IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Not reportable

Case Number: **2025 - 151339**

In the matter between:

D.R. Applicant

and

N.M. First Respondent

R.L. Second Respondent

Coram: Greig AJ

Heard: 13 May 2026

Delivered: 22 May 2026

Summary: Children — minor child — curator ad litem — appointment of — when appropriate —no conflict between child and sole parent established — risk of conflict outweighed by possible effect of appointment on children — Urgency — self-created urgency —nonetheless necessary to consider whether granting urgent relief claimed is in child's best interests.

ORDER

(a) The application is struck from the roll with costs including the costs of counsel payable on Scale C;

(b) The applicant may, if so advised and after:

(i) compliance with practice directive 36B(6);

(ii) filing a report from the Family Advocate as to the desirability of, and need for, the appointment of a curator ad litem,

re-enrol the application for the same or modified relief on supplemented affidavits and an appropriate timetable for filing further papers.

JUDGEMENT

Greig AJ

INTRODUCTION

[1] This is an application brought on an urgent basis seeking the appointment of a curator ad litem to safeguard the interests of [L],[1] a minor child who is four years of age, pending the trial of an action in which the applicant, Mr R, seeks joint care and co-guardianship of [L] as well as contact with [L] and his sister, [W]. Mr R does not hold parental responsibilities and rights in respect of [L]. His standing in these proceedings derives solely from section

[1] The parties names have been anonymised.

23(1) of the Children's Act[2] (‘the Children's Act’), in terms of which he has been declared an interested person.

[2] The first respondent, Mr M, is [L’s] biological father and sole holder of parental responsibilities and rights in respect of [L]. The second respondent, Mr L, is the former spouse of Mr M and joint parent of [W], [L’s] older half-sibling. Mr M is presently receiving in-patient treatment at a drug rehabilitation clinic and is expected to be discharged in June 2026. During his absence, [L] has been residing primarily with Mr L, an arrangement endorsed by Francis J in case management directions issued on 8 April 2026.

[3] The present application was launched on the evening of 7 May 2026 — two days after the refusal of Mr R's application for leave to appeal an interim care and contact order dated 2 December 2025 (‘the December order’), and five days after he withdrew a related application for the suspension of that order pending appeal.

[4] At the outset of the hearing the parties raised differing contentions about whether the proceedings should be held in camera. In canvassing those contentions with the parties it became evident that Mr R did not object to proceedings being held in camera, and accordingly the hearing proceeded on that basis.

[5] The central questions for determination are: first, whether Mr R has established sufficient urgency to justify a departure from the ordinary rules of court; second, whether, on the papers, the urgent appointment of a curator ad litem is appropriate and in [L’s] best interests; and, third, what costs order is appropriate. For the reasons that follow, I am not persuaded as to the

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[2] Children's Act 38 of 2005

urgency of this matter or that the appointment of a curator ad litem is warranted at this stage, and the application falls to be struck from the roll.

RELIEF CLAIMED IN THIS APPLICATION

[6] In summary, the applicant seeks the following urgent relief, including:

(c) The appointment of an advocate as curator ad litem to represent [L] (prayer 2);

(d) An order that the curator investigate and make recommendations and report to the Court, as well as prepare a final report for the trial court at least six weeks prior to the trial date (prayer 3);

(e) An order directing the curator to investigate, inter alia, whether [L] should undergo further assessments regarding care and contact pending trial; what contact arrangements should pertain between [L] and the applicant pending the trial; what proposals she has regarding [L's] welfare generally and future care and guardianship arrangements pending the trial; and what safeguards should be in place regarding Mr M's care of [L] once he is released from the rehabilitation clinic where he is presently (prayer 4);

(f) The granting of various powers to the curator, including:

(i) to confer with and obtain reports from any medical and mental health professionals who have treated or assessed [L] or Mr M; to confer with [L's] teachers and any collateral persons she deems relevant;

(ii) 'to represent the minor child whenever there is litigation between [the] Applicant and the First Respondent which involves or affects [the] minor child, and to represent the minor child at the trial';

(iii) to determine [L's] best interests 'from time to time' regarding contact arrangements; to engage with Mr M's mental health professionals at L[...] M[...] Clinic or elsewhere; to have access to 'any documentation or records that directly or indirectly pertain to the minor child's best interests';

(iv) to appoint a professional, including a social worker, to 'oversee the situation' at Mr [L's] home where [L] presently resides, 'by visiting the home, including the right to require such person to sleep over at the home for observation purposes';

(v) That the curator file her first report on or before 17 July 2026, with the power to file earlier reports should she deem this necessary (prayer 7); and

(g) That the applicant and Mr M bear the costs of the curator in equal shares (prayer 8).

[7] The breadth of the powers sought, encompassing determination of the minor child's best interests, oversight of parties' medical treatment, access to all records, and the right to have a professional sleep over in the respondents' home, is a matter to which I return below.

BACKGROUND

[8] [W] was born in October 2018 by surrogacy during the course of the marriage between Mr M and the second respondent, Mr L. Their marriage terminated by divorce on 13 November 2020.

[9] [L] was born, also by means of surrogacy, during the course of a romantic relationship between the applicant, Mr R, and the first respondent, Mr M, which commenced during August 2020 and culminated in their marriage on 25 April 2023. [L] has just turned four years of age.

[10] According to Mr R, Mr M from early in their relationship struggled with addiction to various substances and became depressed. During such periods, Mr R says, he was called upon to play the primary parenting role in relation to [L].

[11] On 9 February 2024 Mr M left the common home and moved in with his mother, Ms AM. Since then, Mr R avers, he has had to fight to exercise meaningful contact with the children.

Brief litigation history to date

[12] Mr R issued summons on 29 August 2025 claiming, in relation to [L], joint care and co-guardianship with Mr M, a declaration that he is a co-holder of full parental responsibilities and rights, and joint residency, alternatively contact on a rotational basis with equal sharing of school holidays.

[13] On 2 December 2025 a hearing was held before Francis J to determine inter alia interim care and contact pending the action.

[14] By order dated 2 December 2025 ('the December order') (the reasons for which were delivered later on 11 February 2026), Francis J imposed an interim contact regime pending the action and directed Mr R to cooperate with Mr Altman's ongoing assessment. The interim contact regime reduced Mr R's contact under the previous '6:8 arrangement' (six day/nights on a 14 day cycle).

[15] On 19 January 2026 Mr R brought an application in terms of section 18(2) read with section 18(3) of the Superior Courts Act 10 of 2013 for the suspension, pending appeal, of the December order.

[16] An application was later also brought for the recusal of Francis J based on alleged deficiencies in the reasons for the December order given in his

judgment of 11 February 2026. The recusal application was heard on 25 February 2026 and dismissed on 3 March 2026.

