

SOUTH AFRICA / JUDGMENT

C.J.W and Another v S.J.P and Others (88660/2019) [2024]

ZAGPPHC 1217 (2 December 2024)

[2024] ZAGPPHC 1217

COURT

North Gauteng High Court, Pretoria

BEFORE

Millar

CASE / FILE NUMBER

88660/2019

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Policy

FLYNOTES:

FAMILY

– Children – Guardianship –

Provided

for in will where both parents are deceased – Applying for guardianship of child that already has guardian

– Reasons

why child's existing guardian is not suitable –

Advanced age and poor health – Not able

to discharge duties

of primary caregiver – Living arrangements not optimal for children – Mismanagement of finances

– Not suitable to

continue to act as guardian to minor children – Removed as guardian – Children's

Act 38 of 2005, s 24(3).

IN THE HIGH COURT

OF SOUTH AFRICA

(GAUTENG DIVISION,

PRETORIA)

(1) REPORTABLE:

YES/NO

(2) OF INTEREST TO
OTHER JUDGES: YES/NO
(3) REVISED
DATE: 2 DECEMBER 2024

CASE NUMBER: 88660/2019
In the matter

between: W[...], C[...]
J[...]
FIRST APPLICANT
W[...], B[...]
SECOND APPLICANT
and
P[...], S[...]
J[...]
FIRST RESPONDENT
P[...], H[...]
I[...]
SECOND RESPONDENT
AMINAAB KHAN N.O.
(in her capacity as
nominee for ABSA TRUST LTD, the duly appointed trustee of the
C[...]² J[...]² W[...]² Testamentary
Trust)
THIRD RESPONDENT
ABSA TRUST LIMITED
N.O.
(in their capacity as
the appointed executor)
FOURTH RESPONDENT
ABSA PENSION FUND
FIFTH RESPONDENT
MASTER OF THE HIGH
COURT
SIXTH RESPONDENT

In re: ADV
LC HAUPT SC in her capacity as
curator ad litem for
the minor children -
M[...]² W[...]²
(born on 1[...]² J[...]² 2009)
R[...]² W[...]²
(born on 0[...]² M[...]² 2015)

Coram: Millar
J
Heard

on: 2
October 2024

Delivered:

2

December 2024 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the CaseLines system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 2 December 2024.

JUDGMENT

MILLAR J

INTRODUCTION

- [1] Family is the fundamental building block of society. At its heart are loving and caring parents, grandparents and extended family members. Ideally all act in harmony in providing a safe and nurturing environment in which children are raised and can thrive. “In family life, love is the oil that eases friction, the cement that binds closer together, the music that brings harmony”[1].
- [2] The present case concerns not only the social, emotional and familial well-being and best interests of two minor children, M[...] and R[...] W[...], but also the stewardship of their financial interests.
- [3] The minor children are no strangers to tragedy. In their relatively short lives, they have had to confront and deal with the devastating loss of both of their parents and their maternal grandmother. Their late mother, C[...]1 W[...] passed away in July 2017 when M[...]2 and R[...]3 were 8 and 2 years old respectively. When their late father C[...]2 W[...] passed away in 2019, they were 10 and 4 years of age respectively. This tragedy and loss have only been exacerbated by the death earlier this year of their maternal grandmother Ms H[...] P[...].4
- [4] During his lifetime, the late C[...]2 W[...], by all accounts a loving and caring parent and an astute financial planner, ensured that provision was made in his Will for the care and wellbeing of his two children upon his death. The arrangements were twofold.
- [5] Firstly, a Trust was established to be administered by ABSA Trust Limited into which the inheritance of his children would be paid and administered for their benefit. In addition to this, provision was made for payment of a monthly pension for their ongoing maintenance and support.
- [6] Secondly, to ensure continuity and a stable home, he provided that his in-laws, Mr. and Mrs. P[...], the First and Second Respondents respectively would be granted a right of habitatio5 in the family home until such time as R[...] reached the age of 18 as well as that they would be jointly appointed as guardians of his children. The terms of the Will are not in issue.

- [7] His Will also went on to provide that in the event that if either Mr. or Mrs. P[...] could not or would not accept or continue acting as guardians, then in the alternative, he appointed his brother, the First Applicant as their guardian.[6] When C[...]2 W[...] passed away in 2019, Mr. P[...] was 69 years of age and Mrs P[...] was 63 years of age. Mr. P[...] is presently 74 years of age and Mrs P[...] passed away at the age of 67.

THE ISSUES

- [8] This case does not concern the financial and material arrangements that were made. These are more than adequate.[7] The issue in the present case concerns the arrangements made in regard to who would care for the children on a day-to-day basis and make decisions for them until they reach the age of majority and are able to do so for themselves.
- [9] While the Will provides for “guardianship”, this is a general term which encompasses both the obligation to ensure that the day to day needs of the minor children are met and to also act in their stead in legal matters.
- [10] The present case engages both guardianship but also the primary care and residence of the minors. The issues to be considered are whether the guardian, Mr. P[...], should be removed and replaced in terms of section 24(3) of the Children’s Act[8] by Mr. C[...] W[...] in his stead. Furthermore, it is necessary to consider whether the minors should retain their primary residence and primary care with by Mr. P[...] or whether this should also be transferred to Mr. and Mrs. W[...]. This latter enquiry engages section 7 read together with section 18 of the Children’s Act and requires a consideration of the “best interests” of the minor child/ren.

THE FAMILY

- [11] The minor children find themselves an integral part of two families. The maternal family (the P[...]’s) and the paternal family (the W[...]’s). On the part of the W[...]’s, it is the Applicants, the paternal uncle and aunt who find themselves at odds with Mr. P[...] the maternal grandfather.
- [12] Both families live in an upmarket Golf Estate in Centurion, within about 100 meters of each other. The house in which the minor children live was the home that their parents had made for them.
- [13] While the right of habitatio and responsibility of guardianship and being the primary caregivers was awarded to Mr. and Mrs. P[...] alone, they nevertheless besides moving in themselves, allowed their adult daughter M[...]1 to also move in with them. While the reason for her moving in initially is unclear, it has over the passage of time become apparent that with the advancing age of both Mr. and Mrs. P[...], that they were unable, without M[...]1’s assistance, to properly discharge their responsibilities of caring for the minor children.

