THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 512/10

LEGAL AID BOARD

In the matter of

FOUR CHILDREN **Applicants in the court a quo**

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

Coram: NAVSA, NUGENT, HEHER and CACHALIA JJA and PETSE AJA

Heard: **1 MARCH 2011**

Delivered: **29 MARCH 2011**

Summary: Jurisdiction of Supreme Court of Appeal – confined to appeals – case before it not an appeal – no order made.

ORDER

On appeal from: High Court Eastern Cape, Port Elizabeth (Schoeman J sitting as court of first instance)

No order is made.

JUDGMENT

NUGENT JA (NAVSA, HEHER and CACHALIA JJA and PETSE AJA concurring)

[1] The authority of the courts emanates from and is circumscribed by the Constitution. The constitutional authority of this court is confined to deciding appeals and issues connected with appeals.[1] What has been placed before us is not an appeal although it has been presented as such. In truth it is an application by the Legal Aid Board[2] for a declaratory order concerning its rights. This court has no original jurisdiction to hear such an application.[3]

[1]Section 168(3). It may also hear matters that may be 'referred to it in circumstances defined by an Act of Parliament' but that has no application in this case.
[2]Established by s 2 of the Legal Aid Act 22 of 1969. In the papers it called itself Legal Aid South Africa but I have referred to it by its statutory name.
[3]It might be that the Constitutional Court could entertain an appeal in the form that the case has been presented to us (cf *Campus Law Clinic, University of KZN v Standard Bank of SA Ltd* 2006 (6) SA 103 (CC)) but its jurisdiction is not confined in the same terms.

[2] While that is the short answer to this case it is necessary to trace in some detail how the matter came to be before us to explain my conclusion. Before doing so I need to deal with two preliminary matters.

[3] The case has its origin in an application that was brought in the high court by four children, with the assistance of the Legal Aid Board, to protect their interests in a dispute between their parents. The dismissal of the application prompted this purported appeal. Neither the children nor their parents are parties before us although they are reflected as such in various documents that have been filed. The purported appellant is the Legal Aid Board and there is no respondent. The Centre for Child Care and the Family Advocate[4] intervened in the matter to make submissions.

[4] Shortly before the matter was to be heard a letter was received by this court from an attorney who had been consulted by the mother of the children. Following upon what she told him the attorney consulted with the children and also obtained the services of a social worker to do the same. He informed us that both he and the social worker were told by the children that they had not authorised the proceedings, that until recently they were unaware that the proceedings had been brought, that they were distressed that the proceedings were before us, and that they felt that their privacy had been invaded.

[5] On our direction a letter was addressed to the Legal Aid Board, asking whether in the circumstances it was entitled to persist in the proceedings. Its reply was that it indeed intended to proceed. The fact that the Legal Aid Board feels itself able to proceed in the absence and against the wishes of the parties whose rights were there in issue seems to me by

[4] Appointed under s 2 of the Mediation in Certain Divorce Matters Act 24 of 1987.

itself to demonstrate ineluctably that this is not an appeal in that application but is a fresh application by the Legal Aid Board concerning its own rights. The earlier application has merely served as its springboard.

[6] It is unfortunate that the children and their parents were not informed of the Legal Aid Board's intentions, albeit that the case no longer concerned their interests directly. To avoid any further invasion of their privacy we directed at the outset of the hearing that the identity of the children and their parents must not be made public any further than has already occurred and we repeat that direction. In this judgment I have not referred to them by name but instead by the relationship that they bear to one another.

[7] The letter that we addressed to the Legal Aid Board might have alerted it to the question whether this court has jurisdiction in the matter but at the outset of the hearing it soon became evident that it had not been considered. We accordingly allowed counsel an opportunity to consider it but she was not able to advance any submissions of substance on the issue. In the absence of such submissions we concluded that we had no jurisdiction and for that reason we have not heard oral argument on the merits of the case. We have nonetheless had the advantage of informing ourselves of the submissions that would have been advanced so far as they are contained in heads of argument that have been filed.

[8] At the time the application was brought three of the children were 11 years old and the fourth was 14. Their parents were divorced. At the time of the divorce a consent order had been made granting them joint custody of the children. At first both parents lived in the same city and an

harmonious arrangement existed between them for mutual access to the children.

[9] Some time later their mother wanted to relocate to another country and to take the children with her but their father objected. Their mother applied to the high court for an order authorising her to take the children but the order was refused. The mother abandoned those plans but later she moved to another city in South Africa. Again she wanted the children to accompany her and that prompted a repetition of the earlier dispute.

