

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 NO: 2022/6381

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

26 April 2023

DATE

SIGNATURE

In the matter between:

D K: D

Applicant

And

B-D K: R M

First respondent

VAN ASWEGEN N.O.: SANET

(In her capacity as curator *ad litem* to a minor child)

Second Respondent

Neutral citation: *DKD v BDK & VAN ASWEGEN N.O.* (Case number: 2022/6381)

[2023] ZAGPJHC 382 (26 April 2023)

JUDGEMENT

Coram: Sarita Liebenberg AJ

- [1] This is the umpteenth chapter in the confrontation and litigation between the applicant and first respondent. They were previously, and are the parents of a young girl S, who is only 11 years old.
- [2] During the past seven years, S has been subjected to trials and tribulations no young child ought to experience. She had to endure litigious skirmishes between her parents, both in this Court and in the Children's Court, during which proceedings she was called to testify. S was forensically assessed, interviewed on a number of occasions by the second respondent, was interviewed by a social worker appointed in Children's Court proceedings, had four interviews at the Teddy Bear Clinic, and attended therapy for about two years. More litigation is to come in Part B of this application, with the applicant seeking to relocate to Australia, with S, which the first respondent opposes.
- [3] To contextualise the determination to be made by this court, it is necessary to detail these trials and tribulations S has had to tolerate.

FORENSIC HISTORY

- [4] The first respondent instituted divorce action during June 2016, which the applicant defended. Ostensibly, the applicant, first respondent and S remained resident in the same home for an extended period during the divorce proceedings.
- [5] During the course of early 2017, Dr Giada Del Fabro, a clinical psychologist, was engaged to perform a forensic investigation of the family. Dr Del Fabro's

report, which is undated, was ostensibly published during or about May or June 2017. Dr Del Fabro's recommendations included S having her primary residence with the applicant, and the first respondent having defined contact.

[6] Seemingly in response to Dr Del Fabro's report and recommendations, and on 26 June 2017, the first respondent sought and obtained on an *ex parte* order appointing the second respondent as curator *ad litem* to S. The order provided as follows:

1. *SANET VAN ASWEGEN, an Advocate of this Honourable Court, be appointed as Curator Ad Litem to the minor child [S...], for the purposes of investigating and compiling a report as to inter alia:*
 - 1.1 *Whether or not [S's] best interests as minor child and the biological parents of the minor child, have been properly investigated and protected with regard to inter alia:*
 - i. *The primary residence and contact rights in respect of the minor child [S];*
 - ii. *Whether the clinical psychologist report of Del Fabro should be upheld or replaced with a further report and/of the recommendations of the curatrix;*
 - iii. *The right to appoint a further psychologist and/or social worker and the for the biological father to participate in this assessment;*
 - iv. *[S's] current circumstances including her emotional, physical, and psychological wellbeing and the ability, as the biological parents, to have [S] placed in their primary care.*
- 2 *Upon completion of her investigations and findings she shall file same, together with her recommendations, with this Court or any other Court dealing with this matter.*
- 3 *ADV VAN ASWEGEN shall assist [S] in all Court proceedings in the event that same become necessary.*
- 4 *Costs to be paid by [the first respondent in this application]."*

[7] By all accounts, the second respondent performed her duties in terms of paragraph 1 of the June 2017 order. There is no debate that the second

respondent met with the parties, with S, and other role players. She published her report, dated 20 November 2017, which contains her findings and recommendations.

[8] On 3 August 2019, the applicant and first respondent concluded a settlement agreement in the divorce action. A decree of divorce was on 13 November 2018, and the settlement agreement was made an order of court. The following terms of the settlement agreement are pertinent to the issues for determination herein:

[8.1] S's residence shall be shared between the parties, so that she lives alternate weekends, from Sunday to Sunday, with each of her parents.

[8.2] The matter of S's primary residence and contact with her parents is subject to review by the second respondent within six months from date of signature of the agreement.