- [14] There were a number of consequences as a result of M[...]1 taking up residence in the minor children's home. The first was that M[...], who had her own bedroom with an en-suite bathroom, was moved out to another room which did not have an en-suite bathroom. This was done to accommodate M[...]1. The second consequence was that the minor children, and particularly M[...], now found M[...]1's partner (now fiancé), a regular visitor to their home and resident there from 2021 - someone who had now become part of their family life.
- [15] Initially, it seemed that the arrangements made by the late C[...]2 W[...] were uncontroversial. However, it soon became apparent that they were not. When the Applicants raised concerns with Mr. and Mrs. P[...], their contact with the minor children was terminated.

THE GENESIS OF THE PRESENT DISPUTE

- [16] In consequence of their concerns about the wellbeing of the minor children and the termination of their contact with them, during November 2019, the Applicants brought an urgent application.
- [17] The application was brought in two parts. The first part was for the appointment of a curator ad litem to inter alia represent the minor children and to make recommendations regarding contact between the Applicants and the minor children. The second part is the application that is presently before this Court.
- [18] It is evident that the parties' vision of what constitutes the proper care and wellbeing of the minor children and discharge of the obligations as a guardian differ. The present litigation has gone on for 5 years. While it may have been instituted with the intention of quickly resolving the differences of opinion between the parties, it has become a progressively more acrimonious battle of wills and test of stamina. None of those involved have been spared – not least the minor children and their curatrix. The papers filed in these proceedings are voluminous numbering some 4726 pages.
- [19] On 17 March 2020, the Court granted judgment and ordered the appointment of the present curatrix ad litem. The order provided inter alia that:

“15.3 The appointed curator ad litem shall have the following powers and duties:

15.3.1 To investigate the best interest of the minor children concerned specifically the Parental Responsibilities and Rights to be exercised over them by all parties concerned and report thereon to the above Honourable Court.

15.3.2 To represent the minor children in all matters of a legal nature including but not limited to litigation.

15.3.3 The curator shall be entitled to, in the best interest of the minor children, in the interim and pending final adjudication of this matter, issue directives pertaining to the parental responsibilities and rights to be exercised over the minor children.

15.3.4 To represent the best interest of the minor children by advancing all arguments for and on behalf of the minor children relevant to this matter as well as related matters.

15.3.5 To enquire or consult with whatever person necessary in the completion of his/her mandate.

15.3.6 To refer the parties, or other relative persons to experts, for further and/or other assessments or therapy, where curator might find it necessary.

15.3.7 To bring out a report that contains all the facts and circumstances and make a recommendation therein regarding the Parental Responsibilities and Rights to be exercised over the minor children.

15.3.8 Pending the investigation, and subject to any other directive to be issued in this regard by the curator ad litem, the Applicants shall have the following rights of contact to the minor children:

15.3.8.1 Contact every alternative weekend from Friday 17h00 until Sunday 18h00.

15.3.8.2 Contact one afternoon every week as arranged between the parties, subject to school activities of the minor children.

15.3.8.3 Contact for half of all school holidays.

15.3.8.4 Reasonable telephonic contact.”

[20] On 18 March 2020, the day after the order was granted, Mr. and Mrs P[...] filed an application for leave to appeal. The application for leave to appeal was dismissed. This was followed with a petition to the Supreme Court of Appeal. The Supreme Court of Appeal granted leave to appeal to the full Court of this division on 9 September 2020.

[21] On 20 July 2022 the appeal was struck from the roll with costs by the Full Court of this Division. The finding of that court was that the order that had been appealed was not in fact appealable.

[22] At the beginning of 2023, a case manager[9] was appointed. A directive was issued on 2 May 2023 which inter alia made provision for the minor children to receive therapy from a clinical psychologist, Ms. Elmarie Visser and furthermore, prohibited the parties from discussing the dispute with the minor children. The directive also authorised the curatrix to request financial information from Mr. and Mrs P[...].

[23] Both Mr. and Mrs. P[...] failed to comply with either the 17 March 2023 order or the 2 May 2023 Directive. They terminated all contact between the minor children and the Applicants. Additionally, they also prevented the children from participating in the therapeutic process that had been ordered. In consequence of this, the curatrix who filed no less than 3 reports[10] setting out in detail what had transpired, deemed it necessary to approach the Court during August 2023 for assistance.

- [24] The application was heard on 5 October 2023 and judgment was delivered on 2 January 2024. On 6 January 2024, the curatrix accompanied by Ms. Elmarie Visser, visited both the P[...] and W[...] homes to explain the import of the Court order.
- [25] On 27 February 2024, Mr. P[...] served an application for leave to appeal the 2 January 2024 order. The appeal was only lodged against the 2 January 2024 order. For this reason, the 17 March 2020 order and the 2 May 2023 directive remained in force. However, Mr. P[...] again terminated all contact and therapy as he took the view, somewhat self-servingly, that the 17 March 2020 order and 2 May 2023 directive were also both suspended as a consequence of the application for leave to appeal the 2 January 2024 order.
- [26] On 4 March 2024, the Applicants, whose patience by now had been exhausted, brought an application to hold Mr. P[...] in contempt of the order of 17 March 2020. The application for leave to appeal against the 2 January 2024 order was heard on 11 March 2024 and judgment dismissing the application delivered on 14 March 2024.
- [27] On 19 March 2024, the contempt application was to be heard and subsequently became settled in terms of an order granted by agreement between the curatrix, the Applicants and Mr. P[...]. This order, in its terms, provided inter alia for the furnishing of financial information relating to the expenditure of funds by Mr. P[...] that he had received for the care and maintenance of the minor children from 2019 together with a timeline for the filing of further papers.
- [28] The agreement also provided for agreed visitation which was to be resumed. Significantly, this agreement also included an undertaking by Mr. P[...] that:
- “The First Respondent records the undertaking that pending the finalization of the urgent application as referred above that the*
- fiancé of the maternal aunt does not reside in the children’s family home and vacates the home within 12 hours from date of this order.”
- [29] It was not in dispute that by at least by 19 March 2024, M[...]1 was engaged to the partner that had been living in their home since
2021. The reason for the agreement in regard to M[...]1’s fiancé arose out of a report made to Ms. Elmarie Visser by Ms. P[...] C[...] (the home helper at the children’s home) who had been employed by their late parents and who had assisted in their care from birth.

THE INVESTIGATIONS AND FINDINGS

[30] The curatrix filed 5 reports. This was necessitated by the way Mr. P[...] had conducted himself in the litigation. The reports detail the difficulties that were experienced to “get to the bottom” of the matter. The curatrix concluded, in regard to her interim reports that “The golden thread running through the interim reports is the obstruction and hinderance by the maternal grandparents of the orders granted by this Court and the pending investigation by the curatrix.”

