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**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

JUDGMENT

Case No: 1092/2020 & 8498/2020

In the matter between:

B[...] K[...] (born C[...])

Applicant

and

S[...] C[...] K[...]

Respondent

Neutral citation: B K[...] v SC K[...] (Case no 1092/20 & 8498/20) ZAWCHC ____
(26/05/2026)

Coram: GOLIATH, DJP

Heard: 14 April 2026

Delivered: 26 May 2026

ORDER

1. The application for leave to appeal is dismissed with costs.
2. The operation and execution of the decision of this Court on 11 April 2025 under case number 1092/2020 (with 8498/2020) is not suspended, as contemplated in section 18(1) of the Superior Courts Act 10 of 2013, pending the exhaustion of all leave to appeal applications and all appeal proceedings, in all Courts, including the High Court and any Superior Court, and until they are finally determined.

JUDGMENT DELIVERED ELECTRONICALLY ON 26 MAY 2026

GOLIATH, DJP

[1] This is an application for leave to appeal filed by the applicant, Mrs B[...] K[...], against an order granted by this Court on 11 April 2025. The applicant has also filed an application in terms of section 18(3) of the Superior Courts Act 10 of 2013 seeking the suspension of the Order pending appeal, which the respondent has opposed. The applicant filed her application for leave to appeal on 8 May 2025. On 20 March 2026, almost a year later, she filed an application to amplify her grounds of appeal.

[2] The respondent instituted divorce proceedings against the applicant in January 2020. The divorce was acrimonious in the extreme. The parties reached a settlement in the divorce action in respect of spousal maintenance and the proprietary consequences of the marriage. The only outstanding issue in the divorce

was the question of the parties' exercise of their respective parental rights and responsibilities in respect of the two minor children. Adv Diane Davis SC was appointed as *curator ad litem* to the minor children. The *curator ad litem* filed a comprehensive report which culminated in a highly structured Parenting Plan. The Parenting Plan provided for the appointment of a *curator ad personam* to essentially manage the personal and physical well-being of the minor children in the dysfunctional co-parenting environment.

[3] On 11 April 2025 I granted an order of divorce incorporating a parenting plan regulating the care and contact arrangements of the two minor children as proposed by the *curator ad litem*. In terms of the order Ms Magdel Oosthuizen was appointed as the *curator ad personam* to the minor children. Significantly, Mrs K[...] heeded Oosthuizen's role as *curator ad personam* and recognised her powers as provided in the court Order until mid-January 2026.

[4] The main grounds of appeal, as amplified, on which Mrs K[...] seeks leave to appeal can be summarised as follows:

- 4.1. The Court erred in appointing a *curator ad personam* in circumstances where:
- 4.2. The children are not cognitively impaired, and the parents have not been found to be unable or unfit to parent.
- 4.3. The powers conferred on the *curator ad personam* override the parents' joint decision-making powers and to make decisions outside of the scope of the Court ordered parenting plan, amount to an improper delegation of judicial authority.

- 4.4. The appointment of the *curator ad personam* unreasonably limits the parties' rights in terms of section 34 of the Constitution and section 31 of the Children's Act 38 of 2005 ("the **Children's Act**").
- 4.5. The Court assigned parental responsibilities to the *curator ad personam* where no such application was made.
- 4.6. A parenting coordinator or mediator would have been more appropriate.
- 4.7. The Office of the Family Advocate was not directed to or given an opportunity to investigate the necessity of appointing a *curator ad personam*.

[5] The applicant seeks leave to appeal against parts of the order which primarily relates to the parenting plan and appointment of a *curator ad personam* to the minor children. The crux of the application for leave to appeal is therefore Mrs K[...]’s opposition to the appointment of a *curator ad personam* since she is of the view that such appointment imposes unconstitutional limitations on her parental rights and is not in the best interests of the minor children.

[6] It was therefore contended that the Court erred in not having due regard to the Constitutional imperative that the interests of the minor children should be of paramount importance, and in not considering its overriding role as upper guardian of the minor children. The applicant thus seeks to overturn on appeal:

- 6.1 the appointment of a *curator ad personam* for the minor children.
- 6.2 all the provisions in the order referring to a *curator ad personam*.

