

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No. 113234/2023

(1) REPORTABLE: YES

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED: YES

DATE 6 February 2025

SIGNATURE

In the matter between:

TCE

Applicant/Plaintiff

and

EE

Respondent/Defendant

REASONS: REMOVAL APPLICATION

NEUKIRCHER, J

[1] On 29 January 2025 I made the order that is reflected at the end of this judgment and informed the parties that I would provide the reasons for that order. These are those reasons.

[2] On 8 January 2025, just seven days before this four-week trial was due to commence, the plaintiff launched the present application. The relevant relief sought is the following:

- “1. That Advocate Sanya Strauss be removed as the legal representative for the minor children K and T.¹
2. That the suspension of paragraph 2(d) of the urgent Rule 43 order granted on 6 December 2023 is uplifted and the curator ad litem is to act on behalf of the minor children born from the marriage in the divorce trial insofar as it may be necessary.
3. That the fees of the legal representative as referred to in 1 above be disallowed alternatively, that such fees be disallowed which the court deems to have been incurred unnecessarily and/or unreasonably...”

Background

[3] The plaintiff and the defendant (the parties) are embroiled in divorce proceedings. To say that the litigation thus far has been prolific and acrimonious is sadly euphemistic. The intense acrimony between the parties is apparent from the pleadings filed, the amendments, the flurry of voluminous applications², the thousands of pages of discovered documents, the reports of the appointed *curator ad litem* (the *curator*) and the many, many trial bundles.

[4] The acrimonious relationship between the parties saw Adv Stadler's appointment as the *curator ad litem* (the *curator*) on 6 December 2023 (the December 2023 order) on behalf of the parties' three minor children; who are:

- a) K: born on 3 April 2009 (she's almost 16 years old);
- b) T: born on 1 March 2010 (she's almost 15 years old); and
- c) TJ: born on 24 February 2017 (he's almost 8 years old).

[5] The most relevant duties of the *curator*, per the December 2023 order are:

- a) to investigate the issue of the three minor children's best interests regarding care and contact, and to report back to the court on his findings;
- b) to refer the parties and the children for a forensic evaluation by a clinical psychologist to investigate the issues of gatekeeping, parental

¹ The parties' and the children's names are redacted to preserve their anonymity. In this application K and T are referred to as "the children" and TJ by his initials.

² Of which this is but one.

alienation, care and contact and to compile a report with a recommendation;

- c) to refer the three minor children for therapy;
- d) to issue directives regarding care and contact; and
- e) “to act as *curator ad litem* on behalf of the minor children in all litigation between the parties, involving the minor children.”³

[6] Whilst the *curator* had other powers and duties per the 6 December 2023 order, the one that became “contentious” was the one that gave him the power to act on behalf of the three minor children in all litigation in which the children were involved.

[7] It is common cause that Adv Strauss was approached by one CVN who is the mother of one of T’s friends. Apparently, T had sent a recording she had made of a consultation between herself, the *curator* and his attorney⁴ to a friend of hers – CVN’s daughter. CVN’s daughter and Adv Strauss’ daughter are at the same school, and it was upon hearing of Adv Strauss’s profession that she was approached to speak to the two children, which she did.⁵ This resulted in the email to me on 28 November 2024 and the case management meeting of 3 December 2024.

[8] On 28 November 2024, I⁶ received an email from Adv Strauss in which she informed me of the above. She explained that on 27 November 2024 she had had a telephonic discussion with T who confirmed she wanted legal representation and that she had been informed by the *curator* that she was entitled to legal representation.

[9] Adv Strauss states that, having regard to her consultation with T, T is of sufficient age and maturity and has strongly expressed a view and desire to participate in the proceedings.

[10] She states that T has expressed strong views which are contradictory to the contact schedule proposed by the *curator* and that he had advised her to attend the

³ December 2023 order, paragraph 2(d).

⁴ Made on 22 November 2024.

⁵ A confirmatory affidavit by CVN is attached to the answering affidavit.

⁶ Through my secretary.

case management meeting on 3 December 2024 and address me as regards to her appointment as T's legal representative.

[11] A case management meeting took place in my office on 3 December 2024 at 09h30. Present were Adv Haupt SC and her attorney of record⁷, Ms Rauch⁸, the *curator* and his attorney of record⁹ and Adv Strauss.

[12] A discussion ensued on several issues, including the appointment of Adv Strauss as legal representative for K and T, which resulted in a Directive by me dated 4 December 2024 (the December directive). The relevant portions read as follows:

- “1. Paragraph 2(d) of the order of Khwinana AJ, granted on 6 December 2023, is suspended.
2. Advocate Sanja Strauss is appointed as the legal representative for K and T subject to the following:
 - 2.1 the curator ad litem, Advocate Stadler, is to be given unfettered and unrestricted access to the three minor children as and when he deems necessary for purposes of fulfilling his mandate as set out in the order of 6 December 2023;
 - 2.2 the unavailability of Advocate Strauss shall not fetter the curator ad litem's access to the minor children and shall not be an impediment to his ability to consult with them;
 - 2.3 it is recorded that the curator ad litem is appointed by the court to be of assistance to the court for purposes of the decision regarding the best interest of the children after the finalisation of the divorce action. The appointment of Advocate Strauss in no way detracts or alters the functions of the curator ad litem as set out in the order of 6 December 2023. In the event of any of the parties, or the children, refusing to co-operate with the curator ad litem, the appointment of Advocate Strauss may be re-visited;

⁷ For Plaintiff.

⁸ For Defendant.

⁹ Appointed in terms of paragraph 2(g) of the December 2023 order.

- 2.4 no conversations held between the curator ad litem and any other person / party / child(ren) may be recorded for any reason without his formal direct express permission prior to the commencement of any conversation. The curator ad litem has the right to refuse to allow a recording and may do so without providing any reason(s);
- 2.5 the fees of Advocate Strauss shall, until finally determined by the court at trial, be paid by the E Family Trust and:
- 2.5.1 Advocate Strauss will send a fee estimate to the parties' attorneys of record by 16h00 on 5 December 2024;
- 2.5.2 Advocate Strauss will render account to the parties' legal representatives on 27 December 2024 and 20 January 2025.
- 2.6 Advocate Strauss is to be given immediate access to the Caselines profile of this matter.

[13] I also directed that as from 4 December 2024 the matter would be heard in camera. The reasons for this are not relevant to this judgment.

[14] My views on the appointment of a separate legal representative for K and T (the children) at the time were the following:

- a) shortly after this trial would conclude, they would turn 16 years old and 15 years old respectively;
- b) they have had an on-and-off fraught relationship with the *curator* and his attorney, who appears to accompany him to every consultation and through whom all WhatsApps and emails and other correspondence has been directed throughout much of his appointment;
- c) both children specifically voiced a need and a desire for their own representation – they feel that their voice is not being heard, that they are being brushed off and that what they say is not being afforded adequate weight. They voiced a desire to participate in the proceedings – not directly, but through someone who would advocate for them and on their behalf;

d) it seems that their level of distrust is such that T felt a need to record the consultation with the *curator* and his attorney on 22 November 2024. I found this concerning at the time.

[15] Whilst the manner in which I was approached on 28 November 2024 to consider the appointment of a legal representative leaves much to be desired and was not ideal, the fact is that an insistence on procedural formalities would have affected the continuation of the trial which was set down for hearing on 20 January 2025 for four weeks. As it is, this application was the catalyst for the late start to the trial, and the application for postponement launched by the defendant in mid-January 2025 has resulted in the separation of issues.¹⁰ But ultimately, when acting as upper guardian, a court should bear in mind that the interests of children should not be held to ransom for the sake of legal niceties: a child's best interests 'should not be mechanically sacrificed on the altar of jurisdictional formalism'.¹¹ It is also very clear from the December directive that the dual role of the *curator* and Adv Strauss was envisaged. Paragraphs 2.2 and 2.3 of the Directive state:

"2.2 the unavailability of Advocate Strauss shall not fetter the curator ad litem's access to the minor children and shall not be an impediment to his ability to consult with them;

2.3 it is recorded that the curator ad litem is appointed by the court to be of assistance to the court for purposes of the decision regarding the best interest of the children after finalization of the divorce action. The appointment of Advocate Strauss in no way detracts or alters the functions of the curator ad litem as set out in the order of 6 December 2023..."

