

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

REPUBLIC OF SOUTH AFRICA



**THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

DELETE WHICHEVER IS NOT APPLICABLE:

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

DATE: 06/11/23

SIGNATURE:

A handwritten signature in black ink, appearing to be 'S. M. M. M.', written over a grey rectangular background.

CASE NR: B1979/2023

In the matter between:

L[...] C[...]

APPLICANT

and

J[...] T[...]

RESPONDENT

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the judgment is deemed to be 06 November 2023.

JUDGMENT

MARUMOAGAE AJ:

A INTRODUCTION

[1] Our courts are continuously flooded with child-related disputes between seemingly well-meaning parents who appear to be acting in what they perceive to be in the best interests of their children. These parents, with the assistance of their legal representatives, often find it difficult to negotiate or mediate mutually beneficial and less expensive solutions that are truly in the best interests of their children.

[2] In most instances, both parents approach courts well-armed with, among others, accusations, insults, finger-pointing, and deep-rooted desires to prove why the other parent is a bad influence on the children. Often, the needs and interests of the children become secondary, and the parents' interests and desires dominate the proceedings. These sentiments are certainly true in this case. The first letters of the names and surnames of the children who are at the heart of the dispute are the same. To avoid confusion, I will refer to the children as the 'minor daughter' and 'minor son' respectively. They will jointly be referred to as 'children' where context dictates.

[3] The applicant approached this court on an urgent basis and sought two primary orders:

[3.1] An order that the parties' minor daughter be returned to the Applicant's care because she will be writing her final examination on 30 October 2023.

[3.2] An order that the Applicant be allowed to have unsupervised contact with the parties' minor son.

[4] This application is opposed by the Respondent. This matter was heard virtually.

[5] The Respondent and the Applicant are the children's biological parents. Despite efforts to overcomplicate issues that the court should determine, the issue that calls for determination is relatively simple. Apart from urgency, the court is called upon to decide on an interim basis, who between the Applicant and Respondent should be awarded the minor daughter's care and residency, pending the investigation by the Office of the Family Advocate (hereafter Family Advocate). Once a conclusion is reached in this regard, the court is required to determine how the other parent should exercise his or her contact rights with respect to both children.

B THE PARTIES

[6] The two children were born of the relationship between the Applicant and Respondent. The minor son is 12 years old, and the minor daughter is 14 years old. The parties are not married to each other. The Respondent is married to another woman, with whom he has two other children.

C URGENCY

[7] The requirements for urgency are stipulated in Rule 6(12) of the Uniform Rules of Court. This rule is intended to enable persons who are placed in circumstances that require immediate intervention of the court for the protection of their rights to instantly approach the court for assistance without following the prescribed rules that are ordinarily applicable when cases are brought to court. It allows the court to disregard the usual process that should ordinarily be followed and hear their cases before other cases that are brought to court in the ordinary sense can be heard.

[8] The court must be satisfied that the matter is urgent to condone non-compliance with the prescribed rules and allow the case to jump the queue. The decision of whether a case should be heard as a matter of urgency

amounts to the exercise of judicial discretion.¹ Rule 6(12) clearly provides that ‘... [i]n urgent applications the court or a judge may dispense with the forms and service provided for in these Rules ...’. Obviously, this discretion must be exercised judiciously after careful consideration of all the circumstances of the case. The onus is on the Applicant who wishes to be heard on an urgent basis to satisfy the court that the circumstances of their case warrant the court to exercise its discretion to dispense with the ordinary process and urgently hear the matter.

- [9] To discharge this onus, the Applicant must comply with the prescripts of Rule 6(12)(b). First, the Applicant must explicitly set out the circumstances that render the matter urgent. This appears to be a purely factual inquiry. In this case, the circumstances that the Applicant alleges render this matter urgent are that the minor daughter was in her primary care until 20 October 2023. The minor daughter visited the Respondent on this date and the Respondent failed to return the minor daughter on Sunday, 22 October 2023.
- [10] The Applicant alleges that the Respondent decided to change the care and residency of the minor daughter a mere week before the minor daughter’s final examinations. The care and residency arrangement with respect to the minor daughter as of 20 October 2023 was not in accordance with Nyathi J’s order. This arrangement came about when the Respondent travelled outside the country with his wife and left the minor daughter with the Applicant. The Applicant refers to this arrangement as the new status *quo*. The Applicant alleges that she is worried that the minor daughter will start her examinations under circumstances that are not suitable for her to perform well.
- [11] Secondly, in terms of Rule 6(12)(b), the Applicant must provide reasons why she cannot be afforded substantial redress at a hearing in due course. Notshe AJ in *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*, correctly stated that the court is empowered to intervene in

¹ *Lubambo v Presbyterian Church of Africa* [1994] 2 All SA 262 (SE) 264.

favour of the litigant that would not obtain substantial redress if such a litigant was to be required to be heard in the normal course.² Further,

'[w]hether an applicant will not be able obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his cases in that regard'.³

[12] This implies that the Applicant has a duty to satisfy the court that there is a sound basis for the court to instantly intervene in her case. Further, if the court does not immediately intervene and she is forced to litigate her case at a certain point in the future, in accordance with the ordinary rules of court, the relief that she may later be granted will not substantially provide her with the protection that she needs now. The examination is starting on 30 October 2023. This renders this matter urgent because the Applicant will not be afforded substantial redress after the examinations have been written. The Applicant has met the threshold of urgency. The requirements of form and service as provided for in the Uniform Rules of Court are dispensed with.