[9] On the face of the document itself, the second respondent was not party to the settlement agreement. She was also not advised of the settlement agreement and the divorce order until much later.

[10] Despite agreeing to the terms contained in the settlement agreement, and the divorce order being granted on 13 November 2018, the applicant remained aggrieved by the second respondent's investigations and report.

[10.1] In March 2019, the applicant laid a formal complaint against the second respondent with the Johannesburg Society of Advocates ("JSA") "*for the unethical treatment of a minor child and her disregard of the courts mandate and the blatant lies that she expressed to me.*"

[10.2] The professional committee of the JSA considered the complaint, and advised the applicant of its finding that the complaint does not sustain a case of professional contact against the second respondent.

[10.3] Dissatisfied, the applicant sought leave to appeal to the General Council of the Bar. By letter dated 5 February 2020, the applicant was advised that his application for leave to appeal had been refused.

[11] On or about 26 June 2020, the applicant approached the Children's Court, without notice to the second respondent, seeking that the appointment of a social worker to investigate S's circumstances in terms of the provisions of section 50 of the Children's Act, 38 of 2005; and to investigate whether S is a child in need of care protection. The applicant also sought orders that, pending the outcome of the investigations, S be placed in the applicant's primary care, and the first respondent to have supervised contact only. Apparently, the applicant was not awarded the interim relief he sought.

[12] The applicant did not immediately disclose to the Children's Court the terms of the June 2017 order, and the second respondent's appointment as S's curator *ad litem*. It was only when the first respondent appeared, and placed matters on record, that the second respondent was called to attend, and mandated to file a further report in respect of S.

[13] During the course of the proceedings in the Children's Court, S was not only interviewed on at least two occasions by the second respondent, and by a social worker, but she was also called by the applicant as witness to testify in camera. At the time S was about 9 years old and testified through an intermediary.

[14] By judgment dated and order dated 16 July 2021, the Children's Court dismissed the applicant's referral, finding that it could not, on a balance of probabilities, find that S is in fact a child in need of care and protection. It also directed the parties to following the provisions of the settlement agreement with regard to reviewing the care and contact regime.

[15] Of course, had the Children's Court found S to be child in need of care and protection, it would have ordered S be placed in temporary safe care, which could entail placing her in foster care.

[16] In its judgment, the Children's Court:

[16.1] Directed the applicant to follow the agreement of settlement and the divorce order with regards to care and contact, as the Children's Court is cautious of the attempts of parents to use the care proceedings as a means of avoiding a High Court order.

[16.2] Reminded the applicant reminded that, despite Dr Del Fabro's recommendations that S's primary residence should vest with him, he entered into the settlement agreement which provides for share residence, albeit that he blames his previous attorney for bad advice.

[16.3] Remarked about the transcript of a conversation between S and the first respondent, which the applicant placed before the Children's Court, as follows: " *I am not impressed by the fact that the child's private conversations with the other parent are used in a smear campaign in court against the other parent. Both parents must learn to respect a child's right to privacy after they*

have placed the necessary security measures in place against the 'dark internet' on her phone."

[17] Some four months later, the applicant again began agitating for a variation to S's living arrangements. In his attorneys' letter of 15 November 2021, the applicant recorded that that S had expressed the wish to live with him and see the first respondent every second weekend. He also expressed in intention to immigrate to Australia. As such, he believed it necessary for S's circumstances to be investigated by a child psychologist.

[18] Also on 15 November 2021, the applicant's attorney also wrote to the second respondent, recording his client's view that it was inappropriate and contrary to S's best interests for the second respondent to continue acting, and inviting her to resign.

[19] The first respondent's response was simple: she proposed a meeting between the applicant, herself and the second respondent; noted the applicant intention to immigrate and stated that she did not have funds to pay for the costs of another forensic psychologist.

