

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE HIGH COURT OF SOUTH AFRICA  
EASTERN CAPE DIVISION, BHISHO**

**CASE NO: 649/2022**

**REPORTABLE - YES**

In the matter between:

**AMANDA BESSINGER**

**Applicant**

**and**

**N[...] N[...]**

**Respondent**

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**JUDGMENT**

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**NORMAN J:**

[1] Some scholars have described birth in the following terms<sup>1</sup>: “*Birth is an experience that demonstrates that life is not merely function and utility, but form and beauty. It is as safe as life gets. There is power that comes to women when they give birth. They don’t ask for it, it simply invades them, accumulates like clouds on the horizon and passes through, carrying the child with it.*”

[2] There are two applications for determination. In the first application, the applicant, a medical social worker, approached court on 27 October 2022 seeking urgent relief and on an *ex parte* basis, against the respondent. The respondent is the biological mother of the minor child, who shall be referred to as “AN” in these proceedings.

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<sup>1</sup> Drs Christopher Largen, Sheryl Feldman & Harriette Hartigan.

[3] The applicant sought and was granted the following relief by Govindjee J:

**“IT IS ORDERED THAT:**

1. *The applicant’s non - compliance with the Rules of Court relating to time periods and service is condoned.*
2. *The minor child, AN (the minor ) , shall immediately be placed at Canaan Special Care Centre, 5 Glen Eagles Road , Bunkers Hill, East London and shall continue to reside there pending the finalization of the relief sought in the second part of the application.*
3. *The applicant shall accompany the sheriff of this Court when the order is served upon the Respondent and shall make arrangements for an ambulance service to accompany them and thereafter to transport the minor to the Canaan Special Care Centre.*
4. *The sheriff is authorized to enlist the services of the South African Police Services to assist him in giving effect to this Order if necessary.*
5. *A Rule Nisi is issued calling upon the Respondent to show cause, on Thursday, the 8<sup>th</sup> of December 2022, as to why the Order in Paragraph 2 should not continue to operate as an interim order, pending finalization of the relief sought in the second part of the application.*
6. *Advocate James Ramsay is appointed as Curator ad litem to investigate and report to the above Honourable Court on the following issues, within 7 court days from the granting of this Order:*
  - 6.1 *whether a Curator personae ought to be appointed for the minor;*
  - 6.2 *whether the Applicant is a suitable person to be appointed as Curator personae to the minor and if not to recommend whom should be so appointed; and*
  - 6.3 *what powers ought to be afforded to the Curator personae.*
7. *The Applicant’s non - compliance with Rule 57 is condoned.*
8. *The relief sought in the second part of the application is postponed sine die, to be enrolled upon receipt of the reports of the Curator ad litem and the Master of the High Court.*
9. *The Master of the High Court is ordered to deliver his/ her report within 5 days of receipt of the report by the Curator ad litem.*
10. *The respondent may anticipate the return date of this Order by giving not less than twenty-four hours written notice of her intention to do so to the applicants attorneys.”*

[4] The Order quoted above related to the First Part of the Notice of Motion. In the second part of the Notice of Motion the applicant sought the following Order:

**“SECOND PART:**

9. *That the Applicant be appointed as Curator personae to the minor with the following powers:*
  - 9.1 *to consent to any medical treatment which the minor may require;*
  - 9.2 *to determine the minor’s place of residence from time to time, in her best interests; and*
  - 9.3 *to manage and consent to all steps that may be necessary to ensure that the minor’s daily caregiving needs are met.*
10. *That the Respondent be ordered to pay costs of this application, only in the event of her opposing same.*
11. *Such further and/ or alternate relief as the above Honourable Court may deem fit.”*

[5] On 28 October 2022, the order was served on the respondent and the child was removed from her . It appears from the evidence that the child was taken to the

Canaan Centre and not to hospital. On 02 November 2022 the child was admitted to Life Beacon Bay hospital due to malnutrition and onset of pneumonia. On 30 June 2023, after the Canaan facility, was placed under provisional liquidation the applicant brought a second urgent application. In that application she sought the following Order:

1. *That the Applicant's non- compliance with the Rules of Court , insofar as the prescribed time periods and manner of service are concerned, be condoned and that this application be heard on an urgent basis.*
2. *That the minor child , AN , shall immediately be removed from the Canaan Special Care Centre in East London and be placed at the Lily Kirchman Centre in Jarvis Road, Berea, East London.*
3. *That the Applicant shall be appointed as curatrix personam to the minor with immediate effect and on an interim basis, pending finalization of the main application under case number 649/2022, with the specific power to determine the minor's place of residence.*
4. *That the Respondent shall pay the costs of the application only in the event of her opposing same.*
5. *Such further and/ or alternative relief as the above Honourable Court may deem fit."*

[6] During February 2024 the applicant sought an amendment to the second part of the original notice of motion in the following respects:

- “12. *That the matter be referred to trial.*
13. *That the Respondent's right to care for the minor, to consent to any medical treatment which the minor may require and to determine the minor's place of residence, be terminated.*
14. *That the Family Advocate be directed to investigate and report on the minor's best interests, in so far as the relief sought in prayer 13 is concerned, only in so far as the above Honourable Court may deem such an investigation and report necessary."*

[7] Both applications are opposed by the respondent. Mr Nepgen SC with Ms Gagiano appeared for the applicant, Mr Brown for the respondent and Mr Pitt with Mr Ntsaluba appeared for the *amicus curiae*, and Adv Ramsay as a *curator ad litem*.

### **Background facts**

[8] The applicant is a self- employed medical social worker practising in East London. She was appointed by the case manager Anekke Greef Inc. and assigned to the minor girl child, AN.

[9] The respondent resides at Tyusha Location in King William's Town. She went up to Grade 11 at school. She is unemployed. She has three children whose ages are 16, 12 and 4. She resides with her children, her mother and her sister in a home that has

electricity and water. The respondent's mother recently had a stroke and is now disabled. She has been the caregiver to the child since birth doing so with the help of her mother and sister.

[10] The eldest child of the respondent who is 16 years old, is AN, who was born on [...] 2007, and a subject of these proceedings. AN's father died in 2009. AN was diagnosed with spastic quadriplegic cerebral palsy at birth due to the negligence of the employees of the Member of the Executive Council for Health, Eastern Cape ("the MEC").

[11] As a result of her condition the respondent instituted an action, claiming damages on behalf of the minor child, against the MEC. On 28 August 2020, by consent, the claim was settled resulting in an award in the amount of R12 000 000.00 (Twelve Million Rand) for all damages claimed inclusive of costs for the administration of the Trust to be established for the minor child. On 10 March 2021, the Master of the High Court , Port Elizabeth, appointed one trustee, Ms Brigitte Kelsey , a representative of the Standard Trust Limited to the A[...] N[...] Trust .

[12] As aforementioned, the minor child was cared for by the respondent with the help of her mother and her sister. She was responsible for taking AN to the clinic, hospital, doctors and for her well – being for 15 years.

#### *Applicant's case*

[13] The applicant came into the lives of this family during July 2022. She alleged in the founding affidavit that the Standard Trust appointed occupational therapists Anneke Greef Inc. as case managers to assist the Trust, who in turn appointed her. It is common cause that there were two main interactions prior to the order between the applicant, the respondent and AN. The first time was on 20 July 2022, when AN was

being examined by a paediatrician, Dr Miles, where the applicant introduced herself to the respondent as an independent party. The respondent admits that she was uncomfortable with the presence of the applicant as she did not know her and the language barrier complicated matters between them. The second encounter with the respondent and the child was at the Royal Buffalo Specialist Hospital on 11 October 2022 where the minor child was admitted for block therapy and treatment. On those occasions it is the respondent that took the minor child to the doctor's appointments and to hospital on dates arranged with the clinicians.

[14] In the application the applicant relies on an undated advance care plan compiled by the paediatricians. She made reference to page 2 of that plan that recorded the following: *“Main issues identified are the poor condition that this child is in and would be considered neglect”*.

[15] It is common cause that on 19 October 2022 the applicant visited the home of the respondent. After the home visit, the applicant compiled a report dated 20 October 2022 addressed to “To Whom It May Concern” . She went to the home of the respondent with an unnamed trained carer for translation purposes. She picked up AN's aunt who showed them the residence. She described that upon arrival she found the respondent's mother and brother who also live on the property. They were informed that there are six children also living on the property including AN. The house consists of a lounge, kitchen and 3 bedrooms. The food of the minor child was kept in the respondent's bedroom. That bedroom was locked. She observed that the lounge suite was so large in the small room that it was not possible to fit a wheelchair at all.

[16] There was also one rondavel with two double beds. One bed is for one of the children and the other is for AN and the grandmother to share. A large portion of ceiling is

missing and light is exposed. There is an outside toilet. The terrain outside was uneven making it impossible to use a wheelchair from the rondavel to the house. She was informed that the minor child's diet was cornflakes/ weetbix/ instant porridge for breakfast, 2 slices of bread and maas/ or soup for lunch and a jar of purity for supper. There were no toys. The child was carried to the main house to watch television. It was reported that they do not take the child outside at all. She stated , amongst others, in her report that the environment was not conducive for the minor child. She indicated that the child must be placed in a facility suitable for palliative care .

[17] She formed a view that the respondent is neglecting the minor child and not having her interests at heart. She alleged that she feared that if she gave the respondent notice of the application she may remove the child from the family home to avoid her being removed to a care facility. She expressed an opinion that the respondent views the child as her "meal ticket". She alleged that the respondent was placing unrealistic financial demands on the Trust. She alleged that the child was in urgent need of medical care and intervention otherwise she would die. She recommended the appointment of a curator, Advocate Ramsay, from the Port Elizabeth Bar as a curator *ad litem*. She further stated that it was not necessary to appoint a *curator bonis* because the Standard Trust was managing the financial affairs of the minor. She attached correspondence from Ms Ilze van Rensburg where she complained about frequent requests from the respondent for travelling fares. It appears therefrom that each time the respondent had to take AN to doctors she had to request money for travel from Tyusha to Port Elizabeth or East London.

[18] She alleged that the respondent is not interested in the minor child's well-being. She alleged that on 21 October 2022 the respondent left the hospital with the child who was coughing and choking and in respiratory distress. She was chanting and singing,

dancing and laughing uncontrollably. That, according to her, were actions of a mentally disturbed person and not those of a caring mother. She alleged that the respondent discharged the child against advices from Dr Mpondo. The respondent took public transport with the minor child. In this regard she relied on a confirmatory affidavit of Mrs Eleanor Joan Saayman who shared the same sentiments as the applicant.

[19] The applicant contends that the child's health condition has deteriorated to an extent that she now requires palliative care. She contends that the child should instead of being taken back to the respondent, remain at the Canaan facility for the rest of her life where, according to her, she will die with dignity. She relied on , amongst others, a guarantee from the Trust that the costs of the minor's accommodation at the Canaan facility would be met by the Trust.

[20] The applicant, as aforementioned, obtained the order *ex parte*. The child was removed from her home and placed at the Canaan Care facility which was later placed under provisional liquidation. On 10 August 2023 a further Order issued by agreement between the parties that the child would remain at the Lily Kirchman Centre until the finalization of the main application. The parties further agreed that should there be a need to move the child to a different care facility written consent of both parties would be obtained; the respondent would not withhold her consent unreasonably and the minor will remain in a medical facility pending the finalization of the main application. The child was then moved to Lilly Kirchmann Centre where she is currently residing.

[21] The clinicians whose reports and affidavits are relied upon by the applicant are of the same mind that the child is in a palliative state and requires 24 hour care in order to

make her comfortable and pain free. They also recommend that placement at a facility is necessary.

- [22] The child underwent a procedure where a percutaneous endoscopic gastrostomy feeding tube (PEG) was inserted to assist with feeding. Initially the respondent was averse to the PEG until one of the mother's whose child had a PEG explained to her what it was for. After she saw it on that other child and having been told what it was for she then consented to the procedure and the PEG was inserted.
- [23] The curator *ad litem* filed an interim report on 7 November 2022 where he indicated that he was still conducting investigations and mentioned therein the challenges he faced. He then filed a comprehensive report on 29 November 2022 whilst the child was at the Canaan facility. He recorded in detail his interviews with the clinicians, the applicant and the respondent.
- [24] The respondent gave the reasons to the curator on why she refused to take the child to Canaan Care Centre. She informed the curator that on 20 July 2022 the child was examined by Dr Miles. The only issue that Dr Miles raised with her on that occasion was the child's eczema. She prescribed certain medication and showed the respondent how to apply bandages. Dr Miles directed her to bring the child back for a follow up consultation.
- [25] The child was seen again by Dr Miles and various clinicians at the Royal Buffalo Hospital for block therapy during October 2022. The child was admitted for a period of five days for scabies. The respondent took the child to hospital. That period was extended for a further five days by Dr Muller. She remained with her and some days her aunt was there. The respondent was given supplements to give to the child because the child had a small body and was also told how to feed the child. During that stay a nasogastric tube was inserted into the child's nose by Dr Mpondo to assist



with feeding at night. During the day she would feed the child with a spoon, and that tube feeding would occur from 18h00 until 06h00, with the feeding bag being changed at 22h00 and again at 02h00.