[31] It is neither apposite nor appropriate in this judgment to set out in detail what transpired on an instance-by-instance basis since

2020. It suffices to state that the curatrix, on the undisputed facts, concluded that:

[31.1] The maternal grandparents refused to accept the authority of the Court and terminated contact between the minor children and the Applicants when compliance with a Court order did not suit them.

[31.2] The minor children were used by the maternal grandparents as pawns in the litigation to the extent that M[...] began to “collect evidence” by secretly recording what transpired during therapy to fortify the case of the P[...]’s – these recordings and transcripts were discovered for the first time when attached to the answering affidavit filed in the August 2023 proceedings.

[31.3] A recording was made by M[...]1 of 8-year-old R[...] allegedly having a “panic attack” at the prospect of having to spend time with the Applicants. The ostensible purpose for this was to also fortify the case of Mr. P[...] that the minor children did not want contact with the Applicants.

[32] Notwithstanding the resistance on the part of Mr. P[...] to compliance with Court orders, and to the assessment of both the minor children and adults concerned, by the time this application was heard on 2 October 2024, reports had been received from Ms.

Elmarie Visser (Clinical Psychologist), who besides conducting individual therapy with the minor children was also tasked with

conducting family therapy with the adults in the P[...] and W[...] families.

[33] A report was also received from Ms. Nandi Du Plooy (Clinical Psychologist), who was mandated by the curatrix to conduct clinical interviews and psychometric assessments of the minor children and the adults concerned. Besides the clinical interviews and psychometric assessments, she also conducted home visits to both homes and also did interactional assessments between each of the respective sets of adults and the minor children.

[34] The report of Ms. Du Plooy, besides containing her own observations and findings also took account of collateral information obtained by her from inter alia M[...]1, her fiancé, Ms P[...] C[...] and various persons who knew the late C[...]2 W[...] as well as both the P[...] and W[...] families. In addition, she also consulted with the teachers and headmasters of the schools attended by the minor children. The reports by both Ms. Visser and Ms. Du Plooy are meticulous and thorough.

[35] In regard to the conduct of M[...]1's fiancé, Ms. Du Plooy recorded the following in her report:

"Last year (2023) a bystander at M[...]1's school reported that M[...]1's fiancé appeared inappropriately affectionate

in the manner he placed his arms around M[...]. At this stage the curatrix dealt with the matter [sic] by educating the fiancé

and cautioning him against behaviours which may be misconstrued by M[...]. As there was no evidence of inappropriate sexual

contact and the fiancé was surprised but agreed to be cautious of the manner in which he interacts with M[...] so as to prevent her developing inappropriate feelings towards him, the issue waned.

At a later stage in 2023, it was noticed that text messages between the fiancé and M[...] are allegedly concerning and inappropriate.

As recently as February 2024, M[...] and the fiancé were reportedly observed interacting in a flirtatious manner.

Most troubling, is that recently (also in 2024) the housekeeper in the maternal home stated specifically that:

". . . [name omitted] as speel met M[...], hou hom by die tietie en by die boude. Soms was Oupie en Oumie in die kamer. . . vat so aan sy tietie en boude. . . . [name omitted] staan agter M[...], een hand tietie, een hand boude. Voor Oumie dood. . . is nie mooi nie. . .

". . . [name omitted] playing with M[...], holding her by her breasts and her buttocks. Sometimes Grandpa and Granny were in the room. . . touching her on her breasts and buttocks. . . [name omitted] stood behind M[...], one hand on her breast and another hand on her buttocks. Before Granny died. . . it was not nice. . ." [My translation].

Was in die kombuis, M[...]1 was daar. Die dag wat Oumie dood, 25ste. M[...]1, . . . [name omitted], M[...]1 se maatjie . . . dis die eerste keer ek haar sien. . . hulle het gepraat en gese hiers telegram. . .

“was in the kitchen, M[...]1 was there. The day Granny died, the 25th. M[...]1. . . [name omitted], M[...]1’s friend. . . it was the first time that I saw her. . . they spoke and said here is telegram.” [My translation].

[name omitted] was agter M[...]. . . een hand by tietie, ander hand by boude en gekielie.

“[name omitted] was behind M[...]. . . one hand by her breast, and another on her buttocks and was tickling her.” [My translation]

When asked what happened when [name omitted] saw her, she said:

“Ek se Nee! Wat doen julle, julle speel rof! Toe se hy nee ek kielie haar net. . . . [name omitted] is toe na die sitkamer, M[...] was boontoe.

“I said No! What are you doing, you are playing rough! Then he said no I am just tickling her. . . [name omitted] then went to the sitting room. M[...] went upstairs.” [My translation].[11]

When asked how M[...] reacted, she said:

“Nie M[...] se gesig gesien nie”.

“No I didn’t see M[...]’s face.” [My translation].

The assessor also observed that M[...] is more focused on [name omitted] and has recently changed her interests to those which are similar to his. When she was extremely focused on softball and wanted to “study further someday so she could make lots of money”, she is now more focused on cricket and wants to be a professional hunter, like [name omitted]. She indicated that they spend quite a bit of time together, as he has undertaken to perform a number of the parental duties recently. She also reportedly accompanies him and the maternal aunt, M[...]1, when they go out to socialize with their friends at braais and the restaurant/bar name Hennie’s.”

[36] The reports of both Ms. Visser and Ms. Du Plooy were made available[12] during July 2024. After these reports became available, Mr. P[...] indicated that he wished to obtain the services of an expert of his own. A directive was issued that such report together with any supplementary affidavit be obtained and filed. It was also directed that all the experts should meet and that minutes, setting out the points of agreement and disagreement be filed.[13]

[37] The experts duly met on 23 September 2024. Ms. Du Plooy and Ms. Visser, both of whom had been appointed by the curatrix, were joined by two experts appointed by Mr. P[...]. These were Dr. Potgieter (a psychiatrist) who had assessed Mr. P[...] and the minor children and Dr. Kirsten (an educational psychologist).

[38] It was recorded in the minute by Dr. Kirsten that the purpose for which he had been instructed was to:

“advise whether Mrs Visser’s feedback on individual and family therapy and Ms Du Plooy’s psycho-legal assessment report can be objected to, and the grounds for such objections, if any are found.”

and further that:

“his focus regarding the reports was on methodology and on procedures and whether the findings supported the recommendations”.

[39] Dr. Kirsten agreed that he did not find fault with the contents or methodology or the way in which Ms. Visser had dealt with this particular case.

[40] A concern was raised by him in the minute regarding the independence of Ms. Visser and what he cast as “her close relationship” with the curatrix. This was not pursued but ultimately found expression by being framed as a possible “cognitive bias” which Dr. Kirsten opined may well have influenced the opinion of Ms. Visser. I will return to this aspect later.

