

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

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

2 January 2024

DATE

SIGNATURE

CASE NO: 88660/2019

ADV LC HAUPT, SC, NO in her capacity as *curatrix ad litem* for the minor children:

MW

RW

In re: The matter between:

CJW

1st Applicant

BW

2nd Applicant

and

SJP

1st Respondent

HIP

2nd Respondent

Lesego Vilikazi NO

3rd Respondent

(In her capacity as nominee for ABSA TRUST LTD, The duly appointed trustee of the Charles James Testamentary Trust)

ABSA TRUST LTD NO

4th Respondent

AC EMPLOYEE BENEFITS (PTY) LTD

5th Respondent

MASTER OF THE HIGH COURT

6th Respondent

JUDGMENT

(The matter was heard in open court but judgment delivered by uploading it to the electronic file of the matter on Casellnes. The judgment was electronically forwarded to the parties/representatives and the date of judgment is deemed the date of uploading thereof onto CaseLines)

BEFORE: HOLLAND-MUTER J

[1] This matter has a long but sad history, a sad history of two minor children orphaned after losing both their parents within a short time span. Their mother, Christi, died on 24 July 2017 and their father, Charles, died on 6 May 2019, both victims of cancer.

[2] In the ideal world one would have expected their close relatives to embrace them with love and compassion to ease their loss and to make life without their parents more bearable. Sadly, as in many similar matters, the close family became engaged in bitter on-going legal skirmishes.

[3] Charles (the deceased father) nominated his parents in law, the first and second respondents (referred to as “the respondents”), as guardians for the two minor children, should they decline to accept guardianship, or later decline/or become incapacitated to continue with the guardianship, Charles nominated the first applicant, Casper Johan (brother of the deceased) as substitute guardian. Casper is married to Bianca. The other adults are Johan and Leandri, Johan the younger brother and Leandri, the sister in law of Charles.

[4] The first respondent is “Oupa Schalk’ and the second respondent is “Ouma Issie”. The parental grandmother of the two minor children is “Ouma Duifie”, the deceased’s mother married to Oupa Gus (after her husband died earlier).

[5] There were skirmishes shortly after the death of Charles, mostly because of some movables that belonged to Charles and were allegedly taken by the first applicant. This included certain electronic equipment such as a laptop, cell phone and other items.

[6] The growing animosity between the first applicant and the respondents resulted in litigation in an urgent application before Avvakoumides AJ on 10 December 2019. Judgment was delivered on 20 March 2020 (as on CaseLines), the relevant prayers applicable on the parties are the appointment of Adv LC Haupt SC as *curatrix ad litem* on behalf of the minor children and granting certain rights of contact to the applicants regarding the minor children. The contact rights were subject to the finalization of an investigation regarding the best interests of the minor children, specifically the Parental Responsibilities and Rights to be exercised over the children by all the parties concerned.

[7] The contact rights awarded to the applicants were as follows:

- (i) Contact every alternative weekend from Friday 17:00 until Sunday 18:00;
- (ii) Contact one afternoon every week as arranged between the parties, subject to the school activities of the minor children;
- (iii) Contact for half of the school holidays; and
- (iv) Reasonable telephonic contact.

[8] The respondents filed an application for leave to appeal against the whole of the judgment and order, this application dismissed with costs. It is not necessary to dwell into the reasoning by the court for refusing the application for leave to appeal. The respondents petitioned to the Supreme Court of Appeal (“SCA”), the SCA granted leave to appeal to the Full Court. The appeal was struck from the roll by the Full Court on 20 July 2022 and again there is no reason to dwell onto this striking of the appeal. The crux of the striking is that the order granted by Avvakoumides AJ remains the only court order applicable.

[9] Adv Haupt SC was approached during August 2022 by the parties to commence with her investigation as per 15.3 of the court order dated 22 March 2020. She was informed that the parties have agreed to hold over further litigation pending the outcome of her investigation. This turned out to be a mere mirage on the horizon. The presence of the *curatrix* only escalated the extra court battles and was by followed by salvo after salvo in the on-going skirmishes only to deteriorate the already strained relationship between the parties. Attempts to resolve disputes dismally ran aground on rocky shores all to the detriment of the minor children.

[10] In her interim report the *curatrix ad litem*, reference is made to unresolved issues, some stemming from incidents prior to the death of the minor children’s parents. The *curatrix ad litem* emphasised the necessity of

therapy not only for the children but also for the family caught up in the skirmishes. The need therefore is to assist the family to put their differences aside in the interest of the children.