[17] On 10 March 2026, after receiving information that Mr M was using drugs, Mr R's attorneys demanded that Mr M submit to drug testing. The demand was not heeded, prompting Mr R to launch an urgent application that afternoon for hearing the following day. By evening Mr M's attorneys had acceded to the testing sought.

[18] When the matter came before Francis J on 11 March 2026, however, Mr R did not confine himself to drug testing relief. He pressed for a summary enquiry into the appropriate interim care and contact arrangements ('the summary enquiry') in light of developments.

[19] The application for leave to appeal the December order was set down before Francis J together with the summary enquiry on 28 April 2026. However, at the hearing Mr R abandoned the summary enquiry. He raised a legal objection that Mr L had not been declared an interested person in terms of section 23 of the Children's Act, and that an order as to [L's] primary residence could not therefore be made in his favour, and further submitted that Mr M's confinement in a rehabilitation clinic made the enquiry unnecessary.

[20] Leave to appeal the December order was then refused by Francis J on 4 May 2026, and Mr R served a notice of withdrawal of his section 18 suspension application a day later on 5 May 2026.

[21] Two days later, on 7 May 2026, this application was launched.

Correspondence prior to the hearing

[22] The application was served on the respondents' attorneys at 18h48 on Thursday, 7 May 2026 and set down for hearing on Wednesday, 13 May

2026. The following morning, the respondents' attorneys wrote to the applicant's attorneys objecting to the short notice and querying whether the applicant's attorneys had informed Francis J of the application to ascertain his availability. The letter further observes that the ‘application is nothing other than a transparent attempt to vary and appeal the order of Judge Francis in a different guise’.

[23] The applicant's attorneys replied the same day stating that this application would be set down before the urgent duty judge as Francis J had ‘made it clear that he will no longer be involved in proceedings involving these parties, save to assist in the allocation of an early trial date.’

[24] The respondents' attorneys separately forwarded their letter of 8 May 2026 directly to the registrar of Francis J. Upon discovering this, Mr R’s attorneys objected to the communication with Francis J, characterising it as ‘forum shopping.’

[25] On 11 May 2026, the respondents' attorneys wrote to Francis J's registrar, bringing attention to the fact that the applicant had launched the curatorship application and set it down before me in the fast lane of the Third Division on 13 May 2026. They requested that Francis J indicate whether all related applications should remain before him.

[26] On the same day, Francis J's secretary responded indicating that Francis J was engaged in another matter on 13 May 2026 and suggested that the application be referred to the judge on urgent duty. The matter accordingly came before me.

Developments since December 2025 hearing and the founding affidavit's motivation for the relief claimed

[27] Mr R states that during the course of his relationship and later marriage to Mr M, the family unit comprised himself, Mr M, [L], [W], and his two sons M[...] and M[...]. Mr M struggled with addiction and severe depression, and Mr R was 'called upon to perform a primary parenting role' for both children.

[28] He avers that his bond with [L] has been described by an expert, Ms Pettigrew, and by the Family Advocate, as a primary attachment bond, and by the Family Advocate's social worker as being preferential even to the bond between [L] and Mr M. Mr L, by contrast, exercised only 'sparing contact' with [W] during this period and had 'no contact at all with, nor any form of relationship with [L].'

[29] Mr R alleges that from at least December 2025, Mr L was aware of Mr M's relapse into drug-taking and that both respondents colluded to conceal the extent of this from their own legal representatives, the experts, and the Court.

[30] Mr R alleges further that, following Mr M's admission to a drug rehabilitation clinic on 20 March 2026, the two respondents agreed, without reference to him and in breach of an 11 March 2026 order, that [L] and [W] would reside primarily with Mr L. He contends this arrangement is unlawful in that Mr L is neither [L's] parent nor a person with an interest in [L] as contemplated by section 23(1) of the Children's Act, and that Mr L had, until as recently as September 2025, shown no interest in [L]. He further alleges that the arrangement contravenes an order made by Francis J.

[31] As regards [L's] welfare in these circumstances, Mr R states that when he leaves to stay with Mr L he becomes 'inconsolable', and that he has

‘extremely traumatic WhatsApp videos reflecting this.’ He also alleges that Mr M’s representatives refused his expert, Ms Pettigrew, the right to observe [L] at Mr [L’s] home.

[32] Mr R expresses his regret that, following the interim December 2025 order, he is ‘only able to exercise contact with [L] on a Wednesday and one weekend a month (7 days a month, when I had previously enjoyed 12 days a month).’ He laments that Mr L ‘is now exercising contact with [[L]] commensurate with that which the 2 December 2025 order afforded to Mr M as [L’s] father’.

[33] Mr R also expresses concern that it is ‘extremely difficult to negotiate anything’ with Mr M on these issues. He adds that he ‘certainly support[s] attempts to improve [[L’s]] bond [with Mr M], but not at the expense of the very important and emotionally foundational bond which I have with [L].’

[34] Aside from cataloguing the above issues pertaining to interim contact after the December order, Mr R states that it is ‘essential and in the best interests of the children that the relief be granted without delay’, and that a curator ad litem is needed urgently to ‘ascertain what is going on in the home of [Mr L] and what is to happen when [M] is released from the clinic.’

[35] Notably, no expert reports are attached to the founding affidavit pertaining to the desirability of appointing a curator ad litem in light of any circumstances which have arisen since the last judicial consideration of care and contact a few weeks ago. Nor is any reference made to previous judicial pronouncements in the case management directions to which I will refer below.

Mr M's opposing affidavit

[36] Mr M at the outset raises three in limine points. First, he says that his attorney immediately wrote to Mr R's attorney on receipt of the application, noting that Francis J had been seized of the matter and all ancillary applications for approximately one year, and that it would be 'difficult, if not impossible, for any other Judge, besides Francis J, to adjudicate the curatorship application fairly without having read most of the previous nine applications brought by the Applicant in this matter.' Second, he notes that Francis J had previously ruled that all matters between the parties are to be heard in camera. Third, and of central importance, he draws attention to the case management directions issued by Francis J in relation to the various interlocutory applications including the summary enquiry into interim care and contact. These directives are worth setting out in some detail given their relevance to this application.

[37] On 8 April 2026, following a hearing on 11 March 2026 which had been triggered by Mr R's urgent drug-testing application, and following Mr M's admission to in-patient rehabilitation on 20 March 2026, Francis J issued case management directions consolidating all pending applications for hearing on 28 April 2026. In those directions he stated:

> 'This Court is acutely aware that the children, [W] and [L], are not pawns. They are young, vulnerable, and have already experienced significant disruption. The proliferation of applications — urgent, stay, leave to appeal — is contrary to their best interests. All the experts have at some stage or another, and in one way or another, remarked that the greatest risk to the well-being of the children is the conflict between the adults.'