[13] The Respondent is of the view that this application is not urgent. The minor daughter is not in any kind of physical, mental, or emotional danger at his house where she is currently residing. Further, the minor daughter will be prejudiced if an order is made that she should return to the Applicant's care because the Applicant's home is not conducive for studying. There is no irreparable harm that is apparent if an order is not granted. The urgency in this matter is self-created. I disagree with the view that this matter is not urgent.

[14] While the onus is on the Applicant to establish urgency, I am convinced that the allegation made by the Respondent that the Applicant consumes alcohol with medication which has an impact on her ability to properly care for the children justifies this matter being enrolled on an urgent court for the court to intervene in the best interest of the children. It would be irresponsible for this

² (11/33767) [2011] ZAGPJHC 196 (23 September 2011) para 6.

³ *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* para 7

court not to intervene in the interim, with a view to paving the way for necessary investigations that will assist the court that will be deciding the final care, residency, and contact to be instituted and completed. The Respondent alleges that he has always considered the Applicant a danger to the children when she misuses prescription medication and alcohol. The Respondent contends that he cannot allow the minor daughter to reside with the Applicant if the Applicant is a danger to her in any shape or form.

D BACKGROUND

[15] On 21 April 2023, Nyathi J granted an order which among others:

[15.1] Appointed a curator *ad litem* (hereafter 'curator') to determine in whose care the children should reside and issue directives pertaining the exercise of parental responsibilities and rights over the children. Most importantly, the curator was ordered to compile a report that contains all the facts and circumstances relating to the children and make a recommendation regarding the primary residency of and contact with the children.

[15.2] Awarded the primary residence of the children to the Respondent (who was the Applicant in that matter) pending the investigation by the curator (and/or any other investigation).

[15.3] Allowed the Applicant (who was the respondent in that matter) to exercise contact rights with the children on alternating Sundays under the supervision of the appointed social worker as indicated by the curator. This was pending the investigation(s) referred to above.

[15.4] Suspended the cash component of maintenance payments made by the Respondent to the Applicant until the investigation was completed and the curator had compiled her report.

[16] On 3 July 2023, the curator issued her directive in accordance with Nyathi J's order, where she indicated, among others, that:

[16.1] in her consultation with the Applicant and Respondent, she realised that *'a lot of strife is caused by a lack of proper communication between'* them, and directed parties to attend effective communication and conflict resolution sessions;

[16.2] the minor daughter should visit the Applicant without any supervision on alternative weekends starting from 8 July 2023 with a potential sleepover visit. She also directed that the minor son should visit the Applicant on the same weekends that the minor daughter will be visiting. However, the minor son's visits should be supervised until he indicates that he is willing to see the Applicant without supervision.

[17] On 23 August 2023, the Family Advocate requested the Applicant to take a test that detects heavy alcohol consumption over a period of time. The Applicant underwent weekly urine tests at Stabillis Treatment Centre. The Applicant takes prescription medication for anxiety, sleeplessness, and depression.

[18] In September 2023, the Respondent and his wife arranged a trip to travel outside the country. The Applicant and Respondent agreed that the minor daughter will stay with the Applicant. On 15 September 2023, the minor daughter was taken to the Applicant's residency and placed under the Applicant's care. However, on 17 October 2023, the Respondent went to the Applicant's house to take the minor daughter from the Applicant. The Respondent accused the Applicant of being under the influence of some or other substance.

[19] During oral argument, it was conceded on behalf of the Applicant that in terms of the order granted by Nyathi J, the minor daughter was supposed to be at

the Respondent's residence during the duration of her final examination. The Respondent was granted the care and residency of the minor daughter.

E FACTS AND EVIDENCE PROVIDED IN THE AFFIDAVITS

i) Applicant's case

- [20] The Applicant alleges that, notwithstanding the order granted by Nyathi J, a new status *quo* was created when the parties agreed that the minor daughter should reside with the Applicant when the Respondent and his wife travelled outside the country in September 2023. The Respondent voluntarily took the minor daughter to the Applicant's place. The minor daughter was placed under the Applicant's primary care on 15 September 2023. The constant changes of residency regarding the minor daughter have caused her trauma and destabilised her life.
- [21] The Applicant contends that during this new status *quo*, there was no concerning incident that occurred to demonstrate that the minor daughter should not reside with her. Further, the minor daughter improved her school marks since she started residing with her.
- [22] The Applicant states that there is no merit to the allegation that she abuses alcohol. In fact, she contends that she complied with the Family Advocate's request to subject herself to an alcohol test that detects heavy drinking over a prolonged period. Further, this test revealed that she is much lower than the maximum 'normal' level of alcohol. She further states that not only did she take several urine tests, but she also tested for the use of ecstasy, heroin, crystal meth, benzos, cocaine, dagga, mandrax, and alcohol, for which she tested negative. However, she admits that there was one test where she tested positive for alcohol.