[20] In a letter on 24 November 2021, the applicant objected to a meeting with the second respondent because it would be inappropriate and contrary to S's best interests, and, as there were no pending court proceedings, there was not need for the second respondent to be involved. The applicant called on the first respondent to agreed to the appointment of one of three psychologists identified, or to agree for mediation by FAMSA.

[21] Ultimately, the applicant and first respondent did not reach agreement on mediation, and these proceedings were instituted on 22 July 2022.

THIS APPLICATION

[22] The present proceedings are for relief in two parts. This court was called upon to determine Part A, in which the applicant seeks the following orders:

- “1. Removing and/or discharging the Second Respondent as Curatrix ad litem on behalf of the minor child;*
- 2. Directing the Family Advocate to conduct an investigation of the circumstances of the minor child and to furnish a report in regard to the structure of parental rights and responsibilities, with specific regard to the minor child's wishes, care, residency and/or whether it is in the minor child's best interests to relocate to Australia with the Applicant;*
- 3. Directing that Ms Marilyn Davis-Shulman alternatively an independent child psychologist, agreed upon by the parties, and failing agreement, nominated by the Chairperson of the health Professions Council of South Africa (“the child psychologist”), be appointed to conduct an investigation of the circumstances of the minor child and to furnish a report in regard the structure of parental rights and responsibilities, with specific reference to the minor child's wishes, care and residency and/or whether it is in the minor child's best interests to permanently relocate to Australia with the Applicant;*
- 4. Directly the Applicant and the First Respondent to jointly pay the costs of the child psychologist, in equal shares;*
- 5. Directly the Applicant and the First Respondent to co-operate with the investigations of the Family Advocate and the child psychologist;*
- 6. Granting the Applicant and the First Respondent leave to supplement their papers after the report(s) of the office of the Family Advocate and/or the child psychologist have been tabled;*
- 7. Costs of the application, only in the event of opposition...”*

[23] During introductions in chambers, I raised with counsel for the applicant and the first respondent, in the presence of the second respondent, concerns I had about the matter. The parties requested time to reach agreement. On resumption, I was handed a draft order containing the terms of the agreement reached. But for one aspect of the draft order, which I intend amending, I incorporate the agreement reached in my order below.

[24] What remained in dispute is the applicant seeking a postponement of prayer 1, that is the removal of the second respondent. The parties addressed me, and I refused the postponement. Counsel then addressed me on the merits of the applicant's claim.

THE LAW ON CURATORS AD LITEM FOR CHILDREN

[25] Prior to considering the grounds for removal of a curator *ad litem*, it is incumbent to speak to the role and function of a curator *ad litem* to a child.

[26] Section 28 (1)(h) of the Constitution provides that: *'Every child has the right to have a legal practitioner assigned to the child by the State and at State expense, in civil proceedings affecting the child, if substantial in justice would otherwise result.'* The Children's Act¹ expounds on this basic right, and in section 10 dictates that "[e]very child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration."

[27] Gone are the days of children being seen but not heard. It is no longer good enough to let the adults battle it out, excluding the child. In *Minister of Education v Pillay*², the apex court held:

¹ 38 of 2005

² 2008 1 SA 474 (CC) at 494E-G

“Legal matters involving children often exclude the children and the matter is left to adults to argue and decide on their behalf. In Christian Education South Africa v Minister of Education, this Court held in the context of a case concerning children that their ‘actual experiences and opinions would not necessarily have been decisive, but they would have enriched the dialogue and the factual and experiential foundations for the balancing exercise in this difficult matter would have been more secure.’ That is true for this case as well. The need for the children’s voice to be heard is perhaps even more acute when it concerns children of Sunali’s age who should be increasingly taking responsibility for their own actions and beliefs.”

[28] In *Du Toit v Minister of Welfare and Population Development*³ the court broadly interpreted Section 28(1)(h) to include the appointment of a curator *ad litem*. The court specifically stated that in matters where children’s interests are at stake, those interests must be fully aired before the court to avoid substantial injustice to those children and possibly to others.

