogating from the reasoning underscoring my decision in regard to ordering the payment, as aforesaid:-

93.1. it is noted that the First Applicant states in the Replying Affidavit that the relief sought is for an interim period, as **SFN** will turn 18 next year, and she will be able to act on her own, including in regard to the finalisation of **the deceased's Estate**.¹³⁵ Whilst I agree that this matter is not concerned with the winding-up of **the deceased's Estate**, I am of the view that it will not be in the best interests of **SFN** for **the deceased's Estate**, and the winding-up thereof, to remain *in limbo* indefinitely;

93.2. as referred to above, during the course of argument Counsel on behalf of the Applicants, Mr Mvubu, alluded to the fact that there are other assets in **the deceased's Estate**, other than the credit balance in **the deceased's** bank account held with the Third Respondent, said assets being properties and also a pension fund;

¹³³ [2011] 1 All SA 124 (SCA)

¹³⁴ Applicants' Heads of Argument: par 50, CaseLines 19-27;

¹³⁵ Replying Affidavit: par 15.2, CaseLines 06-24

93.3. it is in my mind clearly in the best interests of **SFN** that an Executor/Executrix be appointed to administer **the deceased's Estate** in accordance with the provisions of **the Act** as soon as possible. The Second Applicant therefore needs to take the appropriate steps by either furnishing the security required by **the Master**, alternatively appointing an Agent who is able to do so on her behalf, and failing the aforegoing, applying to Court for the amount of security to be reduced or waived, alternatively informing **the Master** that she is unable to provide the security in order that **the Master** can appoint another suitable person to act as Executor/Executrix in **the deceased's Estate** and attend to the winding-up thereof;

93.4. albeit that the Applicants contend that if there were creditors in **the deceased's Estate**, this fact would be gleaned from the bank statements of **the deceased's** bank account held with the Third Respondent, it is not certain whether the aforesaid bank account is the only banking account held with a banking institution in the name of **the deceased**. In addition, SARS is also a potential creditor in **the deceased's Estate**. It is for this reason that the provisions of **the Act** are there to ensure that an Executor/Executrix is appointed to administer a deceased person's Estate by establishing the assets and liabilities, settling the liabilities and thereafter distributing the residue of the Estate to the heir(s), in this instance, in accordance with the provisions of the Intestate Succession Act, to **SFN**, as **the deceased's** sole heir;

93.5. insofar as the point made by the Third Respondent in paragraph 70.5 above, to the effect that the First Respondent is not solely liable for **SFN's** educational costs, is concerned, this aspect can be dealt with and addressed by the Executor/Executrix in due course, as the First Applicant has been bearing these costs since the passing of **the deceased**.

[94] Regarding the Third Respondent's opposition, as detailed in paragraph 70.6 above, and as amplified in the Third Respondent's Heads of Argument,¹³⁶ to the

¹³⁶ Third Respondent's Heads of Argument: paras 68 to 78, CaseLines 19-63 to 19-65

Applicants' seeking of a mandatory interdict herein, because of my finding in regard to Section 11(1)(b) of **the Act**, together with my powers as upper guardian when applying the best interests of the child principle, it is not necessary for me to consider and decide thereon, albeit that, in passing, I mention that I am not in any event persuaded by the Third Respondent's argument in this regard.

[95] I have also noted that the Third Respondent, although mentioning the evolution of the relief sought by the Applicants, as contained in the initial Notice of Motion and the first Draft Order, to the fourth Draft Order, in its Heads of Argument, and as dealt with in detail above, it does not address the aforegoing in the context of the evolution, as it were, being occasioned by virtue of the Third Respondent's opposition of the matter or in the context of the submission by the Applicants to the effect that initially it was not envisioned that the matter would be opposed. I shall revert to this aspect later in this judgment when I deal with costs.

