

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

**REPUBLIC OF SOUTH AFRICA**



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

**Case Number: 45327/2021**

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED. NO
.....	.....
DATE	

In the matter between:

**O R**

Applicant

And,

**A H**

Respondent

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**JUDGMENT**

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**Summary: Children's Act - meaning of section 24(3)- assignment of guardianship where the child already has a suitable guardian.**

**Held: in terms of s 24(3) - if a child already has at least one guardian a court is not empowered to appoint another unless the existing guardian is shown to be unsuitable; the unsuitability of the existing guardian is a jurisdictional fact which has to be established before the application can be entertained.**

**Held:** parental rights are, by their very nature, not randomly acquired. They are seriously obtained and exercised under the letter the of the law.

**Held:** If a child is adequately cared for by a primary care-giver - such as a natural mother - there would need to be compelling motivation as to why another person should be accorded legal rights the child.

**Held:** There is, within the architecture in the Children's Act, relating to the affording of rights to non-parents, a pervasive recognition that to needlessly invite dissent by increasing the number of people who have legally enforceable rights in relation to a child should be avoided in the interests of the child.

## **FISHER J**

### **Introduction**

[1] The applicant seeks that he be granted rights of contact and care in respect of the respondent's four-year-old son, B A in terms of section 23 of the Children's Act (the Act)<sup>1</sup>, as well as joint guardianship over the child under section 24. The applicant is not the biological father. The application is brought in two parts – A and B.

[2] This judgment is in respect of part A. It is sought that, interim to the adjudication of Part B, the Court order that the report of a clinical psychologist be obtained in relation to whether it is in the interests of B, that the care, contact and guardianship sought by the applicant in Part B be granted to him. The applicant also seeks that I order interim contact pending the determination of Part B.

[3] The respondent opposes the relief in both parts A and B on the bases that the applicant lacks locus standi and that, in any event, the relief sought in both parts is not in the interests of B or the respondent's other minor son, D who is eleven.

### **Legal principles**

[4] Section 23(1) of the Act provides that ' [A]ny person having an interest in the care, wellbeing or development of a child may apply to the High Court, a divorce court in divorce

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<sup>1</sup> 38 of 2005.

matters or the children's court for an order granting to the applicant, on such conditions as the court may deem necessary an order granting to the applicant, on such conditions as the court may deem necessary—

(a) contact with the child; or

(b) care of the child.'

[5] In terms of subparagraph (2) the court considering such an application must take into account—

'(a) the best interests of the child;

(b) the relationship between the applicant and the child, and any other relevant person and the child;

(c) the degree of commitment that the applicant has shown towards the child;

(d) the extent to which the applicant has contributed towards expenses in connection with the birth and maintenance of the child; and

(e) any other fact that should, in the opinion of the court, be taken into account.'

[6] Section 24 deals with the assignment of guardianship. Subsection (1) provides that a person having an interest in the care, wellbeing and development of a child may apply to the High Court for an order granting guardianship of the child to the applicant.

[7] The fact that resort must be had to the High Court for an application for guardianship shows that the Legislature regards such an application as one having a greater degree of seriousness than an application under section 23 which allows lower courts to hear the latter application.

[8] In terms of section 24(2) a court considering an application for guardianship the court must take into account—

('a) the best interests of the child;

(b) the relationship between the applicant and the child, and any other relevant person and the child; and

(c) any other fact that should, in the opinion of the court, be taken into account.'

[9] Subsection (3) provides furthermore that, if the child already has a guardian, the applicant must submit reasons as to why the child's existing guardian is not suitable to have guardianship in respect of the child.

[10] As I have said, there are two parts to this application. It is submitted on behalf of the applicant that all that I need determine, at this point in the proceedings, is whether it is in the best interests of B that the assessment be done and that contact be allowed pending the receipt of the assessment report and the subsequent application for final relief under Part B. Furthermore, Is my enquiry a limited one that has regard only to the interim order sought or does it take account of the fact that such an order is a means to an end- i.e. the granting of final relief for parental rights - which end must also be considered?