[26] She confirmed the home visit by the applicant on 19 October 2022 .She reported to the curator that the applicant told her that she would arrange for some toys for the child's room and for a device to be placed on the bed to prevent the child from rolling out of bed and she was happy with that. The respondent further advised her that the child could be discharged from Royal Buffalo Hospital on 21 October 2022.

[27] On 21 October 2022, the respondent was informed that the child should not go home but should rather go to Canaan Care Centre. She refused because she was of the view that the child should rather go home where she would be with family. She requested Dr Mpondo to let her take the child home. Dr Mpondo agreed on condition that she brought the child back for re- assessment on 31 October 2022. She could not understand why was the child to be taken to Canaan Care Centre and not home when the child's blood pressure and heart rate were normal. She believed that the form she signed was to confirm the child's return day to hospital and not refusal of treatment. She could not understand why after being told that the child could go home, the child was suddenly removed. The respondent conveyed to the curator that she should be responsible for caring for the child because she knows the child best and it would be detrimental to the child not to be with her mother. She indicated that she had no objections to the child being kept at Canaan facility for a rehabilitative period if she was allowed to be with the child.

[28] The curator *ad litem* emphasized in both the interim and final reports, dated 07 November 2022 and 29 November 2022, respectively, that language was a challenge

in communicating with the respondent. In the final report the curator *ad litem* recorded, *inter alia*, that:

“75. The Respondent told me that it was important for things to be explained to her properly in isiXhosa, if necessary through an interpreter, because there is a language barrier. She said she must understand what the doctors are telling her.”

[29] He also recorded in some parts that:

“93. *Dr Miles explained that her engagements with the Respondent have been challenging due to the apparent lack of understanding of the Respondent when advice is given.*”

#### *Curator’s report on interview with Dr Miles*

[30] The curator also dealt with his telephonic interview with Dr Miles, the child’s treating paediatrician. Dr Miles explained that the immediate issue was that the child was severely malnourished and had significant issues with eating as she does not have control over her epiglottis and cannot regulate her swallowing properly. As a result, she chokes when eating and that has caused her to contract pneumonia. It was for that reason that a nasogastric tube was inserted to assist with feeding of the child. The nasogastric tube was not sufficient to provide the required nourishment. It was necessary to insert a percutaneous endoscopic gastrostomy feeding tube (PEG).

[31] Dr Miles informed the curator that although the insertion of PEG is a routine surgery there are risks involved and the surgeons would not operate without the necessary consent. She tried to explain the PEG to the respondent but she was averse to it. She was not sure if the respondent did not understand when she tried to explain the PEG to her and even showed her a picture of it. She indicated that some people may see a PEG as being an unnatural way of prolonging life.

[32] He further recorded that Dr Miles did acknowledge that the respondent did remarkably well to have been able to feed the child up until then because of the child’s difficulty to swallow. However, she did not think that the respondent appreciated that spoon feeding was no longer sufficient.

[33] Dr Miles stated that the condition of the child could indicate neglect or could be as a result of lack of knowledge on the part of the family and respondent on how to properly care for the child with AN's condition.

*Curators report on interview with Dr Mpondo*

[34] Dr Mpondo is a paediatrician who was part of the team that treated the child during block therapy. She worked closely with Dr Miles. She did not think it was a good idea for the child to go home when she was discharged on 21 October 2022 but could not prevent the respondent from doing so. She directed the respondent to bring the child back on 31 October 2022. Dr Mpondo confirmed that the respondent consented to the PEG insertion surgery. The child contracted post – surgery infection but was stable. Dr Mpondo conveyed to the curator that the medical team was of the opinion that the child should be enrolled as a 'scholar' at the Canaan facility during the week and go home on weekends.

[35] The curator recommended that the court should exercise its discretion in favour of the applicant by appointing her as a Curator *ad personam* on an interim basis pending investigations and recommendations by a Family Advocate.

*Social worker's report*

[36] On 30 November 2023 this court appointed Ms Kholeka Xaba as a designated social worker to investigate whether the minor is in need of care and protection, as envisaged in Section 150 (1) (g) and (h) of the Children's Act, Act 38 of 2005 ('the Children's Act'), and to file a report within thirty days of the date of the order.

- [37] A report compiled by Ms Phumza Vakala, another social worker, instead of Ms Kholeka Xaba was filed on 07 February 2024. This court accepted that report even though it was not compiled by Ms Xaba because Ms Vakala appeared to be an employee of the Department, Social Development. Attached to that report was a letter from the Head of Department, Social Development, dated 17 January 2024. The letter recorded the outcome of an enquiry in terms of section 125 of the Children's Act and a search of the National Child Protection Register which revealed that the respondent's name does not appear in the Child Protection Register.
- [38] She visited the Lily Kirchmann facility. She was satisfied that the child seemed to be well cared for. She recorded the care afforded to the child as described by Ms Samantha Goosen. The respondent expressed a wish that the child be placed at a place like Canaan facility where there were other children and the minor child was made to listen to music. Apart from that she would like her child to come back home on weekends.
- [39] The social worker in her findings stated that the child's mother is mentally and physically fit to take care of the child's concerns. She was present in the first five years of the child's life and the child had been staying with her from birth until the age of 15. The mother of the child is a strong and caring person. She makes the child her priority. She has strong bonds with the child. The entire family possess a good and strong relationship which is the key strength towards their relationship. She concluded that the maternal family of the child is safeguarding the rights and best interests of the child. The family needs to be supported in their work of taking care of the child's special needs in order for them to be successful. The child's sense of belonging and bonds created with the family were compromised when she was taken from home after 15 years of birth.

[40] She recommended that, in her opinion, the mother should remain the primary caregiver of the child. That for the purposes of protecting the child, the mother be provided with necessary help that will help to eliminate risk factors that could cause any harm to the child. That the psychosocial support be provided to the family by the social worker that specializes with disability program.

*Master's report*

[41] The Master of the High Court, Bhisho, filed a report on 06 December 2022. He stated that he had regard to the “Copies of Notice of Motion , affidavit by the Applicant with Annexures as well as the report by the Curator – ad Litem were served on the Master 30 November 2022.”

[42] The Master supported the applicant's application that there was a need to appoint a curator *ad personae* to take care of the child's day to day needs as well as make decisions of the patient. In this regard the Master relied on several authorities for his contentions.<sup>2</sup> He submitted that it is very difficult for a private person to obtain security and would abide the decision of the court in this regard.

*Mr Charles Adams of the Trust*

[43] According to the affidavit filed by one Mr Charles Adams, a relationship officer for A[...] N[...] Trust, the Master called for security which was furnished. He filed the affidavit dated 23 January 2023 and stated: “I shall deal only with the relevant paragraphs and allegations relating to the involvement of the trustees and Trust. I accordingly wish to respond as follows to the Respondent's Opposing Affidavit.”

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<sup>2</sup> *Martinson v Brown* 1961(4) SA 107 CPD, *Ex Parte Powrie* 1963 (1) SA 299 WLD ; *Ex Parte Hill* 1970 ( 3)( C ); *Hudson v Prince* 1939 CPD 367.

[44] It is apparent from his affidavit that he relied on the information he received from the case managers regarding the health of the child and the particular needs of the child. He stated that the Trust focuses on the financial side of the administration of the Trust. He has no knowledge of the respondent's living conditions to accommodate the needs of the child. He did not have regard to any expert reports that dealt with the needs of the child prior to the award. He believes that the respondent makes financial demands that are excessive and unreasonable such as those relating to transport costs (from R400 to R1000) or from R2200 to R8000 and R10 000, buying of a house for the family etc. He confirmed that the respondent received an advance payment of R600 000.00 from her attorney. He also confirmed an amount of R150 000.00 was paid to the respondent by the Trust for the renovations to her mother's home. In his earlier affidavit deposed to on 23 January 2023 he stated that:

"11. Ad paragraph 80

*The Trust initially budgeted for the purchase of a house but as the Trust was unable to assess the minor's medical condition since 2021, the purchasing of a house could not be followed through with. As a matter of course in these types of matters, the Trust usually budgets for a house as most of the accommodation of the patient is usually not conducive to accommodating a child with cerebral palsy i.e not being wheelchair friendly or bathrooms not being adequate. As a matter of course we therefore, on receipt of settlements from attorneys, by default budget funds to buy a new house or to modify the existing house to render it conducive to accommodating the beneficiary needs. That being said, the Respondent did receive a substantial advance of R150 000.00 from the Trust in order to carry out renovations and repairs to her property to make it more conducive to accommodating the minor."*

[45] He stated that he used to communicate with the respondent in English and when her demands for funds were not met the respondent adopted the approach of not being conversant in English. He stated that when the respondent was requested to collect medication in Kenton-on-sea for the child, she initially requested an amount of R450,00 per trip but this later escalated to over R1000 per trip.

*Ms Ilze Janse van Rensburg*

- [46] Ms Ilze Janse van Rensburg is an occupational therapist employed by the case manager, Annekke Greef Inc. who is based in Pretoria. She deposed to an affidavit on 20 January 2023. It is apparent from her affidavit that she did not have regard to the expert reports that were filed in the action proceedings. She contends that the respondent severely neglected the minor child. She supports the applicant to be the person to be appointed as a *curator personae*. In an annexure “IVR1” attached to her affidavit there are specific details of interactions that her office had with the respondent and the requests made by the respondent to them including doctor’s appointments and payment approvals for transport fares.
- [47] She also stated that due to the challenges and poor co- operation from the respondent, i.e. by delaying admission to hospital, making exorbitant financial requests and refusal to co- operate unless funds are immediately paid despite receiving R7000 maintenance per month, the decision was made to appoint a social worker.
- [48] She recorded that the primary concern of their office was the child’s health, being, malnourishment, skin condition and general wellbeing , all of which remained dire despite conservative non- surgical intervention including supplements and ointments.
- [49] She stated that a telephonic needs analysis was done on 22 June 2021 by Ms Onica Langa. She stated that several components of those needs including the child’s medical needs, the wheelchair, accommodation and transport were addressed. The respondent during the needs analysis reported that she wished to relocate to East London and to have a house purchased for her. She further stated that during September 2021 the respondent stated that she would not be relocating as she had renovated her mother’s house.
- [50] She supports the applicant’s contention that the child should never be returned to the care of the respondent for the remainder of her natural life.

*Canaan Care Centre report*

[51] A report was filed by an occupational therapist, Ms Angela Dlepu dated 27 January 2023. She stated in the first paragraph of the report that the minor was placed at the Canaan Centre as a place of safety. She was provided with a one- on- one caregiver to assist with her transition into the centre. It was reported that she had allegedly suffered negligence previously. She described the child as an excitable friendly young girl. She responded to her name when called and smiles. She appeared to be underweight for her age and presented with feeding challenges. She communicated her needs by using crying sounds as her mode of communication. She did not show any response when objects were brought close to her eyes and no signs of visual tracking were noted. She presented with seizures which were managed through medication. She is completely reliant on a caregiver for all her needs. She detailed the daily schedules for the child and how she was fed through the PEG. She made recommendations relating to , amongst others, a referral to for orthopaedic review for hip surveillance and procurement of day and night positioners.

*Ms Samantha Goosen*

[52] The applicant also relied on the affidavit deposed to by Ms Samantha Goosen. She is the general manageress of the Lily Kirchmann Step Down Facility. She described the palliative care that the child is receiving from Lily Kirchmann. She opined that due to the child's chronic condition she cannot be moved and placed in the care of her biological mother as she requires 24 hour care. This view is informed by the fact that the respondent lives in the outskirts of King William's Town and not in close proximity to a hospital in cases of emergency such as where the PEG pulls loose.