[38] He added:

> 'Enough is enough. The consolidated hearing on 28 April 2026 will be the occasion for a final determination of the interim care arrangements pending the

action filed by [Mr R]. Thereafter, no further applications will be permitted without compelling new evidence or a material change in circumstances.'

[39] In his supplemental case management directions of 10 April 2026, Francis J reiterated: 'No further interlocutory applications will be entertained except for genuine emergencies relating to the children's safety.'

[40] Critically for present purposes, the 8 April 2026 directions also provided, under paragraph 2.1, that 'the children shall continue to reside primarily with [Mr L], meaning that the arrangement about which Mr R now complains was itself endorsed by Francis J at a time when he was aware of Mr M's admission to rehabilitation and the nondisclosures preceding it.

[41] In relation to the consolidated hearing set down for 28 April 2026, Mr M points out that this was the forum in which all the material facts now advanced as justifying this application (Mr M's drug use and admission to rehabilitation, the arrangements for the children in his absence and upon his return, and the appropriateness of Mr L as a caregiver) would have been ventilated. However, Mr R, on 28 April 2026,

'inexplicably, and without any notice to [Mr L] or me, submitted that for various reasons the enquiry should not proceed, despite the process for the enquiry having been initiated by [Mr R] himself....'

[42] Mr M submits accordingly that 'this application is again a further attempt to address the interim contact arrangements, which interim contact arrangements would have been addressed by the enquiry initiated by [Mr R] in terms of his application, which he then withdrew or abandoned.'

[43] On the merits, Mr M addresses what he characterises as the two reasons advanced by Mr R for the appointment of a curator. As to the allegation that he would not allow Mr R's experts to evaluate [L], Mr M states that this is incorrect, and that his objection to the applicant's experts observing and

interviewing the children was confined to the consolidated hearing of 28 April 2026, where Francis J had ruled, in terms of his supplemental directions, that 'the children have already been the subject of multiple expert reports. They need a respite from being 'observed' and 'interviewed' on behalf of competing adults'. Mr M avers that he 'never indicated that the Applicant's experts will be precluded from assessing and/or observing the children for the purposes of the further conduct of the matter and for purposes of the trial'.

[44] As to the second reason, that it is difficult to negotiate with him, he references Francis J's reasons for the December order, delivered on 11 February 2026 which were animated principally by the consideration that 'it is in the best interests of the children that the contact arrangements prioritise the children's emotional security, sibling bonds and stability', and that 'as far as reasonably possible, [L's] contact with the Applicant should align with [W]'s contact with the Applicant in order to avoid sibling separation and to ensure consistency in their routines.'

[45] In his reasons, Francis J further held that:

> 'The children's need for a stable, unified family environment outweighs the marginal benefit of maximising individual time with [Mr R] if it fractures their shared life…[Mr R] is entitled to meaningful contact in terms of Section 23 of the Children's Act, however, such contact must be structured in a manner that preserves the Respondents' parental authority, prioritises the sibling bond, and reduces the potential for future conflict.'

[46] Mr M submits that he is [L's] sole parent and is not required to 'negotiate' with Mr R about decisions he makes for [L], and so the appointment of a curator cannot assist Mr R in asserting rights he does not have.

[47] In relation to the decision to place [L] with Mr L during his rehabilitation, Mr M states that he made this decision as [L's] sole parent. He explains that Mr L is [W]'s joint parent, and that it was accordingly natural and in the children's interests for them to reside together in Mr [L's] home, ensuring maintenance of both sibling contact and also contact with Mr R, as endorsed by Francis J in his April directions.

[48] As to the non-disclosure of his drug use, Mr M does not directly address this in detail but his expert, Mr Dowdall, notes that when Mr L became aware of Mr M's relapses, rather than making immediate disclosure, he 'implemented careful oversight' including requiring submission to regular supervised drug tests between January and March 2026, (which returned negative results), and helped ensure he attended sessions with his drug counsellor and psychiatrist. The decision not to disclose the situation was informed by the view that 'this would unleash another acrimonious legal and psychological assessment' at the instance of Mr R. Mr Dowdall characterises Mr [L's] approach as 'practical, protective and child-focused', and states that he does not see it as 'reckless or as indicative of an 'enabling' mind-set, given the overall context in which it occurred.'

[49] In support of the contention that the children are faring well under their current arrangements, Mr M relies inter alia on a communication from [L's] school principal, Ms Kaimowitz, dated 23 February 2026 which states:

> '[L] transitions smoothly on arrival and quickly conforms to the daily schedule. He settles into classroom routines enthusiastically, engages with other children and activities and responds well when the structure and expectations of the day are clear and consistent' and that 'it is very encouraging to see [L] beginning to build friendships and form positive connections with the children in his new class.'

[50] As to his own recovery Mr M submitted a report from his psychiatrist Dr Tayob dated 12 May 2026, stating that despite the ongoing stress and

uncertainty of this litigation, Mr M remained positive and engaged in the treatment process, applying recovery tools and coping strategies appropriately. The report further states that he has demonstrated the capacity to make sound and considered decisions regarding the care and well-being of his children, and that he benefits from a strong support network of family and friends. However, the report declines to comment on the sustainability of his commitment to his children and parenting responsibilities beyond the period of the clinic's care and involvement.

[51] Third, as regards expert evidence, Mr Dowdall, in his report of 7 April 2026, states that ‘in prior assessments, and school settings, [L] and [W] have been described as well-adjusted and happy children’ and that in Mr Altman's current 2026 observations he ‘likewise considers the children to be well-adjusted and happy.’ As to Mr R's video evidence of [L’s] ‘tantrums,’ Mr M quotes the joint expert minute of 16 April 2026 in which Mr Dowdall is recorded as saying that ‘videos of toddler tantrums are not necessarily indicative of trauma’. Mr M adds that [L] has on occasion also ‘protested loudly’ and cried when due to have contact with Mr R, but that he ‘would not dream of videoing [L] in his moments of distress’, conceding that [L] ‘then settles once he is with [Mr R].’

[52] Notably Mr M does not raise an objection to the costs of the appointment of a curator ad litem which are likely to be significant especially if other experts are appointed by her. Accordingly, this is not an issue which I have considered relevant in assessing whether a curator ad litem should be appointed.

Mr [L’s] opposing affidavit.

[53] Mr L avers that this is the seventh urgent application launched by Mr R since February 2024, launched within 72 hours of Mr R abandoning his

application for leave to appeal the December order and withdrawing his application in terms of section 18 of the Superior Courts Act.

[54] Mr L takes issue with Mr R's characterisation of his relationship with [L], which he describes as based principally on the views of Ms Pettigrew, who (as recorded in the joint expert minute of 16 April 2026) was constrained to admit that she had never observed Mr L with [L] and accordingly was 'not in a position to comment' on that relationship. Both Mr Dowdall and Mr Altman, by contrast, have observed Mr L with the children and reported positively on his interactions with them. Mr Altman in his September 2025 report described Mr L as 'lovely with the children', noting that 'he is easy going, bounded. He shows love to the children with a shining openness and it was clear that the children adore him and are easily and connected to him.'