6.3 the provisions of clause 13 of the order which provides for mandatory dispute resolution before initiating court proceedings.

[7] Section 17(1) of the Superior Courts Act, Act 10 of 2013 regulates applications for leave to appeal and provides:

“Leave to appeal

17. (1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be

heard, including conflicting judgments on the matter under consideration;

(b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.”

[8] The test, which was applied previously in applications of this nature, was whether there were reasonable prospects that another court may come to a different conclusion. With the enactment of section 17 of the Act the threshold for granting leave to appeal a judgment of a High Court has been significantly raised. In **Mont Chevaux Trust v Goosen and 18 Others**¹ the following was stated:

“It is clear that the threshold for granting leave to appeal against the judgment of a high court has been raised in the new Act. The former test whether leave to appeal should be granted, was a reasonable prospect that another court

¹ 2014 JDR 2325 (LCC) at para 6.

might come to a different conclusion. See Van Heerden v Cronwright & Others 1985 (2) SA 342 (T) at 343H. The use of the word ‘would’ in the new Statute indicates a measure of certainty that another court will differ from the court who’s judgment is sought to be appealed against.”

[9] The fact that the test for leave to appeal is more stringent was reaffirmed by the SCA in the matter of **S v Smith**² where the following was stated:

“In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but has a realistic chance of succeeding. More is required to establish that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorized as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.”

[10] In **Ramakatsa and Others v African National Congress and Another**,³ the SCA stated the test for leave to appeal as follows:

“The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a

² 2012 (1) SACR 567 (SCA) at para 7.

³ (724/2019) [2021] ZASCA 31 at para [10].

reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.”

[11] The grounds of appeal have been succinctly set out in the Notice of Application for leave to appeal. Applicant takes issue with, firstly, the appointment of a *curator ad personam* to the children and, secondly, to the wide powers granted to the said curator *ad personam*. Applicant submitted that a curator *ad personam* is concerned with personal matters relating to the person in respect of whom they are appointed, such as where that person is to live (e.g. whether they need to be consigned to an institution or to live at home), their health (e.g. whether they are to have a particular treatment such as an operation and by whom it is to be performed) and generally the control over their personal day to day living⁴.

[12] Applicant stated that under the common law, the High Court has the jurisdiction to appoint curators to the person (curators *ad personam*), of individuals who are of unsound mind and as such incapable of managing their affairs.⁵ Applicant submitted that this is the only legal basis upon which a *curator ad personam* can be appointed, it is submitted. Furthermore, a curator *ad personam* is not lightly appointed, and a Court will make such an appointment only when it is essential⁶ or when a real need for it has been shown⁷.

[13] Applicant argued that case law does not support the approach adopted by this court insofar as a court has appointed a *curator ad personam* to a minor where such minor is not mentally incapacitated, and there exists no legal basis for such

⁴ Ex Parte Hill 1970 (3) SA 411 (C) 412G-H and Herbstein & Van Winsen supra at p. 1562/3.

⁵ Voet 27.10.3.

⁶ Ex Parte Powrie 1963 (1) SA 299 (W) at 300.

⁷ Martinson v Brown; Gray NO v Armstrong 1961 (4) SA 107 (C) at 110.

appointment. A *curator ad personam* is normally appointed by the Court to take control of the personal matters of an incapacitated person (normally the incapacitated person (adult) similar to the powers which a normal parent has over his child) and such curator is ordinarily empowered with “parental powers” over the patient, in regard to matters relating to the patient's person, physical and mental well-being, as well as their residence, medical decisions and day to day living. Here the appointment is to the children, there being no question of incapacitation.

[14] Applicant argued further that in respect of a minor child, such powers vest in those who have parental rights and responsibilities in respect of the child, ordinarily the child's parents. In other words, by its very definition, the appointment of a curator *ad personam* to a child entails the assignment of parental powers to the said curator which encroaches on the rights of Mr and Mrs K[...], who are the existing co-holders of full parental rights and responsibilities in respect of their children. In other words, by this appointment, the Court gave parental powers to a curator, over these children, in circumstances where the parents already had these powers. Accordingly, the order means that the Court has appointed a “third parent”.