- [23] The Applicant alleges that where alcohol is traced in one's blood, this is not indicative of the fact that one is factually abusing alcohol. On the day she tested positive for alcohol, she took a sachet of bio-plus which contains a trace of alcohol. The Applicant denies that she is addicted to any substance, including alcohol. She argues that she uses medication prescribed by a registered medical practitioner for anxiety, sleeplessness, and depression.
- [24] On 17 October 2023, the Applicant and the Respondent communicated with the curator on the WhatsApp group. The Applicant sent a message with multiple spelling errors and an email from her cell phone with some strange errors which the Respondent saw. The Applicant claims that her cell phone was on the automatic spellcheck which changed her Afrikaans words to words that did not make sense. This incident led the Respondent to assume that the Applicant was under the influence of some or other substance and attended at the Applicant's residence to remove the minor daughter.
- [25] Upon his arrival, the Respondent accused the Applicant of being under the influence of either alcohol or medication and demanded to take the minor daughter to his residence. The Respondent took the minor daughter. However, the minor daughter cried and refused to accompany the Respondent because there was nothing wrong that the Applicant did. The Applicant contacted her attorney by way of telephone on the day, who confirmed that the Applicant was not under the influence of any substance and that her speech was not slurred.
- [26] On 20 October 2023, the curator proposed that the parties should meet and discuss the allegations that the Respondent levelled against the Applicant. The following week, the Respondent left the minor daughter with the Applicant from Tuesday to Friday. According to the Applicant, if there was any merit in the Respondent's allegations that she abuses alcohol, he would not have risked leaving the minor daughter with her for a further three nights.
- [27] The Applicant contends that the minor daughter was reluctant to go to the Respondent's residence on the weekend of 20 to 22 October 2023. The minor daughter sent a message to the curator indicating that she does not want to

go to the Respondent's place for the weekend. The curator convinced the minor daughter to go to the Respondent's place.

[28] On 22 October 2023, the Respondent indicated to the curator that the Applicant was supposed to take another urine test, which the Applicant refused to take. The Respondent wanted the curator to indicate whether it was justifiable not to return the minor daughter to the Applicant due to her failure to take the urine test. The curator indicated that the parties must comply with the agreement relating to their children's residency. However, the Respondent decided not to return the minor daughter to the Applicant.

[29] The parties, together with the curator and their respective legal representatives, attended a meeting on 23 October 2023. This meeting was convened to discuss the Respondent's unilateral decision to remove the minor daughter from the Applicant's care. At this meeting, the curator indicated that the minor daughter is experiencing severe anxiety and trauma due to the constant acrimony between the parties. According to the Applicant, the curator further indicated that the back-and-forth removal and return of the minor daughter between the parties' respective residences is severely unfair. Further, the minor daughter expressed the desire to reside with the Applicant.

[30] The Applicant also argues that the minor daughter does not perform well academically when is under the Respondent's care. The Applicant is worried that the Respondent removed the minor daughter from her care a few days before the minor daughter started writing her final examinations.

[31] With respect to the minor son, the Applicant alleges that the last time she had meaningful contact with him was on 5 August 2023. She argues that it seems like the Respondent's intention is to completely delete her from her children's lives. The Applicant is of the view that the Respondent is not encouraging their son to have contact with her. Further, the Respondent's wife badmouths her in front of her children and sabotages her relationship with them.

[32] It was submitted on behalf of the Applicant that the court should not consider the interim report provided by the Family Advocate dated 26 October 2023. In this report, it is recommended that the primary care of the children should be awarded to the Respondent (who is cited as the Respondent therein). The basis of this argument was that the Applicant was not approached when the information used to compile this interim report was collated. In that, she was not provided an opportunity to answer the allegations made against her. During the oral hearing, it was argued on behalf of the Applicant that it was not clear where the Family Advocate obtained her information and why the allegations contained in her report were made. Further, there is a contradiction between the recommendation made by the Family Advocate and the curator's directive which the court must carefully consider.

ii) Respondent's case

[33] According to the Respondent, from 26 September 2023, the Applicant did not send the minor daughter to school on six different dates. The minor daughter also failed to attend some of her Maths, Afrikaans, and, Accounting classes when she was under the Applicant's care. The minor daughter failed her second semester while under the Applicant's care but managed to pass the third semester when she was under the Respondent's care. The Applicant failed to assist the minor daughter with her schoolwork and there is a possibility that she might fail at school. It is thus, not in the best interests of the minor daughter to be placed under the Applicant's care. The Applicant has repeatedly failed to take the minor daughter to extra classes.