[41] In regard to Ms. Du Plooy, it was recorded that:

“Dr Kirsten acknowledged that the lack of full context led him to take a more reflective stance where he posed questions based on his personal theoretical framework in an attempt to form an understanding of the case”

but nonetheless

“agreed that the structure of the psycho-legal assessment report is logical and the contents generally written with clarity”.

He also, as he had with Ms. Visser, agreed that the methodology employed by Ms. Du Plooy signified “good practice”.

[42] Dr. Kirsten indicated in his report and repeated in the minute that both Mr. P[...] and M[...]1 ought to have undergone psychometric assessments themselves. Especially in the case of Mr. P[...], this was:

“due to the possibility of neurocognitive decline in Mr P[...], especially considering his age and the symptomatology that he reported during the psycho-legal process.”

[43] Again, as with Ms. Visser, Dr. Kirsten found the report to be inclusive of what was expected of such a report and that the findings contained in the report support the recommendations made.

[44] Having found that the methodology employed, findings and recommendations of both Ms. Visser and Ms. Du Plooy were unassailable, Dr. Kirsten, also opined in respect of Ms. Du Plooy that she too “may have been biased in her interpretation of events, due to her alleged close relationship with the curatrix.”

[45] In regard to Dr. Potgieter (no relative of Mr. P[...] in this case), he was not initially instructed by Mr. P[...]’s attorney. He was instructed by Mr. Roelofse. Mr. Roelofse is Dr. Potgieter’s brother’s father-in-law. Mr. Roelofse is a close friend of many years of Mr. P[...] and it could not have been lost on Dr. Potgieter that his involvement in the matter would raise eyebrows. He nonetheless accepted his mandate.

[46] He conducted a single assessment with Mr. P[...], M[...]¹ and the minor children on 16 August 2024. His opinion was “a snapshot of everyone, sort of current mental state.” He recorded that Mr P[...] “informed him that he is unwillingly being forced to have a relationship with Mr W[...], who ensured that the curatrix was appointed and that someone Mr W[...] knows conducted the psycho-legal assessment.”

[47] He accepted that his report was insufficient to be considered as an expert’s report in the context of the present case. Surprisingly, although he acknowledged that he knew that a curatrix had been appointed, he decided not to contact her prior to assessing the children. In this respect, he made himself indistinguishable

from Mr. P[...], choosing to ignore a court order because it suited him to do so.

[48] After the minute together with the affidavits of Ms. Visser and Ms. Du Plooy been filed on 27 September 2024, Dr. Kirsten filed, together with his affidavit, a minute with some amendments which he requested. None of the amendments, save to reinforce the claims of “possible cognitive bias” on the part of both Ms. Visser and Ms. Du Plooy altered the substance of what had been agreed.

[49] In *Michael and Another v Linksfield Park Clinic (Pty) Ltd & Another*[14] it was held that in regard to expert evidence that:

“... the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical

reasoning.”

[50] In the present instance, it is not in dispute that the methodology employed by both Ms. Visser and Ms. Du Plooy was appropriate or that the recommendations made by them flow logically and are consistent with their findings. The only basis upon which their opinions and recommendations were sought to be impeached is due to an alleged close relationship with the curatrix, in consequence of which they were said to have exhibited a “cognitive bias”.

[51] “Cognitive bias” used by Dr. Kirsten in the context of the present matter was meant to cast a shadow over the opinions expressed by those experts who had made recommendations with which Mr. P[...] did not agree.

[52] This is made plain by the fact that Dr. Kirsten readily conceded that he was instructed, not to assist in determining what was in the best interests of the minor children, but rather to try and find something “wrong” with which to impeach the reports he had been tasked with reviewing.

[53] Having found that there was nothing in science or logic that could be found to impeach those reports, he then advanced “cognitive bias” as a basis. This was no revelation on his part. He simply voiced the view that Mr. P[...] held, as recorded by Dr. Potgieter.

- [54] Neither Dr. Kirsten nor Dr. Potgieter were able to impugn the reports and recommendations of either Ms. Visser or Ms. Du Plooy. The claim that they were somehow biased by virtue of an association with the curatrix is far-fetched and there is nothing before the Court which is indicative of this. Both Ms. Visser and Ms. Du Plooy confirmed in their reports that they have no personal relationship with the curatrix save within the context of their being briefed to act in a professional capacity.
- [55] To put this aspect beyond question, the Court specifically requested that the curatrix state for the record whether she has anything other than a professional relationship with either of the two experts and she confirmed that she does not. I accept that this is so without any reservation.
- [56] It is readily apparent that both Dr. Kirsten and Dr. Potgieter were briefed not to assist the curatrix or the Court or to serve the interests of the minor children, but rather to serve the interests of Mr. P[...]. In this regard, they demonstrated themselves to be no more than the proverbial “hired guns” brought in to serve a particular interest, a practice which our Courts have deprecated.[15]
- [57] In respect of Dr. Kirsten, this was through his mandate to “find something wrong” which when he could not scientifically, he did so subjectively, although there was no basis for this. In respect of Dr Potgieter, he conducted a one sided and superficial assessment and deliberately excluded both the curatrix and the W[...]’s. Additionally, he disavowed any reliance upon his report as an expert report and did not confirm his contribution to the minutes on oath.
- [58] Insofar as the findings and recommendations of Ms. Visser and Ms. Du Plooy are concerned, since these are not in dispute, were properly researched and professionally arrived at, I have no reservation in relying on them.

THE HOME

- [59] The right of habitatio in the family home was granted to Mr. and Mrs. P[...] for a limited duration. This right is only extant until R[...] attains the age of 18 (9 years from now). It is readily apparent that the right of habitatio was granted on the basis that guardianship in the wider sense, incorporating both the duty to represent the minor children legally as well as the duty to be their primary caregivers and custodians was to be exercised concurrently.
- [60] In *Hendricks v Hendricks and Others*, the Supreme Court of Appeal held:

“The right of habitation as a servitude is a limited real right which confers on the holder the right to dwell in the house of another,

without detriment to the substance of the property. The right can be traced back to Roman Law when the original objective was to provide accommodation to indigent foreigners. In that context, it was regarded as a factual, rather than a juridical

institution. But Justinian accepted it as a sui generis legal concept, and he classified it as a personal servitude. This was generally accepted by Roman Dutch authorities.” [16] [footnotes omitted] .

[61] Being the primary caregiver enables Mr. P[...] access to the Pension Fund and Trust, both of which are obliged to ensure that the financial needs of the minor children are met. Additionally, this also includes the benefit of payment for all the costs of living including the costs for the maintenance of the property while the minor children are resident there.