[15] Applicant argued that the Children's Act does not provide for the appointment of a *curator ad personam* to a child. More specifically, sections 23, 24 and 28 of the Act provide for very specific requirements (including the bringing of an application by a qualifying person) before any parental rights and responsibilities can be assigned to a third party other, than a child's parent. Applicant stated that in this matter no such application in terms of the Children's Act was brought and no such order was made, but the effect of the 11 April 2025 Order was to assign parental rights and responsibilities, including rights of guardianship and decision-making, to the *curator*

ad personam, Ms Oosthuizen, and which appointment was a nullity, alternatively, unlawful.

[16] With reference to **TC v SC**⁸ the applicant argued that the appointment of and powers conferred on a parenting coordinator can and should be limited to avoid an impermissible delegation of judicial authority. The role of a parenting coordinator is contemplated as assisting high-conflict parents to implement their parenting plans and, to that end, with the consent of the parties or the authority of the Court. Applicant contends that the Children's Act sets out the substantive matters which lie within the exclusive preserve of a Court to decide, having regard to the standard of the best interests of the child. These matters include care and contact, guardianship, and the termination, extension, suspension or restriction of parental responsibilities and rights. Applicant submitted that any purported delegation to a parenting coordinator of the power to decide these matters would be unlawful. Thus, for example, it would be unlawful and invalid to confer on a parenting coordinator the power to change the primary residence of a child, or to alter the allocation of contact between the parents, or to determine whether a parent's contact with a child should be supervised.

[17] Applicant noted that section 34(5) of the Children's Act prescribes that parenting plans which have been made an order of Court may only be amended or terminated by an order of Court on application, while section 22(7) provides that only the High Court may confirm, amend or terminate a parental responsibilities and rights agreement which relates to guardianship of a child. These provisions make it clear that a parenting coordinator cannot make a valid directive which has the effect of amending a court ordered parenting plan. Applicant therefore submitted that the

⁸ 2018 (4) SA 530 (WCC)

11 April 2025 Order clearly violates the second limitation imposed by the Court in **TC v SC** (supra). Applicant therefore asserts that a *'parenting coordinator and/or mediator would have been a more appropriate appointment to resolve disputes between the parties now that they are divorced.'*

[18] Applicant submitted that it is in the interests of justice for leave to appeal to be granted to determine whether a Court is empowered to appoint a *curator ad personam* to a mentally sound child since it has far-reaching consequences not only for Mrs K[...] and the K[...] children but also parties in similar high-conflict divorces.

[19] Respondent submitted that the appointment of the *curator ad personam*, with the powers granted to her, falls squarely within the powers of this Court and the provisions of the Section 6(4) of the Children's Act 38 of 2005 ("the **Children's Act**") which mandates a conciliatory approach, and provides that:

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

[20] Respondent argued that the order under appeal provides for this on an ongoing basis through the intercession of the *curator ad personam*, and through the mandatory dispute resolution clause designed to promote mediation and avoid further litigation between the parents. Respondent noted that Section 7(1)(n) of the Children's Act determines that whenever a provision of the Act requires the best interests of the child standard to be applied, the Court must consider which action, or

decision would avoid or minimise further legal or administrative proceedings in relation to the child. It was therefore submitted that these provisions were properly applied when granting the Order.

[21] Respondent argued that Section 28(4) of the Act authorises a Court to consider the best interests of the child, and any other fact that should, in the opinion of the Court, be considered. In terms of this section, the Court had to consider the fact that there had been numerous assessments and reports, and that the *curator ad litem* took account of all this material when making her recommendations to the Court. Respondent contended that another Court would not have conducted itself differently. Respondent further contended that the applicant had complied with the Order after it was granted and has acquiesced to the Order, and that the doctrine of peremption precludes her from proceeding with her application for leave to appeal.

[22] With regard to the contents of parenting plans, respondent referred to the provisions of section 33 (2) of the Children's Act which provides:

“If the co-holders of parental responsibilities and rights in respect of a child are experiencing difficulties in exercising their responsibilities and rights, those persons, before seeking the intervention of a court, must first seek to agree on a parenting plan determining the exercise of their respective responsibilities and rights in respect of the child.”