She stated that the respondent has visited the child 8 times only. She confirmed that a social worker arrived on 16 January 2024 to visit the minor. She listed the things that they agreed on, namely: that the minor needs to be in close proximity to a hospital in case of an emergency; an ambulance needs to be able to get to the minor's residence as quick as possible in case of an emergency; there has to be clean running water at all times; a generator is a necessity to ensure that the child can be suctioned and nebulized when necessary; the child is in need of 24 hour nursing care, which includes access to a physiotherapist for chest care; the child should have easy access to a doctor as she frequently develops pneumonia, bronchitis and chest infections that require immediate hospitalization, the need to keep the PEG site clean; regular turning and application of creams on the child's body to assist in preventing pressure sores and the importance of positioning the minor correctly to ease or prevent chest infections. She stated that the child should remain at Lily Kirchmann for the remainder of her life.

[53] Attached to her affidavit is a letter that Dr Miles wrote to the case manager on 15 August 2023 where she recorded the child's medical condition at that time. She recorded, *inter alia*,

*"Her position when feeding is crucial to her feed tolerance. The caregivers who are currently looking after her mastered how best to keep her comfortable and not vomiting when feeding. It would be ideal if the same care givers taking care of her in hospital could also take care of her at Lily Kirchmann. Her mother and grandmother have been to visit and have requested if they could be allowed to have her at home for 2 weekends a month (Friday to Monday) . Amanda Bessinger, social worker is her 'legal guardian' at present and Amanda will liase with family and with legal team to see if above is at all possible."* (my emphasis)

#### *Second affidavit of Ms Ilse van Rensburg*

[54] On 22 February 2024 Ms Ilze van Rensburg filed another affidavit where she stated that as a result of the minor child's age and the extent of her disability, no improvement is expected in terms of her physical or mental functioning. She stated that the child is considered a palliative care patient and her level of intervention is

mostly for maintenance purposes. She mentioned the recent health setbacks such as when the PEG pulled loose in November 2023. She concluded by stating that due to the child's needs for 24 hour palliative care, she should remain at Lily Kirchmann for the remainder of her natural life.

*Applicant's supplementary affidavit*

[55] On 23 February 2024, the applicant filed an applicant seeking leave to file a supplementary affidavit. In that affidavit she was critical of the manner in which the report of Ms Vakala was filed and the fact that she was not the designated social worker that was appointed by the court and had not filed an affidavit confirming that it was her report. She further criticised her for going beyond the scope of the issue to be reported on and of being bias in favour of the respondent. She concluded that the report of Ms Vakala was not in the best interests of the child and should be disregarded.

[56] She stated that the current health condition of the child is that she is currently receiving palliative care. The patient must be kept as comfortable as possible and to allow her to die with dignity and without pain. She contended that the fact that Lily Kirchmann is located closer to a hospital saved the child's life when the PEG came loose. She stated that had the child been placed in the respondent's home she would not have been brought to hospital as a matter of urgency. She is being monitored on a 24 hour- basis as she is prone to chest infections, bronchitis and the constant threat of the PEG coming loose. She suggested that the child's room has been furnished with another bed to accommodate the respondent for sleep overs and would be provided with meals. The respondent has not availed herself of that opportunity. She relied on Mr Fraser's affidavit and report indicating that the child relies on nursing care and

requires 24 hour observation to monitor her chest , regular positioning and changes to prevent bed sores as well as aspiration of her lungs, and PEG feeding.

[57] She also attached a report by Dr Pohl dated 19 February 2024. In his report Dr Pohl stated that the minor requires close access to medical professionals, a suction machine, on- site and immediate access to oxygen, 24-hour postural management and weekly physiotherapy, the vulnerability of the child and the importance of the minor's positioning. He recommended the placement of the minor at a facility.

[58] The applicant stated that she visits the minor child a few times a week and takes her for walks. She stated that the child should not be returned to the respondent's home as it is a rural area which cannot be accessed by an ambulance. She stated that due to the child's medical condition she is likely to die if she is returned to the respondent's care. She contended that the matter should be referred to trial to test the different versions and for the court to hear expert medical evidence on the minor's medical condition.

[59] She further asked for the termination of the respondent's right to care for the minor, to consent to medical treatment and to determine the minor's place of residence as envisaged in section 28 of the Children's Act. Contrary to her earlier stance she consented to the appointment of a Family Advocate to investigate the matter and file a report.

#### *Respondent's case*

[60] The respondent contends that the applicant made contact with her 16 months after the Trust funds were paid over to the Trust. She stated that she met the applicant for the first time at Dr Miles rooms and was not informed that the applicant was appointed by the Trust or that she had specific tasks towards AN. She raised lack of *locus standi*

on the part of the applicant to bring the applications. She contended that the applicant did not comply with the requirements contained in section 155 (1), 155(2) , 155(3) , 155 (4)(a) of the Children’s Act, which are peremptory prior to bringing an application of this nature, particularly , where removal of a child from a biological parent is sought. She submitted that she believed that the funds which were awarded to her child would improve their care for her and it largely has.

[61] She submitted that if there were mistakes she may have committed in caring for the child she would like to correct those. She further stated that the applicant failed to comply with the provisions of Rule 57 in relation to the appointment of a curator. She stated that the basis on which the applicant wished to remove the child from her care was unjust and cruel. She stated that the removal of the child by way of Rule 57 of the Uniform Rules of Court was intended to circumvent the clear provisions of the Children’s Act. The route adopted by the applicant was intended to avoid a balanced approach to the determination of the best interests of the child with safeguards to prevent a perpetuation of the past practices where children could be removed from the care of their parents based on privileged and biased opinions.

[62] She stated that the real concern in this matter by looking at the documents filed is not the well - being of the child but is informed by the view of the Trust and case manager that she is using the child as meal ticket. She complained that the applicant ‘s attitude towards her lacked empathy for the difficult situation of caring for a child with cerebral palsy without any training at all. She referred to “IVR 1” , to Ms van Rensburg’s affidavit, an entry dated 6 September 2021 in relation to the location of her homestead and the difficulties she experiences with transportation and courier services to collect medicines. In dealing with criticism relating to her reluctance in having the PEG inserted she stated that some of the mothers that she interacted with

gave her negative feedback about it. As soon as she realized that it may be unavoidable that a PEG be inserted she conveyed her misgivings to Dr Jones as recorded in IVR in entries dated 13 August 2021 and 18 August 2021.

[63] She denied the allegations by Mr Adams that the Trust could not assess the child's needs. She confirmed receipt of R600 000.00 from Mr Dudula , her attorney. She used the money to acquire a portion of land and built better dwellings because prior to receipt of that amount she was living in abject poverty in mud huts with dung floors with no running water or electricity.

[64] The respondent denied that the applicant advised her that she was there to assess the needs of the child. In this regard she relied on several expert reports in the action that had detailed the needs of the child and those of the respondent in order for her to be able to care for the child. She contends that the financial award was based on those needs. She stated that at the first meeting the applicant was abrasive and condescending towards her. Their interaction was complicated by the language barrier.

[65] She complained of the failures of the Trust to equip her in order for her to be able to care for the child. She gave an example that the Trust provided her with a sling which is used to transfer a quadriplegic from a wheelchair into a bath for ablutions. She stated that because they do not have a bathroom the sling is of no use to them. The Trust also gave her two wheelchairs without properly assessing if they were appropriate for the child. She believes that those wheelchairs contributed significantly to the scoliosis or abnormal curvature of the child's spine. She was using a large basin to wash the child which was not ideal for the child's condition. She had enquired from the Trust about the house the Trust promised to buy for them as was recommended by experts. The applicant was dismissive of her concerns and accused

her of neglecting the child and squandering the monthly allowance. She felt judged by the applicant and became resentful towards her.

[66] She stated that to her mind the applicant presented “as a random busy body white woman who was interfering in my business”. In dealing with allegations of her exorbitant financial demands she stated that she has had to ask for transport money from the Trust. She stated that courier services refused to transport the custom made wheelchair without insurance. The insurance and transportation amounted to R4000 and the Trust refused to pay for it.

[67] She attached the minor child’s clinic card which indicated that from as early as 2009 the child had feeding problems, she was underweight, was passing bloodied stools, had skin rashes , pimples, eczema, including scabies and she sought medical treatment for her throughout. She relied on an entry dated 24 July 2018 where there was a diagnosis query of scabies. She stated that she had been managing the child’s health needs even though she did not have adequate understanding of the medical problems. She accused the Trust of having failed to provide her with adequate training as recommended by experts and for failing to appoint a social worker to assist her in caring for the child on time but doing so 11 months after the assessment . She denied that she told Ms van Rensburg that because she had done renovations at home she no longer wished to relocate. She denied that she refused treatment as she had explained to Dr Mpondo why she needed to take the child home and undertook to return to Dr Mpondo with the child on 31 October 2022.

[68] She stated that she had been taking care of the child without resources for 15 years and was never accused of neglecting the child. She contended that the relief sought has far reaching consequences and amounts to a denial of her constitutionally guaranteed parental rights and the right to dignity of her family and AN. She believed

that if the resources meant for caring for the child were adequately used in a loving environment such as their home the child would have the best quality of life. She denied that locking up the child's food was a sign of neglect. She stated that because she had other children she did not want them to have access to AN's food . She stated that the interactions that the applicant had with her made her to be resentful towards her and she decided not to communicate with her further . The respondent dealt with the pain she continues to endure as a result of the removal of her child from her home.

[69] The respondent denies that she is mentally disturbed as alleged by the applicant. She took offence to the suggestion that she was using the child as a meal ticket. She accused the applicant of having come across as abrasive, abrupt and condescending towards her. She denied that she refused treatment for the minor child. She explains that there was a strong gust of wind that blew directly into the minor child's face as she was pushing her in a wheelchair causing her to gasp and to cough. She turned the wheelchair around and exited with her back facing the street so as to avoid the wind blowing into the child's face. She stated that she was doing what she normally does, singing and dancing in order to amuse and calm the child down. On that day the child was upset because of the wind blowing on her face.

[70] The respondent initially demanded a return of the child to Tyusha. However , in a supplementary affidavit delivered during March 2024 she moved away from that position. She stated that the Trust should lease a property for AN and her family in East London, closer to a hospital and that trained caregivers be appointed to live with them and to provide specialized caregiving services to the minor child. She submitted that would be consistent with providing proper palliative care for the child as AN would be amongst the people that have loved and cared for her for fifteen years. She

seeks , in that respect, restitution of her rights to determine what care should be rendered to her child and where it should be rendered depending on medical advice. She concedes that she is not properly equipped to care for the child and is not able to ensure that her medical needs are adequately met hence she will seek medical assistance.

[71] She denied the allegations made by Mr Charles Adams of the Trust that she is conversant in English but pretends not to understand it when her demands for money are not met. She indicated that she was informed by Mr Adams that the person handling her file was one Ms Onica Langa who speaks isi Xhosa. She asked for the dismissal of the application with costs.

[72] In reply, the applicant contended that the appointment of a Family Advocate as suggested by the respondent would take the matter no further because the *curator ad litem* has conducted investigations and reported thereon. She denied the allegations that she failed in her duties. She stated that it made no difference at all whom the Trust pays to ensure that the minor is cared for – as long as she is adequately cared for. She persisted that the child should remain in a facility for the remainder of her life and that, according to her, is the only way in which her needs can and are guaranteed to be met. She stated that it is not an option to place the minor back in the respondent’s care. She further contended that this court cannot make any order against the Trust as it is not a party to this application.

[73] On 04 March 2024 when the matter was set down for argument, the Bhishe Society of Advocates (“the Society”) delivered a notice intending to apply for admission into the proceedings as *amicus curiae*. At that time, it had not made any written submissions. The applicant indicated that absent such submissions she was not in a position to either consent or oppose the application. The respondent consented to the application.



The court admitted the Society provisionally pending its submissions. The matter was then postponed to allow for exchange of outstanding papers and submissions between the parties.

#### *Legal submissions*

#### *Applicant's submissions*

[74] Mr Nepgen SC submitted that the court should refuse to admit the *amicus curiae* on the basis that there has been no compliance with the provisions of Rule 16 A (6) of the Uniform Rules of Court. He argued that because none of the parties had given notice to the registrar that they intend to raise a constitutional issue, as provided for in Rule 16 A (1), there is accordingly no basis upon which an *amicus curiae* can become involved in the matter in the first place. He further submitted that in the submissions filed by the *amicus curiae* after it was provisionally admitted by the court, it has not illustrated any interest in the matter, has not stated any reasons for believing that its submissions will assist the court, and has not advanced any different submissions to those made by the parties. On these bases he submitted that the court should not admit the Bhishe Society of Advocates as *amicus curiae*.

[75] He submitted that the court in determining the best interests of the minor child should follow the approach in *R.C. v H.S.C*<sup>3</sup>, that this type of litigation is not adversarial. It is not of the ordinary civil kind. It involves a judicial investigation and the Court can call evidence *mero motu*. All the evidence fully investigated must be put in for the proper ventilation of the dispute. The enquiry must be a child centred one, the interests of the child should be the primary focus.