[29] Thus, it is imperative that children’s interests be protected when they are involved in a case before the court, and to ensure their right to participate as they would be directly affected by the decisions of the court.⁴

[30] A legal practitioner, referred to in section 28(1) of the Constitution, can and should be interpreted broadly to include the appointment of a curator *ad litem*, and/or the assignment of a separate legal representative who argues the views of the child. Both are forms of child participation, and both be used depending on the circumstances of the case and the ability of a child to direct litigation.

³ 2003 (2) SA 198 (CC) at [3]. See also *S v Mokoena* 2008 5 SA 578 (Y) 589C

⁴ See Sloth-Nielsen: “Realising children’s rights to legal representation and to be heard in judicial proceedings: An update”: 2008 SA JHR 495

[31] The courts have clearly defined the role of curators *ad litem*, differentiating it from the function of a Family Advocate, and distinguishing it from the role of a legal representative. It is the role of a curator *ad litem* to legally assist children in litigation and such a curator is appointed to avoid injustice and to assist persons to vindicate rights where there is no other suitable means.⁵

[32] The common law rules on legal standing for children have been expanded by employing curators *ad litem* to investigate and represent the interests of children who are not before the Court. These developments enhance children's right of access to the Court.

[33] In recent years, the High Courts have appointed curators in several groundbreaking cases that suggest a broader role than that which was traditionally foreseen. These cases include:

[33.1] The Centre for Child Law having appointed a curator *ad litem* to investigate the circumstances of children with behavioural disorders and to report back to the court with recommendations.⁶

[33.2] In *Ex Parte Centre for Child Law (For the appointment of a curator ad litem for the minor child RZD)*⁷ a curator *ad litem* was appointed for a child who had been burned by soldiers in Chad and had been brought to South Africa for surgery. The caregiver, the boy's grandmother who accompanied him, and the South African organization assisting him found themselves in a dispute about his care and treatment. A curator *ad litem*

⁵ Per Reynolds J in *Ex Parte Phillipson and Wells NNO* 1954 1 SA 245 (E) 246

⁶ Boezaart & Skelton "From Pillar to post: Legal solutions for children with debilitating conduct disorder" in *Aspects of disability law in Africa* (eds Grobelaar-du Plessis & Van Reenen) (2011) 107 and further on these cases.

⁷ Unreported case no 12166/08 (NGP)

was appointed to investigate all issues pertaining to the child, liaise between the parties, obtain the views of the child, find solutions, and make recommendations to the court.

[34] In *Legal Aid Board v R & Another*⁸ the Court found that questions about where a child is to live and which parent would be making the most important decisions in the child's life, are of crucial importance for a child. It is the child, it was said, who will be the subject of the decision and who must live with the consequences. It is therefore vitally important that his or her views are taken into consideration when making those decisions. When it is evident that the child's views are being drowned out by the warring parents, there will likely be a substantial injustice if a separate legal representative were not appointed for the child.

[35] *Soller N.O v G & Another*⁹ is helpful in considering the separate roles of the Family Advocate, a curator *ad litem* and a legal representative. In that judgment it was reaffirmed that:

[35.1] The Family Advocate acts as advisor to the Court and mediator, and that it does not represent any of the parties and is therefore required to be neutral to investigate the dispute and report and make recommendations to the Court. It was accepted that during its investigation, the Family Advocate will engage with the child to ascertain his or her views on their future.

[35.2] A legal practitioner, it was held, could not usurp the role of the Family

⁸ 2009 (2) SA 262 (D) at 269G

⁹ 2003 (5) SA 430 (W)

Advocate. The court described the Family Advocate as providing a professional and neutral channel of communication between the conflicting parents (and perhaps the child) and the judicial officer.

[35.3] The legal practitioner stands squarely in the corner of the child and has the task of presenting and arguing the wishes and desires of that child.