[16] I do not mean to suggest that this methodology should be followed in every case - rather a measured and considered approach will dictate how every case should be handled. Some cases, because of their ebb and flow, will require a more flexible approach than others.

[17] Be this as it may, the trial was to commence on 29 January 2025 on the issue of the primary care and residence of and contact to, all three minor children.

¹⁰ In terms of the court order issued on 24 January 2025.

¹¹ *AD and Another v DW and Others (Centre for Child Law as Amicus Curiae; Department of Social Development as Intervening Party)* 2008 (3) SA 183 (CC) para 30.

[18] At the meeting on 3 December 2024, I directed that the children are to spend a two-day/three-day rotational period with each parent until the trial is finalised. This was based in part on the recommendation by the *curator*. Although he recommended a slightly longer Christmas/New Year period with each parent, I was hesitant to consider that¹² in the absence of the final report of his expert which was still outstanding. That report was filed on 11 December 2024.

[19] Whilst I do not intend to discuss Dr Duchen's recommendations in toto in this judgment, it is necessary to state her recommendation is that:

"167. ... the current holding pattern of shared residency continue. [The defendant's] position has not improved enough for the girls to spend more time with her and sustain the gains made in their relationship with their father. On the other hand, the trust between the children and [The Plaintiff] has not recovered sufficiently, and the therapeutic aspects of the healing process with Prof Snyders have not commenced. This means that spending more time with their father will not be sustainable for the girls.

168. [TJ] has asked for longer periods with each parent. It could potentially be considered that he spends the Thursday preceding a weekend with the parent whose weekend it is. This may also accommodate the need for the girls to spend a day alone with each parent.

169. There is scope for holiday contact to be phased in five days at a time and maybe even later at seven days at a time."

[20] On Tuesday 17 December 2024 I received a WhatsApp on my personal cellphone, from Adv Strauss. It states:

"Judge I am extremely sorry to bother. The two daughters ... T and K are inclined to exercise contact over Christmas and New Year for longer than 3 days... they have suggested 5 days with each parent.. the two attorneys are not inclined to agree as they say that it will be too long for more than 3 days?

¹² Because of the extreme resistance K and T had shown towards spending any time, never mind extended periods of time, with plaintiff.

Can you please assist the parties and children in this regard. [T] he schedule that was attached to your directive makes provision for more than 3 days.”

[21] My response was to direct Adv Strauss to send an email to my secretary and copy in all the parties and the *curator*. I received that letter on 18 December 2024. The letter is 8 pages long and not all of it is relevant but what is, is the following:

- a) that the revised contact schedule, as discussed in the case management meeting of 3 December 2024, appears not to have been provided by the *curator*. The one attached to the Directive was the old schedule which included the longer visitation period with each parent over the December/January period. Clarity was sought on this (although it was made clear at the meeting what the schedule to be implemented was);
- b) Adv Strauss acknowledged that her informal direct approach to me, without copying the other parties or the *curator*, was incorrect. She confirmed that her message had been provided to all;
- c) that she received Dr Duchen’s supplementary report which she had discussed with the children. She sets out some of Dr Duchen’s findings and recommendations and then sets out her instructions from the children, which are:
 - “a) that if it was allowed by the Court they would be willing to spend a longer period with each parent during the holidays to give them time to adapt at each home to make it less awkward at the plaintiff’s home;
 - b) that the “to and fro” between the homes every second or third day is very taxing and they feel they have not been able to rest and just spend time with their parents in a normal manner. They both also wanted to see their friends during the holidays, but were not sure how to approach this with their father as he would not agree;
 - c) they are willing to exercise the contact during December despite the difficulties they experience but they wish to spend a longer period with each parent in the remaining holiday as originally suggested by the curator;
 - d) they seek the following contact:
 - (i) holiday contact with the plaintiff from 22 December 2024 to 27 December 2024 at 9h00 (5 nights);

(ii) holiday contact with the defendant from 27 December 9h00 to 2 January 17h00 (six nights)."¹³

[22] The rigid response from the plaintiff's attorney was that, over and above taking issue with Adv Strauss' approach, it was pointed out that TJ was excluded from the contact schedule, the *curator* was not willing to amend the contact set out in the December Directive and that as a result, there was no reason to revisit the schedule.

[23] The defendant had no objection to Adv Strauss' proposal.

[24] The *curator*'s response was the following:

- "1. I am concerned in the way that Adv Strauss is advancing her arguments in correspondence (even WhatsApp directly) and arguing subject matter directly with your office without the involvement of the *curator* or the parties in this matter. Neither the *curator* nor the parties have had an opportunity to address, or to put in proper context, information put forward. It seems to be the practice of the children's legal representative to approach the matter outside of the appropriate channels with knowledge of all concerned and this is creating prejudice regarding the involvement of the *curator* in that a skew image is created regarding the facts. This is not in the children's best interest. The "recommendations" made in the letter is also not understood as surely it cannot be addressed by means of correspondence in this fashion, whether right or wrong.
3. A further grave concern is that Adv Strauss has discussed the report of Dr Duchon with the children and even went as far as discussing the issue of alienation with the children. This is totally inappropriate. A theme which has been of cardinal importance throughout the year, and on which the Case Manager has issued directives also, is that the litigious issues not be discussed with the children. It is not understood why Adv Strauss deems this appropriate.

¹³ As Adv Strauss only acts for K and T, TJ was not included.

4. Adv Strauss is arguing the matter directly with your office whilst circumventing the parties involved. It is not acceptable that Adv Strauss forces the parties, the *curator* or the Court to now consider the report in this fashion and to request that new directives be issued subsequently.
5. In the original contact schedule provision was made for holiday contact for the children with both parents. I indicated to the parties that the holiday contact does not accord with the recommendation and advice of Dr Duchen, and that same is subject to the outcome of a Case Management Meeting. During the Case Management Meeting, it was discussed and concluded that extended holiday contact is not appropriate at this stage and that the 2/3 day schedule must continue. Taking this discussion into account and the challenges faced I am of the view that this should continue. This has also been the contact schedule which has been implemented for the holiday thus far and I do not agree that this issue, already being decided on, should be revisited constantly. The trial is within a few weeks' time where all the relevant aspects regarding contact will be canvassed.
6. The "holding position" which was discussed at the previous Case Management Meeting (and which was made part of the Court's directive, being the 2/3 day contact schedule) takes into account that the children, and the parties' relationship needs time to still adjust and it will prevent prolonged exposure to the issues the parties and the children face whilst having contact with each other. The supplementary and final report of Dr Duchen confirms this. The current decision should, in my view, therefore not be revisited.

In summary, with respect, the correspondence to your office by Adv Strauss is not appropriate and the current contact schedule regarding the December holiday should continue as was already decided."

[25] Having regard to all the information put before the court, and taking into account Dr Duchen's recommendation,¹⁴ I issued the following Directive as a holding position pending finalisation of the trial:

¹⁴ Para 19 supra.

“The Directive is amended so that the contact between the parents and the children shall be on a 3 day/ 4 day rotational basis until the trial is finalised.”

[26] The irony of the situation is that despite the plaintiff's and *curator's* intransigent stance on a lengthier contact period per the children's wishes, this is exactly what transpired. This is because the rotational period directed by me resulted in the children spending both Christmas and New Year with the same parent. In order to split the holidays fairly, the children had to spend slightly longer with each parent – thus, plaintiff spent 22 December 2024 until 27 December 2024 with the children, as put forward by Adv Strauss on 18 December 2024. This extended period was without any objection or hardline stance from either K or T¹⁵.

The application for removal

[27] As stated, three weeks later the present application was launched. The basis for this application is that Adv Strauss overstepped her mandate, that her appointment does not meet the requirements of section 28(1)(h) of the Constitution¹⁶ and has resulted in the *curator's* functions being usurped by Adv Strauss, that it has also resulted in a duplication of costs. Lastly, the allegation is made that her further involvement does not take K and T's interests further.