[34] The Respondent admits that he travelled outside the country with his wife. During the time he was abroad, the minor son was left under the care of the family friend together with the Respondent's other children. The Applicant's legal representative inquired whether the Respondent was comfortable with the minor daughter being left under the Applicant's care. The Respondent indicated that he was comfortable subject to three negative urine tests and the conditions agreed to by the parties in their settlement agreement. The curator indicated that she was not comfortable with the minor daughter being left

under the Applicant's care and indicated that she should be returned to the Respondent's care upon his return to South Africa.

[35] On 17 October 2023, the Respondent saw an email from the Applicant transmitted to the Family Advocate where the Applicant's wording was extremely incoherent. The Respondent denied that the incoherence was due to automatic spell-check settings. He claims to have received similar messages from the Applicant on various occasions. This has always been a sign that the Applicant was under the influence of some substance.

[36] The Respondent alleges that he contacted the minor daughter by way of a WhatsApp message to ascertain whether she was safe. The minor daughter was emotional over the phone and requested the Respondent not to say anything. The Respondent went to the Applicant's house to ensure that the minor daughter was safe. It was clear from the Applicant's demeanour that she was under the influence of some substance. The Respondent asked the minor daughter to accompany him to his house, but the minor daughter was emotional and refused to do so. The Respondent believes that the minor child was concerned about the Applicant and did not want to leave her alone. During oral argument, it was argued on behalf of the Respondent that the Applicant placed a severe burden on the minor daughter, who feels responsible for taking care of her mother.

[37] According to the Respondent, the minor daughter admitted to him that the Applicant was confused when she fetched her from school earlier on the same day. Further, the minor daughter had to constantly ask the Applicant to brake when driving home.

[38] The Respondent argues that there is a settlement agreement that was entered into between the parties. In terms of this agreement, the parties agreed that the minor daughter may reside with the Applicant provided the Applicant undergoes bi-weekly urine tests to determine whether she has benzo and alcohol in her system. After procuring the services of the new legal

representatives, the Applicant refused to take these tests which led to the Respondent refusing to return the minor daughter to the Applicant's care.

[39] It is alleged that these tests were based on the Applicant's consumption of medication with alcohol. Further, the Applicant tested positive for alcohol which she took with medication on two different tests. The Applicant's consumption of alcohol with medication has an impact on her ability to properly care for the children. The Respondent always considered the Applicant a danger to the children when she misuses prescription medication and alcohol. However, he recognises that when the Applicant is not consuming alcohol with medication, she is a fit and proper parent. The Respondent contends that he cannot allow the minor daughter to reside with the Applicant if the Applicant is a danger to her in any shape or form.

[40] The Respondent contends that he is aware that the minor daughter desires to reside with the Applicant. He claims that he also wishes that the minor daughter would return to the Applicant. However, he cannot simply send the minor daughter to the Applicant when his concerns about her have not been addressed.

[41] It was contended further that the minor son does not wish to be transported by the Applicant due to the accident he was involved in with the Applicant. He does not want to spend time with the Applicant at this stage. The Applicant made no effort to exercise her contact with the minor son since the curator issued her directive. Respondent contends that the Applicant is sabotaging her relationship with the minor son and has punished him for being honest about her conduct. During the oral hearing, it was submitted on behalf of the Respondent that the Applicant tends to blame and punish the children when they inform the Respondent or the curator about the events that took place at her house, instead of taking responsibility for some of the concerns raised against her.

[42] The Respondent contends that his wife is not trying to keep the children away from the Applicant. She is merely trying to support the minor daughter and

motivate her not to worry about issues between her parents. The Respondent denies that he and his wife influenced the minor children against the Applicant.

D APPLICABLE LEGAL PRINCIPLES AND EVALUATION

i) The best interests of the children

[43] In terms of section 28(2) of the Constitution of the Republic of South Africa, 1996 (hereafter 1996 Constitution):

'[a] child's best interests are of paramount importance in every matter concerning the child'.

[44] This constitutional provision is given effect by section 7(1) of the Children's Act,⁴ which provides various factors that ought to be considered when the best interest of the child standard is applied. Some of the factors that must be considered are: the nature of the personal relationship between the child and the parents or any specific parent;⁵ the attitude of the parents, or any specific parent towards the child;⁶ the capacity of the parents, or any specific parent to provide for the needs of the child, including emotional and intellectual needs;⁷ and the child's age, maturity and stage of development;⁸ and the need to protect the child from any physical or psychological harm that may be caused

⁴ 38 of 2005.

⁵ Section 7(1)(a)(i) of the Children's Act.

⁶ Section 7(1)(b) of the Children's Act.

⁷ Section 7(1)(c) of the Children's Act.

⁸ Section 7(1)(g)(i) of the Children's Act.

by among others, exposure to harmful behaviour.⁹ In terms of section 9 of the Children's Act:

'[i]n all matters concerning the care, protection and wellbeing of a child the standard that the child's best interest is of paramount importance, must be applied'.

[45] Sachs J, writing for the majority of the Constitutional Court in *S v M*,¹⁰ observed that:

'... the very expansiveness of the paramountcy principle creates the risk of appearing to promise everything in general while actually delivering little in particular. Thus, the concept of "the best interests" has been attacked as inherently indeterminate, providing little guidance to those given the task of applying it'.