[11] Mr Botha for the applicant seems to favour the former approach. He argues that the process of assessment would not be unduly upsetting for the child in that the proposed clinical psychologist, Ms Lynette Roux is experienced and will be sensitive to handling the assessment in a manner which is not likely to cause distress. His submission is that such an assessment would do no harm.

[12] To my mind, such an approach begs the real question. The judicial task here encompasses, not a consideration of the interests of the child in undergoing the assessment process alone but rather an overarching consideration of whether, on what is before me, the interests of the child are served by allowing the applicant to embark on an opposed litigation process in the first place.

[13] As I have said, it is disputed, in any event, that the applicant has the requisite interest to bring the application.

[14] I will consider the issues of *locus standi* and the interests of B in the context of the application as a whole, after examining the facts.

## **Facts**

[15] The applicant is a fifty-two-year-old divorced chartered accountant. He is not able to father children. This has, understandably, been a source of pain to him.

[16] It appears from a psychological report attached to his founding affidavit that he previously married a woman, I who was the mother of two primary school children. He stated that he became a 'father figure' to these children. The applicant and I badly wanted a child of their own. They repeatedly underwent In Vitro Fertilization (IVF) but without success.

[17] There are indications that all was not plain sailing as far as the parenting of these children was concerned. One child was diagnosed with a condition known as Attention Deficit Hyperactivity Disorder (ADHD) which apparently caused some problems in the parental relationship because the child became difficult for the applicant to discipline. This was a factor leading to the breakdown of the marriage. The applicant's ex-wife now resides in Dubai with her children.

[18] During 2017 the applicant and the respondent met on the dating platform known as *Tinder*. At the time of their meeting the respondent was pregnant with B and D was six. D and B have different fathers.

[19] B's father has played no role in his life and it is not clear whether he has acquired parental rights and responsibilities in relation to B. He has neither been joined in these proceedings nor been given notice of them. D's father, C is a protagonist in these proceedings although not a party. His entrance onto the scene is contentious and is dealt with later.

[20] The respondent states that initially she did not want romantic relationship with the applicant. She explains that being pregnant and the mother of a six-year-old this was not a good time to enter into a new relationship. She had, she says, joined *Tinder* for companionship only.

[21] B was born on [...] 2017. *WhatsApp* communications between the parties around that time show that the applicant was supportive and expressed much interest in B.

[22] During the next three months the relationship between the parties grew and the applicant began spending a lot of time with the respondent and her sons. He became a fixture in their lives and grew closer to B and more involved in his life.

[23] The applicant eventually asked the respondent to move in with him, which she did in December 2018. B was then one year old. The applicant and B grew closer still.

[24] The applicant describes this bonding process as follows:

'As B grew older we became inseparable. A close and loving bond had formed between us. When B started talking one of his first words were "Dada". He wanted to shadow me wherever I went. He would ask me to lie down with him at night until he fell asleep. In the mornings I would be the first one B would come looking for with his blanket, calling "Dada, Dada", and then get in bed with me.'

[25] The respondent states that she soon began to feel uncomfortable with the intensity of the relationship which the applicant was engendering between himself and B. The respondent describes it as 'obsessive'. I observe that, on the applicant's own version, the relationship consumes him.

[26] The extreme closeness between the applicant and B did not take account of the feelings of D. The applicant says that he tried to include D in his parental largess but that it was difficult to forge a relationship with him. The respondent says that the applicant was overtly irritable and unduly hard on D. The result was that D was left feeling that he could not compete for the applicant's affections. He felt unwanted and diminished and this took a toll on him psychologically.

[27] The respondent says also that the way in which the applicant related to her was not typical of a loving partner. She expresses that he was always more interested in B than he was in her. More concerning is that she expresses that the obsessive relationship which the applicant has pursued with B has entailed a process of alienation of her from B and B from D.

[28] The behaviour of the applicant has clearly caused this family great pain. It is not disputed that D has suffered as a result of the favouritism. The respondent describes the relationship between D and the applicant as 'toxic.' She expresses that things deteriorated to a point where D expressed suicidal ideation.

[29] There are photographs attached by both the respondent and the applicant as 'evidence' of the relationships. One such photograph is of the applicant remonstrating with D. The fact that the respondent found it necessary to document the relationship between D and the applicant suggests a fear of litigation. The fact the applicant has done so shows a garnering of ammunition against the respondent to be used in the event that the respondent tried to take B away from him. Clearly the applicant's designs in respect of parental rights to B were central to the family dynamic.