[55] As to the objective evidence of [L's] well-being, Mr L states that, contrary to Mr R's depictions of [L's] distress, there have been 'only two tantrums — one in December 2025 (before the new regime was implemented) and one in January 2026', and that no further evidence of trauma or distress has been placed before the court. He provided logs of the children's wellbeing to Francis J as directed, and these reveal [L] cried on one occasion for the au pair, and on one occasion for Mr M, and was easily settled on both occasions. He adds that on one morning [L] cried and said he did not want to go to Mr R, which he characterises as normal behaviour for a four-year-old requiring support after contact periods. He adds that he (unlike Mr R) would not 'dream of videoing [L] in his moments of distress.'

[56] Mr L strongly disputes that [L's] presence in his home is contrary to any court order. He states that Mr M, as [L's] sole parent, made the decision that [L] should reside with him for the duration of the rehabilitation, principally to keep the children together, and that Francis J specifically endorsed this

arrangement in his April 2026 case management directions. He further states that, when Mr R's counsel contended before Francis J that the arrangement was in breach of paragraph 7.4 of the 11 March 2026 order, Francis J ‘stated in no uncertain terms’ that the reference to ‘First Respondent and Second Respondent’ in that paragraph ‘should of course be read as 'or'.’

[57] Mr L further takes exception to the powers claimed in the notice of motion. He contends that the powers conferring access to his medical records and treatment information are in violation of the National Health Act.[3] He deprecates the proposal to have a social worker appointed by the curator ‘oversee the situation’ in his home, ‘including the right to require such person to sleep over at the home for observation purposes’. He also points out that a curator ad litem is sought to represent only [L], yet the powers sought would also significantly impact [W]'s rights as well as his own parental rights, when no case is made for such interference.

[58] Mr L therefore submits that [W] has been ‘air-brushed out of this application’ with no regard for one of the foundational principles of the December order, viz. the preservation of the sibling bond. He submits that this application is ‘yet another demonstration of the Applicant's reaction to not getting what he wants’ and ‘an abuse of the process of Court, vexatious and contemptuous’, representing a further attempt to appeal the 2 December 2025 order via a different means.

[59] He concludes that the appointment of a curator would be detrimental to both children's best interests, as they should not be subjected to yet further interviews and observations, particularly when the parties' respective experts will in any event be updating their reports for trial.

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[3] National Health Act 61 of 2003.

Mr R's replying affidavit

[60] Mr R filed only a short affidavit in response to Mr [L's] affidavit. He filed no response to the affidavit of Mr M and accordingly those facts stand largely uncontradicted.

[61] In his replying affidavit Mr R does not accept that the children are thriving under the current arrangements, relying on his own observations of [L's] distress when leaving his home. He reiterates that he 'has witnessed many incidents of tantrums by [L] and, particularly, when he has to return to the home of [Mr L].'

[62] It is further of some significance that Mr R concedes that the prayers in his particulars of claim referring to parental rights and responsibilities were 'a misnomer' which requires amendment, and that he 'fully appreciate[s] that [he] cannot obtain parental rights and responsibilities.'

[63] He maintains, however, that the respondents' opposition to the curator appointment demonstrates their desire to avoid scrutiny of what is happening in Mr [L's] home, arguing that 'if there is nothing to hide, the appointment of a curator ad litem will do no harm.'

Mr R's submissions

[64] Mr R submitted heads of argument prepared without reference to any answering papers filed by the respondents because by that stage the respondents had failed to comply with the deadlines set for the filing of their answering affidavits (09:30 on Tuesday, 12 May 2026). Mr R submits that the respondents 'ignore the imperative' that they file answering papers by this time, 'in direct contravention of the Appellate Division authority in the case of *Republikeinse Publikasies (Pty) Ltd v Afrikaanse Perse Publikaseis*

Ltd'.[4] (This of course begs the question as to whether the timetable set was reasonable, an issue to which I return later).[5]

[65] Mr R submits in this matter that one is dealing with

> 'two Respondents who are dishonest … who have colluded together to mislead the Court. They have withheld vital information from the Court, the Applicant, their own experts and their own legal representatives, and they have done so not on isolated occasions, but on several occasions.'

[66] Mr R submits that Mr M prior to the December 2025 hearing painted himself as a man in good health, whereas in truth, he had relapsed into drug-taking in Israel in October 2025. Mr L 'again partook in drugs in mid-December 2025 and again in Australia took cocaine and methamphetamines … [and] he got involved in drugs in mid-January 2026 at a festival in Citrusdal'. These facts were 'well known to the Second Respondent when he deposed to an affidavit on 27 January 2026, and when his counsel addressed the Court on 11 March 2026.'

[67] Mr R continues by remarking that 'by the time the Second Respondent came clean, which was only on 20 March 2026, the damage had already been done, in that Respondents had already, in collusion, achieved their aims, namely to substantially diminish Applicant's contact with [L]'.

[68] Mr R also does not accept the 'curated version of the truth' which emerged from the respondents' affidavits on 20 March 2026, stating that the hair follicle tests reveal 'heavy drug-usage for 3 months prior thereto, at 37 times the level of a positive test.'

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[4] *Republikeinse Publikasies (Pty) Ltd v Afrikaanse Perse Publikasieis Ltd* 1972 (1) SA 773 (A) at 782A.

[5] The respondents made certain submissions in a practice note but did not file heads of argument.

[69] Mr R contends that 'as matters stand, there is in place a situation by virtue of the 2 December 2025 Order, which amounts to an order which is unlawful insofar as primary care and contact of [L] currently invests in [Mr L] who is neither [L's] father nor a person with an interest in [L], as contemplated in section 23 (1) of the Children's Act.'

[70] Mr R also points out that the trial date may not be allocated within a year, and the respondents have even mooted the possibility of a separation of issues, which would have the effect of delaying the trial. The result would be that the interim arrangements could continue in place for an appreciable time.

[71] Mr R also submits that the respondents' newly appointed expert, Mr Altman, 'cannot be trusted' given his lack of professionalism and independence, and that at the moment his legal team is

> ''blindfolded' – his experts have been denied the right to observe what is going on in the Second Respondent's household. It is accordingly shocking that there should be an objection … to the appointment of an independent third-party looking after the interests of [L]. We pose by way of a rhetorical question whether it is [Mrs M] (Senior) or [Mr L] who is caring for the children, and why it is that [L] is throwing tantrums from time to time. A further question should be of concern to the Court, is where [Mr M] will live when he exits the clinic, and who will [Mr L] report to if he relapses?'