The founding affidavit

[28] The plaintiff complains that there is a something untoward in the manner in which Adv Strauss was approached by CVN.

[29] He complains that:

- a) Adv Strauss has conducted herself inappropriately by contacting me directly on two separate occasions, informally, and failing to bring a proper application before court in order to place information before court;
- b) despite the December Directive providing that Adv Strauss should provide a fee estimate, none was provided - all that she did was to explain her fee structure;

¹⁵ A vast departure from their previous insistences.

¹⁶ “(1) Every child has the right –

(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result”

- c) during her consultation with the children on 11 December 2024, she took it upon herself to discuss Dr Duchen's report with them which caused them undue emotional stress which they are ill-equipped to deal with;
- d) that his "with prejudice" settlement offer dated 23 December 2024 was emailed to the children directly and then discussed with them on 26 December 2024 whilst they were with him on holiday. According to him, a holiday that had gone well thus far, suddenly became fraught with atmosphere, with the children becoming "increasingly anxious and distant" towards him;
- e) that her conduct undermines the work conducted by the *curator* in conjunction with the therapists who have significantly contributed to the healing and improvement of the minor children's overall health and well-being;
- f) that Adv Strauss should have consulted with the therapists before approaching the minor children;
- g) that Adv Strauss has not considered the factual matrix and complexities of this case in her approach to the children;
- h) that he is concerned for the children's emotional well-being and the negative impact on his relationship with them if Adv Strauss continues as their legal representative;
- i) that the children's voices have been heard and recorded in the reports of the *curator* and Dr Duchen, and Adv Strauss's further involvement will not result in giving them a further voice on issues and views that have not already been recorded as they have not been drowned out by the "*warring voices of their parents*";
- j) that there will be no substantial injustice to the children if they are not afforded the assistance of a legal practitioner to make their voices heard as envisaged by the provisions of section 28(1)(h) of the Constitution; and lastly;
- k) that when Adv Strauss was appointed on 4 December 2024 it was directed that her costs are to be paid (in the interim) by the Trust which is not a party before court and in respect of which the plaintiff will thus bear the resultant costs.

[30] On the issue of costs: at the meeting of 4 December 2024 I directed that the Trust¹⁷ would pay the costs of Adv Strauss until such time as a decision could be made on this issue at the commencement of this trial. At present, the plaintiff:

- a) is paying all the legal costs thus far, including substantial contributions to the defendant's costs and towards her daily costs of trial¹⁸;
- b) he has stated in several applications that these costs are financed from his loan accounts in various companies and in respect of which the Trust is the shareholder, if not in all, then in several¹⁹;
- c) in his answer to the application for a contribution towards the defendant's costs of trial²⁰, the plaintiff had, as part of the remaining costs of trial, already estimated an amount for Adv Strauss' legal costs.

[31] Thus, in my view, not much more need be said on this issue other than: if it is this court's decision that K and T's best interests are served by having their own legal representative, her costs need to be paid. She cannot be expected to act *pro bono* as she has (for all intents and purposes) done so far. She has not yet rendered an account, despite the December directive, because of everything that has happened and because of this application. It was argued that costs should be reserved to be deducted at the end of this trial.

The answering affidavit

[32] Adv Strauss opposed the application and filed an answering affidavit. Her position is that the children oppose her removal and she has placed "statements" of both K and T before the court which set out clearly their views, their wishes and the reasons therefore. I use the word "statements" deliberately as these are not under oath. I must also point out that the children are not joined as parties and have voiced an expressed desire not to give evidence in this matter.

[33] In the answering affidavit, Adv Strauss explains that:

¹⁷ The plaintiff, the defendant, the defendant's sister and the plaintiff's accountant are the trustees of the trust.

¹⁸ In terms of several orders already issued and in terms of several tenders he has made to settle the rule 43(6) applications.

¹⁹ This is a general observation from the affidavits that were placed before me in the August 2024 rule 43(6) application as well as the three applications that served before me on 20 January 2025. As the financial aspects of this trial have been postponed, the observation I have made may well be proven to be inaccurate. The observation is thus simply that, and should not be interpreted as a finding.

²⁰ Argued on 23 January 2025.

- a) she has met with resistance from both the plaintiff and the *curator* not only as regards her role in representing the children, but also in placing their versions before the court;
- b) that T recorded a consultation with the *curator* from which it is clear that the children do not trust him and that they were advised by him that they could obtain legal counsel if they were of the opinion that he had not considered all the evidence and they disagreed with his recommendations. This is thus what they did;
- c) that she consulted with the children in December 2024 telephonically and in person in January 2025;
- d) that she had made an appointment to consult with Dr Duchen on 14 January 2025. However, on 10 January 2025, the *curator's* attorney informed her that he had not (and did not) give permission for this consultation. As a result, she would not be allowed at this stage to consult with the expert "due to the concerns raised by the curator in his report concerning [my] role as legal adviser and that the court still had to rule on [my] continued representation of T and K";
- e) undertakings were demanded from her that she would not discuss the *curator's* report with the children and that she would leave it to him to do so, and that she would not discuss the content of Dr Duchen's report with them either. However it became clear to her that these reports were not discussed with the children by the *curator*;
- f) that she was appointed as their legal representative with a client directed role and not a 'best interests' legal representation role;
- g) that both children are of sufficient age and maturity to be able to express a view and give instructions;
- h) that despite all the accusations made by the plaintiff and the *curator*, she made herself available to consult with the children at the convenience of the parties;
- i) that neither the plaintiff's legal representatives nor the *curator* had contacted her to discuss her views either on her duties and her role as legal representative or how she intended to fulfill that role;
- j) that it was the children who wished to spend more time with each party over the school holiday period but any suggestions made by her were simply rejected out of hand by the plaintiff and the *curator*. She thus felt

that, in the interests of her clients, she had no choice but to approach the court for further direction.

[34] One of the most important aspects that emanates from Adv Strauss' affidavit is the following:

“20.1 ...the children have been aware of the disputes between their parents long before the divorce proceedings and have been subjected to the “tug of war” for a period of two years. They were also aware of the accusation of alienation as they were removed from their mother for this very reason. Dr Duchen confirmed the lack of bonding and loving and or nurturing relationship with their father, my clients cannot be unaware of this as this [...] is their father, and they know the bond they have with him, which they have voiced on many occasions to the curator and their therapist and Dr Duchen long before I was appointed as their legal representative.

20.2 ...they know the biggest dispute is their primary care how can they not? They also know that the issue of finances and provision for them and the Respondent is also a similarly [...] big dispute. They have been in the middle of this dispute since the proceedings began and the emotional strain is caused not by them knowing, but by recommendations and decision being made without their input and their views and voice being heard, and also when it will stop and a conclusion or settlement by their parents would be reached. The fact that they do not know what is being decided concerning the future, specifically by the curator who they trusted would convey this information to them, even if it would lead to emotional strain is a big issue for them.”

[35] The children's statements contain each of K and T's versions and each is approximately 19 pages long. Their versions are almost identical, and what is very clear is that they have put whatever is uppermost in their minds and in their hearts before me. In fact, they discuss many topics which include:

- a) that they do not feel as though their wishes are being given adequate weight or that they are being heard. They also state that the *curator* has not discussed his recommendations with them and this includes his

recommendation of mid-2024 that they should be removed from the primary care of the defendant;

- b) that T recorded the consultation with the *curator* and his attorney of 22 November 2024:

“...omdat ek voel ons word nie deur die Kurator gehoor nie en ons nie vertrou het dat hy al my besware voor die Hof plaas nie...”