[10] The children found themselves being caught up in the dispute between their parents. With further litigation looming they approached a Justice Centre for assistance. (The Justice Centre is the name under which the Legal Aid Board performs its functions in various regions and I will use the names interchangeably). The Justice Centre wrote to the mother's attorneys requesting an undertaking that the children would not be relocated, and would not be placed under any pressure to do so, failing which an application would be made to court for appropriate relief. The mother's attorneys replied that the Justice Centre had no standing to bring legal proceedings, advised that she was averse to it representing the children, and warned that if proceedings were brought punitive costs might be sought against the relevant officer of the Justice Centre personally. Undeterred by that unwarranted threat an application was brought before the high court. The children were the applicants but they were assisted to bring the application by the Justice Centre.

[11] The immediate hurdle to be overcome was that a minor is not generally competent to engage in litigation without the assistance of his

or her guardian. In this case their guardians were obviously disqualified from doing so because they would have had a conflict of interest.

[12] The law in this country has always been conscious of such a difficulty and it provides a ready and simple mechanism to overcome it. It confers upon the courts a wide discretion to appoint a person to substitute the guardian – commonly known as a curator ad litem, meaning, if the Latin term is intimidating, no more than a person to conduct litigation in the name and in the interests of the minor.[5] As early as 1902 the subject was dealt with comprehensively by the author of *The Judicial Practice of South Africa*[6]*:*

'Such curator is appointed by the Court upon the petition of the minor, or, if he is too young to understand it, of some relative or friend or some one who can shew a reasonable interest in him, setting forth that he has no guardian, and is about to institute, or defend, an action at law, and stating also briefly the nature of the case, and praying the Court to appoint a *curator ad litem* to represent him.

…

A minor may have a *curator ad litem* appointed for him even against his will, or without his knowledge, if it can be shewn to the Court that the application will be for his benefit and to his interest.

…

As a general rule a near relative is appointed *curator ad litem*, but this is discretionary with the Court, and frequently the advocate or attorney employed for the minor has been appointed as such.

From the time of the appointment of the *curator ad litem*, the action is to be conducted in the name of the minor, duly assisted by his curator …

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[5]*Blacks Law Dictionary* defines a curator ad litem as 'a person who is appointed by a court to represent the interests of a youth … during proceedings before the court'. *The South African Judicial Dictionary* defines the term to mean 'a curator appointed by the court to protect the interests of some party to a legal proceedings who is unable, or is alleged to be unable, to protect his own interests'.

[6] C H Van Zyl *The Theory of the Judicial Practice of the Colony of the Cape of Good Hope and of South Africa Generally* 2ed (1902) pages 21-22. See, too, *Boberg's Law of Persons and the Family* 2ed by Belinda van Heerden, Alfred Cockrell and Raylene Keightley pp. 902-907.

The duty of a *curator ad litem* is to represent the minor in the particular case then pending, and to watch and protect his interest in the case as a good and prudent father would have done….
A *curator ad litem* may be removed by the Court for the same reasons as an attorney employed in a case. He may also resign his office, but it is in the discretion of the Court to accept or not to accept his resignation.'

[13] The discretion that a court has is as broad as is required to meet every exigency and, if necessary, the court is capable of supplementing or altering the ordinary authority of a curator so far as the occasion requires. Its sole guide in exercising its discretion is the best interests of the minor.

[14] A curator who does not have the appropriate qualifications and skills to conduct the litigation might employ a legal representative to assist in the ordinary way, but a curator who has those qualifications and skills will naturally not find it necessary to do so. Indeed, it is common for legal practitioners to be appointed to that office, and to conduct the litigation themselves, and there can be no objection unless that creates a conflict of interest.[7]

[15] Thus all that was required to overcome the initial hurdle in this case was for the children – or the Justice Centre on their behalf – to ask the court to appoint a suitable employee of the Justice Centre as curator in the exercise of its ordinary discretion. Instead a more complex route was chosen.

[7] In *Martin NO v Road Accident Fund* 2000 (2) SA 1023 (W) at 1034B-C Wunsh J said that it is undesirable for a person to be both curator and legal representative. But that was said in the context of cases where the earning of professional fees might create a conflict of interest. Whether a conflict of interest will arise by acting in both capacities will depend upon the particular case. For the appointment of legal practitioners to that office generally see 1034H-1039D. Needless to say, the particular practitioner should be a suitable person: cf *Soller NO v G* 2003 (5) SA 430 (W) para 16.

[16] Two distinct forms of order were claimed. The first was a preliminary order in the following terms:

‘In so far as it is necessary, [appointing] alternatively [condoning] the appearance of the Justice Centre as legal representative for the Applicants in asserting their constitutional right to be heard in civil proceedings affecting them’.

The second claim was for substantive relief restraining the mother from removing the children to the city she intended locating to until such time as the custody order had been amended by a court, and restraining both parents from discussing the matter with the children other than in the presence of the Justice Centre or its nominee. A temporary order to the latter effect was asked for pending the finalisation of the application for those orders.