[72] Mr R, responding to the allegations of 'forum shopping', states that the correspondence preceding this application indicates a 'transparent attempt of the Respondents to have the matter come again before Francis J', which is 'forum shopping' of the worst variety'.

[73] As to the references by the respondents to the case management directives issued by Francis J, Mr R contends that during the argument on 6 May 2026

before Francis J he 'stated unequivocally' that they (the case management directives) would not continue to be binding.

[74] On the issue of the appointment of a curator ad litem Mr R emphasises authorities which indicate that curators ad litem are appointed where, even if the minor has a guardian, 'the interests of the minor are in conflict with those of the guardian or there is a possibility of such a conflict'[6] or where there is a 'risk of injustice'.[7]

JUDGEMENTS HANDED DOWN IN THE WEEK PRECEDING THE HEARING

[75] In the week preceding the hearing three judgements were handed down by Francis J in relation to the costs of various interlocutory proceedings which had been before him in the course of the year to date. At least two are relevant in the present context.

[76] As to the costs of the urgent drug-testing application of 10 March 2026 and the summary enquiry which followed from it, culminating in the hearing of 28 April 2026 at which Mr R abandoned the enquiry, Francis J held:

> 'the applicant pressed for a summary enquiry into the nature and extent of [Mr M's] drug use, and for an order that the primary residence of [L], and possibly [W], be transferred to him.'

[77] Of relevance to the present application was the fact that Francis J found that Mr R could not excuse his last-minute abandonment of the enquiry on the basis of arguments that were available to him well in advance:

> 'The first respondent's continued presence at the rehabilitation center, the safeguards likely to attend his discharge, and the legal objection concerning the

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[6] *Wolman and others v Wolman* 1963 (2) SA 452 (A) at 459.

[7] *Du Toit and another v Minister of Welfare* 2003 (2) SA 198 (CC) at 201, para 3.

second respondent's status, were available well before 28 April 2026. Some of them were available from 11 March 2026 itself. None required any new factual development. The applicant offers no explanation for why these contentions were withheld until the day the experts assembled at court.'

[78] Francis J expressed similar sentiments in his judgement on costs pertaining to the withdrawal of the application in terms of sections 18 (2) read with section 18 (3) of the Superior Courts Act. He accepted that the nondisclosure by Mr M and Mr L of the drug use was a 'serious matter': deponents in proceedings concerning the welfare of children 'owe a duty of candour to the court' and 'are not entitled to confine themselves to answering the questions framed by the other side'.

[79] Nonetheless, he rejected the 'clean hands' argument which had been advanced by Mr R in opposing a costs award on the basis that the withdrawal of the application came only after the refusal of the application for leave to appeal, not at the time of the disclosure of the drug use.

APPLICABLE LEGAL PRINCIPLES

Urgency and procedure

[80] Section 4 of the Children's Act[8] provides that, in all proceedings, actions or decisions in a matter concerning a child, a delay in any action or decision must be avoided.

[81] However, as held in *MM v NM and Others*:[9]

'urgency is not automatic in cases involving minors. It can never be so. The converse would be chaotic for our Courts especially for the urgent Court, seized with its caseloads.'[10]

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[8]Children's Act 38 of 2005.

[9] *MM v NM and Others* (15133/23P) [2023] ZAKZPHC 117 (18 October 2023)

[82] It therefore remains the case that an applicant who seeks to intrude themselves into the queue of litigants awaiting a hearing must properly motivate the urgency of the matter, even if it relates to the welfare of a child.

[83] As held in *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*[11]

> 'The procedure set out in rule 6(12) is not there for taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course… the delay in instituting proceedings is not, on its own a ground, for refusing to regard the matter as urgent. A court is obliged to consider the circumstances of the case and the explanation given.'

[84] An applicant who seeks urgent relief must thus provide a full explanation for its alleged urgency and for any delays in bringing the application in its founding affidavit.[12] A litigant 'may not simply sit back without taking steps to seek urgent relief or seek such relief without a full and proper explanation for any delay in doing so.'[13]

[85] An applicant must motivate its urgency based on the fact that its entitlement to deviate from the rules is dependent upon and derived from the urgency which it establishes on the papers.[14]

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[10] See further the remarks of Parker AJ in *D.D v I.L and Another* (16939/2024) [2024] ZAWCHC 215 (20 August 2024); *E.L.B v A.V.M* (7521/24) [2024] ZAWCHC 132

[11] *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* (11/33767) [2011] ZAGPJHC 196 (23 September 2011)

[12] *Salt and Another v Smith* 1991 (2) SA 186 (Nm); *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W)

[13] *Mhonko's Security Services CC v City of Cape Town and Others* (21132/2018) [2018] ZAWCHC 168 (30 November 2018)

[14] See *Gallagher v Norman's Transport Lines (Pty) Ltd* 1992 (3) SA 500 (W) at 502I.

[86] It is further relevant in the present context to note the following practice directives:

(h) In terms of practice directive 36B (5), in matters involving minor children:

> 'the Judge shall as far as possible, retain and manage files where the interests of the minor children are at stake. Any other proceedings pending in this Court in respect of the same child or children should be managed by the same Judge to avoid fragmentation of matters impacting on the same children.'

(i) In terms of practice note 36B(6), any party in a case involving a minor child may approach the Judge President by way of a practice note for the appointment of an overseeing/supervising Judge should that be deemed necessary.

Principles governing the appointment of a curator ad litem

[87] In cases where the interests of the minor child are in conflict with the guardian, or there is a possibility of such conflict, it is necessary to have an independent person appointed as curator ad litem. [15]

[88] In matters where the interests of children are at stake, it is important that their interests are fully aired before the court so as to avoid substantial injustice to them and possibly others. Where there is a risk of injustice, a court should appoint a curator to represent the interests of children.[16]

[89] It is not the function of a curator to adopt an objective approach. The Family Advocate is available to provide neutral assistance, should that be

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[15] *Wolman and Others v Wolman* 1963 (2) SA 452 (A)

[16] *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC).

required. The function of a curator is rather to advocate the minor child's interests by advancing all possible arguments advantageous to the child.[17]

DISCUSSION

Basis for urgency

[90] As the authorities cited in paragraph [85] lay down, it is incumbent upon an applicant to show that the timetable imposed, and the date chosen for the hearing, was reasonable in all the circumstances. The hearing date should take into account the rights of the respondent to mount a proper defence as well as the basis for the urgency of the relief claimed. This is a balancing act which must always be undertaken by an applicant who seeks an urgent hearing, and which will be weighed by the court when it considers whether urgency has been established on the papers.