[30] In late 2019 the respondent attempted to terminate the relationship. She, says the applicant made no genuine attempt to repair the relationship with her as this was not his primary consideration. Instead, he furnished her with a parenting plan in terms of which he required that he be afforded parental rights and responsibilities in respect of both D and B.

[31] There was, thereafter, an attempt at reconciliation. The respondent concedes that her financial constraints were part of the reason she stayed with the applicant even though she had significant misgivings about his relationship with her sons. The respondent is a nursery school teacher and has limited resources. The applicant, on the other hand, has been generous in his financial support of the children and especially B. He undertakes to continue to contribute to B's expenses should he be successful in the application.

[32] The parties moved into the applicant's new home in Northcliff on 25 October 2020. It was hoped that this would be a new beginning and that the relationships within the family would improve. The applicant had undertaken to do his best to make D feel loved and included.

[33] It was around this time that D's father, C was brought into the fray. The respondent explains that, at this point, C had not had physical contact with D for many years. She alleges that her and C's relationship had ended violently and that she had been forced to obtain an interim domestic violence order to keep C away from her. The respondent alleges that after the break-up C did not take an interest in D and never paid maintenance. Clearly, there were significant issues between C and the respondent.

[34] The respondent says she was thus shocked to be told by C during 2021 that the applicant had secretly approached him towards the end of 2020 with a view to involving him in the dispute which was brewing in relation to the applicant's rights to B. The respondent taped the conversation with C in which he told her this. Part of a transcript attached to the respondent's answering affidavit reads as follows:

'C: Me and R know each other a year, what actually happened was R came to Checkers and came and see me before, I think it was last year November, last year September, he came to me and he said to me he wants to see me and I didn't know who's this guy. So he didn't tell me he knows you, so he called the school he said to the school listen he needs to find out who I am and there's things I need to talk and the school told me and I said no, I don't know the person because I scared.

Respondent: Which school called you?

C: No he called the school, [inaudible 0:01:41] school, so I'm scared. So I thought its maybe somebody that wants to take me out, so I told Mr Roy, I told Aunty Ella and they said no go, and I went and then he said to me right this is what's going to happen, that's how I actually met him and he told me this is what he wants and then from thereon.

Respondent: What did he want?

C: He actually said to me you are, he just need to know how did we live, so I told him the whole story last year and I said to him no listen me and Hen 0:02:04] had a fight and that's how it be, and then he said then I think Bernice's lawyer and his lawyer came together and now I'm, they thing. So what actually happened was then R from thereon wants to know every time what you do, how did you fight with me and all this and what did we go through.'

[35] The C's explanations are somewhat garbled but the conversation gives a sense of C's understanding of what the applicant wanted from him and the lengths that the applicant was prepared to go to in his quest to gain parental rights in respect of B.

[36] C goes on in the transcript to say that he had been asked to give a statement in this case to assist the applicant – but that he had refused. He stated also that the applicant had paid some of his (C's) legal fees relating to the acquisition of contact with D.



[37] The applicant does not deny that he insinuated himself into the lives of C, the respondent, and D without the knowledge of the respondent. He says that he thinks that children should 'have father figures' and in this way seeks to justify his intrusive behaviour.

[38] The respondent surmises that the applicant contacted C in a bid to bring D's father into his life and thus take some of the pressure off the applicant in relation to D's needs for a father figure. It seems that he also hoped to source information from C as to the respondent's conduct in their relationship in the hope that it would help him to build a case against the respondent.

[39] Whatever his motivations, the applicant's machinations did lead to a contact regime coming into place between D and C.

[40] The respondent has sought to navigate this contact in such a way that it does not exacerbate D's misery. The applicant, it seems, has been less than accommodating of this position. On his own version he has means and likes to spoil B. This inevitably leads to D's feeling of rejection and inadequacy being fuelled. C does not have the means and perhaps not the inclination to compete with the experiences offered by the applicant to B.