[36] A curator *ad litem* is appointed to safeguard the best interests of the child, usually when the child does not have parents or a guardian; or the parent or guardian cannot be found; or if the interests of the minor conflict with those of the parent or guardian; or if the parent or guardian unreasonably refuses or is unavailable to assist the child. Ultimately, the duty of a curator *ad litem* is to assist the Court and the child during legal proceedings, and to look after the child's interests. In doing so, it is likely that, in executing the court ordered mandate, that the curator *ad litem* will irk one or both parents.

[37] Unlike the Family Advocate, the role of the curator *ad litem* is not a neutral one. The curator is there to represent the interests and advance the case of the child concerned.¹⁰ A curator *ad litem* is to speak for the child concerned, and not just on the child's behalf, to enable their voice to be heard.¹¹ A curator *ad litem* cannot and is not mandated to follow a child's instructions. This is the major difference between a curator and a legal representative, and perhaps the greatest source of disappointment for especially older children and their parents.

[38] Generally, a court order appointing someone to act as curator *ad litem* for a

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

¹¹ *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) par 53

child, is couched in broad terms such as the curator is to investigate the matter and file a report of his or her findings. Such an investigation will, of necessity, include interviews with the child (if possible), with the parents, and sometimes family members, the experts involved, teachers, and other collateral sources. Then, the curator must publish a report, without or without recommendations, depending on the mandate. The court will have regard to the curator's report and hear submissions from the curator *ad litem* during the hearing of the matter.

[39] During the course of the investigation, the curator *ad litem* may be called upon to mediate some or other dispute between the parties, or to give advice or a recommendation. It is debatable whether this should strictly form part of the mandate of a curator, but I express no opinion on this count.

[40] More often than not, older children will become quite despondent when their wishes are not regarded as the final say on a curator's findings. This is also why it may be imprudent to appoint a curator *ad litem* for older children. It is suggested that, when deliberating the appointment of a representative for a child, it is important to specifically consider the age and stage of maturity of the child. A 15- or 16-year-old may very well be able to give coherent instructions, which renders the appointment of an own legal representative more appropriate than the appointment of a curator *ad litem*.

[41] Also, when seeking the appointment of curator *ad litem* to a minor child, the litigants, and their legal representatives as well as the court must be mindful of the intended purpose of the appointee, for the purpose will dictate the nature and extent of the powers, duties, and obligations to impose on the appointee.

GROUNDINGS FOR THE REMOVAL OF A CURATOR AD LITEM

[42] In his judgment in *Tshalet v Mosungwa and Another*,¹² Manoim J was called upon to determine an application for the removal of the curator *ad litem* to a road accident victim. He held that the same principles applicable to the removal of a trustee, apply to the removal of a curator *ad litem*. The principles were catalogued as follows in decision of the full court in *McNair v Crossman*:¹³

“The court’s power to remove a trustee though is not restricted to the statutory grounds. Its powers to remove a trustee is derived from its inherent power which has been recognised in our law for over a century and has now been entrenched in the law by s 173 of the Constitution of the Republic of SA, 1996 (the Constitution). Exercising this inherent power, courts have traditionally removed a trustee for misconduct, incapacity or incompetence. Though it must be said that each of these three grounds may also be a basis for an application for removal in terms of s 20(1) of the Act if it can be proved that the alleged misconduct, incapacity or incompetence imperils the trust property or the administration of the trust and courts have often found this to be the case.”

[43] I agree that these principles are apposite in the matter at hand.

[44] Although the removal of the second respondent constitutes final relief, S’s welfare remains at state, and I am thus careful to determine the disputes along the strict lines usually applied in opposed motions.^{14 15}

THE APPLICANT’S CASE

[45] The applicant raises number of bases for the second respondent’s removal.

These include:

¹² (118881/2021) [2022] ZAGPJHC 278 (3 May 2022)

¹³ 2020 (1) SA 192 (GSJ) at [29]

¹⁴ *Plascon-Evans Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)

¹⁵ *B v S* 1995 (3) SA 571 (A)

[45.1] That the second respondent was appointed at the specific request of the first respondent, without prior consultation or communication with him.