- c) that it was the *curator* who told T that she could appoint her own legal representative if she felt that he did not take everything into account, or if she felt that he does not agree with her views. When T discussed this with K, she felt she also wanted a legal representative – thus it was the *curator* who mooted this idea with them;
- d) that neither of them trust the *curator* as they were shocked “om te hoor dat die kurator nog voor hy met ons ontmoed het in Januarie al klaar ‘n besluit gemaak het want dit is nie wat hy vir ons gesê het hy gaan doen nie, hy sou eers met ons praat en ons insette kry...ek vertrou hom nie en ek vertrou nie dat hy my beste belange sal oordra aan die Hof soos ek dit met hom deurgee nie”;
- e) their reasons for the requested extended holiday period with each parent;
- f) how they feel about the protracted divorce proceedings;
- g) that they are acutely aware of the issues in dispute because their parents continue to discuss the issues. For example:

“1.5 Ons het nie maklik tot die besluit gekom nie want ons was baie onseker omdat ons geweet het my ma het nie geld om so persoon te betaal nie, en ons het ook geweet my pa sal nie wil betaal nie want hy het al op baie geleenthede vir ons gesê die saak en prokureurs kos hom baie geld.”²¹
- h) that they want to live with the defendant but that:

“1.13 Ons is bereid om terapie as ‘n familie by te woon om te probeer om ons verhouding met ons pa te herstel maar ons verhouding met ons

²¹ Mom continually tells them she does not have money, and dad continually complains about how much everything is costing him.

pa is tans van so aard dat ons hom nog steeds nie vertrou nie en dat ons nie veilig voel by hom nie permanent by hom wil bly nie.”²² (sic)

[36] Both children state that Adv Strauss did not try to involve them in any of the ongoing disputes or issues and she did not try and influence them on the issue of primary care and residence or contact in any way. What she did was ask what they think, how they feel and with whom they wished to live.

[37] In fact, what Adv Strauss did was to give the children a list of questions for them to answer. The list was the following:

- a) whether either of their parents had, or still does, influence them on the issues on trial;
- b) why they wanted the defendant to be granted primary care and residence;
- c) what they feel guilty about and how they have been influenced by their circumstances;
- d) what their relationship with the *curator* was and the role that he had played;
- e) how they would feel if their primary care was awarded to the plaintiff;
- f) the continuation of their therapy;
- g) whether a parental co-ordinator should be appointed to deal with any disputes regarding contact;
- h) whether either of their parents had exerted any influence over them as regards the issues before the court.

[38] For purposes of this judgment, it is not necessary for me to set out the children's response to the above-mentioned questions verbatim, save that what is important in the context of the application that serves before me is that set out in paragraph 37(d) *supra*. On this, both children had quite a bit to say. They verbalised that in the beginning they trusted the *curator* and his attorney and the legal process; they trusted that the adults would listen to them and that they would help them. However, they felt excluded from the process, arrangements were not discussed with them or their input obtained, that when they expressed strong opinions (about,

²² We are prepared to attend therapy sessions as a family in an attempt to repair our relationship with our father. At this stage we do not trust our father and we do not feel safe with him.

for example, contact with the plaintiff) they felt brushed off, marginalized and their emotions minimalised. They felt that whilst the *curator* said that he was listening to them and that their views would be put before the court, he never discussed his intentions with them or his recommendations. This made them feel as though they were excluded from the process and their voices and wishes ignored.

[39] This for them became especially apparent after the removal order of August 2024. They felt that every time they voiced a dissent to seeing their father they were threatened that they would be removed from their mother. It was a result of this that they state: “ek het besef hulle luister nie vir ons nie, hulle neem nie eers ons opinie in ag nie en nou moet ons doen wat hulle vir ons sê.”²³

[40] Both children then state in their respective statements:

“5.10 Ek dink dus dat baie van die twis het ontstaan ...omdat die kurator nie eintlik behoorlik met ons kommunikeer maar het vir my ma gestuur en dan moes sy vir ons sê, en dit het konflik veroorsaak.”²⁴

5.11 Ons was en nog is steeds frustreerd niks word deur die kurator aan ons gekommunikeer nie, en hy dink ons is nie emosioneel volwasse om ons eie gedagtes en opinies te vorm nie en dat ons teen ons pa is vir geen rede wat volgens hom erg genoeg is nie. As ons dan kontak geweier het en ons ma kon ons nie anders oortuig nie dan word daar aangeneem dit is ons ma se skuld dat ons nie wil gaan nie, so hulle het eintlik baie konflik tussen almal veroorsaak oor die wyse wat dit hanteer is.”²⁵

[41] In my view, the fact that T felt the need to record the meeting between herself and the *curator* speaks to their trust relationship at that stage. There is no finger-pointing to be done in this regard – I am simply stating a fact. The recording is

²³ I realised that they did not listen to us or take account of our opinions. We just had to do what they wanted.

²⁴ I think that most of the conflict occurred due to the fact that the curator did not communicate with us. He communicated with my mother and she then communicated with us which led to conflict.

²⁵ We are frustrated by the curator who fails to communicate with us as he thinks that we are not emotionally mature to form our own ideas and opinions and that we are against our father for no good reason. When we refused contact with our father and our mother could not convince us otherwise, it would be assumed that it was our mother’s fault that we do not want to visit our father. So the way this was handled actually caused much of the conflict.

attached not only to the children's statements, but also to the affidavit deposed to by the *curator's* attorney on his behalf.

[42] What one can also not lose sight of, is the fact that this recording was made prior to Adv Strauss's appointment.

[43] It is unnecessary to set out in any detail what transpired, other than to highlight a few aspects:

- a) too much of the conversation with T was led by the *curator's* attorney;
- b) that T became extremely agitated at the thought of having to sleep over at the plaintiff during any contact with him, although she did consent to seeing him during a day contact²⁶;
- c) T was told in no uncertain terms that she "will" sleep over at the plaintiff and that "jy moet baie mooi onthou dat jy 'n kind is" and "jy weet nie wat die beste is vir jou nie"²⁷ when she expressly stated that she refused;
- d) she was also told "eers as jy 18 is kan jy 'n keuse maak oor jou lewe. Vir nou is jy nie instaat om die beste keuses vir jouself te maak nie";
- e) that the *curator* specifically told her:
"As jy oortuig is dat wat aangaan op hierdie stadium nie sekere goed in ag neem nie, dan mag jy jou eie prokureur aanstel maar dan moet jy toesien dat jy jou eie prokureur aanstel.." ²⁸
and
"Dit beteken dat jy jou eie prokureur aanstel en dan daai prokureur namens jou met die hof praat as jy en daai prokureur van die oortuiging is dat wat ek sê nie aan alles dink wat daar aan gedink moet word nie, jy mag dit doen." ²⁹

[44] It can thus be hardly surprising that, armed with this information, and feeling that they are not being heard and their voices drowned out, this is exactly what they

²⁶ She kept repeating "ek wil nie by hom slaap nie, ek gaan nie daar slaap nie, julle kan sê wat julle wil, hy kan doen wat hy wil maar ek gaan nie daar slaap nie."

²⁷ Both these by the *curator's* attorney.

²⁸ If you are convinced that what is happening does not taken certain things into account, you can appoint your own attorney which you must see to

²⁹ This means that you can appoint your own attorney and that attorney can talk to the court on your behalf if you and the attorney are of the view that I don't say everything that can be considered, you may do that

did. In my view, at the time that Adv Strauss was appointed, it was not about whether the children's views were factually correct – it was about finding a path where they felt represented and their voices had value.³⁰

[45] This being said however, Adv Strauss conceded that the children are now satisfied that they have been heard; that their voices have been placed before the court; that they have said what they wanted to say and that for the first time they feel as though they have been properly represented.

[46] This being so, Adv Strauss proposed that perhaps it is unnecessary for her to be present during the trial proceedings pertaining to primary care, residence and contact. She proposed that, in the event that the court has questions for the children, she would avail herself to discuss any questions with the children and would relay that information back to the court. This then would save time and legal costs. It would also put pay to the vehement objections to her appointment.

[47] She conceded that her approach in discussing and showing Dr Duchén's report and Plaintiff's rule 34 tender to the children – in retrospect – could have been handled differently. She also informed the court that she had not exercised her functions *in vacuo*: instead, she had done so using the guidelines set out in a publication by Ann Skelton and Carina du Toit in the Pretoria University Law Press in 2016 titled "*Guidelines for legal representatives of children in civil matters*" (the Guidelines). As none of the parties were aware of this article, I provided a copy to them during the tea adjournment and they were given an opportunity to address me on it.³¹

[48] The *curator's* view is set out in an affidavit deposed to by his attorney of record and in his report dated 6 January 2025:

"104. The *curator* has serious concerns about the involvement of adv Strauss and the way in which the children [are] approached in her conduct of this matter.