THE PURPORTED AMENDMENT OF THE INITIAL NOTICE OF MOTION

[96] As referenced hereinabove, it is common cause that the Applicants electronically served an Amended Notice of Motion ("**the Amended Notice of Motion**") on the Third Respondent's attorneys on Saturday, **09 March 2024** at 09h45, uploading the same onto CaseLines at 09h56.¹³⁷

[97] In **the Amended Notice of Motion**, insofar as the relief on the merits is concerned, prayers 2, 3 and 4 thereof are identical to the same prayers in **the initial Notice of Motion**, the **first Draft Order** and the **second Draft Order**.¹³⁸ Prayer 5 of **the Amended Notice of Motion** is couched in the alternative to prayer 2 thereof and is, for all intents and purposes, identical to prayer 2 of the **third Draft Order** and prayer 3 of the **fourth Draft Order**.¹³⁹

[98] Insofar as the aspect of costs is concerned, at prayer 6 of **the Amended Notice of Motion**, the Applicants seek therein that the Third Respondent be ordered

¹³⁷ CaseLines 02-68 to 02-72

¹³⁸ Amended Notice of Motion: prayers 2, 3 and 4, CaseLines: 02-68 to 02-69

¹³⁹ Amended Notice of Motion: prayer 5, CaseLines 02-69 to 02-70

to pay the costs of this Application on the attorney and client scale, said costs to include the costs occasioned by the employment of Counsel¹⁴⁰ and, in the alternative, at prayer 7, the Applicants seek that the costs of this Application are to be paid by the First Respondent, being ***the deceased's Estate***, but that such costs are to exclude the costs of the Third Respondent.¹⁴¹ The relief, as sought in prayer 7, is effectively identical to the relief sought in prayers 4 and 5 of the ***third Draft Order***, as referred to hereinabove.

[99] It is stated on behalf of the Applicants that, given the Third Respondent's alleged nefarious conduct in these proceedings, ***the Amended Notice of Motion*** was served (*as stated above*) on the Third Respondent in order to notify the Third Respondent that punitive costs would be sought against it.¹⁴²

[100] The Third Respondent submitted that ***the Amended Notice of Motion*** is irregular and/or that it should be regarded as *pro non scripto* because of non-compliance with the provisions of Uniform Rule of Court 28, more specifically Rule 28(1), the provisions of which, it submits, are peremptory.¹⁴³

[101] In addition, it was submitted on behalf of the Third Respondent that it had opposed the Application on the strength of the relief sought in ***the initial Notice of Motion***, which was the case that the Third Respondent states it was called upon to meet. In ***the initial Notice of Motion*** the Applicants did not seek costs against the Third Respondent when the Application was served on the Third Respondent¹⁴⁴. I will deal with this aspect further in this judgment when I deal with the aspect of costs.

[102] Rule 28 of the Uniform Rules of Court provides as follows:

“(1) Any party desiring to amend any pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all

¹⁴⁰ Amended Notice of Motion: prayer 6, CaseLines 02-70

¹⁴¹ Amended Notice of Motion: prayer 7, CaseLines 02-70

¹⁴² Applicants' Heads of Argument: par 11, CaseLines 19-10

¹⁴³ Third Respondent's Heads of Argument: paras 6 to 8, CaseLines 19-45 to 19-48

¹⁴⁴ Ibid: par 9, CaseLines 19-48

other parties of his intention to amend and shall furnish particulars of the amendment.”

(2) The notice referred to in subrule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of the delivery of the notice, the amendment will be effected.

(3) An objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded.

(4) If an objection which complies with subrule (3) is delivered within the period referred to in subrule (2), the party wishing to amend may, within 10 days, lodge an application for leave to amend.

(5) If no objection is delivered as contemplated in subrule (4), every party who received notice of the proposed amendment shall be deemed to have consented to the amendment and the party who gave notice of the proposed amendment may, within 10 days after the expiration of the period mentioned in subrule (2), effect the amendment as contemplated in subrule (7).

(6) Unless the court otherwise directs, an amendment authorized by an order of the court may not be effected later than 10 days after such authorization.

(7) Unless the court otherwise directs, a party who is entitled to amend shall effect the amendment by delivering each relevant page in its amended form.

(8) Any party affected by an amendment may, within 15 days after the amendment has been effected or within such other period as the court may determine, make any consequential adjustment to the documents filed by him, and may also take the steps contemplated in rules 23 and 30.

(9) *A party giving notice of amendment in terms of subrule (1) shall, unless the court otherwise directs, be liable for the costs thereby occasioned to any other party.*

(10) *The court may, notwithstanding anything to the contrary in this rule, at any stage before judgment grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit.”*

[103] It is common cause that no Notice of the intended Amendment was served by the Applicants. What was served was ***the Amended Notice of Motion*** which was presented as a *fait accompli*,¹⁴⁵ not only to the Third Respondent's Attorneys, but also to this Court.