[23] Respondent argued that section 33(3) provides that a parenting plan may determine any matter in connection with parental responsibilities and rights, including contact between the child and any other person. This wide wording authorizes the Court to insert structures to regulate the exercise of parental responsibilities and

rights through third parties (such as panels of experts, or even a *curator ad personam*).

[24] Respondent noted that Section 33(5) provides that:

In preparing a parenting plan as contemplated in subsection (2) the parties must seek-

(a) the assistance of a family advocate, social worker or psychologist; or

(b) mediation through a social worker or other suitably qualified person.

[25] Respondent submitted that by the time the Order under appeal was made, the parties had the benefit of input from the Family Advocate, the family counsellor, the children's psychologists, social workers, and extensive mediation by the *curator ad litem*. Respondent emphasized that the views of all the professionals resonate with each other, in particular, the dire need, in the interests of the children, to create mechanisms to minimise conflict between the parents. According to respondent these avenues have been exhausted, hence the time was ripe for the Court to make the Parenting Order.

[26] Respondent emphasised that conventional parenting coordination has failed. Respondent noted that Section 28 (1) of the Children's Act also expressly authorises the Court to order a restriction of parental responsibilities and rights. Respondent averred that to the extent the applicant considers her rights to be restricted, the Court was empowered to do so, and this power was exercised appropriately and proportionately. Respondent noted that the High Court, as upper guardian of all minor children, bears a duty to ensure that judicial processes do not prejudice a child's welfare.

[27] Respondent argued that when regard is had to the circumstances surrounding the granting of the Order, the proper fulfilment of the statutory requirements, and the proper exercise of the Court's statutory powers, as well as the time, expertise and consultation that went into the crafting of the Court's Order, that no other Court would find that the terms thereof are not "satisfactory or the best that can be effected in the circumstances". Respondent contended that the Court's reasoning for the appointment of a *curator ad personam* cannot be faulted.

[28] In my view, the applicant's contention that the Court Order empowers the *curator ad personam* to make directives which have the effect of amending the parenting plan is misguided. It is evident that the Order only allows for the intervention of the *curator ad personam* if the parties are unable to agree on issues impacting on the minor children, which decision may be taken on review. The primary function of the *curator ad personam* is to "*make decisions in the children's best interests in the place and stead of the parents in circumstances where a joint decision is required but the parents do not agree*" (clause 1.2 of the Powers).

[29] In light of the extensive investigation, expert reports, consultations, time and energy that went into crafting the parenting plan that was made an Order of Court, in consultation with both parties (who were afforded a full opportunity to comment and provide alternative wording), it is difficult to conceive how another Court, on the same facts, bearing in mind the same levels of conflict and the same documented harm to the minor children, could come to a different conclusion.

[30] Notably, Mrs K[...] has not been able to present a suitable alternative to a *curator ad personam* to assist with the dysfunctional co-parenting relationship. Previous parenting coordinators resigned particularly after Mrs K[...] rendered it

impossible for them to fulfil their functions. I am satisfied that the appointment of a *curator ad personam* to the minor children was not only necessary but is also the only solution that would be in the best interests of the minor children.

[31] In the event that this Court had erred in appointing a *curator ad personam*, I am of the view that any relief sought if leave to appeal should be granted will be a *brutum fulmen*. If leave to appeal is granted, it will not dispose of the real issues in dispute in this matter. The parties are unable to co-parent without the intervention of the Courts and professionals. Co-parenting and decision-making in respect of the minor children is dysfunctional and immobilized to the detriment of the minor children. Granting leave will serve no practical purpose to promote the best interests of the minor children. At best the designation of the *curator ad personam* may be converted to a Family Coordinator, Mediator or Parenting Co-ordinator which will not resolve the real issues between the parties. The Family Advocate pleaded that the children should not be subjected to further litigation between the parties, and no further assessments of the minor children be conducted. However, the conflict has escalated.