[76] He submitted that the court must reject the respondent's submission that the applicant has no locus standi to bring the application, given the nature of the dispute before it.

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<sup>3</sup> R.C.v H.S.C 2023 (4) SA 231 (GJ) (14 March 2023) at paras 38 to 40.

In this regard he relied on the decision by the Full Bench of this Division, on appeal, in *M.B v N.B*<sup>4</sup>.

[77] He submitted that the court should refer the disputes to trial in order to determine the best interests of the child. He submitted that a judicial investigation instead of an adversarial one should be adopted. He further submitted that the court should appoint a Family Advocate to conduct an investigation into the minor's best interests.

[78] Mr Nepgen, acknowledged, correctly in my view, that the appointment of a curator *personae* would severely restrict the rights of the biological mother of the child. He further submitted that that relief was sought to meet the *locus standi* attack from the respondent.

[79] He conveyed a proposal, contained in his heads of argument made by the Trust that it was prepared to make furnished rental accommodation and caregivers available in East London, where the minor and her family can reside over weekends, should the minor's health be such that she can safely leave Lily Kirchmann. The court was informed that the Trust was prepared to have such made an order of Court without its formal joinder being required, alternatively, should the court deem it necessary, consents to its joinder for such purpose.

[80] He argued that the expert reports compiled prior to the award were outdated and this court must not have regard to them because the condition of the child has now changed. He submitted that there is now medical evidence that the child was malnourished and therefore neglected. On this basis, he argued, the applicant had reason to act as she did.

[81] He submitted that the court as the upper guardian of the minor child must ensure that there is no immediate removal of the child from Lily Kirchmann as that would be

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<sup>4</sup> *M.B v N.B* ( CA & R 60/2017) [2018] ZAECGHC 74 (28 August 2018) para [8].

reckless. He submitted that the court must refer the matter to trial as prayed for and allow the child to remain at the Lily Kirchmann facility for the rest of her life.

*Society's submissions*

[82] Mr Pitt for the Society submitted that parental responsibilities and rights include the responsibility to act as guardian of a child and in terms of section 19(1) of the Children's Act the biological mother of a child, whether married or unmarried, has full parental responsibilities and rights in respect of the child, and only a court may on application award any other person with guardianship over a child.

[83] He further submitted that a parent or other person who acts as a guardian of a child must, amongst others, administer and safeguard the child's property and property interests; and assist or prevent the child in administrative, contractual and other legal matters. None of the parties made this argument.

[84] He argued, relying on **Short v Naisby**<sup>5</sup>, where Henochsberg AJ stated:

*"It seems to me, however, that the court has no jurisdiction to deprive a surviving parent of her custody at the instance of third parties, except under its power as upper guardian of all minors to interfere with their custody, but then only on special grounds. Such special grounds include danger to a child's life, health or morals, but those are not the only grounds on which a court will interfere. Good cause must be shown before a court will interfere, but good cause is not capable of precise definition."*

[85] He submitted that in **Townsend Turner and another v Morrow**<sup>6</sup> the court approved the approach which recognized that any intervention in a family may have unsettling effects on the dynamics of that family which may in turn affect the welfare and interests of the child. This point too, was not made by any of the parties. He submitted that to the extent that the respondent was willing to have the child placed in an institution, that should be supported as there were sufficient funds to cater for that. He submitted that according to the Society it will not be in the best interests of the minor child to appoint the applicant as curatrix personae to her person.

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<sup>5</sup> **Short v Naisby** 1955 (3) SA 572 (D) at page 575 BC.

<sup>6</sup> **Townsend Turner and Another v Morrow** [2004] 1 ALL SA 235 (C) at page 236.

### *Respondent's submissions*

[86] Mr Brown persisted in the respondents attack on the applicant's lack of standing to institute the application. He submitted that the applicant is not a designated social worker as envisaged in section 1 of the Children's Act. He submitted that the urgency of the application was contrived and of the applicant's own making. He submitted that the respondent had consented to the placement of the child from Canaan Special Care Centre to Lily Kirchman Centre due to insolvency of the Canaan Special Care Centre. He submitted that the second urgent application should be dismissed with costs. He submitted that the Lily Kirchmann facility is not a hospital. He submitted that section 28 (3) of the Children's Act provide for categories of persons who may bring an application for the termination of the respondent's parental rights<sup>7</sup>.

[87] He submitted that in **Swartz v Swartz**<sup>8</sup>, the jurisdiction of the Children's Court is not ousted by a subsisting High Court Order for care, custody or contact. Relying on , amongst others, **Adand Another v DW and Others**<sup>9</sup>, he submitted that the applicant's submission that the inherent powers of the High Court as upper guardian of all children, trumps the jurisdiction of the Children's Court, will lead to a violation

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<sup>7</sup> Section 28 (3):

**28 Termination, extension, suspension or restriction of parental responsibilities and rights**

“(1) A person referred to in subsection (3) may apply to the High Court, a divorce court in a divorce matter or a children's court for an order-

- (a) Suspending for a period, or terminating, any or all of the parental responsibilities and rights which a specific person has in respect of a child.
- (b) Extending or circumscribing the exercise by that person of any or all of the parental responsibilities and rights that person has in respect of a child.

(2) ...

(3) An application for an order referred to in subsection (1) may be brought-

- (a) By a co- holder of parental responsibilities and rights in respect of the child;
- (b) By any other person having a sufficient interest in the care protection, well – being or development of the child;
- (c) ...
- (d) In the child's interest by any person, acting with the leave of the court;
- (e) by a family advocate or the representative of any organ of state

<sup>8</sup> **Swartz v Swartz** [2002] 3 ALL SA 35 (T)

<sup>9</sup> **Adand Another v DW and Others** (Centre for Child Law as Amicus Curiae: Department for Social Development as Intervening Party 2008 (3) SA 183 (CC); De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae) 2007 (5) SA 184 (SCA) .

of the minor child and the respondent's constitutional right to equality in that they would be denied the rights and protections offered by the Children's Act, as opposed to those who are dealt with in terms of the inherent jurisdiction of the High Court applying Rule 57 of the Uniform Rules of Court.

[88] He relied on the provisions of section 155 (2) of the Children's Act for the submission that before a children's court can consider whether a child is in need of care and protection, there must be a section 155 (2) investigation by a designated social worker. He submitted that the proposed proposal by the Trust was first made by the respondent where she made the suggestion that the Trust should make rental accommodation available to her and family in East London.

[89] He submitted that the minor child should be returned to the respondent where she could spend her last days with family. The respondent had indicated that she was not averse to spending time with the child in East London where accommodation could be arranged for her by the Trust. She had agreed that the child be placed at Lily Kirchmann since she was very ill at that time but never relinquished her rights as a parent. He submitted that the Court should dismiss both applications with costs. I raised with Mr Brown and he accepted that whatever order the court makes it must take into account the health condition of the child and make necessary orders to cater for her condition.

### *Discussion*

[90] The two applications consist of 8 volumes amounting to about 903 pages. The matter involves a minor who has a disability where the medical evidence suggests that she has limited time on this earth. That, in my view, enjoined the court to dispose of the matter urgently, by first, issuing a supervisory order as indicated to the parties at the

hearing and reserved judgment for a period of less than three weeks. The supervisory order was issued on 11 April 2024. It reads:

**IT IS ORDERED THAT:**

1. *The Bhisho Society of Advocates is admitted as amicus curiae.*
2. *The minor child, AN, shall remain at the Lily Kirchmann Step Down Facility (Lily Kirchmann) until 31 May 2024 at 12h00.*
3. *The social worker, Ms Phumeza Vakala is appointed to assist the respondent with matters relating to the minor child, AN and interactions with The A[...] N[...] Trust or the Case Manager, Annেকে Greeff Inc. or a medical social worker and counselling for a period of six months or until discharged from that responsibility by the court.*
4. *The A[...] N[...] Trust, a Trust formed in terms of paragraph 4 of the Order issued by Tokota J on 28 August 2020, is joined in these proceedings in order to give effect to the implementation of this Order:*
  - 4.1 *The Case Manager and The A[...] N[...] Trust are directed to secure a fully furnished rental home for the respondent's family and the minor child in East London for a period of six (6) months in close proximity to a hospital in case of an emergency within 14 (Fourteen days) hereof, and shall immediately furnish the address of the rented property to the Court and all the parties including the Curator ad litem.*
  - 4.2 *The Case Manager and The A[...] N[...] Trust must ensure that the rented house is also equipped with the following items as identified by Ms Phumeza Vakala and Ms Samantha Goosen :*
    - 4.2.1 *A generator must be secured for the rented home to assist with power outages or load shedding; and*
    - 4.2.2 *A water tank to assist with interruption of water supply.*
  - 4.3 *The Case Manager, Anneke Greeff Inc. must draw up a needs assessment plan in consultation with the medical social worker, clinicians, the respondent and Ms Vakala for the minor child and the family if and when moved from the rented home to their permanent home. Such a plan must be submitted to this Court within twenty (20) days hereof.*
  - 4.4 *The A[...] N[...] Trust shall pay to Ms N[...] N[...] the monthly allowance of R7000 per month which was previously paid to her, to commence on 30 April 2024 and such allowance must not be terminated without following due process of the law.*
  - 4.5 *The Case Manager, Anneke Greeff Inc. and The A[...] N[...] Trust are directed to engage and discuss with the respondent, assisted by Ms Vakala, the budget by the Trust for the purchase of a house for the family as indicated in the affidavit of Mr Charles Adams deposed to on 23 January 2023 (Volume 3 page 362 para 11) and*

report the outcome of that engagement to Court within **Twenty (20)** days hereof. Such report must be furnished to all the parties.

5. *The application for the appointment of the applicant (Ms Amanda Bessinger) as a curatrix personae as contained in paragraph 9, Second Part of the Notice of Motion is dismissed.*
6. *The additional prayers sought in paragraphs 12, 13 and 14 of the Second Part of the Notice of Motion are dismissed.*
7. *The Case Manager, Anneke Greeff Inc. is directed to appoint another medical social worker in the stead of Ms Bessinger, preferably a medical social worker that is conversant in IsiXhosa language within **Ten (10) days** hereof, to attend to all matters involving the minor child, AN. The name of the medical social worker must be furnished to all the parties including the Curator ad litem **on the same day** of the appointment.*
8. *The medical social worker to be appointed by the Case Manager, Anneke Greeff Inc shall in consultation with the respondent, Ms Phumeza Vakala, Ms Samantha Goosen of the Lily Kirchmann Step Down Facility (Lily Kirchmann) and any persons appointed by the Case Manager to assist, identify the needs of the minor and those of the respondent to ensure a smooth transition from the Lily Kirchmann facility to the rented accommodation for the respondent's family. That must be attended to within **Ten (10) days** hereof.*
9. *The Case Manager, Anneke Greeff Inc. is directed to identify a team of caregivers, nurses and clinicians in consultation with the minor child's doctors and therapists, the respondent, Ms Vakala, and if necessary Ms Goosen, who will render palliative care and management of the minor child at the rented home and create temporal work schedules for them within **Ten (10) days** hereof. A list of names of the aforementioned team shall be furnished to all the parties and to the Curator ad litem on the same day.*
10.
  - 10.1 *The Case Manager, Anneke Greeff Inc. must facilitate adequate training sessions for Ms N[...] N[...] , the respondent , with the assistance of the nurses or therapists who are conversant in isi Xhosa and Ms Vakala , where possible, on every matter that relates to rendering of palliative care by a parent and to the extent necessary to ensure a smooth transition of the minor child from the Lily Kirchmann facility to a home environment which includes but not limited to :*
    - (i) *Complete personal hygiene care for the minor child;*
    - (ii) *Bowel care;*
    - (iii) *Prevention of fungal and eczema and application of skin care regime;*
    - (iv) *Daily walks in a wheelchair and/or pram;*
    - (v) *Constant interaction between the child and the staff, siblings and family including playing with toys with siblings;*
    - (vi) *Interaction with physiotherapist regarding positioning of the minor child to try and ease or prevent occurrence of chest infections and any other matter where training is required to assist with her caring and management of the minor child.*
    - (vii) *The need for regular turning and application of creams on the minor child's body to prevent pressure sores.*
    - (viii) *Massaging of the minor child's limbs.*
  - 10.2 *Such training must take place whilst the minor child is still housed at the Lily Kirchmann facility within **fourteen days (14 days)** hereof in preparation for the care*

- of the child at a rented home and a report confirming such training must be filed with the court within (5) days after completion.*
11. *Ms N[...] N[...] and her family must move into the rented home on or about 25 May 2024 before the minor child is relocated to the rented home or even earlier depending on the terms of the lease agreement.*
  12. *The Case Manager, Annেকে Greef Inc. must facilitate and supervise the minor child's move from the Lily Kirchmann facility to the rented accommodation on 31 May 2024.*
  13. *The Curator ad litem, Advocate Ramsay, is directed to attend to the following:*
    - 13.1 *To attend to the rented home **five (5) days** after the child has been moved into it, conduct interviews with the respondent, minor child's siblings, the caregivers, nurses, clinicians and therapists.*
    - 13.2 *Thereafter report to court, within **Ten (10) days** on the condition of the minor child and the relocation of the family to the rented accommodation.*
  14. *Upon receipt of the various reports referred to above, the parties must indicate in writing whether they wish to address any issues with the court. The court will thereafter indicate when and how will those issues be dealt with.*
  15. *Any other matters not dealt with herein in relation to the application are reserved pending compliance with this supervisory order and thereafter shall be dealt with in the judgment, including issues of costs.*

[91] On 18 April 2024 the applicant requested reasons by email. On 22 April 2024 a formal notice requesting reasons was delivered by the applicant. The court through the Registrar advised the parties that judgment would be delivered on Thursday, 26 April 2024 in motion court.