[11] The *curatrix* issued certain directives with reference to specific dates on which the applicants could exercise the existing contact rights granted by Avvakoumides AJ and appointed a therapist and forensic expert on accordance with the provisions of 15.3.6 of the court order. The directives are one of the burning thorns in the flesh of the respondents. It is the reality of the process that certain directives issued by the *curatrix* from time to time will be unpopular with some of the parties, but it must be kept in mind that the *curatrix* is there to act in the best interest of the minor children and not to be a mere puppet for any of the parties. Unless any bias or improper conduct is proven by a party, the *curatrix* will remain appointed by the court and only the court may remove her from the appointment. See below.

[12] Without going into detail of certain therapy sessions, the *curatrix* was challenged for *inter alia* why the maternal grandparents (first and second respondents) should receive therapy, arguing that they have raised their own children/grandchildren and do not require any guidance or therapy. In my view, the mere reaction of the respondents illustrates the need for therapy in these circumstances.

[13] The long term object is to restore a cordial relationship between the respondents and the applicants in the interest of the minor children. This was what the deceased father of the minor children envisaged when appointing the successive guardians for his children for the future. The respondents are advanced in life and the future cannot be predicted, but should anything happen to them before the minor children attain majority, the first applicant becomes the guardian of the children. The first and second respondents do not have the right to appoint any successor should they become incapable to continue as guardians. The will of the deceased is clear in this regard.

[14] The on-going feud between the parties is illustrative of the need for professional intervention to normalise the relation between the parties and I accept it was one of the aspects Avvakoumides AJ considered when granting the order in March 2020.

[15] The existing order is an interim order and Part B thereof should be finalised in the interest of the children.

PRESENT APPLICATION:

[16] The *curatrix* deemed it necessary to launch this application on an urgent basis. The need therefore arose after the *curatrix* experienced on-going frustration and continuous obstruction in particular by the First Respondent. This obstruction manifested in a Whatsapp message from the First Respondent to the *curatrix* on 14 July 2023 stating that “*More almal die kinders wil nie meer die paterne familie (Casper en gesin) besoek nie en ons gaan hulle ook nie meer dwing nie, verdere kominikasie kontak ons prokureur*” – verbatim quote).

[17] The respondents opposed the application, and in particular opposed the urgency thereof. It has to be remembered that urgency is for the court to decide upon and that in particular, where minor children are involved the usual test for urgency finds a more lenient application. Where minor children are involved, the notion is to hear the matter as soon as possible. The court as upper guardian of minor children will expedite the matter because the best interest of the children is of paramount importance and the well-being of minor children is considered inherently urgent. Phooki AJ dealt with the question of urgency on 22 August 2023 and I am also of the view that the application when brought was indeed urgent.

[18] The underlying issue is the now continuous non-compliance by the respondents with the existing court order which granted certain rights towards the applicants. The refusal by the respondents to allow the applicants to exercise the granted rights and indirect parental responsibilities may have far reaching consequences for the respondents.

[19] Section 35 of the ***Children's Act, 38 of 2005*** ("the Act") is clear that such refusal by the respondents is a criminal offence liable on conviction to a fine or to imprisonment for a period not exceeding one year. It would be a last resort should the respondents continue to frustrate the applicants in this regard and it would be a serious consideration when considering the evaluation and assignment of future contact and care to interested persons. Section 23 of the Act is clear what the court will take into consideration, particular in view thereof that the "B" part of the application is pending. See **Child Law in South Africa, Trynie Boezaart (ed) Juta 2009 p 91 -92.**

[20] It is not for this court to find on the issue of access by the applicants as this aspect has already been addressed by Avvakoumides AJ (supra). This court has to consider the non-compliance of the existing court order and in view of the appeal being struck of the roll, the court order continues to apply.

[21] The recent history that led to the *curatrix* to issue the present application needs closer attention. The already strained relationship between the applicant and the respondents received a further blow when the first applicant raised concerns regarding the finances surrounding the whole issue. The deceased left a healthy legacy for the minor children but the first applicant's concern was that the respondents should account on a monthly basis what is done with the amounts received from the trust (the trust created in the will of the deceased). Reference is made supra to the Whatsapp message by the First Respondent dd 14 July 2023 in par [16].

[22] A further issue is the presence of the respondents' adult daughter and her fiancé residing in the residence left for the minor children. The request that the adult daughter (Marna) and her fiancé should account what they contribute for residing at the home and benefit from residing there is reasonable. In my view this is a reasonable request as it may raise the perception that these adults are benefitting from the funds and assets that should be in the interest of the children. A further concern to the first applicant is that Marna has taken over Megan's bedroom and that the applicants are excluded from decisions affecting the future of the children.