[45.2] She failed to conduct a review of the residence and contact arrangements within 6 months from the date of signature of the settlement agreement in the divorce action.

[45.3] The second respondent has not conducted herself in a matter that is impartial or unbiased. On this score, the applicant alleges that the second respondent had released a copy of on of her reports first to the first respondent without providing him such a copy thereof.

[45.4] S described to the applicant that, during a discussion she had with the second respondent in August 2022, the latter appeared to 'bagger' her for answers to specific questions about the applicant, interrupting S which she was talking about school and friends, and the asked S whether she was scared of foster care. S apparently also expressed distrust in the second respondent.

[46] It is of no consequence in that the second respondent was appointed *ex parte*, and that the first respondent pays her fees and charges. The applicant never sought a reconsideration of the June 2017 order. There is no evidence that he ever tendered to contribute towards the costs of the second respondent's appointment. He also does not explain why, if he was so aggrieved by the second respondent's appointment, he agreed, in settling the divorce action, to the second respondent's continued involvement in the family's affairs.

[47] In terms of clause 5.3.4 of the settlement agreement, S's primary residence and contact was subject to review of the second respondent within 6 months from date of signature of the agreement, being 3 August 2018.

[47.1] *Ex facie* the agreement, the second respondent was not a party thereto, and there is no evidence upon which this Court can find that the second respondent was aware of the terms thereof.

[47.2] There is no evidence to contradict the second respondent's reports that she only learnt of the divorce order in late March / early April 2019.

[47.3] There is also no evidence of any request being made to the second respondent to review S's primary residence and contact, whether within 6 months after signature of the settlement agreement, or any time thereafter.

[47.4] The directive of the Children's Court, to utilise the agreed methodology of reviewing S's care, residence and contact, appears to have fallen on deaf ears.

[47.5] The applicant objected to a proposed meeting between him, the first respondent and the second respondent, to address issues concerning S's residence and contact.

[47.6] On a conspectus of the evidence, the distinct impression is that the applicant has refused to cooperate any further with the second respondent.

[48] On the facts before me, I cannot find that the second respondent acted unprofessionally or acted unethically against S. Had she done so, the applicant ought not have agreed to her continued involvement in S's life.

[49] As S's curator *ad litem*, the second respondent is mandated to be partial and biased in favour of S's best interests. The second respondent is not a neutral party, but firmly in S's corner. This does not necessarily mean that the second respondent (much like S's parents themselves) must heed every wish, view, or whim that S may express.

[49.1] The applicant suggests that the second respondent's bias is evidenced by the fact that the first respondent received a copy of the second respondent's report before him.

[49.2] The second respondent's explanation is uncontroversial: early morning on the date of the hearing, and in the passages of the Children's Court, the second respondent met the first respondent's attorney first, and handed her a copy of the report. Moments later, the applicant's attorney came out of an office into the passage, and the second respondent handed him a copy of her report.

[49.3] I cannot find, on reasonable grounds, that the mere fact that the second respondent acted with bias in favour of the first respondent, or that she somehow improperly favoured the first respondent, when she handed her report to the first respondent's attorney moments before she handed it to the applicant's attorney.

[50] Finally, the applicant asserts that S's evidence in the Children's Court proceedings evidences that S distrusts the second respondent, and that the second respondent's report does not properly record or align with what S had told her.

[50.1] At the outset, it is a very sad day when a 9-year-old little girl is called by her one parent to testify against other in Children's Court proceedings, whether through and intermediary or not. By necessary implication, the child was expected to choose sides, which is lamentable.

[50.2] S's evidence in chief was led by the applicant's attorney, who put one leading question to another to her, which she answered through the intermediary. The evidence led was not truly that of S, but rather the evidence of the examiner, which significantly undermines the evidentiary value of the evidence.