[104] Whilst I accept that the matter had been brought as one of urgency, with respect to the Applicants, there was no attempt whatsoever on their behalf to comply with the provisions of Rule 28(1) and (2), even on a truncated time period basis. To make matters worse, I was also not requested by the Applicants, in terms of the provisions of Rule 28(10), to grant leave to amend.

[105] Rule 28(10) presupposes that a party, in the circumstances, must apply to the Court for leave to amend. *In casu*, there has been no Notice of Intention to Amend and, as a necessary concomitant thereof; no Notice of Objection as per Rule 28(3); no Application for Leave to Amend in terms of Rule 28(4) and no Application for Leave to Amend in terms of the provisions of Rule 28(10).

[106] During argument, Mr Mvubu, on behalf of the Applicants, referred me to the unreported judgment in the matter of **African Amity NPC v The Minister of Home Affairs and Others**¹⁴⁶ (**African Amity NPC matter**), ostensibly as authority for ***the Amended Notice of Motion*** as passing the muster of the requirements for an amendment. I have had regard to the aforesaid judgment which dealt with a

¹⁴⁵ Email of service from M. Ningiza Attorneys to the Third Respondent's Attorneys, dated 09 March 2024, CaseLines 02-72, wherein it is stated, *inter alia*: “Kindly find attached amended Notice of Motion presented for service.”

¹⁴⁶ Available on Juta's Unreported Judgments: 2023 JDR 2407 (GP), being a decision of Collis J, in the Pretoria Division of this Court, under case number: 51735/2021, with the judgment being dated 29 June 2023

purported amendment not only of a Notice of Motion but also of an Affidavit. The matter is, however, distinguishable on the facts in that a Notice of Intention to Amend was served in the matter, albeit that the Notice did not comply with the provisions of Rule 28(2). The Application for Leave to Amend was opposed, with Answering and Replying Affidavits having been filed. The Application for Leave to Amend was dismissed.

[107] In the **African Amity NPC matter**, Collis J, who delivered the concurring judgment of the full Bench, stated the following:-

“Rule 28 is explicit about the steps to be followed by a party intending to amend a pleading or document other than a sworn statement.”¹⁴⁷

[108] During argument, Mr Mvubu submitted that because the Third Respondent did not make use of the Uniform Rules of Court, specifically by not having invoked either Rule 30 or Rule 30A in respect of the purported amendment, that the Third Respondent had, by its conduct, consented to the purported amendment. With respect to Mr Mvubu, this submission is a far stretch, to say the least, is untenable and, as such, is rejected by me.

[109] The fact of the matter is that the Applicants have not complied with the provisions of Rule 28 and there is/was no Application for Leave to Amend ***the initial Notice of Motion*** before me. In the circumstances, I am simply not inclined to entertain ***the Amended Notice of Motion*** and to have any regard thereto.

COSTS

[110] I refer to what I have stated above in regard to the relief sought by the Applicants, including costs, having evolved since the ***the initial Notice of Motion*** and associated ***first Draft Order*** and that the evolution resulted from the Third Respondent's opposition of the Application, coupled with that which respectively

¹⁴⁷ Ibid: par 23, at page 8 of the judgment

transpired before the Honourable Vally and Crutchfield JJ, as well as thereafter, when the matter came before me. This evolution can be summarised as follows:-

110.1. during argument before me, it was submitted on behalf of the Applicants, that when this Application was drawn, it was not anticipated that the Application would be opposed. For that reason, it was submitted, that apart from, in ***the initial Notice of Motion***, making the costs of this Application in the administration of ***the deceased's*** Estate, no costs were sought.¹⁴⁸ In ***the initial Notice of Motion*** and the ***first Draft Order***, the Applicants therefore sought that the costs of this Application be paid for by ***the deceased's*** Estate (*the First Respondent*);¹⁴⁹

110.2. that no opposition was envisaged is borne out by the various factors, as dealt with in detail in paragraph 18 above (*inclusive of the subparagraphs thereto*), the contents of which I will not repeat here, suffice to say that I accept this to be the case;

110.3. in its Answering Affidavit, served on ***04 March 2024***, and in its Practice Note filed in anticipation of the appearance before the Honourable Vally J, on ***05 March 2024***, it is common cause that the Third Respondent placed urgency in dispute, raised two points *in limine* and furthermore disputed the relief sought by the Applicants on the merits. As a result, the Third Respondent sought that the Application be struck off the roll, with costs, for lack of urgency and/or that the Application be dismissed with costs (*either by virtue of the upholding of one or both of the points in limine, or on the merits*);¹⁵⁰