[62] Accordingly, while Mr. P[...] has the right granted to him to live in the property for a further 9 years. He has no right to any payment towards the cost of the exercise of his right or in fact any of his or M[...]’s or her fiancé’s

living costs from either the Pension Fund or the Trust. The fact that any of these costs have been paid is only because both

minor children are resident on the premises.

[63] In consequence of the agreement reached on 19 March 2024, Mr. P[...] provided documentation relating to the monthly expenses incurred by him from 2019 to the present. All payments by the Pension Fund and the Trust for the wellbeing of the minor children were made into Mr. P[...]’s bank account. The reconciliation for 3 complete years as contended by Mr. P[...], is set out hereunder.

[64] The payments received and expenses disbursed for the benefit of the minors was as follows:

[64.1] for 2021 – the sum of R518 142.10 less expenses of R430 966.42 leaving a surplus in the hands of Mr. P[...] of R87 175.68.

[64.2] for 2022 – the sum of R561 868.74 less expenses of R262 411.42 leaving a surplus in the hands of Mr. P[...] of R299 457.32.

[64.3] for 2023 – the sum of R599 470.20 less expenses of R476 107.28 leaving a surplus in the hands of Mr. P[...] of R123 362.92.

[65] From paragraphs [64.1] to [64.3] above Mr. P[...] has, over the years in question, accumulated a surplus R509 995.92.

There is nothing before the Court explaining what happened to the surplus but having regard to the total payments received as against

the expenses, this does not seem to have been either paid to the Trust or held in credit for the benefit of the minor children.

[66] It is not in dispute that neither M[...]’s nor her fiancé make any financial contribution to the household. Their contribution, it seems, having regard to the papers before the Court, is in discharging the functions for which Mr. P[...] was appointed but is now no longer able to carry out. It bears mentioning that between the Pension Fund and the Trust, a Ford Explorer

SUV and the costs associated with running it, is provided to transport the minor children. This vehicle is also used by Mr. P[...] and/or M[...]1 and is an additional benefit besides the right of habitatio.

- [67] The right of habitatio enjoyed by Mr. P[...] entitles him to allow others to live on the property. His rights are however subordinated to his obligations to the minor children. It is perplexing that Mr. P[...], if he acts in the interests of the minor children, allows both M[...]1 and her fiancé to live on the premises without making any tangible financial contribution to their own cost of living.
- [68] The curatrix sought to clarify this anomaly but was unsuccessful in obtaining any coherent explanation for this state of affairs from either Mr. P[...], M[...]1 or her fiancé.[17] It is somewhat surprising that Mr. P[...] would hold the view that he was “being forced to have a relationship” with the First Applicant. The minor children are entitled to a relationship with the entirety of their family, both maternal and paternal. The very reason the litigation commenced was because of questions relating to his financial stewardship. The only reason the First Applicant has engaged with Mr. P[...] in the way in which he has, is because of his concerns which Mr. P[...] does not want to allay.
- [69] M[...]1 is presently unemployed and financially dependent upon both her father and her fiancé. The curatrix reports that “M[...]1 did not seem to comprehend the concerns that the children’s funds and assets are being utilized to benefit her directly or indirectly. Her response is simply that this is what C[...]2 would have wanted and they always did everything together with C[...]2. And he paid for everything”.
- [70] In *Allen and Another NNO v Estate Bloch & Others*[18], it was held:
- “Basically the duty of the Court is to ascertain not what the Testator meant to do when he made his Will, but what his intention is, as expressed in his Will. Consequently, where his intention appears clearly from the words of the Will, it is not permissible to use evidence of surrounding circumstances or other external facts to show that the Testator must have had some different intention. . .”*
- [71] The view of M[...]1 is entirely consistent with the view of Mr. P[...]. They do not seem to appreciate that whatever the late C[...]2 W[...] may well have done when he was alive, the position now is that the arrangements made by him in his Will are to be interpreted solely for the benefit[19] of his two minor children.
- [72] Put plainly, persons who have no right, save as set out in the Will and subject to the discharge of the concomitant obligations upon them, are not entitled, besides the minor children, to benefit.

GUARDIANSHIP

- [73] Section 1 of the Children’s Act[20] defines a guardian as a parent or other person who has guardianship of a child and “guardianship” in relation to a child means guardianship as contemplated in section 18.

[74] Section 18(3) to (5) regulates guardianship, as follows:

“(3) Subject to subsections (4) and (5), a parent or other person who acts as guardian of a child must –

- (a) Administer and safeguard the child’s property and property interests;
- (b) Assist or represent the child in administrative, contractual and other legal matters; or
- (c) Give or refuse any consent required by law in respect of the child, including –
 - (i) Consent to the child’s marriage;
 - (ii) Consent to the child’s adoption;
 - (iii) Consent to the child’s departure or removal from the Republic;
 - (iv) Consent to the child’s application for a passport; and
 - (v) Consent to the alienation or encumbrance of any immovable property of the child.
- (4) Whenever more than one person has guardianship of a child, each one of them is competent, subject to subsection (5), any other law or any order of a competent court to the contrary, to exercise independently and without the consent of the other any right of responsibility arising from such guardianship.
- (5) Unless a competent court orders otherwise, the consent of all the persons that have guardianship of a child is necessary in respect of matters set out in subsection (3)(c).”

[75] A guardian, particularly when such guardian is not one of the biological parents of a minor, has a fiduciary duty to protect the assets of the minor.

[76] Having regard to the information furnished by Mr. P[...] with regards to the expenditure of funds received from both the Pension Fund and/or the Trust, which were ostensibly to be solely for the benefit of the minors, it is readily apparent that there has been a conflation of the living expenses of initially Mr. and Mrs. P[...] and M[...]1 and from 2021, M[...]1’s fiancé together with the living expenses of the minors.

[77] Leaving aside the R509 995.92 surplus over the 3 years from 2021 to 2023 which remains unaccounted for, it is self-evident that the costs of supporting, substantially if not wholly, 4 adults is significantly more than that of 2 minor children.

[78] Despite Mr. P[...] agreeing to provide an accounting of both the income received as well as the expenditure of the minor children, he has been unable to do so in a way that would enable the curatrix or this Court for that matter, to ascertain with any accuracy the actual living expenses of the minors.