[50.3] The transcript of the proceedings which formed part of the record of this application is not complete, and does not include the cross- or re-examination, nor the questions put to S by the presiding officer.

[50.4] When asked whether she had a relationship with the second respondent, S response was that she did not really like talking to the second respondent so that do not have a relationship.

[50.5] Most concerning, S's evidence suggests that she had knowledge of the contents of the second respondent's reports. S explained that she does not like the second respondent because "[w]hen she spoke to me I told her a

whole bunch of things and I do not know, she did not write some down and she kept asking a lot of questions about my dad instead of me.”

[51] S could not recall on how many occasions the second respondent had met with her. S could not remember that the social worker had interviewed her, the name of her therapist at the Teddy Bear Clinic or even how many therapy sessions she had at the Teddy Bear Clinic. She testified about negative experiences and aspects of her mother and her father, yet the Children’s Court was satisfied that she is not a child in need of care and protection. S’s own words are not sufficient to tip the scales in favour of an order discharging the second respondent.

CONCLUSION

[52] Children are entitled to parents who are loving, supportive, caring, protective, parents who act in their best interests. That is the dream, but the reality can be so disappointing. All too often family law practitioners, and courts are confronted with high conflict families where each of the parents are so preoccupied with his or her own pain (or agenda) that they lose track of their children’s best interests, and their children’s views on matters concerning them in litigation. It appears that S is such a child.

[53] The second respondent was appointed as S’s curator *ad litem*, and not her legal representative. By agreement between the applicant and first respondent, they subsequently mandated the second respondent to review S’s care, residency, and contact arrangements. Implicit in the second respondent’s extended mandate is duty of the applicant and first respondent to cooperate in

the review. If either of them fails to cooperate, the blame cannot be laid at the feet of the second respondent.

[54] It is evident that the applicant has been discontent with the second respondent's appointment and involvement for years. He has attempted to have her removed adopting various methods. On a conspectus of the evidence, it is apparent that the applicant's discontent is aimed at the second respondent's findings that S's best interests dictate that she spends equal time with both her parents, which informed the terms of the settlement agreement in the divorce action.

[55] I find no reasonable grounds to hold that the second respondent is guilty of misconduct, had acted with impropriety, or is incompetent to continue in her role as S's curator *ad litem*. Moreover, in view of the applicant's expressed intention to relocate to Australia with S, and the first respondent clear opposition thereto, it is important that the second respondent continues in her role.

[56] There is no reason why the applicant should not pay the costs of both the first and second respondents in relation to the relief sought in prayer 1 of Part A of the Notice of motion dated 19 July 2022.

[57] Accordingly, it is ordered that:

[57.1] The application for the discharge of the second respondent as curator *ad litem* to S, a girl born on [...] April [...], is dismissed.

[57.2] The office of the family advocate is requested to investigate, and report their findings and recommendations regarding S's best interests including,

but not limited to S's care, residence, and contact with both her parents as well as the applicant's proposed relocation to Australia with S.

[57.3] The applicant and first respondent are directed to cooperate with the investigations of the office of the family advocate.

[57.4] Upon publication of the report of the office of the family advocate, the applicant and first respondent are granted leave to supplement their affidavits, if so advised.

[57.5] The remainder of the relief sought in Part A of the Notice of Motion dated 19 July 2022 is postponed *sine die*.

[57.6] The applicant is ordered to pay the costs of the first and second respondents in respect of the application for the postponement and the dismissal of prayer 1 of Part A of the Notice of Motion, dated 19 July 2022.

[57.7] The remainder of the costs are reserved for later determination.

SARITA LIEBENBERG
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

For the applicant: Adv (Ms) A Saldulker (attorney)

Instructed by: Cuthbertson & Palmeira Attorneys Inc.

For the first respondent: Adv (Ms) K Howard

Instructed by: Karen Shafer Attorneys

Second respondent: Adv (Ms) S Van Aswegen