[41] Towards the end of 2020, the respondent decided that she and the boys had to move out of the Northcliff house as things had become intolerable, especially for her and D. This was conveyed to the applicant. It seems that it was around this time that the applicant contacted C for the purposes of building a case for parental rights to B.

[42] In the months leading up to the intended move, the respondent received a letter from the applicant's attorney demanding that she submit proposals as to how contact would work after she moved out and threatening litigation if she did not agree to contact. On 12 April 2021 she received another of the applicant's parenting plans.

[43] The applicant moved out of the Northcliff house on 2 June 2021.

[44] The correspondence around this time shows that the respondent was prepared to allow some contact between the applicant and the boys, albeit reluctantly. She explains that she was concerned that B would keenly feel the absence of the applicant but also that she

was intimidated by threats of litigation – which she could ill afford. At the same time, she knew that she needed to accommodate the difficulties that the intensity of the bond that the applicant had engendered between himself and B had visited on her family.

[45] The respondent emerges as a caring and sensitive mother who has been attempting to do her best to deal with integrating the fraught relationships which the applicant had formed with her sons and herself over the two and a half years that the family lived with him.

[46] The respondent says that the applicant is manipulative and controlling. He proposed marriage during early 2021 by way of handing the respondent vouchers for an engagement ring. This somewhat lacklustre proposal was accepted but the engagement was broken off shortly thereafter. She says she knew that he did not have any real love for her. The respondent simply returned the vouchers to the applicant's closet. Nothing was said of this after such return of the vouchers.

[47] The applicant sates the following in relation to the respondent moving out:

'I felt powerless as the boys, and particularly B, were ripped from my life. I was very distressed about the move, and the prospect of not seeing them again. My life seemed to lose meaning. I cannot begin to describe the sadness I felt when alone in the spacious family home in Northcliff, surrounded only with memories of the life we previously had together.'

[48] 04 June 2021 applicant's attorney Pieter Coetzee wrote to the respondent. The letter underscored that the applicant was 'intent on maintaining contact with the boys.' The following threat was levelled:

'Your apparent refusal to permit our client contact with the boys , and in particular B leaves our client with no alternative (sic) to approach the High Court for the appropriate relief, on an urgent basis. Our client will in addition seek an order for costs against you in view of the fact that you have been given ample opportunity to comply with our client's reasonable suggestions in so far as contact with the boys are(sic) concerned.'

[49] By July 2021 the parties were in full blown legal conflict.

[50] As at the date of the signing of the answering affidavit, being 01 November 2021, the respondent was allowing contact every alternate Saturday from 08h00 to 17h00 and telephonic contact three times a week.

[51] She has now taken the decision to terminate contact. She concedes that B initially did ask about the applicant's absence. However, she says, as the weeks have worn on, this has become less frequent.

[52] She says also that she had begun to have difficulty getting B to interact with the applicant by way of video call. She explains that the calls were often not light hearted and enjoyable for B but were of an intensity which was inappropriate for telephonic engagement with a three year old. She describes the applicant telling B how much he loved and missed him repeatedly until B became emotionally overwhelmed and tearful. The following vignette of family life sketches a compelling scene:

'The difficulty that I have is the way the Applicant talks to B. He is always talking about a gift he gave to him, that his fish are missing him [ a gift from the applicant], that he loves him etc. D overhears this and becomes extremely distressed. I try my best to not let D hear the calls any more. Sometimes the 2 boys are watching TV together when the Applicant calls. B is a three year old so he gets distracted very easily. The Applicant will tell B to turn off the TV so that he is not distracted which impacts on D watching TV. The calls are very difficult to monitor and control.'

[53] She says that the atmosphere in her home has become more relaxed and less fraught with the exclusion of the applicant therefrom. Most importantly, she says that she perceives that the relationship between the brothers is being given a chance to mend now that the fierce sibling rivalry has abated.

[54] The applicant is understandably distraught at the loss of contact to B. He states the following;

'I cannot imagine life without B in it and I am certain that he feels the same. I am extremely concerned that a separation from me for too long will cause irreparable harm to our relationship, apart from damage and/or trauma to B's psyche;'

[55] The respondent, after having initially agreed to the assessment sought in Part A, now opposes both parts of the application. She explains that she has realised that a psychological assessment as prayed for in part A will tend to have a negative impact on the family relationships as a whole and thus on B. The respondent says also C has not agreed to the assessment of D as part of that inquiry whereas the applicant says that C has agreed.