[79] This, it seems to me, is a direct consequence of the conflation of expenses and must have been deliberately done. The curatrix also sought the assistance of both M[...]1 and her fiancé in an endeavour to separate the expenses attributable to the 4 adults from those of the minor

children but this came to naught. It was argued on behalf of Mr. P[...] that the impasse with regards to the finances could be addressed in two ways. The first was that no funds for the maintenance and support of the minors be paid to him directly but that he “be paid for his services as the children’s guardian in an amount of R11 000.00 per month.” The second is that the status quo be maintained subject to the supervision and control of the Pension Fund and the Trust. Neither of these is satisfactory. The status quo has led to a situation where even on his own version there is an amount of R509 995.92 paid to him that is unaccounted for. I was unable to find any authority for the proposition that a guardian (let alone a grandparent) should be paid a “salary” for acting as a guardian. Had the late C[...]2 W[...] contemplated such a situation, he would have made provision for it in his Will.

- [80] The W[...]’s are financially independent and self-sufficient while Mr. P[...] and M[...]1 are clearly not. The deliberate failure to separate living expenses and thus frustrate a proper accounting in circumstances where the minor children constitute only a third of the members of the household but were to all intents and purposes paying all the expenses is a matter of concern.
- [81] The absence of any explanation as to what has happened to the R509 995.92 surplus, makes it abundantly clear that Mr. P[...] (and M[...]1 insofar as she may have assisted him) has not conducted himself in a manner that displays a proper understanding of the role of a guardian and in particular, a guardian’s fiduciary duty to protect the assets of the minor children for whom he is responsible.
- [82] For the reasons I have set out above, I find that Mr. P[...] is not suitable to continue to act as guardian to the minor children.
- [83] Insofar as it was argued on behalf of Mr. P[...] that should I find that he is not suitable to continue as guardian, M[...]1 should be so considered. There are two reasons why I do not believe that it is appropriate that she should be appointed as guardian.
- [84] The first reason is that the late C[...]2 W[...] was clear in his Will as far as the persons that he considered should be appointed as guardian/s to his children. M[...]1 is not nominated in his Will to this capacity.
- [85] Secondly, in consequence of her lack of employment and having made common cause with her father by conflating her personal expenses with those of the minors, she demonstrates the self-same deficit of appreciation of the fiduciary duty borne by a guardian as her father.
- [86] On consideration of their conduct, at least insofar as their financial stewardship of the minor children is concerned, there is merit to the argument on behalf of both the applicants and the curatrix that both Mr. P[...] and M[...]1 are actuated by financial self-interest.

PRIMARY CARE AND RESIDENCE & BEST INTERESTS OF THE MINOR CHILDREN

[87] The Court, as upper guardian, does not look at a set of circumstances in isolation. Any decision to be made must be made holistically on consideration of all the circumstances. I find myself in the same position as Davis J in *Schneider NO and Others v AA and Another* [21] when he said:

“I find these cases the most difficult for a judge. These are not my children. That is a difficult enough task. These are other people’s children for which I, as a judge of this court, am now to assume responsibility. That is a terribly weighty decision to make in a case such as the present dispute.”

[88] When determining the best interests of the minor children in the present case, I am mindful that both the W[...]’s and the P[...]’s are invested in their best interests. The papers filed in this case are voluminous. Counsel for the Applicants, the curatrix and Mr. P[...] all pointed to specific incidents and specific findings involving both minor children. I do not intend to burden this judgment with reference to these save to record that I had regard to all the papers that were filed by all of the parties.

[89] This court is required to decide on the facts that are presently before it. It is axiomatic that in cases such as the present, the curatrix, appointed by neither party and beholden to neither party, is the proverbial “eyes and ears”[22] of this Court. In regard to the curatrix, it has been held that:

“What is required is a lawyer who will use particular skills and expertise to represent the child. Neutrality is not the virtue desired but rather the ability to take the side of the child and to act as his or her agent or ambassador. In short, a child in civil proceedings may, where substantial injustice would otherwise result, be given a voice. Such a voice is exercised through the legal practitioner.”[23]

[90] Without the diligent investigation and unbiased reporting of the curatrix, this Court would be in no position, as an independent arbiter to decide on what are the best interests of the minor children.

[91] Both Ms. Visser and Ms. Du Plooy found that the present home situation with the P[...]’s, experienced by the minor children is far from optimal. The factors that militate towards this finding include the following:

[91.1] The advanced age and poor health of Mr. P[...]. He is presently 74 years of age and has undergone major heart surgery earlier this year. By all accounts, he accepts that he is not able to discharge the duties of a primary caregiver for the minor children and that he is dependent upon M[...]1 to do this.

[91.2] The living arrangements in the house. The minor children, although the home is theirs, are subject to the right of habitatio which Mr. P[...] enjoys and with it, the additional persons that he brought to the house – M[...]1 and her fiancé.

[91.3] The way in which Mr. P[...] has responded to the litigation and his periodic termination of both recommended therapy for the minors as well as himself together with the minors’ visitation with the applicants – even when this is ordered by Court.

[92] It is not in issue that the applicants have a stable and loving home. They are themselves parents of two children. They enjoy a socio-economic status which was commensurate with that enjoyed by the late C[...]2 W[...] and for which he provided for his children.

[93] The Applicants have acted in a measured and responsible manner. They are actuated by the best interests of the minor children. They have subjected themselves to grueling and acrimonious litigation, therapies and psychometric testing. They have done all of this selflessly and to bring about a situation in which the best interests of the minor children, both financially and in terms of their living arrangements can be realized.

[94] Ms Visser, Ms. Du Plooy and the curatrix have all reported positively on the Applicants and the home that they will provide to the minor children, should they be appointed as primary caregivers and residence awarded to them.

[95] In *P v P*, [24] it was stated:

“ . . . In determining what custody arrangement will serve the children’s interest in a case such as the present a Court is not looking for the “perfect parents” – doubtless there is no such being. The Court’s quest is to find what has been called “the least detrimental available alternative for safeguarding the child’s growth and development . . . ”

[96] In *P v P and Another*, [25] germane to the present matter, the court stated:

“But the Court does not look at sets of circumstances in isolation. I am bound, in considering what is in the best interests of G, to take everything into account which has happened in the past, even after the close of pleadings and in fact right up to today. Furthermore, I am bound to take into account the possibility of what might happen in the future if I make any specific order.”

[97] “A child’s best interests are of paramount importance in every matter concerning the child.” [26] Section 7(1) of the Children’s Act follows and expands upon this and requires that there must be consideration of various factors in determining whether it is in the best interests of the minor children to remain with Mr. P[...] and M[...]1 in their present living situation or whether primary care and residence should be awarded to the Applicants.