[46] It has been argued that the best interest of the child principle does not lend itself to a precise explanation of its application and it does not outline any particular duties or rules associated with it.¹¹ This opens the door for individual judges to impose a solution on the children's caregivers based on their notion of what they subjectively regard to be in the best interest of the children before them.¹² It is important for courts when called upon to apply the best interest of the child principle to adopt a principled child-centred approach. This *'... approach requires a close and individualised examination of the precise real-life situation of the particular child involved'*.¹³

[47] In my view, a truly child-based approach should be located within the circumstances under which the children are or should be cared for. What is best for children should be evaluated from the perspective of a system or

⁹ Section 7(1)(i) of the Children's Act.

¹⁰ 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC); 2007 (2) SACR 539 (CC) para 23.

¹¹ Zermatten 'The best interests of the child principle: Literal analysis and function' (2010) 18 International Journal of Children's Rights 483 at 484

¹² Bulow and Gellman 'The judicial role in post-divorce child relocation controversies' (1983) 35 *Stanford Law Review* 949 at 961.

¹³ *S v M* para 24.

network of support provided by those who are responsible for their care or those who wish to care for them. What is best for children is or should be delivered by those who care for them. It is for this reason that despite being treated as paramount, the best interest of the child principle should never be elevated to the point that it is regarded as the ultimate consideration when disputes relating to children are determined. But should be adequately balanced with the equally important welfare of those who are mandated to care for them.¹⁴ In *B v M*,¹⁵ opined that:

'[n]o one factor can be given pre-eminence in all cases involving children. The complexity of the "best interests" principle require[s] the court to consider all factors which contribute towards ascertaining children's "best interests. It is necessary to avoid a unidimensional focus which fails to suggest a careful balancing of the different ingredients which may all point towards and comprise the children's "best interests"'.

[48] When applying the best interest of the child, it is important to always bear in mind that everyone comes from a socially embedded background within the context of social relationships, including children. Children are dependent on their caregivers for their survival. Children and their caregivers are relational, interconnected, and interdependent.¹⁶ It may not necessarily be in the best interest of children to overemphasise their subjectively viewed 'best interest' over the interests of their parents or appointed caregivers, who are clearly acting in what they perceive to be in their best interests.

[49] It is important to view both the Applicant and Respondent as members of a family together with their children, even though they are not living together. Both the Applicant and the Respondent clearly wish to exercise their parental responsibilities and rights, even though they do not agree with respect to

¹⁴ *B v M* [2006] 3 All SA 109 (W) para 148 where an Australian High Court case of *U v U* [2002] HCA 36 was quoted with approval.

¹⁵ [2006] 3 All SA 109 (W) para 154.

¹⁶ Herring *Relational autonomy and family law* (2014) 13.

interim care, residency, and contact. Both have clearly expressed their interests and desires, which cannot be regarded as insignificant when assessing what is in the best interests of the children. They both have a life-long relationship and bond as well as a commitment to raise the children and assist them to realise their true potential. Their interests regarding the children are equally important and should be considered when applying the best interest of the child principle.

[50] On the one hand, the Applicant truly and genuinely wishes to have the interim care and residency of the minor daughter with the possibility of also having that of the minor son sometime in the future when their relationship improves. However, this interest cannot be immediately realised because of the concerns relating to the Applicant's either real or potential abuse of alcohol. While the Applicant denies that she abuses alcohol or that she takes alcohol with prescription medicine, she does not deny that she does take alcohol.

[51] In principle, there is nothing wrong *per se* in having a drink or two. The challenge is when a drink or more interferes with one's ability to care for the children. Nyathi J granted an order that provides the Applicant with the opportunity in the future to be awarded the care and residency of both children after adequate investigations by the Family Advocate and curator have been completed. There is no reason to interfere with Nyathi J's order in this regard. This appears to be a sensible way to deal with this dispute.

[52] There is no justification, none whatsoever, that was offered as to why the parties decided to unilaterally deviate from Nyathi J's order. It is also not clear why the minor daughter did not return to the Respondent's care when he returned to South Africa as directed by the curator. Nyathi J's order was validly granted and ought to have been complied with diligently. The parties had an option upon change of circumstances to approach the court to amend that order. In any event, Nyathi J's order was also so flexible that it provided the curator the power to direct how the minor children's interim care, residency, and contact should be exercised which alleviated the parties'

burden to approach this court where the need arose to deviate from some of the items in that order.

[53] The parties' arrangement was not even supported by the curator who was empowered to make care, residence, and contact directives after the interim order granted by Nyathi J. In her email dated 14 September 2023, the curator clearly stated that she is not comfortable with the minor daughter moving back to the Applicant. She unequivocally stated that while the minor daughter could stay with the Applicant when the Respondent is outside the country, she must be returned to him upon his return to South Africa. On 6 October 2023, the curator wrote another email where she made it absolutely clear that everything should stay as it is until she indicates otherwise.