110.4. pursuant to the foregoing, and on ***05 March 2024***, the Applicants uploaded the ***second Draft Order*** onto CaseLines and wherein, insofar as costs were concerned, the Applicants sought that the costs of the Application

¹⁴⁸ Applicants' Heads of Argument: par 16, CaseLines 19-13

¹⁴⁹ Notice of Motion: prayer 5, CaseLines 02-3

¹⁵⁰ Third Respondent's Practice Note: paras 4.2.2 and 4.2.3, CaseLines 16-7; Answering Affidavit: prayers 2 and 3, CaseLines 05-22; Third Respondent's Heads of Argument: par 24, CaseLines 19-52, par 31, CaseLines 19-53 and par 81, CaseLines 19-66

are to be paid for by ***the deceased's Estate*** (*First Respondent*), but that the Third Respondent is to bear its own costs;¹⁵¹

110.5. following the appearance before the Honourable Vally J, on **05 March 2024**, and when he referred the matter to the Honourable Crutchfield J for hearing on **06 March 2024** at 10h00, the Applicants uploaded the ***third Draft Order*** wherein the same Order, as per as the ***second Draft Order***, was sought;¹⁵²

110.6. on **08 March 2024**, the Applicants uploaded the ***fourth Draft Order*** to CaseLines, and wherein they sought that the Third Respondent be ordered to pay the costs of this Application,¹⁵³presumably on the party and party scale, as no reference to any other scale is made;

110.7. on Saturday, **09 March 2024**, the Applicants uploaded ***the Amended Notice of Motion*** to CaseLines and wherein they sought, in the first instance, that the Third Respondent be ordered to pay the costs of this Application on the attorney and client scale, said costs to include the costs occasioned by the employment of Counsel. In the alternative, the Applicants sought that the costs of this Application be paid by ***the deceased's Estate*** (*the First Respondent*) but that such costs are to exclude the costs of the Third Respondent.¹⁵⁴ For the reasons advanced hereinabove, I have found that the purported amendment was not properly effected and, as such, I have mentioned the same here purely for the sake of completeness in regard to the evolution of the relief sought by the Applicants insofar as costs are concerned.

[111] The aspect of costs was canvassed in the respective Heads of Argument filed at my request and was furthermore argued before me during the appearance on **12 March 2024**. The approach taken by the Third Respondent is that it opposed the Application on the strength of the relief that was sought by the Applicants in ***the***

¹⁵¹ Second Draft Order: prayers 5 and 6, CaseLines 21-6

¹⁵² Third Draft Order: CaseLines 21-7 to 21-9

¹⁵³ Fourth Draft Order: prayer 5, CaseLines 21-12

¹⁵⁴ Amended Notice of Motion: prayers 6 and 7, CaseLines 02-70

initial Notice of Motion and, *inter alia*, wherein the Applicants did not seek costs against the Third Respondent when the Application was served on the Third Respondent.¹⁵⁵ The Third Respondent further avers that notwithstanding the foregoing, the Applicants make out no case for a cost order to be made against the Third Respondent, let alone on an attorney and client scale, and refer to the manner in which the Third Respondent is cited in this Application being merely due to the interest it may have therein and particularly for purposes of assisting in carrying out the terms of the order that the Applicants seek be made and that beyond the foregoing, no relief is sought against the Third Respondent.¹⁵⁶

[112] It is contended on behalf of the Applicants that the Third Respondent has demonstrated an undue attitude and has displayed unwarranted conduct in the manner in which it has dealt with this matter.¹⁵⁷ The Applicants further contend that, to make matters worse, the Third Respondent is aware that it has no case on the merits and yet, it persisted with an aggressive opposition, which was unwarranted in the circumstances.¹⁵⁸

[113] Furthermore, the Applicants aver that the matter could have been resolved before the Honourable Vally J and that the matter was extended for a week resulting in the Applicants having to incur the legal costs associated with further appearances as well as the drawing of Heads of Argument. The Applicants state that it is not in the interests of justice that **the deceased's Estate** should bear the costs of this matter as the extent of the Third Respondent's opposition was unjustified given the fact that this Application concerns the best interests of **SFN** and implicates Constitutional rights.¹⁵⁹

[114] The Applicants contend that the persistence by the Third Respondent in its aggressive stance, including its seeking of costs against the Applicants when no costs were sought against it, is untenable.¹⁶⁰