### *The test for admission of an amicus curiae*

[92] An *amicus curiae* is a friend of the court. It is an individual or organization that is not party to an action but who volunteers or is court- invited to advise on a matter before the court. The footing on which the amicus is heard is that the person will offer submissions on law or relevant facts which will assist the Court in a way in which the Court would otherwise not have been assisted.<sup>10</sup> At paragraph 15, the Constitutional Court stated :

“[15] *As a general matter, in criminal matters a court should be astute not to allow the submissions of an amicus to stack the odds against an accused person. Ordinarily, an accused in criminal matters is entitled to a well- defined case emanating from the state. If the submissions of an amicus tend to strengthen the case against the accused, this is cause for caution. This , however, is not an inflexible rule. But it is*

<sup>10</sup> Institute for Security Studies in re : The State v Basson Case CCT 30/03, Constitutional Court : para 6: heard on 1 December 2004 , decided on 2 December 2004 reasons delivered on 9 September 2005



*a consideration based on fairness, equality of arms, and more importantly, what is in the interests of justice.*” (my emphasis)

[93] In a matter where both parties were emotive the court welcomed the voice from another person which would ensure that the determination of the issues focuses on what is in the best interests of the child. It is so that there were certain procedural matters that were not properly attended to by the Society such as the notice that was filed late. According to Mr Pitt the matter was brought to the attention of the Society late. The submissions of the *amicus* linked the interests of the minor child to those of the mother. That argument differed materially from the one made by the applicant who severed those interests and intended to create a ‘home’ for the minor child permanently at the Lily Kirchmann away from the mother. The respondent, on the other hand, focused mainly on the harshness of the act of removal of the child from her and her wish to have the child returned to her. The *amicus curiae* dealt with the symbiotic relationship between a mother and child and thus added value to the debate. This argument was consistent with the Preamble to the Children’s Act which reads in part:

*“AND WHEREAS protection of children’s rights leads to a corresponding improvement in the lives of other sections of the community because it is neither desirable nor possible to protect children’s rights in isolation from their families and communities.”*

[94] There were instances where there was repetition of the law , however , what I identified earlier distinguished its submissions from those of the parties. It did not strengthen the case of one party to the prejudice of the other. It was for those reasons that I admitted the Bhishe Society of Advocates as an *amicus curiae* into the proceedings.

[95] What is apparent from the jurisprudence of this country is that any matter involving a minor child involves the paramountcy principle provided for in section 28 of the

Constitution.<sup>11</sup> Mr Nepgen criticized the Society for involving itself in the matter. The Society is not the first legal body to apply to be admitted as a friend of the court where there is a constitutional issue.<sup>12</sup> This court derived value from its submissions as indicated and it was accordingly in the interests of justice to admit it.

#### *Issue on the merits*

[96] At the outset I must state that all the clinicians are of the same mind that that the child is now in a palliative state. She is being made comfortable and kept free from pain. They have indicated that she has limited time to live. The respondent believes that it is in the best interests of the child that she must spend her last days with a loving family with adequate medical support in a home environment. The applicant contends that the child must spent her last days at Lily Kirchmann where she contends that way she will die with dignity. That , according to her would be in the best interests of the child.

#### *Locus standi*

[97] The applicant is a medical social worker who is in private practice. She was appointed by the case manager that was appointed by the Trust. She became involved with both the child and the respondent from July 2022. I have dealt with the two interactions she had at the doctor’s rooms and at the hospital with the respondent and the minor child. She brought the application on the basis that the child was neglected by the respondent, was gravely ill and needed to be re – admitted to hospital to receive emergency medical treatment.

[98] There is one way that a person can apply for the removal of a child from her home. That is in terms of the Children’s Act . The applicant did not ground the application

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<sup>11</sup> *Centre for Child Law v Minister of Justice and Constitutional Development and Others*(11214/08) [2008]ZAGPHC 341 ( 4 November 2008).

<sup>12</sup> In *S v Shinga ( Society of Advocates ( Pietermaritzburg) as Amicus Curiae; S v O’ Connell and Others* , CCT 56/06; CCT80/06 2007 (2) SACR 28 ( CC).

on the Children's Act. She alleged that the child was neglected and needed urgent medical attention. In assessing the evidence the court must view it holistically . The applicant wanted to have the matter referred to trial and to the Family Advocate . In my view , I did not deem that necessary for the reasons that shall become apparent later in this judgment.

[99] This court had requested a designated social worker to file a report on whether or not the child was in need of care and protection as envisaged in section 150 (1) (g) and (h) of the Children's Act. Those relevant provisions read:

*“150 Child in need of care and protection*

- (1) A child is in need of care and protection if such a child-*
  - (g) may be at risk if returned to the custody of the parent, guardian or care-giver of the child as there is reason to believe that he or she will live in or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child;*
  - (h) is in a state of physical or mental neglect; or*
  - (i) ....”*

[100] The social worker recommended that the mother should remain the primary caregiver. She found that the maternal family of the child are seen to be safeguarding the rights dealt with in section 7 (1) (c ) ; (k) and best interests of the child. She further recommended that the family be given support in taking care of the special needs of the child.

[101] She recommended that the child be united with her family. The applicant is not a co-holder of parental responsibilities and rights in AN ; she does not have sufficient interest in the care , protection, well – being or development of the child to such an extent that she could bring an ex parte application for the removal of the child.

[102] The Children's Act provides for cases like these where a person forms a view that a child is in need of care, who that person should be and the process that must be followed. Section 150 (2) of the Children's Act 38 of 2005 provides:

*(1)...*

(2) *A child found in the following circumstances ( as set out in Section 150 (1) may be a child in need of care and protection and must be referred for investigation by a designated social worker.”*

[103] A designated social worker means a social worker in the service of-

- (a) *the Department or a provincial department of social development.*
- (b) *a designated child protection organization; or*
- (c) *a municipality.*

[104] The applicant does not fall within any of those categories. The applicant belatedly asked for investigations by a Family Advocate. That approach will not cure the defects in the applicant’s case and will simply prolong the stay of the child at another residence where the order was obtained in an unlawful manner. The fact that Lily Kirchmann or Canaan provided care to the child does not mean that the court must overlook the process to get the child there in the first place. She lacked standing to bring the removal of the child application. On this basis alone the order obtained on 27 October 2022 for the removal of the child must be set aside. The setting aside of that order must take into account the evidence that the respondent needs education and training in rendering palliative care to the child. The removal of the child to the respondent’s custody must take into account the acquisition of rented accommodation for the family closer to the hospital, the training of the respondent and equipping of the rented accommodation with the medical needs of the child and all the matters dealt with in the supervisory order.

#### *Evaluation of the evidence*

[105] The totality of the evidence reveals the following : The child lived with her family in a modest home in the rural area where the house was made of mud with no running water and electricity . She slept on the bed. She was bathed and fed the types of food mentioned to the applicant. The child’s mother and grandmother took turns to sleep and care for the child. She had skin problems like eczema and scabies . She was at

some point admitted into hospital to treat that condition. The mother or her aunt would attend to clinic or hospital visits. She was well despite those medical conditions with experts commending the mother for looking after her well.

[106] After the award when funds were made available to the respondent to renovate the home. Whenever the respondent was directed by the clinicians to bring the child for medical attention, she did. She stayed with the child at Greenacres Hospital in Gqeberha when the child had eczema and fed her in accordance with the advices of a dietician. She had taken the child to East London for consultations with Dr Miles , upon being referred to her by the Trust, including the occasion when the child was admitted for block therapy. She remained with the child at the hospital. The child was malnourished and had significant issues with eating as she does not have control over her epiglottis and cannot regulate her swallowing properly. As a result, she chokes when eating and that has caused her to contract pneumonia, according to Dr Miles. A naso – gastric tube was inserted to help with feeding . The mother was there to assist with the day feeds. Later and only when it was indicated a PEG was inserted. Initially Dr Jones had advised that it was not necessary to put one in . The child was removed a week after she had been with a team of doctors for block therapy.

[107] According to the curator Dr Mpondo informed him that the team decided that the child be enrolled as a scholar at the Canaan Care Centre during the week and go home on weekends. A decision had been taken to discharge the child to Canaan Care Centre and not for her to go home. This is apparent from the Trust guarantee to Canaan (21 October 2022); the confirmation from Canaan dated (25 October 2022); and the letter by the applicant where she advised placement of the child in a ‘suitable care’ dated (20 October 2022). The applicant’s letter of 20 October 2022 preceded

the refusal of treatment form. That which was made to be the reason for the application was not a genuine reason for removing the child because on the 20 October 2022 already the applicant had decided that the child be placed in a suitable care. This is consistent with the report of the curator that the medical team was of the opinion that the child be enrolled as a scholar at Canaan and be allowed to go home on weekends.

[108] The expert reports predating the award recorded clearly that the child was not able to chew her food hence the Trust facilitated the purchase of a blender. I have referred above to the Kididoc report dated 16 November 2023 that the child had not gained weight well for the past six months. There has been improvement in the nutrition of the child since admission but she is still underweight. The child now has seizures which she did not have prior to the removal Order. She was admitted to hospital with pneumonia from 28 September 2023 to 5 October 2023. She was again admitted to hospital with repeat episode of viral pneumonia on 02 November 2023 to 13 November 2023. That cannot be attributed to the mother of the child because the child for over a year has been at these facilities. The child has seizures now which were not there prior to her removal.

[109] There is no medical opinion that has been put up by the applicant that has found conclusively that the child was neglected. The reading of the founding affidavit clearly indicates that the applicant did not disclose to the court that the respondent had refused to have the child moved to the Canaan facility on the 21 October 2023 when she and Dr Mpondo interacted with her at the hospital on that issue. She had to compel compliance with that suggestion by obtaining a removal of the child by means of a court order *ex-parte* and on an urgent basis.

[110] She stated:

“41. I was present at the hospital when the Respondent had the minor discharged. I was with Dr Mpondo when she explained to the Respondent that the minor could die if she did not receive medical attention.

“44. Dr Mpondo, on discharge, conveyed to the Respondent that the minor is gravely ill and needs to be re- admitted to hospital to receive emergency medical treatment. I annex hereto, marked as “ G ”, an affidavit deposed to by Dr Mpondo in which she specifically states that she advised the Respondent that it is a life and death situation if the minor does not receive the necessary medical treatment.”

As aforementioned no such affidavit was obtained from Dr Mpondo . What was filed was what purported to be an affidavit, which was neither signed nor commissioned. It was confirmed at the hearing by Mr Nepgen that there was no confirmatory affidavit from Dr Mpondo.

[111] What is apparent from the facts viewed objectively was that when the respondent requested to take the child to her mother, Dr Mpondo directed the respondent to return with the child on 31 October 2022 after she made her to sign the refusal of medical treatment form , an issue I shall return to later. That is apparent from the curator’s report.

[112] The respondent conveyed to the applicant that she would return with the child on the 31 October 2022 in a text message she sent to the applicant during the evening of 21 October 2022. There is no explanation why the child had to be removed on the 28 October 2022 just a few days before the date agreed with Dr Mpondo and confirmed with the applicant in a text message.

[113] Upon the execution of the order on 28 October 2022 and contrary to the urgent ‘*life and death*’ argument, the child was not taken straight to hospital. The child was taken to Canaan facility.