[98] In her report, Ms. Du Plooy addressed each of the 14 factors listed in section 7(1)(a)-(n) of the Children’s Act. In this regard, her findings were that:

“a) the nature of the personal relationship between –

(i) the child and the parents, or any specific parent; and

(ii) the child and any other care-giver or person relevant in those circumstances:

· Although the minor children no doubt love the maternal family, the enmeshed relationships and lack of appropriate boundaries within the maternal home are not good for the children's emotional, social and psychological development. These unhealthy family dynamics have already caused developmental delays and psychological and emotional difficulties for the minor children, as was especially revealed by the psychometric assessment results.

· Furthermore, it is evident from the information and collateral resources gathered the minor children had a good relationship with the paternal family prior to the maternal family's alienating tactics took their toll. It has been observed that the more enmeshed the minor children become with the maternal family, the worse the alienation is towards the paternal family.

· The paternal family's behaviour throughout the psycho legal assessment process has displayed more commitment towards facilitating a cooperative relationship with the maternal family, than what the maternal family has. Thus, they will be less inclined to withhold the children from the maternal family.

(b) the attitude of the parents, or any specific parents, towards –

(i) the child; and

(ii) the exercise of parental responsibilities and rights in respect of the child

· It could briefly be mentioned that the assessor has observed there to be healthier boundaries and rules set out for the children within the paternal family home, than the enmeshment and inappropriate exposure (to the legal process, to being the main decision makes, to having access to adults' phones, being included in adult activities when they should be with peers of their own age, to name but a few) the minor children have at the maternal home.

· Mr. P[...], as well as Mr. and Mrs W[...], have a positive attitude towards the minor children. However, Mr. and Mrs W[...] are more inclined to enforce healthy rules in an emphatic but firm manner, where Mr. P[...] finds it difficult to control M[...].

· Mr. P[...] has shifted his parental rights and responsibilities to M[...]1 and [name omitted], as he has been unable to fulfil them.

· Mr. and Mrs W[...] have been willing and able to fulfil the parental responsibilities and rights.

(c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs:

· It has been observed that the maternal grandparent have in the past year passed many parental responsibilities on to M[...]1 and [name omitted], despite the paternal uncle's willingness and clear capacity to provide for the minor children's needs in a developmentally appropriate manner. It was observed throughout the process that the paternal family has greater capacity to provide for the minor children's needs (including emotional and intellectual needs). A simple example is the manner in which the maternal family has refused cooperation regarding

attending therapy in order to take care of the children's mental health.

- Considering the minor children's social, emotional and moral developmental delays, as well as their specific needs as per their respective developmental stages, the maternal family has not been able to meet these needs sufficiently (as has been revealed by the respective psychometric assessment results and observations regarding family dynamics).

- Specifically noting the psychometric assessment results of the parties, Mr. P[...] does not appear to have the capacity to take care of the minor children.

(d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child or any separation from-

(i) both or either of the parents; or

(ii) any brother or sister or other child; or any other care-giver or person, with whom the child has been living;

- Considering the enmeshed relationship between the minor children and the maternal family, it will definitely be emotionally difficult for the children to be separated from them. However, considering the unhealthy environment within the maternal family which is not conducive to the children's overall development, it would be in their best interests to be relocated to the paternal family.

- The children have a strong bond with M[...]1 too, and their need to maintain a healthy relationship with her should be considered.

(e) the practical difficulties and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;

- In the case that the court should decide that it is in the children's best interests to be relocated to the paternal family home, it would not hinder the children from having contact with the maternal family, as the two houses are in the same estate around the corner from one another. However, should the children remain with the maternal family, the alienation towards the paternal family is sure to continue, and likely escalate, as has been observed time and again over the past months.

(f) the need of the child-

(i) to remain in the care of his or her parent, family and extended family; and

(ii) to maintain a connection with his or her family, extended family, culture or tradition;

· The minor children are more likely to maintain their connection with the maternal family, as well as heal from the psychological and emotional difficulties, and the developmental delays, if they are in a healthier environment with Mr. and Mrs W[...]. Their familial relations and cultural values will not be negatively affected, but are likely to improve in this case.

(g) the child's-

(i) age, maturity and stage of development;

(ii) gender

(iii) background; and

(iv) any other relevant characteristics of the child;

· Considering the results from the psychometric assessments, observations, and all collateral information gained, it is evident that both minor children's best interests are not being upheld whilst in Mr. P[...]'s care.

· M[...] displays a number of worrisome behavioural difficulties as described throughout, especially regarding her attitude towards authority figures, immoral behaviours, emotional, moral and social developmental delays, and the manner in which she has been parentalised as a child.

· From the results of the psychometric assessments, observations, and all collateral information gained, it is clear that both M[...] and R[...] have substantial developmental delays and they require intervention in this regard.

(h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;

(i) any disability that a child may have;

(j) any chronic illness from which a child may suffer;

(k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;

· Neither children have physical disabilities or chronic illnesses, but the focus should be on improving their emotional, social and moral developmental delays, as well as repairing the psychological and emotional damage inflicted by the unhealthy, enmeshed maternal family dynamics where the children experience being parentalised.

(l) the need to protect the child from any physical or psychological harm that may be caused by-

(i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or

(ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;

· It is necessary to protect the minor children from the maternal family's alienating tactics, as well as the inappropriate interactions between M[...] and [name omitted].

(m) any family violence involving the child or a family member of the child; and

(n) which action or decision would avoid or minimize further legal or administrative proceedings in relation to the child.

· The allegations regarding [name omitted]'s inappropriate behaviour towards M[...] should be investigated.

· The children should not be exposed to any further legal processes, should not be involved in the adult matters as they have been by the maternal family, and should be safeguarded from the crossfire of any further litigious activities.

· They are less likely to be exposed to such proceedings in the future, should they be with Mr. and Mrs W [...], especially considering that the maternal family specifically allowed them to consult with various legal professionals etc., despite the appointment of the curatrix." [my underlining].

[99] Since Dr. Kirsten, who was briefed for the purpose of finding fault in the methodology and conclusions reached by Ms. Visser and Ms. Du Plooy, was unable to do so, the conclusions reached by Ms. Du Plooy stand unimpeached.

[100] The opinion and recommendations of Ms. Du Plooy (as set out in paragraph [98] above) make plain the comprehensive nature of both her investigation and consideration of the issues in this case and are reflected in her recommendations. Having regard to the contents of all the reports before the Court, the curatrix had no hesitation and neither does this Court, in accepting the conclusions and recommendations of the experts and in particular Ms. Du Plooy.

[101] Casting a shadow over the entire case, is in my view, the report of Ms. P[...] C[...]. This was not the only report of such behaviour. The fact that the conduct of M[...]1's fiancé that was reported by Ms. C[...], was alleged to have taken place in the presence of both Mr. and Mrs. P[...] and M[...]1 is a matter of grave concern.