³⁰ Even if it would be shown in due course that this had always been the case or that their views and wishes were as a result of an influence: this in the context of the parental alienation allegations.

³¹ Paragraph 75

105. A situation that had to be carefully managed throughout the litigation of 2024 was to prevent the litigation being discussed with the minor children and to expose the children to the discussion regarding relevant information and the possible outcomes thereof with the involvement adv Strauss what has been carefully managed throughout the year has since her appointment simply [been] ignored.
106. The report of Dr Duchen was discussed with the minor daughters, and it has also come to light that the Rule 34 tender which was disseminated by the attorneys of record of Mr E was also discussed with the minor daughters.
107. It is uncertain how the Rule 34 tender was provided to adv Strauss as she was not included in the email in which the tender was disseminated amongst the relevant party. Mr E has informed the *curator* that subsequent to the dissemination of the Rule 34 tender that he was informed by the minor daughters that they were contacted by adv Strauss soon thereafter to consider the content thereof. Mr E reported also in this regard that subsequent to the tender the daughters' attitude to him changed as they were exercising contact with him during the time that the children received the tender from adv Strauss.
108. It is concerning that adv Strauss would provide this document to the minor children at all or at least with the necessary guidance to understand the content and context thereof.
109. Good progress has been made in respect of the challenges in the relationships between the parties and the children throughout the year with the intervention of all the respective therapists and Dr Ronel Duchen and it does not seem as if adv Strauss is considering the factual matrix in her approach to the minor children.
110. It is not in the best interests of the minor children to be put in a position where they must choose between their parents, nor that they must consider the factual allegations pertaining to the dispute and their best interests. The children are being put in a position where they will have to exercise judgment regarding the facts in general and the views held by their parents towards each other. This will not result in the effective management of the dynamics of this matter."

[49] The affidavit then complains:

- a) the issue is the manner in which Adv Strauss executes her duties;
- b) that she has failed to present all relevant information to the children, alternatively, that she discloses unbalanced versions and is selective in what she discusses with the children;
- c) that the information she discloses to the children “polarizes” them and forces them to choose between their parents;
- d) that a legal representative is not “a mere mouthpiece”;
- e) that the discussions between Adv Strauss and the children focuses on the alleged absence of any trust between the *curator* and the children and not whether the recommendations are in fact in the children's best interests;
- f) that he has obtained the views of the children but that the “outcomes” of the reports “cannot” be discussed with the children and the any recommendation is not final;
- g) that the *curator* does not have to agree with the views of the children.

The defendant's position

[50] The defendant's view was unsurprising. She elected not to place any affidavit before this court and instead filed a notice in terms of rule 6(5)(d)(iii). The notice is couched in such general, broad and vague terms³² that it is unnecessary to deal with it. It certainly did not add to the debate before court.

[51] During address, the submission was made that it was necessary for Adv Strauss to be present during the entirety of a hearing concerning the primary care and residence of and contact to the minor children to ensure that their voices were adequately and properly placed before the court, to address information that may come up during evidence, to obtain instructions from her clients when necessary, and to generally be of assistance to the court in exercising a discretion as upper guardian.

³² Which includes “the rights of the minor daughters to have legal representation and be heard in matters concerning them; the role of a legal representative of children in legal proceedings versus the role of the curator; the duties and responsibilities of legal representatives; the duties and responsibilities of a curator at litem; and the necessity of the appointment of a legal representative to voice the children's wishes in this matter.”

[52] In *Minster of Finance v Public Protector and Others*³³, the court stated:

“[13] What, by way of comparison, is a rule 6(5)(d)(iii) notice? In terms of this rule, where a respondent, who opposes the relief sought in the notice of motion, intends to rely on a point of law only, he or she must deliver a notice to that effect in lieu of an answering affidavit setting out the point or question of law. A rule 6(5)(d)(iii) notice may, however, be filed together with or without the answering affidavit. In instances such as we have here, where the respondent elects not to file an answering affidavit in response to the applicant's allegations, but to take a legal point only by way of a rule 6(5)(d)(iii) notice, a court may hear the case without giving the respondent an opportunity to file an answering affidavit on the merits. Alternatively, it may grant a postponement to enable the respondent to prepare and file an answering affidavit. This approach is, however, discouraged as it is likely to give rise to an undue protraction of the proceedings and a piecemeal handling of the matter.

[14] Once a respondent, intending to rely on a point of law only, delivers a rule 6(5)(d)(iii) notice of his or her intention to do so to the applicant, then the matter is ready to be set down for hearing in court. The applicant will have an opportunity, at the hearing, to present argument on, inter alia, why the law points raised in the notice fail to establish a defence capable of being adjudicated without a factual basis (supported by evidence) being put up by the respondent in an answering affidavit.

[15] Viewed in its proper context, a rule 6(5)(d)(iii) notice is ... merely a notice in which the respondent sets forth its intention to rely on point/s of law that are dispositive of the dispute between the parties. The respondent is merely required to set out, in the rule 6(5)(d)(iii) notice, the points of law that it seeks to rely on that will be dispositive of the issues for determination in the matter...”

[53] The “points of law” thus raised by the defendant are not stand-alone points of law at all – they are the generic catch-all phrases that judges are so typically confronted with in applications where the best interests of a child must be

³³ 2022 (1) SA 244 (GP) at paras 13 – 15.

determined. As nothing turns on the notice itself, nothing more on this issue need be said.

The plaintiff's reply

[54] I must say that, in replying argument, and subsequent to reading the “Guidelines article” provided, the plaintiff’s initial intractable stance appeared to soften slightly and it appeared that the plaintiff seemed to suggest that were Adv Strauss to remain as the children’s legal representative, her role should be severely curtailed. It was argued that the children have quite clearly aired their voices and their views in their statements. The argument was that, should this application be dismissed, guidelines needed to be provided for her through her participation (if any) on the separated issues.

The legal representative

[55] Section 28(1)(h) of the Constitution clearly contemplates the appointment of a legal representative for a minor child in civil proceedings affecting them “if substantial injustice would otherwise result.” Apart from section 28(1)(h) of the Constitution, the following also provides guidance on this issue:

- a) section 6(4)³⁴ of the Divorce Act³⁵ provides:

“For the purposes of this section the court may appoint a legal practitioner to represent a child at the proceedings and may order the parties or any one of them to pay the costs of the representation”;
- b) section 10 of the Children’s Act³⁶ provides:

“Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration”;
- c) section 6(4) of the Children’s Act provides:

“(4) In any matter concerning a child –
(a) an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided; and

³⁴ Which resides under the general heading of “Safeguarding the interests of dependent and minor children”

³⁵ Act 70 of 1979.

³⁶ Act 38 of 2005.

(b) a delay in any action or decision to be taken must be avoided as far as possible.”

[56] I emphasise that the children *in casu* are 8, (almost) 15 and (almost) 16 years old respectively. Adv Strauss was appointed only to represent the two eldest.

Was the appointment of a legal representative necessary?

[57] The gist of the argument was that a legal representative in this matter was unnecessary as the court had already appointed a *curator* whose task it was to act in the best interests of the minor children in the divorce proceedings. The submissions were that the role of the *curator* was an extensive one and that, given his powers and duties, it is clear that he consulted with all three children and that he has given air to their voices. But the argument went further: it was that he was not a mere mouthpiece for the children, but he had considered their views, placed them in the necessary context and afforded them the weight he deemed appropriate in making his final recommendation to the court.

[58] Having had the benefit of reading through multiple applications and the reports filed by the *curator* and his expert (Dr Duchon) thus far, it is clear to me that he has performed his duties in an exemplary manner under what can only be described as very difficult circumstances. However, one cannot lose sight of the fact that this court will be tasked with the unenviable decision of ultimately deciding what is in the best interests of the three children. The fact that the *curator* has made a recommendation, does not mean that this court is obliged to follow it. The fact is also that the argument was that the *curator* had decided what weight to afford to the children’s views which had left them feeling marginalised (even if they had not actually been). Given that I am tasked with following an approach which is conducive to conciliation and problem-solving³⁷, the question was how to approach this.