[23] The urgent application was served on the respondents and was set down for hearing before Phooko AJ on 22 August 2023. The respondents opposed the application and indicated that the urgency of the matter will be opposed *in limine*. Counsel for the respondents further indicated that should the court dismiss the point *in limine*, a postponement of the matter will be requested to enable the respondents to file answering papers. No opposing papers were filed and a Rule 35(12) & (14) notice was filed on Friday 18 August 2023 (after closing of papers for the application as per Practice Directive).

[24] The matter was before Phooki AJ on 22 August 2023, and after determining the urgency issue, postponed the matter to 27 September 2023 to the Urgent Court as requested to file answering papers. No answering papers were filed on behalf of the respondents and counsel for the respondents requested a postponement *sine die*.

[25] When the matter came before me on 27 September 2023, after hearing counsel, I postponed the matter to 5 October 2023 in the Family Court and directed counsel for the respondents to file the answering affidavit before the 5th of October 2023. Counsel vehemently objected thereto and argued that it was not possible because of the requested documents in the Rule 35 (12) & (14) notice still outstanding. He could not explain why this argument was not raised before Phooki AJ on 22 August 2023. Having perused the Rule 35 notice,

I came to the conclusion that this was an attempt to stall the matter further because an answering affidavit could well be drafted in the absence of the requested documents. Counsel then raised his involvement in a matter in Polokwane in the next days and that time would restrict him to draft any papers. This is not a convincing argument as there is still the attorney of record to draft the papers. This was another attempt to slow down the process. I then proceeded to direct the Respondents to file the necessary answering affidavit without the requested documents.

[26] The respondents requested *inter alia* transcriptions and /or consultation notes by the *curatrix* of her consultation(s) with the minor children and respondents, even though the instructing attorney for the respondents attended some of these consultations. These private consultation notes do not fall within the ambit of what was decided in **Centre for Child Law v Hoerskool Fochville and Another 2016 (2) SA 121 SCA**. The minor children and respondents completed no documents or questionnaires during these consultations. The attorney on behalf of the respondents attended some of these consultations and can recall what was discussed during consultation.

[27] It must be noted that Megan made some secret recordings with her cell phone of these consultations without the knowledge of the *curatrix* and at least two copies of such recordings were already in the possession of the Respondents and then annexed to the later filed answering affidavit. There is no justification to request documents already in possession but claiming the need therefore to draft an affidavit. This raises some concerns regarding the conduct of the Respondents and their representatives.

[28] I doubt whether Megan recorded these consultations on own initiative and serious doubt should be cast over the request therefore on behalf of the respondents while having at least two manuscripts of the consultations recorded.

[29] In the Rule 35 notice, the respondents request copies of financial disclosures completed by the respondents with regard to information received from the respondents. It makes no sense at all why the request is for information supplied by the respondents. This is similar to the request for the consultation notes (although a secret recorded copy was already in the Respondents' possession).

[30] The other documents in my view are not required to respond to the application at all. All in all the Rule 35 notice is nothing more than an attempt to slow the process. It is in public interest that litigation be dispensed of as speedily possible. There is such a thing as the tyranny of litigation, and in many cases, an award of costs does not adequately compensate the other party for inconvenience suffered as a result of a postponement. Although the issue of costs is not the main factor here, the inconvenience and continuous alienation of the applicants by the conduct of the respondents should be addressed.

[31] The legal team of the respondents filed a comprehensive answering affidavit on 4 October 2023 despite not having the required documents, an answering affidavit with annexures comprising 297 pages. I find it difficult to understand how counsel for the respondents could argue that it was almost impossible for them to draft an answering affidavit until placed on strict terms by court.

[32] The answering affidavit also contains a counter-application for the discharge of the *curatrix ad litem*. The counter-application is brought on short form without a founding affidavit. The reasons for the counter-application can be inferred from what is stated in the answering affidavit. The gist thereof is that the respondents are not satisfied with the process followed by the *curatrix* and that the majority of directives issued by her are restrictive on them. The reasonable inference for the court to make is that the respondents' views the *curatrix* to be proloner of the applicants. I could not find any iota of substance for such arguments.

