

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 DIVISION, PRETORIA

CASE NO: 2023 - 063599

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

Date: 25 July 2023 E van der
Schvff

In the matter between:

T[...] D[...] APPLICANT

and

C[...] D[...] RESPONDENT

JUDGMENT

Van der Schvff J

Introduction

[1] Mr. D[...] approached the court on an urgent basis. The application is brought in two parts, and relief is sought in Part A and Part B. In Part B, Mr. D [...], who is not

the biological or adoptive father of minor L, ultimately wants to be awarded parental rights and responsibilities, and co-guardianship of minor L. Since he is located abroad, he requests the court to appoint a *curator ad litem* to 'monitor the child on a regular basis' to ensure that her best interests 'particularly but not exhaustively with regard to her education and her socialization with peers' are protected and that she is not alienated from him. In this application, he specifically seeks an order appointing an expert to assess the child and make recommendations to the court, to be awarded daily telephonic contact with the child, and to have physical sleep-over contact with the child in the event that he visits South Africa before Part B is finalised.

Background

- [2] The applicant, Mr. D[...], married the respondent, minor L's mother, in August 2018. L was 4 years and 4 months old at the time. He met the respondent when she was appointed as his son's *au pair*. He was a single father at the time, being awarded primary residence of his son after a divorce. There is a dispute as to whether he became involved in L's life when she was a few months or two years old. L is currently 9 years and 3 months old, and the facts indicate that the applicant was at least for the biggest part of the last 6 years part of her life.
- [3] The family relocated to England late in 2019. L settled in her new environment and made friends. Mr. D[...] states that he fulfilled a father's role in L's life. Whilst Mr. D[...] was in the process of securing British citizenship for Mrs. D[...] and L, Mrs. D[...] returned to South Africa with L, when Mr. D[...] was on a business trip. This, Mr. D[...] states, was 'totally unexpected and a devastating blow'. The court first learns from Mr. D[...]'s affidavit that the respondent contends that she was abused by him and fled. He claims, however, that the fact that she and L subsequently went away with him for a holiday and that she initially allowed L to have telephonic contact with him, belies allegations of abuse.

- [4] Mr. D[...] and L had regular telephonic and video call contact until 5 June 2023, when the respondent indicated that the contact was not to continue. Although communication between the parties indicates that Mrs. D[...] was amenable to allowing Mr. D[...] to have telephonic contact with L, albeit that she required the discussions to be under supervision or recorded, she unilaterally stopped the contact after receiving a report from a social worker. L was assessed by the social worker early in May after she allegedly informed her mother that she did not want to have daily telephonic communication with Mr. D[...], whereafter Mrs. D[...] took L for the assessment.
- [5] The social worker's report does not indicate that the purpose of the assessment was to 'investigate Mr. D[...]', as he alleges. The social worker indicated that the goal of the socio-emotional assessment was to 'holistically evaluate the child's emotional experience of the different significant systems in her life'. The social worker reflects that L indicated that she did not know why the assessment was being done. She found that L did not want any contact with the applicant, but she indicated the need for a 'comprehensive collateral investigation' to verify the information obtained and to investigate any alternative hypothesis relevant to the information.
- [6] Mr. D[...] alleges that Mrs. D[...] informed him that she and her sister were victims of abuse and molestation perpetrated by their father, L's grandfather. He depicts L's grandfather, with whom she and her mother currently reside, as a domineering, overbearing, and controlling person. He claims that the respondent divulged specific information regarding abuse, but he did not put that information before the court. Mrs. D[...] 'vehemently' denies any allegation of abuse or molestation by her father.

Section 23 of the Children's Act

- [7] Section 23 of the Children's Act 38 of 2005, provides that any person having an interest in the care, well-being, or development of a child may apply to the High

Court, or the Children's Court for an order granting the applicant, amongst others, contact with the child.

- [8] In considering the application, the court is obliged to take into consideration, amongst others, the best interests of the child; the relationship between the applicant and the child, and any other relevant person and the child; the degree of commitment that the applicant has shown towards the child; the extent to which the applicant has contributed towards the maintenance of the child.

Discussion

Urgency

- [9] This application was brought as an urgent application. I do not know when it was served on the respondent, but the notice of motion is dated 28 June 2023. The respondent was afforded until 4 July 2023 to indicate her intention to oppose the proceedings, and until 10 July 2023 to file an answering affidavit. It is evident from the communication between the parties and/or their respective legal representatives, that the issue of the applicant's telephone contact with L has been brewing at least since April 2023.

- [10] It is trite that the urgent court cannot be approached on a 'whim'. It is by now also trite that all matters concerning children are not *per se* urgent. In considering whether an applicant justifiably approached the urgent court, a court must determine whether the applicant will be afforded substantial redress if the matter is heard in the ordinary course. If it is considered that the Family Court was established with the sole purpose of ensuring that matters affecting the interests of children are heard expeditiously, matters that are enrolled as urgent applications must be stringently evaluated to determine if it meets the urgency requirement in order to protect the integrity of the urgent court and prevent the abuse of process.

- [11] If one considers the facts of this application and the interim relief sought, I am not of the view that it meets the test for urgency. We are not dealing with a child in need. Nothing in this application sets the relief sought apart from the relief daily

sought in numerous Rule 43 applications. To enrol the matter on the urgent roll, and to truncate the periods within which the respondent had to indicate whether she intends to oppose the application and file an answering affidavit cannot be justified. In addition, the applicant never formally approached the respondent with a request that the issue pertaining to the applicant's telephonic contact with L be mediated. Neither does the CaseLines record reflect that a Rule 41A notice was served on the respondent together with the notice of motion. Both parties indicated in correspondence attached to the application that they were not discarding mediation as an option to settle the matter – however, litigation ensued.