[17] The application was brought as a matter of urgency and the supporting affidavits were brief. The founding affidavit was deposed to by the oldest child (the first applicant, the remaining children being the second, third and fourth applicants). It set out briefly the factual circumstances that had arisen. The application was supported by an affidavit deposed to by an employee of the Justice Centre, explaining why it was considered necessary for the substantive relief to be granted. He also expressed the opinion that ‘it is not necessary to bring a prior application to represent the children’ but that ‘in so far as it may be necessary we will ask for an order condoning our representation of the children’. He went on to say that he wished to assure the court that ‘we act in this application only to give the children the voice that they need to enforce their best interest’.

[18] The appointment of an employee of the Legal Aid Board as curator would have met everything that was avowedly required and might have

been done by granting the preliminary order in suitably modified form. The case was presented instead as an application for the appointment of a legal practitioner under s 28(1)(h) of the Constitution (which accounts for the view expressed in the affidavit that authorisation was not in truth required, and for the form in which the order was couched). That section affords children the right to have a legal practitioner assigned to him or her by the state in civil proceedings affecting the child if substantial prejudice would otherwise result.

[19] It is not clear to me why that section was invoked. The Constitutional Court has said repeatedly that where it is possible to decide any case without reaching a constitutional issue then that is the course that must be followed and it has directed the courts accordingly.[8] No more was required for the Justice Centre to achieve its avowed aim than to have one of its employees appointed curator. Where a curator is not able personally to conduct the litigation then no doubt a child is entitled to have a legal practitioner assigned under that section but that was not the present case.

[20] The application came before Schoeman J. It was taken further off course by the view that she took of the matter. She said that the duty of a legal practitioner contemplated by s 28(1)(h) would have been 'to advance the case of the children' (which was no doubt correct)[9] but that that was not what the case called for. She said that it called for a person

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[8] *S v Mhlungu* 1995 (3) SA 867 (CC) para 59; *Zantsi v Council of State, Ciskei* 1995 (4) SA 615 (CC) paras 3 and 4; *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) SA 984 (CC) para 7; *Gardener v Whitaker* 1996 (4) SA 337 (CC) para 14; *S v Bequinot* 1997 (2) SA 887 (CC) para 12; *Motsepe v Commissioner for Inland Revenue* 1997 (2) SA 898 (CC) para 21; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 21; *Minister of Education v Harris* 2001 (4) SA 1297 (CC) para 19; *Ex parte Minister of Safety and Security: In re S v Walters* 2002 (4) SA 613 (CC) paras 64 and 65; *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC) para 9.

[9] Cf *Soller NO*, above, para 26.

'exercising independent judgment…with the necessary objectivity that is needed', which, she said, was the function of a curator. Along that line of reasoning she concluded that 'the applicants are not entitled to approach the court without the assistance of a *curator ad litem*' and she dismissed the application accordingly. (The learned judge went on to make a further order that is not now material.)

[21] The learned judge was clearly incorrect. The case indeed called for the appointment of a person to advance the case of the children – for how else was their case to be advanced? And it is not the function of a curator to adopt a so-called objective approach. The Family Advocate is available to provide neutral assistance should that be required.[10] The function of a curator is to advance the case of the minor. Indeed, this court has had occasion to reprimand a curator who approached his task along the lines suggested by the learned judge. In *Du Plessis NO v Strauss*[11] an order had been made by a court in favour of the persons represented by the curator. On appeal the curator presented argument in favour of the appeal because he considered that 'it would assist the court if he adopted a "more objective" approach'.[12] Van Heerden JA took him to task in the following words (my translation):

'This approach was manifestly in conflict with his duties, because it is hardly necessary to say that a curator-*ad-litem's* own view is irrelevant and that what is expected of him is to advance all possible arguments advantageous to the relevant minors and unborn children ...'[13]

[22] The court could there and then have appointed counsel for the Justice Centre as curator[14] and then turned to the substantive relief that

[10] *Soller NO*, above, para 26.
[11] 1988 (2) SA 105 (A).
[12] At 145J.
[13] At 146A-B.
[14] Cf *Yu Kwam v President Insurance Co. Ltd* 1963 (1) SA 66 (T) at 69-70.

had been claimed, and in my view it ought to have done so, but that is now water under the bridge. Shortly after the application was dismissed the mother moved to another city and took the children with her. Their father then brought an urgent application for orders to the effect that the children should be returned and should reside with him unless the consent order was varied. The application was dismissed by Kroon J on 12 January 2010. The factual position that then prevailed rendered moot the application that had been decided by Schoeman J. Indeed, the family difficulties have happily been resolved. Both parents now live once more in the same city and the harmonious arrangement that prevailed before has been restored.