[54] The Applicant did not provide any evidence that seems to suggest that the curator after the directive she issued on 3 July 2023, expressed a view that the Applicant could have the interim care and residence of the minor daughter. Once the parties have decided to involve the court in their dispute, they cannot unilaterally make arrangements that are contrary to the order granted by this court. In *SS v VVS*, the Constitutional Court authoritatively held that:

'[a]ll court orders must be complied with diligently, both in form and spirit, to honour the judicial authority of courts. There is a further and heightened obligation where court orders touch interests lying much closer to the heart of the kind of society we seek to establish and may activate greater diligence on the part of all. Those interests include the protection of the rights of children and the collective ability of our nation to "free the potential of each person" including its children, which ring quite powerfully true in this context'.¹⁷

[55] The Respondent conceded that the minor daughter desires to reside with the Applicant. However, he submitted that at this stage, this is not what is in the best interest of the minor daughter. The Respondent does not accuse the Applicant of being a bad mother. He is also not alleging that the Applicant is

¹⁷ 2018 (6) BCLR 671 (CC) para 23.

not fit and proper to care for the children. His main concern is what he regards as the Applicant's abuse of alcohol which he alleges at times she consumes with prescription medication. He is also concerned with the minor daughter missing some of the classes when she is with the Applicant, which is an aspect that must be investigated. I am of the view that these are legitimate concerns.

[56] The Respondent's concerns appear also to be rooted in the accident that the Applicant was involved in with the minor son, which appears to be the reason the minor son is distant from the Applicant. This concern is legitimate, and the Applicant should seriously consider how the consumption of alcohol is affecting the trust that the Respondent has in her ability to care for the children at this stage. The Respondent indicated that he also wishes that the Applicant should have the care and residency of the children subject to the conditions of the settlement agreement concluded by the parties. At the heart of this agreement is the fact that the Respondent wishes to have a piece of mind that the children would be safe around the Applicant. The Respondent cannot be faulted in this regard.

[57] I am not convinced that it will be in the best interest of the minor daughter at this stage to reside with the Applicant. I am also not convinced that there will be any harm suffered by the minor daughter if she writes her final examination under the Respondent's care. It seems to me that it rests on the Applicant to ultimately have the care and residency of her children. The only issue that may be standing in her way appears to be the consumption of alcohol.

[58] The Respondent and his wife have a duty to ensure that the extent to which the minor son may have some animosity towards the Applicant, such a feeling does not grow even further. In fact, I am of the view that they should play their part in ensuring that the relationship is repaired. The Applicant must also meet the minor son halfway and try to repair their relationship. If this means attendance of relationship-building sessions with the minor son, it is in the best interest of the minor son that such sessions are attended.

[59] I am not convinced that the so-called 'new status *quo*' can be the basis upon which it is said that the Applicant at any time was vested with the primary care of the minor daughter. There was no provision for such an arrangement in Nyathi J's order. The evidence provided to the court indicates that there is no basis to believe that the minor daughter will be prejudiced in any way should she write the exams under the Respondent's interim care, in line with Nyathi J's order.

[60] I also do not agree with the submission made on behalf of the Applicant that the minor daughter has been moved around between the parties' respective houses like a yo-yo. It is not unusual for children whose parents are not residing together to travel between their parents' respective places of residence. Even if the Applicant can be granted the primary care and residency of the children, the children will still travel between the two residences both on weekends, and at times, during the week.

[61] Both parties submitted that their respective houses provide a calm environment for the minor daughter to prepare for her final examination and that the other's house does not. There was no evidence provided with respect to the actual studying arrangements during the examination that both parties made for the minor daughter to prepare effectively for her final examinations. It is clear, however, that both the Applicant and Respondent have a deep-rooted desire for the minor daughter to perform well in her final examination.

ii) Children's voices

[62] In terms of section 10 of the Children's Act:

'[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'.

[63] The court did not assess the children to determine their state of maturity and development. However, from the reports of the curator and the Family Advocate, as well as various WhatsApp messages that were provided to the court, it is clear that both children are mature relative to their ages. It is also clear that they have developed to such a stage that they can express themselves clearly through oral and written form. In coming to my conclusion, I also considered their voices as expressed in various WhatsApp messages, the curator's directive, and the Family Advocate's interim report.

[64] The minor daughter desires to reside with the Applicant while the minor son desires to reside with the Respondent. While their voices are important and should be considered to the extent necessary, this is one of the factors that should be looked at together with all the other factors in this case. The minor son's desire appears to be influenced by the accident he experienced at the hands of the Applicant. The minor daughter's desire appears to be influenced by what she may regard as her duty to the Applicant given the difficulties that her mother may be experiencing.

[65] Notwithstanding the children's respective desires, it is important that the Applicant is provided space to create an environment that will ensure that she is ultimately granted the care and residency of the minor children in the future. It is in the best interests of the children at this stage to reside with the Respondent pending all the investigations. This is also in the interest of both the Applicant and Respondent in the long run and would create an environment where they can effectively co-parent.

iii) Reports by Professionals

[66] In terms of section 28(1)(h) of the 1996 Constitution:

'[e]very 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 injustice would otherwise result'.