[32] The children have been assessed by more than 20 experts, amicable parenting coordination is impossible, multiple parenting co-ordinators have resigned, the experts have recommended no contact between the parties due to hostilities, the parties are still embroiled in civil and criminal litigation and the minor children are currently suffering mentally and physically due to the incessant conflict. Mrs K[...]’s assertion that a ‘*parenting coordinator and/or mediator would have been a more appropriate appointment to resolve disputes between the parties now that they are divorced*’ is disingenuous. All the parenting co coordinators found the

situation untenable and opted out.

[33] Consequently, any interference with the Order of this Court will not be in the interests of the minor children. As stated by the Court appointed *curator ad litem*, “*the risk and opportunity for parental conflict needs to minimise by way of a highly structured court order which eliminates room for debate and power struggles between the parents, as far as possible.*”

[34] Section 18(1) of the Superior Courts Act provides that “*unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.*” Section 18(3) requires a party applying to Court to enforce an order in its favour, despite a pending application for leave to appeal, to, in addition to showing exceptional circumstances (as required by section 18(1)), “*prove on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.*”

[35] At the time of writing this judgment Mrs K[...] had actively blocked the *curator ad personam* to fulfil her mandate to protect the minor children from parental relationship distress and dysfunction. The Office of the Family Advocate is currently engaging the parties following a referral by this Court emanating from concerns raised by the *curator ad personam*. For purposes of the consideration of this application for leave to appeal the report of Ms Oosthuizen is annexed hereto marked “A”.

[36] It is clearly not in the best interest of the minor children to grant an Order in terms of section 18 since it would be detrimental to the well-being of the minor

children. A structured parenting plan with conflict resolution mechanisms is vital for the protection of the minor children while any appeal proceedings and litigation are pending between the parties.

[37] The Order, against which is being appealed, did not result simply from legal argument on behalf of both sides, upon which the presiding officer then reached a decision. Rather, the Order is the product of extensive investigation and consultation by the *curator ad litem*, who advocated not on behalf of either party, but on behalf of the children. The Order was crafted based on the best interests of the minor children after their voices had been heard via a *curator ad litem*.

[38] If the Order is suspended, there will be no mechanism in place to regulate the care, contact and decision-making in respect of the minor children, in circumstances where the *curator ad litem* has expressly found that the parties are unable to make decisions in the best interests of the minor children without judicial intervention. If the Order is suspended, there is no fallback position, previous order, or agreed system which will regulate the care, contact and decision-making in respect of the minor children, in circumstances where a decree of divorce has been granted.

[39] The Order appealed against also embeds protections for the children by virtue of the fact that the *curator ad personam* must report to the Court in 2028. Furthermore, because of the high conflict between the parties, it is inevitable that the Family Advocate will remain involved in this matter. If the parties remain locked in legal conflict, and the dysfunctional co-parenting continues, the Court may well have to consider limiting the parental rights of either party as intimated by the Family Advocate.

[40] I have considered the facts of the matter, and the grounds of appeal in the

Notice of Appeal, together with the submissions made by the parties. I have carefully reconsidered my judgment and have concluded that the arguments raised by the Applicant are without merit. I have considered whether the appeal would have reasonable prospects of success and I am convinced that there are no reasonable prospects that this appeal would succeed.

[41] It is trite that costs fall within the general discretion of the Court and that unless exceptional or unusual circumstances exist, costs follow the result. Both Counsel submitted that costs should follow the result. I am in agreement that this approach is fair, reasonable and justified under the circumstances.

[42] In the result, the following order is made:

42.1. The application for leave to appeal is dismissed with costs.

42.2 The operation and execution of the decision of this Court on 11 April 2025 under case number 1092/2020 (with 8498/2020) is not suspended, as contemplated in section 18(1) of the Superior Courts Act 10 of 2013, pending the exhaustion of all leave to appeal applications and all appeal proceedings, in all Courts, including the High Court and any Superior Court, and until they are finally determined.

DEPUTY JUDGE PRESIDENT GOLIATH

Appearances:

For the applicant: Brian Pincus SC
 Adri Thiart
 Instructed by Carolissen Attorneys Inc.
 Ms Simone D Carolissen

For the respondent: Fiona Gordon-Turner SC
 Paula Gabriel
 Instructed by Abrahams & Gross Inc.
 Mr Juan Smuts