[33] A *curatrix* appointed by the court has a particular function and is not a puppet for a particular party. The *curatrix* is there to investigate and report to court on the best interest of the minor children, and if during the process some of the parties' toes are trampled upon, the party must endure it. The court will only intervene and remove a *curatrix* on grounds of misconduct, incompetence or similar reasons. In this matter I am of the view that the *curatrix* is performing her task with diligence and she is pursuing her task in good faith. The *curatrix* indicated during arguments that she will stand down if necessary but I am of the view that it is not necessary. It will only further delay the process before a final report is submitted to court. The request to remove the *curatrix* is dismissed.

[34] While preparing judgment after the hearing arguments, I deemed it necessary to interview the two minor children alone. I arranged with the *curatrix* via my registrar to have the minor children brought to my chambers. This was done and I interviewed the children in my chambers on 27 November 2023 (after most school examinations were completed). I explained to the children that the purpose of the interview was for me to listen to the children before making any decision. I expressed the nature thereof and that what is discussed is private and not to be discussed with the parties. The interview strengthened my view that further therapy was needed by all involved. Megan in particular now holds a different view with regard to the applicants than before and what was dealt with by the experts earlier.

[35] I am of the view that although the Act states that a minor child should be heard, the child cannot hold all other hostage because of her/his view. All relevant aspects must be considered and the view of the child is but one aspect in determining the best interest of the minor children, even though the outcome is contrary the "wishes" of the minor child.

[36] A further incident occurred thereafter on 29 November 2023. I received an email (via my registrar) from the *curatrix* that she requested the first respondent to assist her in the request from Ouma Duifie (the deceased's mother and paternal grandmother of the children) to see them relating her personal health before she was hospitalised. The *curatrix* phoned the first respondent with the request but he at first refused to commit himself thereto. The refusal was following the existing practice by the respondents to refuse the applicants' or nearby family as Ouma Duifie any contact with the children.

[37] I requested the *curatrix* via my registrar to make a final effort to persuade the first respondent to adhere to this request, and if unsuccessful, to approach the court for relief. Ouma Duifie wanted to discuss a personal health issue with the children to prevent them from hearing it from others. Sanity prevailed and the *curatrix* reported to my registrar that the first respondent agreed to the request.

[38] I am well aware of the provisions of the Act regarding hearing the minor child, particular when taking into account the age of the minor. I am aware of the provisions of section 10 of the Act to allow the children to participate, but the view of a child is only a factor to consider together with all the other relevant aspects as set out in section 23 of the Act. Although a court should listen to what the minor children's views are, their views may not be in their best interest. Their views are not final and overriding the discretion of the court.

[39] Although not dealing with the consequences of divorce and the effect thereof on the minor children, the dilemma as to the different problems and views of access from the adults' point of view compared with the problems from the child's point of view is noteworthy. See **Schafer, The Law of Access to Children, Butterworths p 14 to 18**. The children will most often side with the party with whom they are, and such party unnecessarily deprives the children the opportunity to experience the affection of the other party. See Van den

Heever J in **Riches 1981 (1) PH B4(C)**. *“Such breaking down of the image of the other party in the eyes of the child(ren), is done by a selfish parent, robbing the child of what should be its heritage in order to salvage his own wounds”*.

[40] Grownups lose their objectivity and use the children as clubs to beat the other, and ultimately the children suffers the most trauma in the process.

[41] The court has to balance all the factors before making a final decision. In this matter the proceedings is still interim, but where a court order is made, the parties must comply therewith.

[42] It is clear that there will be no winners should the parties continue on this trend and that the ultimate losers will be the minor children. It is clear that all the parties need professional guidance through this myriad with the ultimate aim to act in the interest of the minor children.

[43] I have considered the request by the *curatrix* that Megan be placed in the school hostel at Afrikaanse Meisies High School, but in view of the state of the application, it may be pre-empted. I am also of the view that it may not be prudent to change the guardianship at this moment because it may be the recommendation by the expert(s) to retain the respondents as guardians. I am however of the view that the applicants' rights of access as set out by Avvakoumedis should be implemented as soon as possible.

[44] To summarise, the court order by Avvakoumedis must be respected and the respondents may not, even if they differ from the order, disregard the order. I referred to the consequences *supra* if the disregard continues, and urge the respondents to bury the hatchet and act in the best interest of the minor children. Likewise the applicants should have the best interests of the minor children as priority in what and how they conduct themselves. Should

the respondents however continue to be obstructive, they will have to face the music.

[45] I deem it not necessary to deal in detail with each and every aspect of the interim report by the *curatrix*, but will address certain aspects in the order *infra*. This includes the continuation of the therapy to enable the experts to finalize the necessary reports and to enable the *curatrix* to finalise her report. As soon as all investigations are completed and all reports are finalised, the matter may be enrolled in the Family Court for final adjudication.