[114] No tangible evidence was advanced to show that the respondent neglected the minor and did not have the best interests of the minor child as submitted by the applicant. Dr Miles does not say so as mentioned above. The team of paediatricians records the opinion of the author of the report as : “ *My opinions at the time of this review are that this child has multiple issues that suggest neglect or poor understanding by the family on how to care for a child with severe*

*cerebral palsy.*” That opinion was not conclusive. It is not surprising that none of the medical practitioners deposed to affidavits to support the removal of the child from home on 27 October 2022. The applicant did not refer this court to any authority that supported the type of drastic order against a parent.

[115] It is not the applicant’s case that Canaan facility or Lily Kirchmann are hospitals. The removal of the child from her home to a frail care facility amounts to relocation of the child to another residence. That cannot be done without the consent of the parent. Such consent, in my view, must be real. It must be positive and it must be unequivocal<sup>13</sup>.

[116] Section 11 of the Children’s Act provides that in any matter concerning a child with disability or chronic illness consideration must be given to , providing the child with parental care, family care or special care as and when appropriate; and providing the child and the child’s care-giver with the necessary support services and providing the child with conditions that ensure dignity<sup>14</sup>.

[117] It follows that no matter how noble the applicant’s intentions were , she had no right on the facts of this case to remove the child from home , from parental and family care in the way she did. The fact that the child’s health has now deteriorated to the stage where she is on palliative care does not mean that this court must allow an injustice to continue. Malnourishment and underweight of the child had been raised by the medical experts before and after the award. It continued to be a concern even when the child was at the facilities. The paediatricians attributed that mostly to the child’s inability to swallow and the condition better described by Dr Miles as dealt with in the curator’s report.

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<sup>13</sup> See: *Re A (Abduction: Habitual Residence: Consent)* [2006] 2 FLR1 (FD) paras 70 -88.

<sup>14</sup> Section 11 (1) (a), (c) and (d) of the Children’s Act.



[118] The reports (some are dated September 2018) of all the clinicians and therapists that were engaged as experts in the action proceedings, which reports were relied upon by the respondent and are annexed to her answering affidavit, did not record any signs of neglect of the child by the respondent whatsoever. In fact, the experts mostly commended the respondent for having taken good care of the child with scarce resources. The respondent receives disability grant for AN and child grants for the other two children. That is how she has taken care of her children, including AN, over the years. Mr Nepgen urged me to ignore those reports and he termed them as outdated. In motion proceedings if a party wishes to have a matter ignored as irrelevant it must invoke the rules. The applicant did not do so. Those reports in my view are significant because they demonstrate that the feeding issue and underweight of the child have always been a concern. The PEG and the naso- gastric tube are measures that were suggested and implemented by the clinicians only in October and November 2022.

[119] Section 19 of the Children’s Act provides:

***“19 Parental responsibilities and rights of mothers***

*(1) The biological mother of a child, whether married or unmarried, has full parental responsibilities and rights in respect of the child.”*

[120] The evidence reveal that the respondent had taken the child for medical appointments and hospital care throughout the child’s life. Even after the award, whenever the Trust made appointments for the child she took the child to those appointments except where she contracted COVID 19 and when the transport broke down. On both occasions alternative dates had to be arranged.

[121] Courts are enjoined to protect women as vulnerable members of the community, especially those who have limited resources, from being subjected to unfair treatment.

The respondent who comes from a humble background raised the child for 15 years , only to be told once the child is worth R12 million that she neglected the child to such an extent that the child had to be removed from her and for her to face the threat of termination of her parental rights.

[122] The order removing the child from parental care and the one being sought for appointment of a curator ad personae , are not only drastic but are invasive. They do not consider the feelings of the minor child. According to the Canaan report and that of Ms Vakala the child is able to show her feelings by smiling when her name is called. She has a mother , siblings , grandmother, aunt and uncle that she has interacted with for 15 years.

[123] In this case a proper investigation where a child was to be removed from home ought to have been done before the removal of the child<sup>15</sup>. It was peremptory because the respondent's own child, who suffered from a disability, was removed from home without notice to her or an opportunity to state the reasons why she was opposed to the removal of her child and placement at a facility.

[124] In the report dated 20 October 2022, where the applicant recorded her interactions with the respondent on the two occasions and the observations of the home setting after the home visit , the applicant recorded, *inter alia*, “I am concerned about Nolubabalo’s cognitive capacity to look after A[...] ( which I recommend could be confirmed with psychiatric assessment )”. There is no evidence whatsoever from all the clinicians that have had interactions with the respondent and the child who formed an opinion that the respondent lacked cognitive capacity to look after the child. That ,in my view, amounted to an unfair and unsubstantiated opinion.

[125] An application that is brought ex parte contemplates a situation in which an application is brought without notice to anyone, either because no relief of a final

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<sup>15</sup> Section 151 (1) read with section 155(2) of the Children’s Act.

nature is sought against any person, or because it is not necessary to give notice to the respondent. In ***Sizwe Development v Auditor General, Transkei***<sup>16</sup>, the Court stated that an *ex parte* application is ‘*simply an application of which notice was as a fact not given to the person against whom some relief is claimed in his absence*’. The immediate removal of the child from her biological mother’s care was not to take the child to hospital but to effectively relocate the child to another home , being Canaan facility. The order was sought and obtained without hearing the respondent’s views on the issue . That was unlawful.

[126] In ***C M and Centre for Child Law v Department of Health and Social Development, Gauteng***<sup>17</sup>, Justice Skweyiya J wrote :

[23] *The coercive removal of a child from her or his home environment is undoubtedly a deeply invasive and disruptive measure. Uninvited intervention by the state into the private sphere of family life threatens to rupture the integrity and continuity of family relations, and even to disgrace the dignity of the family, both parents and children, in their esteem as well as in the eyes of their community. ..” In the following paragraphs Justice Skweyiya continued:*

[24] *The removal of a child from the reach of her or his family clearly constitutes a limitation of the child’s right to ‘ family care or parental care’ in terms of section 28 (1)(b) of the Constitution. Although section 28(1)(b) itself also contemplates” appropriate alternative care when removed from the family environment”, this is a secondary right , not an equivalent alternative right. It does not necessarily render a removal constitutionally compatible with the primary right to family care or parental care. If that were to be the case , the primary right would be entirely superfluous and legally meaningless, and section 28 (1)(b) would entrench only a right to appropriate care, irrespective of environment. In my view, Van Dijkhorst J was correct in his interpretation of section 28 (1) (b) in Jooste v Botha, namely that it envisages-  
a child in [the] care of somebody who has custody over him or her. To that situation every child is entitled. That situation the State is constitutionally obliged to establish, safeguard and foster. The State may not interfere with the integrity of family.*

[25] *This interpretation is fortified by the formulation of the right in international law, which we are bound by section 39 (1) (b) of the Constitution to consider. The African Charter on the Rights and Welfare of the Child( ACRWC) provides that “[e]very child shall be entitled to the enjoyment of parental care and protection and shall , whenever possible, have the right to reside with his or her parents’, while the United Nations Convention of the Rights of the Child ( UNCRC) guarantees every child’s right ‘ to know and be cared for by his or her parents’; and to preserve his or her identity, including.. family relations as recognized by law without unlawful interference.”*

[127] The respondent had undertaken to consult her mother for her mother to “*release the child*” and return to hospital with the child on 31 October 2023. There was nothing wrong with her approach given the fact that the respondent’s mother had throughout

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<sup>16</sup> ***Sizwe Development v Auditor General, Transkei*** 1991(1) SA 291 (TkGD) at 292 I; Ghomeshi – ***Bozorg v Yousefi*** 1998 (1) SA 692 (W) at 696 D.

<sup>17</sup> ***C M and Centre for Child Law v Department of Health and Social Development, Gauteng*** CCT 55/11 [2012] ZACC 1, at para 23.

the child's 15 years assisted in caring for her. Most importantly the respondent resides with her mother. There was no consideration of this aspect or even seek to understand the purpose of such 'release'.

[128] Courts are enjoined to discourage perpetuation of orders that were obtained unlawfully where the constitutional rights of the other party who was deprived of a hearing are affected. I intend to do so herein.

[129] The applicant, contrary to her initial stance, belatedly asked for an investigation by the Family Advocate. The office of the Family Advocate was established in terms of the Mediation in Certain Divorce Matters Act 24 of 1987. It was intended to provide for mediation in certain divorce mediation, read with section 21 (3) (a) of the Children's Act which deals with disputes between unmarried parents of a minor child. Its main purpose is to facilitate mediation of the disputes between the parents by the Family Advocate and the Family Advocate may seek the children's views on matters affecting them depending on their level of maturity. She would then take into account the relevant circumstances at an enquiry and in ascertaining and presenting evidence of a child's expressed views to the court.<sup>18</sup> This matter is different because the applicant does not have any rights that have accrued to her which compete with those of the respondent, the mother of the child.

#### *Alleged refusal of medical treatment for the child*

[130] It is important to record what the respondent recorded in isiXhosa on the form entitled 'refusal of hospital treatment'.

*"Ndicelile ukuba ndikhe ndigoduke nayo uba ekhaya umama wam naye siyokumazisa azokwazi ukumbona amkhulule emveni koko aze elincwedeni kwakhona."*<sup>19</sup>

<sup>18</sup> **Brown v Abrahams** [2004] 1 ALL 401 (CC).

<sup>19</sup> "A simple translation of that is: " I asked to be allowed to go home with her in order for me to inform my mother so that she can see her and then release her. Thereafter I will take her back again for her to receive (medical) help."

[131] Dr Mpondo wrote on the same form in English:

*“Placement has been secured but A[...]’s mother wants to take her home to see grandmother before transfer/ placement despite extensive counselling.”* This was signed on 21 October 2022. What purports to be an affidavit of Dr Mpondo was attached to the founding affidavit as Annexure “G” but it was neither signed nor commissioned . That same evening applicant received a message from the respondent to the effect that the minor was settled and well and that she would return her on 31<sup>st</sup> October 2022 for follow – up medical treatment. Refusing of treatment is not supported by the evidence that the respondent had taken the child for block therapy. She remained present for the benefit of the child. The order was sought and obtained before 31 October 2022.

[132] In the South African context, a country that has a Constitution that seeks “to level the playing field”, for those who have and those who were previously disadvantaged, a removal of a child from her home and from family ,must be consistent with the constitutional imperatives, if not , it must not be tolerated .The Constitution and the protection that it affords everyone’s dignity and privacy, it becomes untenable that an invasive order, *in casu*, the removal of a child from her mother and home ,can be granted in the absence of the respondent<sup>20</sup>.

[133] Ms Ilze van Rensburg made it clear in her affidavit that the primary concern of their office was AN’s health i.e malnourishment, skin condition and general well being, all of which remained dire despite conservative non- surgical interventions including supplements and ointments. She further stated that a needs analysis was conducted on 22<sup>nd</sup> June 2021 by Ms Onica Langa and that several components were addressed including AN’s medical needs, the wheelchair, accommodation and transport. She further recorded that the respondent indicated her wish to relocate to East London and

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<sup>20</sup> See sections 10 & 14 of the Constitution; See Law of Persons Trynie Boezaart , Seventh Edition , page 147 footnote 165.

that a house be purchased for her. The child has a family and the Trust cannot in assessing the needs of the child isolate the child from the family , especially the mother, otherwise there would be no conducive family environment for the child's comfort.

[134] The respondent stated the challenges she was confronted with when it comes to transportation needs of her child. She stated that she used taxis as a predominant mode of transport and taxi drivers do not want to load children who have AN's condition due to superstitions and cultural prejudices. As a result of these difficulties she is forced to hire private transport where she is charged exorbitant amounts. This , she stated is something she has no control over.

[135] The reading of the correspondence between the Trust and the case managers which was annexed to the applicant's affidavit demonstrates the hardships that the respondent has had to endure in collecting medication to travelling with the child even though there is a Trust that is meant to make things easy for her. She is expected to collect medication from, for example, Kenton- on - sea , in the age of couriers and Mr Delivery or even uber services which could be employed to have medicine delivered to King Williamstown or closer to where she is with the child. She had to organize her own transport to take the child to hospital either in East London or King Williams Town. In the reports filed at court for the claim, a car was going to be purchased for her.

[136] For example, it is mentioned in an affidavit that her child is dying and it better for the child to die away from her. No evidence has been put up that she ever received counselling in order for her to deal with the sad news and to prepare her for what is to happen. A house was going to be purchased for her in East London. There was a

budget for the house, according to Mr Adams. All of these matters were to be done in order to improve the family environment for the child so as to make her comfortable.