¹⁵⁵ Third Respondent's Heads of Argument: par 9, CaseLines 19-48

¹⁵⁶ Third Respondent's Heads of Argument: par 10, CaseLines 19-48

¹⁵⁷ Applicant's Heads of Argument: par 66, CaseLines 19-32

¹⁵⁸ Applicant's Heads of Argument: par 67, CaseLines 19-32

¹⁵⁹ Applicant's Heads of Argument: par 68, CaseLines 19-32 to 19-33

¹⁶⁰ Applicant's Heads of Argument: par 69, CaseLines 19-33

[115] It is trite that the awarding of costs is a matter which falls within the domain of the Court's discretion, which discretion should be exercised judicially. Generally, costs should be awarded to the successful litigant. These principles have been confirmed time and again, by our Courts. The Applicants' Counsel, Mr Mvubu, in his Heads of Argument, referred to several authorities in support of the foregoing and to which I have also had regard.¹⁶¹

[116] In one of the matters referred to, being the matter of **Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others**,¹⁶² Ackermann J, delivering the concurring judgment on behalf of the full Court, stated the following:

*"The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer and the second that the successful party should, as a general rule, have his or her costs. Even the second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of the parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of the litigants and the nature of the proceedings."*¹⁶³

[117] In the Applicants' Heads of Argument, it was submitted that the Third Respondent has not set out any facts that pertain to it and/or indicated any real difficulties and/or impediments that would obfuscate its ability to meet the Order sought by the Applicants. The Third Respondent has not suggested that it would suffer any real prejudice. The Applicants further contend that the Third Respondent's opposition is not "ABSA – based" but rather constitutes a legal "Stalingrad" approach. The Applicants contend that even if there was prejudice to the Third

¹⁶¹ Applicant's Heads of Argument: paras 71 and 73, CaseLines 19-33 to 19-34

¹⁶² 1996 (2) SA 621 (CC)

¹⁶³ Ibid: par 3, page 624; Applicants' Heads of Argument: par 71, CaseLines 19-33 to 19-34

Respondent by virtue of the Order, which they deny, such prejudice would be purely administrative in nature and that any transaction authorised in terms of a Court Order would entitle the Third Respondent to compensation by virtue of the fees it would raise in respect of the functions it would perform.¹⁶⁴ I am inclined to agree with the aforesaid submissions.

[118] In addition, I refer to what I have stated hereinabove in this judgment regarding the Third Respondent's failure to address Section 11(1)(b) of **the Act** as well as the evolution insofar as the various Draft Orders are concerned, and as arising directly from the Third Respondent's opposition to this matter.

[119] As stated above, the Third Respondent opposed the Application on three levels being urgency, the raising of two points *in limine* and the on the merits. It is common cause that I held the matter to be urgent and that I did not uphold either of the points *in limine*. For the reasons advanced hereinabove, I have granted relief in terms of this Application, albeit that I have crafted an Order based on the best interests of **SFN**.

[120] Surely, it simply cannot be that the Third Respondent seriously believed that because costs were not being sought against it in **the initial Notice of Motion**, it could litigate with impunity in this matter. The Third Respondent must have envisaged the possibility that were it not to be successful in its opposition on all levels in this matter, that costs could very well follow the result. The question is, however, whether I should, in the exercise of my discretion insofar as the ordering of costs is concerned, order that the Third Respondent pay the costs of this Application on a punitive scale as opposed to the ordinary party and party scale.

[121] In the matter of **Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd**,¹⁶⁵ Fabricius J stated the following in regard to costs orders:

¹⁶⁴ Applicant's Heads of Argument: par 74, CaseLines 19-35

¹⁶⁵ 2014 (3) SA 265 (GP)

“Costs are ordinarily ordered on the party and party scale. Only in exceptional circumstances and pursuant to a discretion judicially exercised is a party ordered to pay costs on a punitive scale.”

[122] In the Constitutional Court matter of **Mkhatshwa and Others v Mkhatshwa and Others**,¹⁶⁶ Khampepe J, delivering the concurring judgment of the full Court, stated the following in regard to punitive costs on the attorney client scale:

*“Generally speaking, punitive costs orders are not frequently made, and exceptional circumstances must exist before they are warranted. In SARB, [being a reference to the matter of Public Protector v South African Reserve Bank [2019] ZACC 29; 2019 (6) SA 253 (CC)], this Court affirmed the following guiding principles in relation to punitive costs, elucidated by the Labour Appeal Court in Plastic Converters Association of SA: ‘The scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably, vexatious and reprehensible manner. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium.’ ”*¹⁶⁷

[123] Despite, however, the manner in which the Third Respondent has dealt with and opposed this matter, I am not persuaded that there are any exceptional circumstances warranting a punitive costs order against the Third Respondent on the attorney and client scale.