[91] The motivation for urgency in the founding affidavit is the following:

(j) Mr M does not accept the contentions relating to the current well-being of the children at school and in the home of Mr L;

(k) Ms Pettigrew has expressed the view that reducing Mr M's contact time with [L] is not in [L's] best interests;

(l) Mr R attempted to have his expert observe [L] with Mr L, but this was refused;

(m) Matters concerning children are 'generally urgent' having regard to the provisions of the Children's Act 'and this application admits of no exception';

(n) It is a matter of

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[17] *Legal Aid Board: In re Four Children* (512/10) [2011] ZASCA 39 (29 March 2011)

> ‘extreme urgency that an independent voice, such as the curator ad litem, ascertain what is going on in the home of [Mr L] and what is to happen when [Mr M] is released from the clinic. Although he is expected only to be released in June 2026, there is nothing to prevent him from leaving at a much earlier time, and the curator will be able to urgently advise the court as to safeguards required.’

[92] The primary basis submitted by Mr R for the acknowledged ‘extreme urgency’ is thus the fact that Mr M, though currently confined to a drug rehabilitation clinic from which he is due to emerge in mid-June 2026, may be released (seemingly of his own volition) ‘at any time’. As matters presently stand, there is no court order in place containing safeguards for the protection of [L] as and when his father exits the in-patient programme.

Self-created urgency

[93] Mr R’s counsel candidly and correctly admitted in argument that the trigger for this application was the refusal of Mr R’s application for leave to appeal the December order. This occurred on 4 May 2026.

[94] The difficulty with the above is that the reason advanced for the urgency of the application is not motivated with respect to the dismissal of the application for leave to appeal the December order. On the founding papers the urgency is said to arise from Mr M’s relapse into drug-taking.

[95] It is further not in dispute on these papers that the above issue now said to constitute the reasons for the urgency originated in early March 2026. In Mr R’s own founding affidavit he says that he received ‘a tip-off of cocaine usage by Mr M…on the 7 March 2026 weekend…which led me to launch the drug-test application’.

[96] The day after the launch of the drug-testing application on 10 March 2026 an order was granted on 11 March 2026 to the effect that, pending a hearing on 8 April 2026, interim arrangements in relation to the children would

apply, and that 'save for when the children sleep at the home of [Ms A.M.] their grandmother, should the First Respondent and Second Respondent not be able to be present with the children, the children shall be placed with the Applicant' (para 7.4).[18]

[97] The founding affidavit then narrates how the hair follicle and urine drug tests on 12 March 2026 to which Mr M submitted established drug usage in the preceding 3 months. In the ensuing 'affidavits filed by the respondents on 20 March 2026, the extensive drug use became apparent', and 'revealed that Mr L had deliberately decided … that he would not inform either myself or the Court of his knowledge of Mr M's relapses.' Mr M then booked himself into the in-patient drug rehabilitation programme.

[98] It is therefore established on the papers that Mr M's relapse was known to Mr R by 7 March 2026, and by 20 March 2026 there could be little doubt about the gravity and extent of the relapse. Accordingly, all the conditions necessary for relief relating to the appointment of curator ad litem were present by no later than 20 March 2026, but arguably from as early as 7 March 2026. Yet despite this Mr R did nothing to appoint a curator, focusing instead on the summary enquiry and his attempts to obtain leave to appeal the December order. It was only after he abandoned the summary enquiry on 28 April 2026, and his application for leave to appeal was dismissed on 4 May 2026, that Mr R turned to the relief he now seeks. This is despite the fact that the advantages now said to flow from the appointment of a curator ad litem would have been just as apparent in the time preceding the dismissal of the application for leave to appeal. (Counsel for Mr L

[18] As noted elsewhere it is not disputed that Francis J stated this should be interpreted as stating 'First Respondent or Second Respondent'.

submitted that Mr R during this time was ‘content for Mr M to be a parent to [L] for 16 out of 28 nights but not for 21 out of 28 nights’).

[99] It is further important to remember that the summary enquiry was intended to ventilate the recent concerns which had emerged in relation to Mr M’s relapse, with the benefit of expert evidence. I may add that in my view it was an ideal opportunity to do so. I do not accept the suggestion made in argument by Mr R’s counsel that the pre-hearing directions in relation to the evidence which could be led, and the fact that lay witnesses could only be led with the leave of the court, rendered the summary enquiry somehow inapposite for the purpose for which it had been constituted.

[100] On a conspectus of all the facts, therefore, it cannot be gainsaid that Mr R, for reasons which still remain unclear, abandoned the opportunity presented by the summary enquiry to ventilate the issues arising from Mr M’s relapse and admission to a rehabilitation clinic. Moreover, the December order and the attempt to appeal it had nothing to do with the appointment of a curator ad litem and everything to do with the rights of Mr R to contact, placing further strain on the ostensible motivations for urgency.

[101] In short, the urgency advanced is self-created because Mr R was aware of all the circumstances now relied upon for urgency from as early as 7 March 2026, and certainly by no later than 20 March 2026. He elected not to seek the appointment of a curator ad litem at that stage, instead pursuing the summary enquiry, and thereafter his application for leave to appeal the December order. Only after those avenues closed did he turn to the present relief. The common-cause trigger for this application was not any fresh or supervening concern relating to the welfare of [L], but rather the failure of these other litigation endeavours. An application for the present relief could

have been launched much earlier in March 2026, but was not. This is classic self-created urgency.

The timetable for filing papers and choice of hearing date

[102] In the event, three court days' notice of the hearing was provided after this application was launched on the evening of Thursday, 7 May 2026. The notice of motion required the respondents to deliver their answering affidavits by 09:00 on Tuesday, 12 May 2026. No provision was made for replying affidavits, and the hearing was scheduled for the following day, Wednesday 13 May 2026.

[103] The reasons for choosing 13 May 2026 as the date for hearing are not made clear. As mentioned, the founding affidavit predicates the urgency on the imminent discharge of Mr M from rehabilitation, suggesting that, though only scheduled for discharge in June 2026, he may emerge suddenly at any time. However, (for instance) no attempts were made by Mr R to ascertain, in the week before the hearing, whether Mr M would be likely to be discharged the following week. If that answer had been in the negative, then more time could have been afforded to the respondents (and to court) to digest the application. Indeed, such enquiries may have revealed that there is no intention on the part of Mr M to be discharged prior to June 2026, or could have engendered an undertaking from him to this effect, so that this matter could have proceeded in a more measured way, as its seriousness requires. The position is exacerbated by the self-created urgency already discussed.

[104] Finally, it is relevant that the practice directives quoted in paragraph [86] above imply that there was a duty on the applicant either to ascertain the availability of Francis J to hear the matter on a mutually convenient date,

(subject to any perceived urgency), or to urgently seek the appointment of a new Judge to oversee the matter by way of a practice note.