[59] This then leads me to consider the roles of the *curator* and the legal representative both in general and in this particular case.

³⁷ Section 6(4)(a) of the Children’s Act

[60] In *Soller NO v G and Another*³⁸, the question arose as to the differentiation between the functions of the Family Advocate and those of a legal representative appointed in terms of s28(1)(h) of the Constitution. Satchwell J stated:

“[25] It is significant that the Legislature inserted s 28(1)(h) into the Constitution with full knowledge that the office of Family Advocate had been created some nine years prior thereto and had been functioning in all High Court jurisdictions over that period of time. It cannot be assumed that the Legislature intended the legal practitioner assigned to a child in civil proceedings in terms of s 28(1)(h) of the Constitution to appropriate the role and usurp the function of the Family Advocate. One must attribute other responsibilities and expect other contributions from the assigned legal practitioner.

[26] Notably, s 28(1)(h) envisages a 'legal practitioner' who would be an individual with knowledge of and experience of the law but also the ability to ascertain the views of a client, present them with logical eloquence and argue the standpoint of the client in the face of doubt or opposition from an opposing party or a Court. Section 28(1)(h) does not allow for the appointment of a social worker, or psychologist or counsellor. What is required is a lawyer who will use particular skills and expertise to represent the child. Neutrality is not the virtue desired but rather the ability to take the side of the child and act as his or her agent or ambassador. In short, a child in civil proceedings may, where substantial injustice would otherwise result, be given a voice. Such voice is exercised through the legal practitioner.

[27] On this analysis, it would seem that the Family Advocate and the s28 legal practitioner occupy dissimilar positions. The Family Advocate provides a professional and neutral channel of communication between the conflicting parents (and perhaps the child) and the judicial officer. The legal practitioner stands squarely in the corner of the child and has the task of presenting and arguing the wishes and desires of that child. This task is not without certain inbuilt limitation. The legal practitioner does not only represent the perspective of the child concerned. The legal practitioner should also provide adult insight into those wishes and desires which have been confided and entrusted to him or her as well as apply legal knowledge and expertise to the child's

³⁸ 2003 (5) SA 430 (W). No curator had been appointed in this matter.

perspective. The legal practitioner may provide the child with a voice but is not merely a mouthpiece.

[28] At one of the hearings, Mr Charles Mendelow, the legal practitioner assigned to K in terms of s28, ably and concisely summarised his role as follows: Firstly, it is to 'put K's case in respect of his wishes to stay with his dad'. Secondly, 'it is to make sure that he is under no duress of any sort. He is, after all a minor under disability.' Thirdly, 'there are consequences I can foresee which may not be foreseen by the child and I should report on these and alert the Court to them'."

[61] In *Ex parte Phillipson and Wells, NNO and Another*³⁹ the court stated that it was difficult to state the limits of a court's power to appoint a *curator ad litem* but that a court will appoint one in circumstances to avoid an injustice.

[62] Whilst this was stated in the context of the protection of right of heirs to an estate it is in my view, difficult to conceive a more appropriate circumstance for such an appointment that one where children are caught up in the middle of their warring parents and where a court must make a decision as upper guardian that will affect them, if not until they reach the age of majority at 18 years, then at least for a foreseeable future.

[63] Until section 28(1)(h) of the Constitution was signed into law, the concept of appointed a legal representative to minor children was a foreign one. In *MEC for Education, Kwazulu-Natal, and Others v Pillay*⁴⁰ the Constitutional Court stated:

"Legal matters involving children often exclude the children and the matter is left to adults to argue and decide on their behalf. In *Christian Education South Africa v Minister of Education* this court held in the context of a case concerning children that their 'actual experiences and opinions would not necessarily have been decisive, but they would have enriched the dialogue, and the factual and experiential foundations for the balancing exercise in this difficult matter would have been more secure'. "

[64] In *Du Plessis NO v Strauss*⁴¹ the SCA stated:

³⁹ 1954 (1) SA 245 (E) at 246C.

⁴⁰ 2008 (1) SA 474 (CC) at 494E.

“Dit is ten slotte nodig om iets te sê oor die optrede van die kurator-*ad-litem*. Diegene wat hy moes verteenwoordig het onder andere kinders wat die insolvent en sy seuns nog mag verwek, ingesluit. Sodanige ongeborenes se belange was dus dieselfde as dié van die respondent in wie se guns die Hof a *quo* uitspraak gegee het. Nogtans het die kurator in 'n verslag wat hy by hierdie Hof ingedien het argumente aangevoer waarom die appèl moes slaag. Hy het gesê dat argumente tot die teendeel volledig deur die respondent aangevoer is en dat dit hierdie Hof sou baat indien hy 'n 'meer objektiewe' standpunt inneem.

Hierdie houding was klaarblyklik strydig met sy pligte, want dit is nouliks nodig om te sê dat 'n kurator-*ad-litem* se eie siening ontersaaklik is en dat van hom verwag word om alle moontlike argumente ten behoeve van die betrokke minderjariges en ongeborenes aan te voer; soveel te meer indien uitspraak reeds in hulle guns gegee is. (Vergelyk *Ex parte Ortlepp and Another* 1966 (1) SA 809 (N) op 812.)”

[65] In *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian And Gay Equality Project As Amicus Curiae)*⁴² the Constitutional Court held that where the interests of children were at stake it was important that their interests were fully aired before the Court so as to avoid substantial injustice to them and possibly others. It held further that where there was a risk of injustice, a court was obliged to appoint a *curator* to represent the interests of children.

[66] There are many other decisions of our courts over the years in which a legal representative or a *curator ad litem* was appointed to represent children in terms of section 28(1)(h) of the Constitution:

- a) the first judgment on this issue was that of *Soller and Another v G* (supra);
- b) the second was a year later when Hartzenberg J⁴³ joined two minor children to contact proceedings between their parents in order to give them an opportunity to appeal against any adverse order. He also

⁴¹ 1988 (2) SA 105 (A) at 145H - 146B.

⁴² 2003 (2) SA 198 (CC).

⁴³ *Ex parte van Niekerk and Another: In re Van Niekerk v Van Niekerk* [2005] JOL 14218 (T) par 7.

appointed them their own legal representative to present their case independently from their parents:

“Only if the children or somebody on their behalf puts their case, which might not necessarily be their present views, but could be the expert views of somebody unattached to either one of the parents, will a court have a balanced presentation of the situation.”

- c) in *Centre for Child Law and Another v Minister of Home Affairs and Others*⁴⁴, De Vos J directed the appointment of a legal representative, paid for by the state, to all unaccompanied children affected by the matter before him, that find themselves in South Africa illegally;
- d) in *R v H and Another*⁴⁵ the court appointed a legal representative to a minor child in a bitterly contested application the father had brought to have contact to him. Upon her application, the legal representative was ultimately joined as the second defendant in the action as she had sought relief⁴⁶ on behalf of the minor child in his best interests. The minor child gave evidence in the judge’s chambers;
- e) *Legal Aid Board v R and Another*⁴⁷ dealt with the authority of the Legal Aid Board to appoint a legal representative for the child after the child approached it for assistance in the acrimonious proceedings between her parents. The appointment was thus not one made by the court. The court stated:

“I would not wish it to be thought that a legal representative appointed to assist a child in this type of delicate situation should not listen to the views of the parents as to the best way in which he or she should go about their task. However, if the legal representative is to perform that task appropriately and adequately, they must ultimately decide the best way in which to proceed. The fact that one or other parent disagrees with them is a risk inherent in the situation. The whole point of appointing a legal representative for the child is for that legal representative to exercise her or his independent judgment as to the best interests of the child in the particular circumstances of the case and to place material before the court as she or he deems appropriate, to assist the court in

⁴⁴ 2005(6) SA 50 (T) para 29.

⁴⁵ 2005 (6) SA 535 (C).

⁴⁶ Additional to that sought in the original action.