[56] I now move to deal with the issues for consideration as outlined above.

### **Issues for consideration**

#### *Locus standi*

[57] The applicant and the respondent lived together for a period of 2½ years. During that period the applicant appears to have become fixated with becoming B's father. This kind of loving fixated affection given by an adult to a very young child will inevitably have the result of the attachment of the child to the adult. The more intense the fixation the more likely it is for a co-dependency to grow between the two.

[58] It is not unusual for people, in this day and age, to form extended families. Indeed, some may argue that the nuclear family is no longer the norm. This results in biological parents living with non-biological parents who inevitably form bonds with the children that they are co-parenting in these living arrangements. Often the relationships do not have much commitment to permanency.

[59] One would expect in this context that there be a recognition that children are fragile and impressionable and that the parent-child connection is profound. People should adopt a measured and responsible approach to forming deep emotional ties with children.

[60] The depth of the 'parental' connection which has been established is not, without more, enough to afford an applicant the necessary *locus standi*. Put differently, it does not follow, as the applicant seeks to suggest, that merely because there is a loving relationship

between a person and a child which has parental hallmarks that, such person automatically has the necessary interest contemplated in sections 23 and 24 of the Act.

[61] This child has two biological parents; a competent, loving, and able mother and an absent biological father who may or may not have acquired parental rights.

[62] Implicit in these sections of the Act and particularly section 24 is that a child is not necessarily benefited by more than one person having parental rights in respect of that child. It may '*take village to raise a child*'<sup>2</sup> but this does not mean that parental rights should be universally enjoyed and easily obtained. Such rights are, by their very nature, not randomly acquired. They are seriously obtained and exercised under letter of the law.

[63] It seems to me that, because of his deep love for B and the intimate part he has played in his up-bringing thus far, the applicant has acquired an inflated sense of his entitlement to legal rights under the Act. This is presumptuous. To my mind, the applicant has not established that he is a person with the necessary interest to seek the relief that he does in respect of contact and care.

[64] The misguided application for guardianship rights reinforces this sense of a deep misunderstanding by applicant of his entitlement to legal rights under the Act.

[65] The legal position in relation to the right to be made guardian has even more stringent requirements than rights of contact and care. This is because the rights relate to milestone matters such as formal consents necessary to achieve legality in relation to important aspects of the child's life - such as the change in his status or his movement beyond the court's jurisdiction.

[66] Section 24(2)(b) provides that a court considering an application for guardianship must, inter alia, consider 'the relationship between the applicant and the child and any other relevant person and the child.'

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<sup>2</sup> '*It takes a village to raise a child*' is an African proverb that means that an entire community of people must provide for and interact positively with children for those children to experience and grow in a safe and healthy environment.

[67] This peremptory requirement proceeds from the acceptance that there may be competing guardianship rights. A question which is specifically to be considered by a court in determining whether the aspirant guardian has *locus standi* is whether the child already has a suitable guardian.

[68] Section 24(3)<sup>3</sup> requires that the applicant must submit reasons as to why the child's existing guardian is not suitable. If this is not done, as is the case here, this is fatal to the application. The non-suitability of the existing guardian is a jurisdictional fact needed for the court to entertain the application. This is because, on a purposive interpretation, the provisions of section 24(3) mean that, if the child has an available and capable guardian there is no reason to appoint another.

[69] I perceive within the architecture in the Act relating to the affording of rights to non-parents, a pervasive recognition that to needlessly invite dissent by increasing the number of people who have legally enforceable rights in relation to a child should be avoided in the interests of the child.

[70] In sum, If the child is properly cared for by a primary care-giver – such as a natural mother - there would, to my mind, need to be compelling motivation as to why another person should be accorded legal rights to the child; and, in the case of an application for guardianship, if the child already has a guardian who cannot be shown by the applicant to be unsatisfactory the application cannot succeed.

[71] The the applicant has, in any event, failed to make out a case on the merits as far as care and contact rights are concerned.