[105] It may be so that Francis J had, in the course of a previous hearing, indicated that he would no longer remain involved beyond securing a trial date, and that he intimated that he would approach the Judge President to allocate a different Judge to oversee the matter. However, the fact remains that the founding affidavit does not explain why an approach was not first made to Francis J, before the choice was made of 13 May as the date of the hearing. For instance, if Francis J was available on 14 or 15 May, or even in the following week, this would have made no discernible difference on the case for urgency advanced, and the matter could have been adjudicated by a court familiar with the facts and the history. Approaching the duty court in the fast lane in Third Division on 13 May 2026 should have been resorted to last, not first.

The desirability and need for the appointment of a curator ad litem

[106] Despite what I have said above on the issue of urgency, even if an applicant drags their heels unnecessarily, or pays insufficient heed to the usual requirements to motivate the urgency of the hearing date, this may not negate the need for urgent relief if the interests of the child demand it: it is trite that the interests of the child trump all other considerations.[19]

[107] Thus, though the urgency is self-created, and the reasons for the choice of the hearing date opaque, it is nonetheless necessary to consider whether granting the urgent relief claimed is in [L's] best interests.

[108] Counsel for Mr R argued that a curator ad litem in a matter such as this will be in a position to be 'the voice of the child' to advocate the child's

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[19] *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC)

interests in what is by all accounts an extremely acrimonious and litigious atmosphere which has infected not only the litigants' relationships but also those of the professionals dealing with the matter. The intercession of such an independent professional person, so he submitted, would conduce to defusing these tensions and focusing the parties on what is really at stake, namely the interests of [L].

[109] These arguments are superficially attractive. However, as mentioned, Mr L in his opposing affidavit expresses his view that the appointment will only increase the risk of interference in the daily lives of these children. As submitted by Mr [L's] counsel, these children are increasingly 'living under a microscope'.

[110] I agree. The pattern of the litigation thus far, even from the vantage point of my brief involvement, can lead to no other conclusion. The remarks of Francis J adverted to by the respondents, though made in the context of case management directions for previous consolidated interlocutories, are recent and remain relevant, as Mr M contends in his opposing affidavit.

[111] As already mentioned, Francis J's case management directions of 8 April 2026 ruled that, pending the summary enquiry, no further interlocutory applications would be permitted without prior leave 'except for genuine emergencies'.

[112] The court was 'acutely aware that the children… are not pawns', and that

> 'all the experts have…remarked that the greatest risk to the well-being of the children is the conflict between the adults… enough is enough…no further applications will be permitted without compelling new evidence…'.

[113] The supplemental case directions of 10 April 2026 (arising from an application to allow Mr R's experts to interview the children after they had already filed reports), observed that

'the children have already been the subject of multiple expert reports. They need a respite from being 'observed' and 'interviewed' on behalf of competing adults'.

[114] In summary, therefore, I am confronted with recent compelling judicial pronouncements that the welfare of these children will be affected by further interference in their daily lives arising from this litigation. I have before me no evidence that circumstances have changed substantially, or even at all, since then, nor do I have any expert evidence that the relief claimed is desirable and will not result in unnecessary disruption to the children. The reasons advanced for the appointment of a curator evaporate in the face of this.

[115] It is further unrealistic to expect a curator ad litem to defuse tensions in this litigation: this is the responsibility of the professionals, parents, and all the adults interested or involved in [L] and [W]'s welfare. Whilst such may be the effect of a curator ad litem, equally, in advocating for what are believed to be the child's best interests, a curator may attract accusations of partiality and collusion, and thereby risk being drawn into the ongoing internecine wrangling between the adults.

[116] It is further relevant that the appointment of a curator ad litem is not always to be thought of as a balm. For instance, in *Van den Burgh v National Director of Public Prosecutions*[20] the court declined to appoint a curator when urged to do so by the amicus curiae, the Centre for Child Law. The court accepted that there was a 'significant difference and even a conflict between the parents' and the children's interests', but held that

'the critical question is rather whether the information before the High Courts was sufficient to consider the interests of the children, or whether the appointment of a curator to present this information is necessary. In exceptional circumstances –

[20] *Van den Burgh v National Director of Public Prosecutions* 2012 (2) SACR 331 (CC)

where there is insufficient information about the children, or where the information before the Court leaves some doubt regarding the children's well-being – the Court may need to appoint a curator to conduct an independent assessment of the children's interests.'

[117] In the present matter there is ample information before the court and no impediment offered by the respondents to such further observation and interviews as may be required to assess any developing situation in Mr [L's] home. The suggestion that the case management directions preclude such observations does not hold water: they were made pending the summary enquiry which was abandoned by Mr R on 28 April 2026.

[118] Thus, should Mr R's experts require reasonable access to the children to assess the situation after Mr M's return home from rehabilitation, they would be entitled to request this; there is no need for the appointment of a curator to place this information before the court.[21]

Inadequate assurance that appointment would be in [L's] (and [W]'s) best interest

[119] I am mindful of the fact that in these urgent proceedings I have not had the benefit of expert opinions in relation to the appointment of a curator ad litem. Whilst engaging experts to opine on this would arguably be overkill, the fact remains that this matter was argued on the basis of extreme urgency in circumstances where not even the Family Advocate submitted a report on the desirability of the appointment or its possible effect on the children.

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[21] See e.g. *TH v CH* [2024] ZAWCHC 100 which also involved a parent undergoing substance-abuse treatment: the court did not consider the appointment of a curator but ordered a structured, phased approach to gradually increase the mother's contact with the child, making each phase contingent upon rehabilitation.

[120] Had a more appropriate timetable been employed, as already suggested, there may have been time to procure such a report and to weigh the issues with the benefit thereof, and with the benefit of heads of argument.

[121] Nor did the founding affidavit motivate why the Family Advocate could not perform the required investigative role into 'what was going on' in the respondents' home. After all, the Family Advocate has at their disposal qualified social workers arguably better placed to conduct these kinds of investigations than a curator ad litem. The curator ad litem, a legal practitioner whose task it would be to advance partisan arguments in the interests of the child, would in my view be less well placed to conduct such an investigation than an impartial person appointed by the office of the Family Advocate.