⁴⁷ 2009(2) SA 262 (D) at para 23.

reaching the best possible decision in the circumstances. Naturally, there is a risk that the decisions taken by such a legal representative may, with the benefit of hindsight, turn out to be wrong. However, the mere fact that one of the parents disagrees, however strongly, with the approach adopted by the appointed legal representative, will not ordinarily provide a basis for that legal representative not to be appointed or to be removed from discharging their functions.”

- f) in *S and Others v G*⁴⁸, Meyer J endorsed the view⁴⁹ that in cases where very young children are involved, the role of the legal representative would be more akin to that of a *curator ad litem*, while with older children the legal representative would take instructions from the child, act in accordance with those instructions and represent the views of the child;
- g) and in *FB and Another v MB*⁵⁰ Meyer J then stated that a request by a child to be assisted in legal proceedings by his or her own legal representative will only be refused in exceptional circumstances;
- h) lastly, the court in *Centre for Child Law v Hoërskool Fochville and Another*⁵¹ stated

“[21] Children have always received assistance through the common law. *Herbstein & Van Winsen* states that a child must be assisted by a guardian to institute legal proceedings. Legal proceedings instituted by a child, without the assistance of a guardian, may be ratified by that child's guardian. Furthermore, if a child wants to litigate and does not have assistance from a guardian, a curator ad litem must be appointed for the child. A child may litigate without assistance if the High Court grants him or her *venia agenda*.

[22] The drafters of our Constitution appeared to recognise that there may well be circumstances where, notwithstanding the common-law protection, additional assistance may be required by children in specific instances. Accordingly, the right of children to be legally represented in civil matters was included in the Constitution. Thus, s 28(1)(h) of the Constitution guarantees state-funded legal representation as one

⁴⁸ 2012 (2) SA 329 (GSJ).

⁴⁹ Expressed by CJ Davel and AM Skelton in *Commentary on the Children's Act* at p2-17 –2-21.

⁵⁰ 2012 (2) SA 394 (GSJ) para 13.

⁵¹ 2016 (2) SA 121 (SCA).

incident of the right of children to participate in matters affecting them. It provides:

'Every child has the right to have a legal practitioner assigned to the child by the State, and at State expense, in civil proceedings affecting the child, if substantial injustice would otherwise result.'

Section 28(1)(h) affords every child a right to legal representation at state expense in *civil proceedings* affecting a child if substantial injustice would otherwise result. The right is triggered, not only when the child is a party to the proceedings, but whenever he or she is affected by the litigation. The child is then entitled, not merely to be heard, but to be afforded the envisaged legal representation at state expense."

[67] Thus it is quite clear that, over the past twenty or so years, our courts have not only appointed a *curator ad litem* in proceedings⁵², but appointed a legal representative to a minor child in terms of section 28(1)(h) of the Constitution.

[68] But, as stated, that is not the only circumstance in which children may have their own legal representative. The Divorce Act itself makes provision for this and this time not at state expense, but rather at the expense of a party or both of them. Their functions would be the same of an own legal representative⁵³ and include taking instructions from the child, acting in accordance with those instructions and representing the child in the proceedings⁵⁴

[69] In my view, there is place in proceedings for both a *curator ad litem* and a legal representative to be appointed to and for minor children. But this would depend on the facts of each case. There is no hard-and-fast rule that can, or should, be laid down.

⁵² *AD v DW* 2008 (3) SA 148 (CC); *S v J* 2011 (3) SA 126 (SCA), *DKD v BDK & Van Aswegen NO* [2023]. ZAGPJHC 382.

⁵³ *S v LM* (Faculty of Law, University of the Western Cape: Children Rights Project of the Community Law Centre and Others as amici curiae) 2013 (1) SACR 188 (WCC) at para 25.

⁵⁴ *B and Another v G* 2012 (2) SA 329 (GSJ) para 12 ; *CK v DH* (2896/23) [2023] ZAWCHC 54 (16 March 2023) where the court expressed the view that the 13-year old child was of an age that he can express a view on issues that affect him and that therefore this was an appropriate case for the appointment of a legal representative to give the child a voice.

[70] In proceedings where the children vary vastly in age, such as the present one, it may well not only be prudent, but appropriate to appoint both. Here there is an 8-year old who, in my view is too young to truly express his views with any weight. For him it is appropriate that a *curator ad litem* be appointed to act in his best interests. In this case, the *curator* ended up having a much broader role to play than simply to act in TJ's best interests. He was tasked with appointing experts, collating evidence and making a recommendation on the issue of what would be in TJ's best interests. In doing so, his conduct is driven by the 'best interests' principle and TJ did not, and could not, give him instructions⁵⁵. Although TJ may express views or wishes, those are simply part of the conspectus of evidence that the *curator* takes into account when making a recommendation to the court.

[71] However, K and T will soon be 16 years old and 15 years old respectively. To be told that they are too young to express their views or give instructions simply cannot pass muster. K will reach the age of majority where she will have full legal capacity in two years. To say that she must wait until then cannot be – especially when, by then, a court will no longer be entitled to exercise any authority over her well-being as upper guardian.⁵⁶

[72] I am also of the view that in this particular case, and because of the extremely strong views expressed by K and T vis-à-vis primary care and residence as well as contact, the *curator* simply cannot properly represent them in the proceedings as they should be: he cannot advocate for a 'best interests' outcome and then 'stand squarely in the corner' of the children⁵⁷. In the proceedings *in casu* the two positions are not compatible.

[73] Although section 28(1)(h) of the Constitution provides for legal representation of children in civil proceedings affecting them "if substantial injustice would otherwise result", section 6(4) of the Divorce Act contains no such proviso. The word "may" in that section gives the court a discretion which should be exercised given all the circumstances of the matter, and taking into account section 6(4) and section 10 of the Children's Act.

⁵⁵ He is, in any event, *doli incapax*.

⁵⁶ The Children's Act is only applicable to children under the age of 18 year per s17.

⁵⁷ As expressed in *Soller and Another v G*.

[74] Where children are, in fact, young adolescents who have voiced strong views from the outset of a matter and who have categorically expressed their desire for separate representation, a court should only disregard their expressed wishes in exceptional circumstances.⁵⁸

[75] Whilst the courts have, over the years, provided a few guidelines regarding the role and responsibilities of a legal representative, they are in broad general terms. This is where the *Guidelines*⁵⁹ provide invaluable assistance to the court in setting out the role and responsibilities of a legal representative. The *Guidelines* explain the difference between what it terms the “client directed legal representative” and the “best interests legal representative”. The main difference between the two is the fact that in the latter, the child does not give instructions. In my view, the latter is the traditional role that a *curator ad litem* would play in matters where a court is tasked with a decision of what is in the child’s best interests.

[76] The child directed litigation, however, cannot be undertaken without an assessment of whether the child is, in fact, not just of an age, but mature enough to express a view. In this case, Adv Strauss has specifically undertaken that task. She has expressed the opinion that both K and T are mature enough to express a view.

[77] The *Guidelines* set out principles that should be adopted by the legal practitioner in these circumstances. They range from the relationship between the child and the legal representative, to access by the child to court documents, and the manner in which a child should participate in proceedings. I am of the view that not all of the factors set out in these *Guidelines* are relevant in proceedings in which care and contact are in issue, nor should all be adopted *in casu* and therefore not all need be adopted. But I am of the view that, at a minimum, those which should be adopted are the following:

- (i) advising them of the legal process;
- (ii) obtaining copies of court documents and evidence;

⁵⁸ FB and Another v MB (supra).

⁵⁹ Para 47 supra.

- (iii) participating in any pre-trial conferences, meetings, settlement negotiations or discussions which directly affect their interests via-a-vis the issues before this court that directly affect their interests;
- (iv) considering and discussing with them the recommendations made by the *curator ad litem* and/or any expert who has expressed an opinion as regards their best interests relating to primary care and residence as well as contact;
- (v) considering and discussing with them any offer of settlement pertaining their primary care, residence and contact;
- (vi) informing them that although she will convey their instructions to the court, and present their case to court, the court's decision on their best interests may vary from their wishes;
- (vii) discussing the options available to them and advising them of the possible consequences;
- (viii) consulting with Dr Duchon;
- (ix) cross-examining any party or witness, including any expert witness, on the issues of primary care, residence and contact in the event that she considers it necessary in light of her instructions and the wishes of K and T;
- (x) explaining the consequences of any outcome of the trial and any appeal process⁶⁰;
- (xi) submitting oral and written arguments to the court on their behalf.