[72] I thus move to examine the case on the merits more closely.

### **The case on the merits**

<sup>3</sup> Section 24(3) reads as follows:

'In the event of a person applying for guardianship of a child that already has a guardian, the applicant must submit reasons as to why the child's existing guardian is not suitable to have guardianship in respect of the child.'

[73] Assuming *locus standi*, I still am of the view that the applicant has not established that the best interests of B are served by granting the applicant any legal rights which are enforceable by the applicant against the respondent, B's father, B himself and generally.

[74] The aspects of the case that inure to a finding that the applicant should be accorded rights of contact and care are the following:

- He loves B and wants his happiness and wellbeing.
- He has funds which will allow for a meeting of B's needs above those that the respondent can offer.
- B, notwithstanding his tender years, has evidenced that he has obtained comfort, succour and enjoyment from contact with the applicant. The applicant interprets this as an acknowledgment that B (and all children for that matter) 'need a father'.
- The applicant wishes to be B's father in all senses of the role.

[75] The aspects militating against the relief sought are the following:

- The applicant has not shown that the respondent is an unsatisfactory guardian or caregiver.
- The respondent's drive to be 'a father' seems to eclipse the interests of B and lead to a lack of perspective as to the applicant's place and function in the life of the child.
- The applicant puts his own needs ahead of the respondent and her sons.
- The relationship between the respondent and the applicant has broken down to an extent that there is bound to be dissonance in a co-parenting relationship.
- The effect of this breakdown and the applicant's inflated sense of his position within the relationship is that, if he is allowed to pursue this application, this will lead to protracted conflict and litigation – which the respondent can ill afford.
- The conflict between the parties is having and will, in all likelihood, continue to have a negative effect on the manner in which contact to and care of B is being exercised.

- The applicant seeks to impose his will on the respondent in relation to her parenting of both B and D to the exclusion of her wishes and the needs of the children.
- The relationship between the applicant and B has caused a situation where the filial relationship between B and his mother is negatively affected.
- D is profoundly affected by the manner in which the applicant has related to him and to B.
- The relationship between the whole family – i.e. the respondent and her sons individually and together is negatively impacted upon by the applicant's presence in the relationship.
- The applicant's interactions with B are, at times, overly emotional and inappropriate given B's age.
- The insinuation by the applicant of himself into the relationship between the respondent and C in relation to D suggests (i) that the applicant does not respect other people's boundaries;(ii) that the applicant is not mindful of the respondent's right to make her own decisions as to her children; and (iii)that the applicant believes that he is entitled to manipulate circumstances to further his aims regardless of the consequences of those involved.
- The applicant believes that his relative wealth will give him an advantage over the respondent.
- The applicant's intimidation of the respondent in the context of this litigation is inappropriate.
- The applicant has had no respect for the respondent's autonomy as a parent.
- The respondent has given no regard to the rights of B's biological father in that he has not given him notice of this application.

[76] On a balancing of these aspects,there is, to my mind no question that the interests of B will not be negatively impacted upon by the application and the relief sought.

## **Conclusion**



[77] If I am wrong in my decision that the applicant has failed to establish *locus standi*, on a consideration of the facts, it is my view that the last thing that B needs is a father in the guise of the applicant with power over his life and family.

[78] It seems to me that in stopping contact between the applicant and B, the respondent has acted as a sensible mother and in the best interests of B.

[79] The resort to the opinion of an expert, to my mind, has no prospect of having any real effect on the findings in this judgment. It is within this Court's province and function to determine the interests of the child and not that of the expert.

[80] It is my view that this application should go no further and that the respondent's decision to revoke all contact between B and the applicant should stand firm so that B and his family can move past the pain that the relationship has caused.

## **Order**

[81] I thus order as follows:

Part A of the application is dismissed with costs.

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**FISHER J**

**HIGH COURT JUDGE**

**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**Date of Hearing:** 11 March 2022.

**Judgment Delivered:** 18 March 2022

**APPEARANCES:**

**For the Applicant** : Adv J G Botha.

**Instructed by** : Coetzee Duvenage Inc.

**For the Respondent** : Adv T Eichner-Visser.

**Instructed by** : Keyes Attorneys.