[23] That notwithstanding, the Legal Aid Board filed what purported to be an application to the high court for leave to appeal. An affidavit deposed to by one of its employees was filed in support of the application, which is unusual in an application for leave to appeal. He frankly acknowledged that the Legal Aid Board had no mandate from the children and set about explaining why the application was nonetheless being brought. I need not recite his explanation in full. In summary he said that the Legal Aid Board had a constitutional duty to assist children to assert their constitutional rights, that the judgment of Schoeman J threatened to hamper it in fulfilling its duty, and that it wanted to have clarity as to its rights.

[24] The principal way in which it would be hampered, so the deponent said, was that the judgment had the effect that 'in each matter an independent curator should be appointed [which would mean] that suitably qualified attorneys and advocates in private practice will have to be appointed … and this will have a negative effect on our budget for

civil litigation for children'. Absent the errors of the learned judge that is not correct. I have pointed out that there is no bar to an employee of the Justice Centre being appointed curator to a minor. Indeed, employees of the Legal Aid Board will generally be admirably suited to such an appointment. They will seldom have a conflict of interest – as private practitioners might have – and yet they have the qualifications and skills to conduct the litigation without further outside assistance.

[25] The Legal Aid Board turned once more to the Constitution to overcome its perceived difficulties – on this occasion to s 38. That section entitles anyone acting in the public interest to approach a competent court for a declaration of rights in certain circumstances.[15] Invoking that section the deponent concluded as follows:

'[We] request the above Honourable Court to allow Legal Aid South Africa to proceed in its own name, in the public interest, to seek leave to appeal against the legal question of locus standi only and to grant leave to appeal as set out in the Notice of Motion to which this affidavit is attached'.

It sought orders in the following terms:

'1. That Legal Aid South Africa is granted leave to act in this appeal in the public interest.

2. That leave to appeal is granted against the decision that the children do not have locus standi to act in their own names'.

[26] It will be apparent that leave to appeal in the terms set out in the second prayer is not competent. It is trite that an appeal lies against an order that is made by a court and not against its reasons for making the

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[15] Section 38: 'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –

….

(d) anyone acting in the public interest'

….'

order.[16] The 'decision that the children do not have locus standi to act in their own names' was not an order made by the court but no more than the reason given for the order.

[27] The application came before Schoeman J who similarly invoked s 38 of the Constitution. In a short judgment the learned judge said that an application contemplated by that section is permitted 'even if there is no live case'. After considering what was meant by 'public interest' for purposes of that section she concluded that the Legal Aid Board was an 'interested party' (presumably meaning that it fell within the terms of that section). On that basis she made the following order:

'I grant leave to appeal to [Legal Aid] to appeal to the Supreme Court of Appeal against the dismissal of this application and to obtain a declarator on the legal standing of children to initiate legal proceedings'.

[28] Although the learned judge granted leave to appeal against the order dismissing the application, that is not what was asked of her by the Legal Aid Board, and before us counsel expressly disavowed an intention to appeal against the order. What it wanted from us was only declaratory relief that was expressed as follows in its heads of argument:

'That where Legal Aid South Africa assign a legal representative to a child in terms of its Constitutional mandate to act in the best interest of that child, that the said child will have locus standi to litigate to protect a constitutional right without the consent of that child's parent/s or without the consent of the Court'.

[29] I see no reason why the ordinary discretionary powers of the courts at common law do not suffice for the Legal Aid Board to perform its mandate, nor why their ordinary supervisory function needs to be dispensed with in order for it to do so, particularly if the wishes of

[16] T C Harms *Civil Procedure in the Superior Courts* C1.26, and generally the jurisdictional requirements for an appeal at C1.16.

guardians are to be overridden. But no doubt it is entitled to invoke s 38 if it feels that to be necessary,[17] though a claim for a declaration that is as profound as that will undoubtedly call for notice to be given to interested parties – not least the relevant minister of state who is charged with responsibility for the welfare of children[18] – which has not occurred in this case.

[30] From the approach that was taken to this matter I think it abundantly clear that both the Legal Aid Board and the court below considered that the case should be placed before us to serve as an application for a declaratory order under s 38. What they both overlooked is that this court has no original jurisdiction to consider an application of that kind. This court is a court of appeal and its jurisdiction is limited accordingly. The case that is before us is not properly an appeal and I think that we are bound to make no order in the matter.

R W NUGENT
JUDGE OF APPEAL

[17] In the affidavit filed in support of the purported application for leave to appeal it was said that in *Legal Aid Board v R* 2009 (2) SA 262 (DCLD) Wallis AJ had 'ruled that Legal Aid South Africa has locus standi, without an application to court, to represent children in court'. The learned judge made no such ruling. He did no more than to express a view to that effect in the cover of a discursus that was not germane to the issue before him.

[18] Cf *Campus Law Clinic*, above, para 27.

APPEARANCES:

For Legal Aid Board:	E Crouse J M Coertzen
For Centre for Child Law:	A M Skelton
For Family Advocate:	B Pienaar SC L Ah-Shene