[78] The order I made reflects Adv Strauss's role and responsibility bearing in mind that:

- a) the children are not joined as parties to these proceedings;
- b) their views and wishes have been fully placed before the court;
- c) they specifically state they do not wish to give evidence;
- d) they have expressed a desire for the issues of primary care, residence and contact to be finalised.

These are thus the parameters within which she is to exercise her duties. Under no circumstances, given this, can this become a "he says/she says/they said" situation.

⁶⁰ The issue of whether the children would have *locus standi* to launch an appeal is not relevant here as they have not been joined as parties in these proceedings

One must also bear in mind that, as the children are not parties, they cannot (and have not) made discovery in terms of Rule 35. As their views and the reasons for these are contained in their statements, it is within those parameters that cross-examination (especially of plaintiff and defendant) must be conducted. There may be scope to give her more leeway in the cross-examination of an expert⁶¹ but, once again, the court adjudicating the matter would have to make that decision. This is all part of the ebb-and-flow of trial proceedings. How much to allow and what to allow must be left to the presiding judge's discretion.

[79] I am of the view, as I have already stated, that there may well be cases where a court would need to consider a broader role for the legal representative and give him/her additional powers⁶² – but this is not one of them.

[80] In this case, much criticism has been levelled against Adv Strauss for the manner in which she has approached her role and the alleged lack of sensitivity she has displayed in disseminating sensitive information to the children in view of the history of this matter and the emotional vulnerability of the children. The accusation was also levelled that she did not impart information to the children in an even-handed manner: for example she shared the entirety of the plaintiff's rule 34 tender with them but failed to discuss the defendant's; that she shared the reports of Dr Duchon and the *curator* without considering the impact that certain information would have on the already sensitive and historically fraught relationship the children had with the plaintiff.

[81] Adv Strauss correctly conceded that she could have approached the manner in which she shared certain information with the children in a more sensitive manner, but that her sole intention was to fulfill her role to the best of her abilities and represent the children in terms of section 10 of the Children's Act, advocate for them and ensure that they, for once, felt heard. Although her methodology may be criticised, I cannot find that her motives were *mala fide*.

⁶¹ Ie one that has made a recommendation regarding primary care, residence and contact

⁶² For example in cases where there are allegations of physical and/or emotional abuse, where the issue is related to cultural or religious differences in the raising of the child, in matters involving child abduction or adoption – the list is not exhaustive.

[82] There is also the complaint that, by allowing them to voice their views and wishes through their own representative, the children have been drawn into the acrimonious litigation, which is exactly what the *curator* was trying to avoid. But it is very clear from the papers that these children have been drawn into every aspect of the litigation by their own parents, and that despite the experts warning them to stop, they have continued to do so. These children are acutely aware of everything that is going on, but they complain that the recommendations that directly affect them are not discussed with them. This is an important consideration. In my view in this case they are entitled to know what recommendations have been made and why, but “packaged” in age-appropriate language. I am also of the view that Adv Strauss’s duties, as set out in paragraph 4.4 of the order, flow from her appointment. All clients are entitled to their legal representatives sharing information with them to obtain instructions.

[83] *In casu*, and bearing in mind the children’s ages and the confines of the appointment, not all information is relevant to the children⁶³. It is her task to discern between what is and is not relevant and impart information with care and sensitivity bearing in mind the children’s ages, their level of maturity, the context in which the litigation is unfolding and how they have been affected by the litigation thus far. It is important that, if necessary, the legal representative be given access to the children’s therapist (if any) to obtain advice on how to impart information

[84] All in all I am of the view that in this case, K and T should not only have a platform to express their views, but that they feel included in the process and that their views be properly expressed and explained to the court. Above all, it is important that they feel they have been heard. From the information placed before me in this application, it appears (at least *prima facie*) that since Adv Strauss’s appointment, this has been achieved.

[85] This being so, I am of the view that removing Adv Strauss as legal representative is not in either K or T’s best interests. I am also of the view that they are best represented by her for the duration of the trial on the issues of primary care, residence and contact, so that she can put their views directly to Dr Duchon and the

⁶³ For example: those portions of the plaintiff’s Rule 34 tender which did not pertain to primary care, residence and contact.

parties, and test their responses within the confines of what they have already placed before me.

[86] In my view, there is no reason that costs of the application should not follow the result. To reserve costs would not serve any purpose as the application is to be dismissed.

[87] However, insofar as Adv Strauss's costs are concerned: I initially directed that the Trust was to pay her costs until they could be decided in this trial. Having considered the facts, I am of the view that it is just and equitable that both parties pay her costs in equal shares. After all, they bear equal responsibility for their children. I consider that, until the financial aspects of the divorce have been finalised, the defendant may not have the means to pay Adv Strauss immediately. It is for this reason that the order makes provision for the plaintiff to pay those costs immediately and the defendant's share of Adv Strauss's costs is to be considered in the calculation of, alternatively deducted from, any monetary amount that the plaintiff may be ordered to pay to the defendant in respect of her patrimonial claims including the plaintiff's tender of an *ex gratia* payment.

ORDER

[88] The order I make is the following:

1. The application is dismissed with costs, which costs are to include those of the *curator ad litem* and Adv S Strauss.
2. Adv Strauss's appointment as the legal representative of the two minor daughters, K and T - in terms of section 6(4) of the Divorce Act 70 of 1979 and as set out in the Directive dated 4 December 2024 - is confirmed.
3. In this trial, Adv Strauss shall represent the two minor daughters, K and T, during the entirety of the proceedings pertaining to the issue of which of the parties should be awarded their primary care and residence and the delineation of the rights of contact to be awarded to the other party.
4. Adv Strauss's duties and rights will be the same as in the case of an own appointed representative, and will include the following:
 - 4.1 the relationship will be that of attorney and client;

- 4.2 to consult with and take instructions from K and T;
- 4.3 to act in accordance with those instructions;
- 4.4 to advocate for K and T's position by:
 - (i) advising them of the legal process;
 - (ii) obtaining copies of court documents and evidence;
 - (iii) participating in any pre-trial conferences, meetings, settlement negotiations or discussions which directly affect their interests vis-a-vis the issues before this court that directly affect their interests;
 - (iv) considering and discussing with them the recommendations made by the *curator ad litem* and/or any expert who has expressed an opinion as regards their best interests relating to primary care and residence as well as contact;
 - (v) considering and discussing with them any offer of settlement pertaining their primary care, residence and contact;
 - (vi) informing them that although she will convey their instructions to the court, and present their case to court, the court's decision on their best interests may vary from their wishes;
 - (vii) discussing the options available to them and advising them of the possible consequences;
 - (viii) cross-examining any party or witness, including any expert witness, on the issues of primary care, residence and contact in the event that she considers it necessary in light of her instructions and the wishes of K and T;
 - (ix) explaining the consequences of any outcome of the trial and any appeal process;
 - (x) submitting oral and written arguments to the court on their behalf.

5. Adv Strauss's costs of the trial shall be borne in equal shares by the parties save that:

- 5.1 the plaintiff shall pay any invoice submitted by her within 30 days of the submission of the invoice;

5.2 the defendant's share of Adv Strauss's costs is to be considered in the calculation of, alternatively deducted from, any monetary amount that the plaintiff may be ordered to pay to the defendant in respect of her patrimonial claims including the plaintiff's tender of an *ex gratia* payment.

B NEUKIRCHER
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

This judgment was prepared and authored by the judge whose name is reflected, and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 6 February 2025.

Curator ad litem	: Adv S Stadler
For the Applicant	: Adv L Haupt SC
Instructed by	: Van Heerden & Krugel Attorneys
For the Respondent	: Adv N van Niekerk
Instructed by	: Van Der Merwe and Associates
Legal representative for minors	: Adv S Strauss

Matter heard on	: 22 January 2025
Order handed down	: 29 January 2025
Judgment date	: 6 February 2025