- [67] This constitutional provision is given effect by section 55 of the Children's Act, which empowers the court when it is of the opinion that it would be in the best interests of the children to have legal representation, to refer the matter to Legal Aid South Africa for such a legal representation to be appointed for the children. It was on this basis that Nyathi J ordered that a curator should be appointed to represent the children in this matter.
- [68] The Supreme Court of Appeal made it clear in *Legal Aid Board In re Four Children*, that a curator is appointed to advance the case of the children.¹⁸ This court rejected the notion that the curator must exercise independent judgment with the necessary objectivity.¹⁹ It endorsed the view that the curator's duty is to represent the minor children with respect to cases where they are involved in court with a view to watch and protect their interest in the case as a good and prudent parent would have done.²⁰ In the execution of her duties, the curator cannot adopt an objective approach because that would be manifestly in conflict with her duties. What is expected of the curator is to advance all possible arguments that are advantageous to the children for whom she was appointed.²¹
- [69] In this matter, the curator consulted once with each party and twice with the minor children. She also created a WhatsApp group where she could communicate directly with the children at any time when it is appropriate to do so. The Applicant noted that the minor daughter trusts the curator and can confide in her. The Respondent does not appear to dispute this fact. It appears that the minor son is also able to communicate freely with the curator. None of the parties questioned how the curator performed her duties thus, far.

¹⁸ [2011] JOL 27159 (SCA) para 20.

¹⁹ *Legal Aid Board In re Four Children* para 20

²⁰ *Legal Aid Board In re Four Children* para 12.

²¹ *Du Plessis NO v Strauss* 1988 (2) SA 105 at 146.

[70] On 3 July 2023, the curator issued a directive where she clearly directed that the Respondent should retain the interim care of the children. Further, the Applicant should exercise unsupervised contact with the minor daughter on alternative weekends. She further directed that the minor son should visit the Applicant subject to supervision by the maternal grandmother. The curator was clearly not pleased by the minor daughter being left with the Applicant when the Respondent travelled outside the country. She made it clear that once the Respondent returned to South Africa, the minor daughter should be returned to the Respondent. None of the parties referred the court to any WhatsApp message attached to their respective affidavits that indicate that the curator changed her stance with respect to the interim care, residency, and contact regarding the children.

[71] There is no basis to interfere with the directive provided by the curator, which is largely in line with Nyathi J's order. Courts should be reluctant to interfere with the performance of duties by professionals requested by courts to assist in resolving children-related disputes. Unnecessarily interfering with their duties without any just cause may lead to those who are appointed in the future not diligently dedicating their expertise and time to effectively assist in these kinds of disputes. These professionals should be provided space to do their important work without unnecessary interference or alteration of the directives that they are empowered to issue. Obviously, in instances where they are not performing their task as required, they may be removed from office.

[72] The Family Advocate also provided an interim report dated 23 October 2023. It was only uploaded on Caselines on 26 October 2023. In terms of this report, the Family Advocate recommends that the interim primary care and residency of the children should be awarded to the Respondent. Further, the Applicant should have contact with the minor daughter on alternative weekends under the supervision of the maternal grandmother. Further, the Applicant should have contact with the minor son on alternative weekends under the supervision of the maternal grandmother for two hours.

[73] During the oral hearing, it was argued on behalf of the Applicant that the court should disregard the Family Advocate's report and award the interim care and residency of the minor daughter to the Applicant. It was contended that it is not clear where the Family Advocate obtained the information that led to her recommendation. Most importantly, it was submitted that the Applicant was not provided an opportunity to reply to some of the allegations that may have influenced the Family Advocate to make the recommendations she made.

[74] This submission appears to be inconsistent with what is contained in the Family Advocate's interim report. In this interim report, it is clearly stated that the Family Advocate consulted with both parties jointly on 13 July 2023. Separate consultations with the Applicant, the maternal grandmother, and the Respondent's wife were conducted on 24 October 2023. The children were also interviewed. It is clear to me that the information that influenced the recommendations made by the Family Advocate was obtained during these consultations.

[75] I, therefore, reject the contention that the Applicant was not provided an opportunity to respond to the allegations levelled against her. It may be that perhaps the Applicant was not informed of what other people who were interviewed during these consultations said about her, but that does not mean she was not consulted. I doubt whether the Family Advocate in her information-seeking process was obliged to disclose to any party what the other party said about them. Every person consulted by the Family Advocate had a duty to be completely honest with the Family Advocate and not to worry about what any other person said about them, and this included both the Applicant and Respondent.

[76] In my view, there is no material conflict between the curator's report and the Family Advocate's interim report. The Applicant's invitation to disregard the Family Advocate's report is declined. The Family Advocate is an important statutory institution that plays a critical role in the resolution of child-related

disputes. Unless it is shown that she dismally failed to perform her expected duties, the court should be reluctant to reject the reports she issued, which are often produced with limited resources under strict timelines.