[122] Lacking expert views directed specifically at the issue of the appointment of a curator ad litem, the recency of the report from Mr Dowdall attached to the answering affidavit of Mr M (it is dated 16 April 2026) is relevant to address the primary basis for the relief sought, viz. the current risk posed by Mr M's drug taking. I quote the relevant passage in full:

> 'The absence, as far as available evidence shows, of any link between the alleged instability and any demonstrable harm to the children, suggests that Pettigrew's arguments may be more based on speculation than actual evidence. One allegation of neglectful parenting appears to be based at least partly on Mr M's failure to immediately disclose his substance use to the Court. Yet this, in and of itself, does not constitute neglect in parenting, in that no evidence has been presented of neglect whilst the children were in Mr M's care, nor have they been in his care when he was under the influence of drugs. In fact three of the instances occurred outside his periods of caregiving and during the fourth his mother was taking care of the children. In the absence of evidence that the children were directly exposed to harm or risk during those periods, the description of his conduct as neglectful parenting appears overstated. Pettigrew's report includes a generalised account of

the range of behavioural effects associated with the drugs in question, including increased aggression, impulsivity, diminished stress tolerance and increased risk of reckless behaviour. Whilst this is not inaccurate data in terms of general types of response to these substances, the report does not adequately connect these theoretical risks to Mr M's actual behaviour. There is no clear evidence that he has exhibited aggressive behaviour, impulsiveness or reckless conduct in his role as a parent. There is passing reference to allegations of sexual behaviour contained in recent affidavits, but reliance on this is problematic, given the contested and intensely adversarial nature of those allegations …'

[123] The above is a response to a report from Ms Pettigrew dated 25 March 2026 which was not attached to the founding affidavit.[22] However, it seems to me that these remarks of Mr Dowdall are apposite in the present context. There is little substantiation for any link between the substance abuse and harm to [L] and [W] in the founding affidavit.

[124] To sum up: there is insufficient information before the court to conclude that there is, or may be, a conflict of interest between [L] and Mr M requiring the appointment of a curator ad litem. This is because, aside from a few tantrums, all indications are that [L] is being well cared for, and is happy; on the facts currently before this court the interests of Mr M in maintaining the interim contact regime do not run counter to the interests of [L], nor is there established any appreciable risk of conflict between the interests of father and son at this stage. Moreover, even if some risk of conflict exists, in my view this does not outweigh the possible disadvantages to the children of appointing a further participant in this acrimonious

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[22] I was invited by counsel for Mr R to utilise this court's inquisitorial powers (see *Mpofu v Minister for Justice and Constitutional Development and Others (Centre for Child Law as Amicus Curiae)* 2013 (9) BCLR 1072 (CC)) and call for whatever documents are missing. However, in my view there is a limit to the extent to which this court may institute a roving enquiry unless the child's interests demand it; the founding affidavit necessarily shapes the litigation even where minor children are involved.

litigation when an impartial party such as the Family Advocate may adequately address the concerns raised.

Powers of curator unacceptably wide

[125] The respondents correctly pointed out that the powers of the curator as set forth in the notice of motion are very wide. They submitted that, even if the court could be persuaded to grant an order appointing a curator ad litem, the powers afforded in the notice of motion were unnecessarily intrusive.

[126] Whilst the notice of motion affords the curator ad litem the power to submit a report to the trial court, the focus of the powers appears to be on interim care and contact pending the trial.

[127] The respondents thus understandably submitted that the proposed appointment of a curator was nothing less than a Trojan horse for Mr R's persistent goal to increase interim contact.

[128] In response, counsel for Mr R submitted that, if I was of the opinion that any of the powers in the notice of motion were too wide, I was free to modify them or whittle them down as I saw fit.

[129] Of course this is true, but it was the responsibility of Mr R as the applicant to put forward powers he viewed as appropriate and reasonable at the outset. Whilst the court would not hesitate to craft an order whereby the curator would be afforded appropriate powers, if that was indicated, it is nonetheless not desirable (unless circumstances dictate) to leave a court to puzzle out the appropriate provisions in a draft order without expert assistance.

[130] Thus in my view, even if I had been persuaded as to the wisdom of the appointment a curator ad litem, the powers afforded in the notice of motion are too wide and intrusive, and their proper ambit remains unclear.

CONCLUSION

[131] The proposed curator ad litem appointment would entail interviews of the children by the curator, access to school and medical records, and the compiling of comprehensive reports for the court. In a matter involving children who have already been subjected to acrimonious litigation for several years, and the interference in their daily routines that such litigation inevitably produces, the proposed appointment carries the risk that ultimately it is the children that will pay the real cost of this intervention. This risk currently outweighs the risk of any possible conflict between the interests of Mr M and [L].

[132] There is further no basis advanced for concluding that circumstances have changed in any material way since the judicial pronouncements in recent weeks by Francis J to the effect that further interference in the daily routines of [L] and [W] will not be in their best interests. Mr R chose to launch this application as a matter of extreme urgency in the face of this and based on the same information already before the court. I am therefore not persuaded of the wisdom of the appointment sought.

[133] Nonetheless, the fact that Mr M's drug relapse was not disclosed at the very least to his own appointed experts and legal representatives is serious, and a cause for concern. Accordingly, if all required information is to hand as to whether the associated disruptions are warranted, a court may be persuaded to appoint a curator. I have therefore made provision in the order for the application to be appropriately re-enrolled with such amendments to the proposed powers of the curator ad litem as are deemed necessary, and after obtaining a report from the Family Advocate on the desirability of, and need for, such an appointment.

COSTS

[134] I take cognizance of the fact that generally speaking, in litigation concerning children, costs do not follow the result. But one rationale for this rule is to prevent costs becoming an obstacle to access to the courts as this will be to the detriment of children,[23] which it would seem applies with less force to Mr R.

[135] Furthermore, as held by Francis J in his judgement awarding costs to the respondents for the 2 December 2025 application, this principle does not immunise litigants in matters concerning children from costs altogether. The court retains a discretion to be exercised with due regard to the conduct of the parties and the interests of the minor child.

[136] I have made my views on the timing and basis for this litigation clear. The fact that the litigation concerns a minor child takes nothing away from these findings, particularly in that it is evident that Mr R's primary concern remains focused on increasing his own interim contact with [L].

[137] This further precipitate application is bound only to increase the existing acrimony between the parties. Repeated urgent applications of this kind should be discouraged.

[138] In the particular circumstances of this matter I therefore take the view that it is appropriate that the costs should follow the result. Given the complexity and seriousness of the matter the costs of counsel should be payable on scale C.

[139] However, I do not believe that the facts warrant costs on a punitive attorney and client scale, as was submitted by both respondents.

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[23] *JJ v RV* (5832/2019) [2020] ZAFSHC 226.

ORDER

[140] I accordingly make the following order:

(a) The application is struck from the roll with costs including the costs of counsel payable on Scale C;

(b) The applicant may, if so advised and after:

(i) compliance with practice directive 36B(6);

(ii) filing a report from the Family Advocate as to the desirability of, and need for, the appointment of a curator ad litem,

re-enrol the application for the same or modified relief on supplemented affidavits and an appropriate timetable for filing further papers.

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M GREIG
ACTING JUDGE OF THE HIGH COURT
WESTERN CAPE

Appearances:

For Applicant: Adv B Pincus SC, Adv RDE Gordon

Instructed by: Maurice Phillips Wisenberg, B Preller

For First Respondent: Adv S van Embden

Instructed by: Norman Wink & Stephens

For Second Respondent: Adv J McCurdie SC

Instructed by: Norman Wink & Stephens