[137] This court is obliged to direct that matters of this nature be attended to otherwise a mother's efforts for better living conditions for her child in her home would be meaningless and the award would be a hollow victory for the child. These matters are dealt with in the affidavits and directing an engagement on them by the parties does not amount to over – reaching but to ensuring resolution of issues that affect the child's home.

*Why train the respondent?*

[138] Most of the experts that consulted with the child and compiled reports which were filed in the action proceedings, recommended that the respondent should be adequately trained on how to handle and position the child properly. In her answering affidavits she raised the point that the case manager has not attended to her training in order for her to understand how to handle the child's condition. It is for that reason that I have appointed Ms Vakala to assist the respondent throughout her interactions with the clinicians, nurses and even the Trust.

[139] The *curator ad litem* in his report dated 29 November 2022 stated, *inter alia*:

*“33. The Applicant expressed the opinion that if the Respondent received proper guidance, counselling, training and education regarding the child's condition, she would be better equipped to care for the child.”*

[140] This is in stark contrast to the attitude of the applicant in these proceedings who not only seeks to take over parental rights of the respondent but has labelled the respondent as untrainable. If training of the respondent is not factored into the Order that would be prejudicial to her and the child in that she would forever be ill - equipped to attend to certain matters affecting the child , such as feeding the child or posturing the child. If there is the will on the part of the case managers to improve

the living conditions of the respondent and the child , there can be no resistance to training her.

[141] In one of the correspondence Dr Miles even suggested that the staff that is taking care of the child in hospital could do so at the Lily Kirchmann. I do not see any impediment in employing the same nursing staff that has been attending to the child at Lily Kirchmann to attend to the child at the rented home in East London. I have also directed that the training of the respondent should be done at Lily Kirchmann to ensure a smooth transition from the facility to the child's rented home. In my view, a period of six weeks which I have allowed in the order would not amount to abrupt removal of the child from the Lily Kirchmann facility to the rented home.

[142] I have dealt with the order removing the child and how unjust it is. It follows that that order cannot be allowed to stand. In discharging that Order this court must make provision for adequate medical care in restoring to the respondent the rights that were taken away from her, which include the removal of the child from her and from her family. The structural order I made marries the suggestions of the parties as communicated to the court by various experts. There is no evidence that if the rented home for the respondent is equipped in the way proposed in the order with care givers and nursing carers , the medical needs of the child will not be met.

[143] There is agreement between the clinicians and medical experts that the child requires palliative care to keep her comfortable and free from pain. I have decided that that is care that must be rendered in a home environment equipped with medical equipment and personnel to take care of the child. She will be with her siblings and family . It is in the child's best interests that during her last days she must be in the company of her loving family.

*Appointment of the Applicant as a curator personae*



[144] A *curator personae* is appointed to see to the personal needs of the person in question and in that person's best interests even if that meant discontinuing naso-gastric feeding<sup>21</sup>. In that case the applicant was the wife of the patient who was a medical doctor. The patient suffered a cardiac arrest in 1998 and had since then been in a persistent and irreversible vegetative state and was fed artificially by means of a naso-gastric tube. The applicant applied to be appointed as a *curatrix personae* of the patient and to be authorised to discontinue any treatment to which the patient was subjected, especially the discontinuance of any naso-gastric or other non-natural feeding regime and to act in this manner notwithstanding that the implementation of such decision may hasten the patient's death. The patient had "A Living Will" where he had expressed his wishes that in the event of there being no reasonable expectation of his recovery from extreme physical or mental disability that he be allowed to die and not be kept alive by artificial means.

[145] The application was opposed by the Attorney - General on the basis that the order would amount to the fact that the applicant was asking for a declaratory relief that she would be not acting unlawfully if she were to be authorised to discontinue artificial life sustaining measures. Thirion J held that the decisions relating to that issue depended on the quality of life which remained to the patient. The court granted the Order.

[146] Those facts are distinguishable from the case at hand in that the applicant seeks to terminate the parental rights of a biological mother of the minor child and that she should be the one to take over those rights which by law are assigned to the mother as a parent. She is not related to the child by blood. The mother of the child is healthy and of sound mind. The social worker has found that she loves the child and there is a great bond between them. The Master and the curator support this relief. The Master

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<sup>21</sup> See Law of Persons Trynie Boezaart 7<sup>th</sup> Ed page 156; see also *Clark v Hurst* 1992 (4) SA 630 (D) 637-638 G.

did not have regard to the answering affidavit of the respondent. The curator had regard to all the papers and interacted with the respondent but has not advanced cogent reasons why the mother of the child must be constitutionally deprived of a say to matters affecting her child's property.

[147] Professor Boezaart relied on *Ex parte Hill*<sup>22</sup> where the court described the competencies of a *curator personae* as follows:

*"A curator personae is someone who decides where the person concerned must live (in an institution or at home) make decisions regarding aspects of the person's health whether the person concerned must undergo an operation and who should perform the operation and in general, has control over the individual's persons."*

[148] In *Martison v Brown; Gray v Armstrong*<sup>23</sup> the court found that the appointment of a *curator personae* places serious limitations on the rights and freedom of a person for whom he or she is appointed.

[149] As a medical social worker, the applicant does not have an interest in the property of the child whose biological mother is still alive and of sound mind. Most importantly, the Trust has been set up by order of court to safeguard the financial and best interests of the minor child. The respondent is the only person in the circumstances of this case who had a right to approach court and seek appointment of a curator. Therefore, there can be no other interest that flows from whatever relationship the applicant has with the Trust to clothe her with sufficient standing to take over the rights that accrue naturally to the respondent as a biological mother and parent of the child. There certainly is no legal interest that warranted the application. The application seeking the applicant's appointment as a curator personam must fail. Similarly, the application seeking to terminate the respondent's rights as sought by the applicant in paragraph 13 of the Second Part of the Notice of Motion must also fail. My finding herein applies to paragraph 14 as well relating to the appointment of the Family Advocate. In

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<sup>22</sup> 1970 (3) SA 411 (C) at 412 H.

<sup>23</sup> 1961 (4) SA 107 (C) at 109 E.

summary paragraphs 12, 13 and 14 of Second Part of the Notice of Motion are dismissed with costs.

*Appointment of a curator ad litem*

[150] A person who brings an application for the appointment of a *curator ad litem* must be a member of a family of the person in question or someone who has an interest in his or her person or property<sup>24</sup>. Rule 57(2) of the Uniform Rules of Court sets out the procedure when one seeks an appointment of a *curator ad litem*.

[151] The applicant first interacted with the minor child once in July 2022, and in October 2022, at the doctor's rooms and at the hospital. Thereafter she brought the application for the appointment of a *curator ad litem*. First, those facts indicate that the duration was too short for it to qualify the applicant as a person who have known the patient well. On her version, she did not satisfy the requirement relating to the duration and intimacy of the association with the child. Second, there was no compliance with the provisions of Rule 57(3)(b) in that there were no affidavits by at least two medical practitioners. There was no affidavit from a psychiatrist who recently examined the person concerned to report on his or her mental condition.. She did not get consent from the mother of the child that she could bring the application. She did not put up a single affidavit from a person who knows the child well. Fourth, the applicant did not know the child well except the condition that she saw the child in. When she moved court ex parte for urgent removal of the child and the appointment of a *curator ad litem* there were no affidavits from medical practitioners.

[152] The appointment of a *curator ad litem* was intended to investigate whether a *curator personae* ought to be appointed for the minor, and whether the applicant should be appointed as a *curator personae* to the minor and if not , to recommend who should be

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<sup>24</sup> See *Ex Parte Geldenhuys* 1941 CPD 243 at 244.

so appointed and what powers should be afforded to the curator personae. The curator ad litem in his report , although he fully appreciated that the appointment of a curator *ad personam* would eclipse the respondent's rights to act as the guardian and caregiver of the child , he recommended that the applicant should be so appointed. He recommended that the applicant should be granted powers to consent to any medical treatment and/ or surgical procedures which the child may require; to determine the child's place of residence from time to time in the best interests of the child and to manage and consent to all steps that may be necessary to ensure that the child's daily care giving needs are met.

[153] She purported to rely on an affidavit by Dr Mpondo when she knew that no such affidavit existed. There was no affidavit even from Dr Miles , the minor child's treating paediatrician. There is no evidence whatsoever that an attempt was made by the applicant to discuss the appointment of a curator with the mother of the child. There was no compliance with the provisions of Rule 57. In ***Modiba obo Ruca v RAF***<sup>25</sup>, Bertelsmann J , expressed disquiet about a practice that developed where there was avoidance or circumvention of the provisions of Rule 57 of the Uniform Rules of Court in matters involving the Road Accident Fund. He remarked that such practice may cause irreparable harm to the RAF victims and leaves the door open to other abuses of the RAF litigation. These remarks apply equally herein.

[154] The applicant proceeded with the application with the full knowledge that the child had a biological mother, a grandmother, an aunt , an uncle and elected not to involve them at all in the application. The curator has discharged his obligations and filed the necessary reports which the court relied on in this judgment. It was the applicant's duty to ensure that she had the requisite standing to bring the application and comply with the provisions of Rule 57 as aforementioned. For these reasons, there was no

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<sup>25</sup> ***Modiba obo Ruca v RAF*** [2014] ZAGPPHC 1071 (27 January 2014) at p138.

basis whatsoever for the applicant to approach court on an urgent basis to appoint a curator *ad litem* when a Trust was set up to protect the financial interests of the minor child and when the minor child had a mother who was also a caregiver.

[155] For all the above reasons, the appointment of the *curator ad litem* cannot be allowed to stand beyond the date that this court will determine. . Having said that due to the fact that the order was granted more than a year ago , and the curator has filed reports, the court shall terminate the appointment of the curator on Friday , 24 June 2024, after the filing of a report by the curator as indicated in paragraph 13 of the supervisory order dated 11 April 2024.

#### *Joinder of the Trust*

[156] A constitutionally protected right is legally enforceable and gives rise to a legal interest which may require joinder. In this case The A[...] N[...] Trust not only does it have a direct and substantial interest in the subject matter of the litigation, it also has an interest in the outcome of it<sup>26</sup>. The Trust has fiduciary obligations that are subject to some supervisory powers of the Master. It is for that reason that I confined the orders to what the Trust had expressed as being within its powers or has given effect to previously. The joinder of the Trust in this case was necessitated by the following factors:

- (i) it is a Trust that was set up by means of a court order to protect the property of the minor child who is the subject of these proceedings. The minor child is a beneficiary to the Trust.
- (ii) the Trust participated in the proceedings in the following manner:
  - (a) it appointed the case managers Anneke Greeff Inc. who in turn appointed the applicant;

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<sup>26</sup> See *Harun v Gallic* [2007] 2 ALLSA 627 (C) para 14.

- (b) the correspondence between the Trust and the case managers about the minor child and the respondent was placed before court;
- (c) the Trust guaranteed payment of costs related to the accommodation and consumables on behalf of the minor child at Cannan Care Centre and at Lilly Kirchmann Centre where the child is currently kept. The Trust therefore associated itself with the relief sought by the applicant that the minor be kept in an institution.
- (d) a relationship officer of the Trust, one Mr Charles Adams, deposed to more than one (1) affidavit actively responding to the allegations made by respondent in her answering and supplementary affidavits. He stated that the Trust had paid to the respondent an amount of R150 000 for renovations of her mother's home to make it more conducive to accommodate the minor child. Therefore, the Trust by actively engaging and participating in the dispute between the applicant and the respondent , entered the fray and supported the applicant.
- (e) Although Mr Nepgen indicated in argument that he was not acting on behalf of the Trust, he, referred to his written submissions, which conveyed to the court the following proposals made by the Trust:

*“Proposal on the way forward*

44. *The respondent initially during the minors needs analysis indicated that she wish to relocate to East London and requested that her house be purchased. Later however during September 2021 she reported that she had done renovations to the property that belongs to the minor's grandmother and that she would not be relocating.*

45. *In January 2024 the respondent told Mrs Vakala that she wants the minor to remain in a care facility like Canaan and to spend the weekends with her.*
46. *In March 2024 in her latest affidavit, the respondent contends that a property can be rented in East London and that she and her family can live in it with the minor and trained care givers.*
47. *The respondent however also concedes in her latest affidavit that the minor should remain in Lilly Kirchmann 'for now'.*
- 48.2 *It accordingly appears to be common cause that at least the minor child needs to be close to hospital facilities at all times.*
- 48.2 *The respondent is not presently equipped for whatever reason to take care of the minor on her own. Neither her home is so equipped and*
- 48.3 *The minor should not be removed from Lilly Kirchmann Care Centre and placed back in the respondent's care immediately.*
49. *Considering all of the above the Trust has indicated that it is prepared to make furnished rental accommodation and care givers available in East London, where the minor and her family can reside over weekends should the minor's health be such that she can safely leave Lilly Kirchmann.*
50. *The Trust proposal of making accommodation available in East London addresses all the main concerns in this matter being the following:*
  - 50.1 *It ensures that the minor will be close to hospital facilities at all times;*
  - 50.2 *It ensures that the minor will have trained care givers around her at all times;*
  - 50.3 *It ensures that the respondent and her family will have ample contact with the minor in a home environment.*
51. *The Trust proposal was conveyed to the respondent's attorneys in letter on 18 March 2024 but was rejected by the respondent.*
52. *It is important to bear in mind that there is no dispute on the medical evidence advanced by the applicant.*
53. *Be that as it may the Trust offer as set out in the last mentioned letter remains open for acceptance and the Trust is prepared for such to be made an order of court without its formal joinder being required, alternatively should the Honourable Court deemed it necessary consents to its joinder for such purpose. ( my underlining).*

[157] Although this court has made an order that is slightly different from that proposal it is this court's view that the joinder is necessary for its order to be implemented. The Trust has to be joined in order to ensure that the orders given shall benefit both the minor child and the family or the biological mother for the child's benefit and to ensure that they are implemented without delay. Otherwise, the order cannot be sustained without its joinder. In fact the child is the subject of these proceedings and the Trust was intended to safeguard the child's interests . The extent of its financial involvement relates only to the acquisition of a rental home , caregivers and nursing services and payment of the allowance to the respondent. The nursing and caregiving services were being paid for at Canaan and at Lily Kirchmann Centres.