[77] In terms of section 4(1) of the Mediation in Certain Divorce Matters Act,²² the Family Advocate is empowered to institute an inquiry to determine what, in the circumstances, will be in the best interest of the child and furnish a report to the court containing her recommendations. Her interim report in this matter indicates the following:

[77.1] based on the information received, there seems to be reason to believe that the initial risks identified by the Respondent relating to the Applicant are still evident;

[77.2] the minor daughter seems to feel responsible for the Applicant's well-being and is willing to put herself at risk for the Applicant's sake;

[77.3] it is in the best interests of the minor children to primarily reside with the Respondent subject to the Applicant's right to exercise contact with them.

[78] It would be irresponsible for this court after being furnished with the curator's directive and the Family Advocate's interim report to award interim care and residency of the children to the Applicant. The directive and interim report are not necessarily against the Applicant and should never be viewed as either supportive of the Respondent's case or indicative of the fact that the Respondent won herein. These documents should rather be seen by both parties as a concerted effort by appropriately qualified professionals to identify the issues that may be detrimental to the well-being of the children.

[79] These documents call both parties to action. They need to work together to ensure that the challenges identified with respect to the Applicant are

²² 24 of 1987.

adequately addressed in a non-litigious manner for the sake of the children. These documents also represent an opportunity for the Applicant to self-reflect with a view of working towards adequately addressing the concerns raised.

[80] I have no doubt in my mind that both parties love their children dearly and are acting in what they believe to be in their best interests. There is absolutely no winner or loser in this case. The Applicant was motivated by a genuine act of love when she brought this application. There is no need to punish her with costs. The order made below does not materially interfere with Nyathi J's order granted on 21 April 2023, save for the terms indicated below.

[81] It is regrettable that I instructed my secretary to transmit an order in these proceedings before judgment was delivered, having regard to the date of the minor daughter's examinations. To my shock, the copy that I transmitted was not the original copy that I intended to issue. As such, the order that was transmitted to the parties had patent errors and, thus not in line with this judgment.

[82] In terms of Rule 42(1) the Court may, of its own accord or on application, rescind or vary an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error, or omission.²³ The order transmitted to the parties is accordingly varied by the order made below.

E CONCLUSION

[83] It was argued on behalf of the Respondent that this court should consider the appointment of a social worker who will act as a parenting coordinator between the parties. It was argued that one of the duties of the parenting coordinator will be to mediate disputes that will arise between the parties regarding the children. It is hoped that this will assist the parties in finding less

²³ *Minister of Finance v Sakeliga NPC (previously known as Afribusines NPC) and Others* 2022 (4) SA 401 (CC); 2023 (2) BCLR 171 (CC) para 4.

expensive means of settling their future disputes pending the finalisation of the Family Advocate's investigation.

[84] It is also important that both the curator and the social worker constantly communicate new developments with the Family Advocate, who should consider information received from these professionals when compiling her final report.

ORDER

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

1. The matter is enrolled and heard as one of urgency as contemplated in Rule 6(12) of the Uniform Rules of the above honourable court.
2. The children are to remain in the Respondent's care and residency pending the investigation and recommendation by the Family Advocate.
3. The Applicant shall exercise contact rights with respect to the minor daughter, who will sleep over at the Applicant's house, every alternative weekend.
4. The Applicant shall exercise contact rights with respect to the minor son on every alternate Saturday and Sunday for two hours per day.

5. The Applicant shall exercise contact rights with respect to both children during the week through electronic means, in a way that does not interfere with the children's routines, studies, and extramural activities.
6. The Applicant should not transport the minor son when he visits her. The Respondent will transport the minor son to and from the Applicant's house.
7. When compiling her final report, the Family Advocate must consider the directives and inputs of the curator and the social worker appointed by this court.
8. A social worker, Ms Marize Nel, is appointed as a parenting co-ordinator. Ms Nel is vested with the following functions:
 - 8.1 to mediate disputes between the Respondent and Applicant relating to the children;
 - 8.2 to arrange random lawful tests to be taken by both the Applicant and Respondent when the children are under their respective care to monitor any abuse of alcohol or any other substance;
 - 8.3 to provide the curator and the Family Advocate with the results of any test that was taken by either the Applicant or Respondent;
 - 8.4 to monitor the Applicant's contact with the children until the final order is made in this matter;

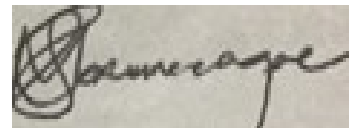
9. The parties shall be equally liable for the costs of the parenting coordinator.

10. Both parties should attend therapy sessions by Ms Christa Botha together with the children. The parties shall equally be liable for the costs of these therapy sessions. A therapy session between the Applicant and the minor son should be attended within seven days of the date of this order.

11. The curator and parenting coordinator must regularly provide the Family Advocate with new information as and when they obtain such information.

12. The curator is empowered to direct changes regarding the care, residency, and contact rights between the parties when circumstances warrant such changes. This includes the power to direct that contact with the children should be exercised without supervision.

13. Each party is to pay his or her own costs.



C MARUMOAGAE
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
PRETORIA

Electronically submitted

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DATE OF THE HEARING:	27 OCTOBER 2023
DATE OF JUDGMENT:	06 NOVEMBER 2023