[124] It is common cause that I held the matter to be urgent and further that I did not uphold either of the points *in limine* raised by the Third Respondent. For the reasons set out above, I have granted relief in terms of the Application before me, albeit that I have crafted an Order in the best interests of **SFN** and which, as a result, deviates to an extent, from the relief originally sought by the Applicants. It is fair to say that the Applicants have been successful in this matter whilst the Third Respondent has been

¹⁶⁶ 2021(5) SA 447 (CC) ; and 2021(10) BCLR 1182 (CC)

¹⁶⁷ Ibid: par 21, page 9; and footnotes 16 and 17; Plastic Converters Association of SA on behalf of Members v National Union of Metalworkers of SA [2016] ZALAC 39; (2016) 37 ILJ 2815 (LAC)

unsuccessful in its opposition thereof. Accordingly, in my mind, there is no reason why the costs should not follow the result.

[125] In the premise, I find that the Third Respondent is liable for the costs of this Application, on Scale B of the party and party tariff, said costs to include the costs occasioned by the employment of Counsel on behalf of the Applicants.

ORDER

It is accordingly ordered that:-

1. the non-compliance by the Applicants with the provisions of the Uniform Rules of Court in regard to the time periods, forms and service of the Application is condoned, as provided for in Uniform Rule of Court 6(12)(a), and the Application is heard as one of urgency;
2. the late filing of the Third Respondent's Answering Affidavit is condoned;
3. within 5 (*five*) days of the Applicants providing the Third Respondent with a letter from the banker's of the minor child's school, Reddham House, Helderfontein, confirming the school's banking details, the Third Respondent shall effect payment from ***the deceased's*** bank account held with the Third Respondent, directly to the school, in the sum of R323 194,00 (*three hundred and twenty three thousand, one hundred and ninety four rand*);
4. within 3 (*three*) days of effecting the payment as provided for in paragraph 3 above, the Third Respondent shall provide the Applicants with proof of payment of the aforesaid sum;
5. the Third Respondent shall be entitled to raise its normal transactional fee/s associated with the payment of the sum referred to in paragraph 3 above;

6. within a period of 5 (*five*) days of the receipt of the proof of payment referred to in paragraph 4 above, the Applicant's shall lodge, with the Second Respondent a copy:-

6.1 of the proof of payment by the Third Respondent;

6.2 of any tax invoice from the Third Respondent in regard to any fee/s raised by it, as contemplated in paragraph 5 above;

6.3 a copy of this Order;

7. within a period of 30 (*thirty*) days from the date of the granting of this Order, the Second Applicant is to take the necessary and appropriate steps to either furnish the security requested from her by the the Second Respondent on **08 September 2023**, in the sum of R860 827.39 (*eight hundred and sixty thousand eight hundred and twenty seven rand and thirty nine cents*), for the due administration of the First Respondent; alternatively to appoint an Agent who is able, and to the satisfaction of the Second Respondent, to do so on her behalf; alternatively, to launch an Application to Court for the aforesaid amount of security to be reduced or waived; alternatively to inform the Second Respondent that she is unable to provide the security, as requested by the Second Respondent, in order that the Second Respondent can appoint another suitable person to act as Executor/Executrix to the First Respondent;

8. the Third Respondent is to pay the costs of this Application, including the costs occasioned by the employment of Counsel by the Applicants, on scale B of the party and party tariff;

9. the reference to "*days*" in this Order shall, for the sake of simplicity, be Court days.

H.D.C PRETORIUS

Acting Judge of the High Court of South Africa
Gauteng Division, Johannesburg

Electronically submitted

Delivered: This Order was prepared and authored by the Acting Judge whose name is reflected herein and is handed down electronically by circulation to the Parties / their legal representatives by e-mail and by uploading it to the electronic file of this matter on Court Online/CaseLines. The date of hand-down is deemed to be 17 July 2024.

Heard: **06 and 12 March 2024**

Judgment: **17 July 2024**

APPEARANCES:

For Applicants: Advocate K. Mvubu

Instructed by M Ningiza Attorneys

For Third Respondent: Advocate A.J. Reyneke

Instructed by Tim Du Toit & Co Inc