[158] The Trust, according to Mr Adams used to pay to the respondent an allowance of R7000.00 per month which was discontinued upon removal of the child from her. There is no reason advanced which would justify the deprivation of the respondent of this allowance. How is she supposed to take care of her needs since she is not employed? She devoted her life to caring for AN . The position that she has been put in by the Trust of having to ask for money all the time is an affront to her dignity as a mother of the minor child and a plaintiff who made it possible for the Trust to exist in the first place. In my view, the Trust, as indicated in its proposal, directly or indirectly consented to be joined without following the formal process of joinder. Alternatively, it waived its rights in that regard. In the further alternative it participated in the dispute and would thus not be prejudiced by giving effect to the order, where it is directed to act. In any event, the Trust with the full knowledge and its participation through Mr Adams neglected to intervene formally as it ought to have<sup>27</sup>.

*Removal of the current medical social worker and her replacement by a medical social worker*

*who is conversant is IsiXhosa*

[159] The relationship between the applicant and the respondent is acrimonious. They have called each other names. The court is not in a position to remove the mother of the child but the case manager can appoint another person in the stead of the applicant.

[160] The respondent indicated to the curator that she would prefer to have matters explained to her in *isi* Xhosa. She has a right to use her language<sup>28</sup> and participate in the caring program for the child in an environment where she will be able to communicate in her language with someone who is conversant in it. The language

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<sup>27</sup> See *Eden Village (Meadowbrook) (Pty) Ltd v Edwards* 1995 (4) SA 31 (A) at 46 E – 48 E.

<sup>28</sup> Section 30 of the Constitution.



barrier has been identified by the curator as an impediment in communicating with the respondent.

[161] The applicant continues to expect the respondent to stay over at the Lily Kirchmann because a bed is provided for her there. Despite having been advised by Dr Miles that the respondent would like to have the child over for the weekends, she did not make any effort to entertain that suggestion. The suggestion by her that if the child is returned to the respondent she would likely die and suffer neglect in circumstances where the finding of neglect was not conclusive, demonstrates her unfavourable attitude towards the respondent.

[162] The respondent herself has stated that she resents the applicant and has decided not to communicate with her further. As a professional she has become personally involved in the matter by, *inter alia*, seeking to terminate parental rights of the respondent and be the person responsible to exercise those rights ; and applying for the appointment of the curator in total disregard of the respondent as the biological mother of the child.

[163] The applicant has no legal entitlement to deal with the child in the circumstances where the relationship between her and the mother of the child is not good. In any event, on the facts before this court an inescapable conclusion is that her continued involvement with matters affecting the respondent's child will not restore harmony to the family.

[164] In order to create a conducive palliative environment for the minor child it would be in the best interests of the minor child if the applicant is replaced with another medical social worker who will work closely with the respondent and be able to communicate with her meaningfully in isiXhosa.

[165] There was no need to hear her on this issue because she informed the *curator ad litem* that it made no difference at all whom the Trust pays to ensure that the minor is cared for – as long as she is adequately cared for.

[166] I accordingly intend to amend the Supervisory Order by adding to it paragraphs 16 to 20 in the following terms:

“16. The Supervisory Order of 11 April 2024 is incorporated herein in full as paragraphs 1 to 15 and is amended by incorporating further Orders 16 to 20 as follows:

17. The main application for the removal of the child from her homestead in Tyusha Location to Canaan and Lily Kirchmann Step Down Facility is dismissed with costs.

18. The Orders granted on 27 October 2022 and 10 August 2023, respectively and pursuant to the application for the removal of the minor child, are set aside.

19. The operation of both Orders in paragraphs 17 and 18, above, is suspended to allow for the implementation of the Supervisory Order dated 11 April 2024 and shall terminate on 31 May 2024; with the exception of the order appointing the *curator ad litem* which shall terminate on 24 June 2024.

20. The applicant is ordered to pay costs of the application for her appointment as a *curator personae*.”

#### **AMENDED ORDER**

1. The Bhisho Society of Advocates is admitted as *amicus curiae*.

2. The minor child, AN, shall remain at the Lily Kirchmann Step Down Facility (Lily Kirchmann) until **31 May 2024 at 12h00**.
3. The social worker, Ms Phumeza Vakala is appointed to assist the respondent with matters relating to the minor child, AN and interactions with The A[...] N[...] Trust or the Case Manager, Annekke Greeff Inc. or a medical social worker and counselling for a period of six months or until discharged from that responsibility by the court.
4. The A[...] N[...] Trust, a Trust formed in terms of paragraph 4 of the Order issued by Tokota J on 28 August 2020, is joined in these proceedings in order to give effect to the implementation of this Order:
  - 4.1 The Case Manager and The A[...] N[...] Trust are directed to secure a fully furnished rental home for the respondent's family and the minor child in East London for a period of six (6) months in close proximity to a hospital in case of an emergency within **14 (Fourteen days)** hereof, and shall immediately furnish the address of the rented property to the Court and all the parties including the Curator *ad litem*.
  - 4.2 The Case Manager and The A[...] N[...] Trust must ensure that the rented house is also equipped with the following items as identified by Ms Phumeza Vakala and Ms Samantha Goosen:
    - 4.2.1 A generator must be secured for the rented home to assist with power outages or load shedding; and
    - 4.2.2 A water tank to assist with interruption of water supply.
  - 4.3 The Case Manager, Anneke Greeff Inc. must draw up a needs assessment plan in consultation with the medical social worker, clinicians, the respondent and Ms Vakala for the minor child and the family if and when moved from the rented home to their permanent home. Such a plan must be submitted to this Court within **twenty (20)** days hereof.
  - 4.4 The A[...] N[...] Trust shall pay to Ms N[...] N[...] the monthly allowance of R7000 per month which was previously paid to her, to

commence on 30 April 2024 and such allowance must not be terminated without following due process of the law.

- 4.5 The Case Manager, Annekke Greef Inc . and The A[...] N[...] Trust are directed to engage and discuss with the respondent, assisted by Ms Vakala, the budget by the Trust for the purchase of a house for the family as indicated in the affidavit of Mr Charles Adams deposed to on 23 January 2023 (Volume 3 page 362 para 11) and report the outcome of that engagement to Court within **Twenty (20)** days hereof. Such report must be furnished to all the parties.
- 5 The application for the appointment of the applicant (Ms Amanda Bessinger) as a *curatrix personae* as contained in paragraph 9, Second Part of the Notice of Motion is dismissed.
- 6 The additional prayers sought in paragraphs 12, 13 and 14 of the Second Part of the Notice of Motion are dismissed.
- 7 The Case Manager, Anneke Greeff Inc. is directed to appoint another medical social worker in the stead of Ms Bessinger, preferably a medical social worker that is conversant in IsiXhosa language within **Ten (10) days** hereof, to attend to all matters involving the minor child, AN. The name of the medical social worker must be furnished to all the parties including the Curator *ad litem* **on the same day** of the appointment.
8. The medical social worker to be appointed by the Case Manager, Anneke Greeff Inc shall in consultation with the respondent, Ms Phumeza Vakala, Ms Samantha Goosen of the Lily Kirchmann Step Down Facility (Lily Kirchmann) and any persons appointed by the Case Manager to assist, identify the needs of the minor and those of the respondent to ensure a smooth transition from the Lily Kirchmann facility to the rented accommodation for the respondent's family. That must be attended to within **Ten (10)** days hereof.
9. The Case Manager, Anneke Greeff Inc. is directed to identify a team of caregivers, nurses and clinicians in consultation with the minor child's doctors and therapists, the respondent, Ms Vakala, and if necessary Ms Goosen, who will render palliative care and management of the minor child at the rented home and create temporal work schedules for them within **Ten (10) days** hereof. A list of names of the

aforementioned team shall be furnished to all the parties and to the Curator *ad litem* on the same day.

10.

10.1 The Case Manager, Anneke Greeff Inc. must facilitate adequate training sessions for Ms N[...] N[...], the respondent, with the assistance of the nurses or therapists who are conversant in isi Xhosa and Ms Vakala, where possible, on every matter that relates to rendering of palliative care by a parent and to the extent necessary to ensure a smooth transition of the minor child from the Lily Kirchmann facility to a home environment which includes but not limited to:

- (i) Complete personal hygiene care for the minor child;
- (ii) Bowel care;
- (iii) Prevention of fungal and eczema and application of skin care regime;
- (iv) Daily walks in a wheelchair and/or pram;
- (v) Constant interaction between the child and the staff, siblings and family including playing with toys with siblings;
- (vi) Interaction with physiotherapist regarding positioning of the minor child to try and ease or prevent occurrence of chest infections and any other matter where training is required to assist with her caring and management of the minor child.
- (vii) The need for regular turning and application of creams on the minor child's body to prevent pressure sores.
- (viii) Massaging of the minor child's limbs.

10.2 Such training must take place whilst the minor child is still housed at the Lily Kirchmann facility within **fourteen days (14 days)** hereof in preparation for the care of the child at a rented home and a report confirming such training must be filed with the court within (5) days after completion.

11. Ms N[...] N[...] and her family must move into the rented home on or about **25 May 2024** before the minor child is relocated to the rented home or even earlier depending on the terms of the lease agreement.
12. The Case Manager, Annেকে Greef Inc. must facilitate and supervise the minor child's move from the Lily Kirchmann facility to the rented accommodation on **31 May 2024**.
13. The Curator *ad litem*, Advocate Ramsay, is directed to attend to the following:
  - 13.1 To attend to the rented home **five (5)** days after the child has been moved into it, conduct interviews with the respondent, minor child's siblings, the caregivers, nurses, clinicians and therapists.
  - 13.2 Thereafter report to court, within **Ten (10) days** on the condition of the minor child and the relocation of the family to the rented accommodation.
14. Upon receipt of the various reports referred to above, the parties must indicate in writing whether they wish to address any issues with the court. The court will thereafter indicate when and how will those issues be dealt with.
15. Any other matters not dealt with herein in relation to the application are reserved pending compliance with this supervisory order and thereafter shall be dealt with in the judgment, including issues of costs.
  
16. The Supervisory Order of 11 April 2024 is incorporated herein in full as paragraphs 1 to 15 and is amended by incorporating further Orders 16 to 20 as follows:
17. The main application for the removal of the child from her homestead in Tyusha Location to Canaan and Lily Kirchmann Step Down Facility is dismissed with costs.
18. The Orders granted on 27 October 2022 and 10 August 2023, respectively and pursuant to the application for the removal of the minor child, are set aside.

19. The operation of both Orders in paragraphs 17 and 18, above, is suspended to allow for the implementation of the Supervisory Order dated 11 April 2024 and shall terminate on 31 May 2024; with the exception of the order appointing the *curator ad litem* which shall terminate on 24 June 2024.
20. The applicant is ordered to pay costs of the application for her appointment as a *curator personae*.

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**T.V. NORMAN**  
**JUDGE OF THE HIGH COURT**

**Matter Heard on:** 30 November 2023; 04 March 2024 & 09 April 2024

**Judgment Delivered on:** 25 April 2024

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