- [12] I am, however, not inclined to strike the matter off the roll. I decided to consider the application and grant the order as set out below because I do not regard it to be in the minor child's best interest to unnecessarily prolong the process that has been set in motion through this application. The cost order I grant reflects my displeasure at what I perceive to be an opportunistic approach to gain an advantage over other litigants by 'jumping the queue.'

Relief

- [13] The applicant was one of the people who was part of L's inner family circle for at least 6 years, this is a fact that cannot be denied. Whether he was indeed a father figure with whom she bonded strongly cannot be determined on the papers as it stands.

- [14] The applicant perceived himself to have been a father figure for L, and to have been regarded as such by her. However, his opinion in this regard must be considered against the background that he says that he was completely caught off-guard when the respondent left him while he was away, as he did not experience their marriage to be in jeopardy, although they had some arguments. He also persisted in declaring his affection to the respondent after she left him, to the extent that she pertinently had to ask him to refrain from doing it, and again reiterated that she must return so that they can sort out the issues. I must consider that the applicant's perceptions do not necessarily accord with the respondent- and

L's reality. On the other hand, it is evident from the papers filed of record that the applicant and L continuously had telephonic contact since the minor relocated to South Africa and that the respondent initially agreed to this.

[15] If the applicant was, and is, an important nurturing and caring presence in L's life, she is indeed entitled to be allowed contact with him, and it would not be in her best interests to deny her that contact. If, however, on the other hand, she did not bond as closely with the applicant as he perceived, and she indeed does not want to continue having contact with him, she should not be forced to have contact with him against her wishes. For this reason, I am not inclined to grant any order pertaining to any form of contact, telephonic or otherwise, without a report from the *curatrix ad litem* in this regard.

[16] I requested both parties to provide me with draft orders. The applicant's counsel proposed that a social worker, Ms. Elsabe Bosh-Brits, be appointed to conduct a full forensic investigation and assessment of the applicant, the respondent, the minor child L, and any other parties she deems necessary. The respondent requested that a psychologist be appointed. I am, however, cautious to subject the minor unnecessarily to intrusive assessments, and am of the view that it is in the minor child's best interest that a *curator ad litem* be appointed with the power, *inter alia*, to mediate disputes between the parties and to consult with the minor child as well as other parties in order to determine the best interests of the child, and to report back to this court.

[17] The costs of the *curatrix ad litem* are, in the *interim*, to be paid by the applicant, but as between the parties, the *curatrix ad litem*'s costs are reserved to be argued once her report is provided to the court.

ORDER

In the result, the following order is granted:

- 1. Advocate Isma Delport from Groenkloof Advocate Chambers is appointed as *curatrix ad litem* for the minor child, L[...] E[...], in these proceedings as well as any other proceedings involving the child;**

2. The *curatrix ad litem* shall have the following duties and powers:
 - 2.1. To consult with the minor child, the parties, as well as any other party, person, or expert she deems necessary, in order to determine the best interest of the minor child with specific reference to the exercise of contact rights by the applicant, and the question as to whether the minor is compromised in any manner by residing with her mother at her grandparents' residence;
 - 2.2. To appoint, in her discretion but after consultation with the parties, an independent expert as she deems may be necessary, to evaluate any or all the relevant parties and the minor child to determine the best interests of the minor child;
 - 2.3. To mediate disputes between the parties and to make directives in this regard;
 - 2.4. To take any action she deems necessary and advisable, including approaching the court in order in order to protect the interests of the minor child;
 - 2.5. To approach the court to have her duties and power extended if the parties cannot reach an agreement in this regard;
 - 2.6. Pursuant to her investigations to provide a report for the assistance of the court, containing any recommendations that she may deem to be in the interests of the minor child;
 - 2.7. To facilitate interim contact between the applicant and the minor child in her sole discretion, if she deems it in the minor child's best interests.
3. The parties shall give their full co-operation to the *curatrix ad litem* which includes providing unrestricted access to the minor child and submission to any directive issued by the *curatrix ad litem* until such time as the court makes an order.

4. The applicant is to provide an acceptable guarantee for the *curatrix ad litem's* costs, absent whereof the *curatrix ad litem* may approach the court on notice with an application to be relieved of her duties.
5. The matter is retained by Van der Schyff J for case management, subject thereto that any party or the *curatrix ad litem* may, with notice to all parties and the *curatrix ad litem*, approach the Deputy Judge President with a request to appoint another case manager.
6. Both parties may supplement their papers after receipt of the *curatrix ad litem's* report. The applicant may supplement his papers within 15 days after receipt of the report, whereafter the respondent may supplement her papers within 15 days of receipt of the applicant's supplemented papers.
7. On receipt of the *curatrix ad litem's* report and after all papers have been supplemented, the applicant may approach Van der Schyff J's registrar, or the registrar of the case manager appointed by the Deputy Judge President, to enrol the matter for hearing.
8. The applicant must ensure that the application, all papers filed of record, and this order are provided to the *curatrix ad litem* within 3 days of the granting of this order, and that *curatrix* is invited to the CaseLines' file.
9. The remainder of the relief sought is postponed *sine die*, pending the receipt of the *curatrix ad litem's* report.
10. The applicant is to pay the *curatrix ad litem's* account, and the costs of any expert appointed by her in the interim, but such costs are reserved *inter partes* and to be argued with the application.
11. The applicant is to pay the costs of this application on an attorney and client scale.

E van der Schyff

Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

For the applicant:	Ms. C. Von Ludwig
For the respondent:	Adv. D.A. Smith
Instructed by:	Hopgood Attorneys
Date of the hearing:	18 July 2023
Date of judgment:	25 July 2023