[46] The aspects of Part B of the initial application must be attended to without delay to have the matter laid to rest (if that is possible). All outstanding replying affidavits must be finalised and the *curatrix* is in the best position to manage the process further. If she is frustrated by any of the parties, she may on amended papers approach the Family Court for suitable directives.

[47] I considered the issue of costs and hold the view that the conduct of the Respondents is the reason why this matter again ended up in court. They are from the outset frustrating the applicants in all ways and should not be allowed to continue on this route. Costs is in the discretion of the court and taking into account all aspects, from appealing an interim order to filing of the belated Rule 35 (12) & (14) notice and the failing to timeously file the answering affidavit, only to file a document of more than 250 pages without requested documents, I am of the view that the Respondents pay the costs of this application on a party and party scale. I was tempted to order it on an attorney and client scale but after consideration decided on a party and party scale.

ORDER:

1. The First and Second Respondents are to comply with prayer 15 of the order granted by Avvakoumedis AJ on 17 March 2020 (“the order”) and any further directives issued by the *curator ad litem* (“*curatrix*”) in terms of prayer 15.3.3 of the order, such compliance to start with the beginning of the new school year term;

2. In addition to 1 above, the First and Second Respondents are to comply with the directive issued by Janse Van Nieuwenhuizen J in her capacity as Case Manager on 2 May 2023;

3. The First and Second Respondents are to attend therapy with the clinical psychologist Elmarie Visser (“the therapist”) on such times and dates as provided by the therapist, on condition that all dates are set at least one week in advance by the therapist taking into account the situation of the respondents. All dates and times as provided by the therapist for sessions are to be strictly adhered to unless alternative arrangements has been made with the therapist; and if no alternative dates be arranged, the initial day and time remain in place. The therapist is to provide the respondents with a schedule for therapy on a weekly basis to the respondents and the *curatrix*. The respondents shall report weekly to the *curatrix* no later than the Monday 16:00 in writing (i e by email or Whatsapp group) the dates and times on which they will be attending therapy for that week;

4. The Applicants, First and Second Respondents and the minor children are to attend family therapy on such times and dates as provided by the therapist; the First and Second Respondents may elect that Mrs Marietjie Ackermann attend and participate in the family therapy sessions involving the Applicants and the First and Second Respondents.

5. The minor children will remain in the interim care and primary residence of the First and Second Respondents (the erstwhile family residence). The First

and Second Respondents will ensure that the minor children attend individual and family therapy on such times and dates as requested by the therapist.

6. The Applicants and their two minor children and the paternal grandmother are to attend to family therapy sessions on such times and dates as requested by the therapist;

7. The First and Second Respondents are to keep the applicants informed of the minor children's progress at school and of their involvement in all academic, sporting and cultural extra-mural activities and sport events.

8. As from date of this order, the Fifth Respondent will continue to make payments from the monthly pension amounts in favour of the minor children to the First and Second Respondent after receiving the written estimated monthly expenses towards the minor children as budgeted for and approved by the Trustees of the Fourth Respondent.

9. The First and Second Respondents will on a monthly basis reconcile and account for all monies received from the Third and /or Fourth Respondents, such accounting be done towards Ms Sarette Grove (in her capacity as nominee of the Third Respondent).

10. The First and Second Respondents must record and account for any contributions received from the adult daughter, Marna and her fiancé for their reasonable monthly contributions towards the household of the First and Second Respondents for their continuation to reside in the residence of the minor children.

11. The powers and duties of the *curatrix* are extended to include the appointment of counsel of her choice if she deems it necessary.

12. Lesego Vilikazi is hereby substituted by Aaminah Khan as the nominee of the Third Respondent.

13. The First and Second Respondent are to pay the outstanding account of the forensic expert Nandi du Plooy within 30m days from date of this order.

14. The Respondents is ordered to pay the costs of this application on a party and party scale. All other costs are reserved to be adjudicated together with the finalization of Part B of the initial application, the initial application to be finalized after all expert reports are finalized and the *curatrix* 's final report is made available.

A handwritten signature in black ink, appearing to read 'J Holland-Müter', with a large, stylized initial 'J' at the start.

J HOLLAND-MÜTER J

Judge of the Pretoria High Court

Dates heard: 27 September 2023 and 5 October 2023.

Individual interview with the minor children on 27 November 2023

Date of Judgment: 2 January 2024.

Appearances: Obo Applicants: Adv R Ferreira

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MASTER OF THE PRETORIA HIGH COURT (**Sixth Respondent**)