[102] The concern arises out of the fact that it required Ms. C[...] to voice an objection to what she observed. Despite her report, neither Mr. P[...] nor M[...]1 took any steps to immediately stop what was viewed by a third party as improper. Since it occurred in their presence and they did nothing to stop it, it calls into question their fitness to act as primary caregivers.

[103] The protection of minor children is not something that a primary caregiver engages while harm is occurring. It requires that the primary caregiver, a responsible adult with some measure of life experience and insight, can anticipate the occurrence of a

potentially harmful or dangerous situation and then take steps to avoid its occurrence. This situation has only been exacerbated by the fact that both Mr. P[...] (and presumably M[...]1 on his instruction) seem to use the necessity for the minor children to attend therapy as a weapon against any criticism of them or when they feel that they are being compelled to do something that they do not want to do. This is clearly not in the interests of the minor children[27] and they quite clearly need to continue therapy on an uninterrupted basis.

[104] The curatrix, quite correctly, did not jump to any conclusions and interviewed M[...]1's fiancé. He denied any improper conduct.

This is beside the point. The mere suggestion of any improper conduct particularly at a time when the litigation was raging between the parties ought to have caused Mr. P[...] and M[...]1 and for that matter also her fiancé, to have taken steps to ensure that there could be no suggestion whatsoever of any improper conduct.

[105] Rather, they were content to maintain the status quo until the bringing of the contempt proceedings by the Applicants at which time Mr. P[...] agreed, after the concern of the Court with regards to these allegations had been raised, to have M[...]1's fiancé move out.

[106] While Mr. P[...] is possessed of the right of habitatio in the family home, he is also well within his rights to have whoever he wishes live in the house. However, his rights in this regard do not and cannot supersede the rights of the minor children to live in a safe environment. The fact that neither Mr. P[...] nor M[...]1 can appreciate this, is inimical to being an appropriate primary caregiver with whom these minor children should live.

[107] The experts as well as the parties to this case all sought collateral information from persons outside of the families regarding the relationship between the late C[...]2 W[...] and inter alia, the maternal family and his brother, the applicant. The outcome of this case cannot be determined based on the personal interactions of the deceased with third parties or any of the parties to this litigation, before his passing.

[108] In his Will, he made plain who he wanted to act as guardian and caregivers to his children in his and his wife's absence. It is to my mind, a matter of common sense that if the late C[...]2 W[...] had any reservations about either Mr. P[...] or his brother C[...], he would not have drawn his Will in the way that he did.

[109] However, this case has been decided on not what occurred before his passing but afterward. It is the conduct of Mr. P[...], once he had become the guardian of his grandchildren, that is determinative of this case.

COSTS

[110] When these proceedings first commenced, no order for costs was sought pending the outcome[28] of the investigations to be conducted by the curatrix. Had Mr. P[...] co-operated, it is likely that both the duration as well as the costs incurred in the conduct of this litigation would have been significantly curtailed.

- [111] This litigation was never about what was best for the Applicants or Mr. P[...] for that matter. It was always about what was best for the minor children. This fundamental fact appears to have been overlooked by him.
- [112] The way in which Mr. P[...] (and his late wife) conducted the litigation was obstructive and defiant and designed to undermine the curatrix and prevent the investigation that had been ordered by the court.
- [113] This included non-compliance with court orders and directives as well as a failure to ensure that they and the minor children attended necessary therapy when called upon to do so. They also failed to make payment of their share of the costs of certain investigations when this had been ordered by the Court. This is particularly inexplicable considering the unaccounted for R509 995.92 from which such payments could and should have been made.
- [114] This resulted in the curatrix, besides having to instruct attorneys herself because of the conduct of Mr. P[...] towards her and the litigation, also having to approach the trustees of the Trust and negotiate regarding the payment of these costs in order for the expert to continue and finalise her assessment process. Had the curatrix not done so, this litigation would never be finalised.
- [115] It reflects the difficulty experienced by the curatrix but also the Applicants, that it was necessary on more than one occasion for them to approach the Court in consequence of Mr. P[...]’s conduct. The way Mr. P[...] has conducted this litigation is to be deprecated. He did so in a manner that served his own interests and those of M[...]1 but not those of his minor grandchildren.
- [116] A disturbing feature of the way in which Mr. P[...] conducted himself in the present litigation was by attacking all those who did not agree with his view of how the case should be conducted or decided.
- [117] None involved were spared including the Judges who had delivered judgments in the matter as well as the curatrix and the experts. His approach evidences at best for him, a stubborn inability to appreciate that it is the Court and not him, which is the upper guardian of the minor children and at worst a cynical and destructive conduct of litigation motivated by his own desire to maintain the status quo for selfish financial reasons.[29]
- [118] It was argued for Mr. P[...], that the curatrix had caused significant costs to have been incurred and that an order for costs should be made against her. This submission is without any merit and were it to have been seriously considered, its consequences would be diabolical. It is the very conduct of Mr. P[...] that caused the appointment of the curatrix, put the Applicants and the curatrix to substantial work and costs simply to ensure that the matter could be adjudicated.

[119] In *FS v JJ and Another* [30] the Supreme Court of Appeal remarked in a matter where the maternal grandparents and the biological father of a child became embroiled in protracted litigation after the passing of the biological mother, as follows regarding legal practitioners advising clients to follow a non-confrontational approach in matters concerning children:

*“[54] I record too that the litigation has not been in any of the parties’ interests. Clearly, after Ms R’s death, in particular, emotions ran high. All wanted to keep C with them. But, had the J’s not ambushed S at the funeral with papers in respect of proceedings in the children’s court, and had all concerned attempted to talk about her genuine best interests, they would not have spent nearly five years embroiled in a dispute about her residence. This was not only at great emotional cost to all, but also at great financial cost, which none of them could really afford. Fortunately, C’s interests have been served by Deyssel who has acted pro bono. I endorse the views expressed by Brassey AJ in *MB v NB*, that mediation in family matters is a useful way of avoiding protracted and expensive legal battles, and that litigation should not necessarily be a first resort. Legal practitioners should heed s 6(4) of the Children’s Act which provides that in matters concerning children an approach ‘conducive to conciliation and problem solving should be followed and a confrontational approach should be avoided.’”*

[120] A confrontational and obstructive approach was embarked upon from the outset after Mr. P[...] and the maternal family members withdrew from the mediation process. The Applicants were left with no other alternative but to approach the court.

[121] The present litigation was entirely avoidable had Mr. P[...] conducted himself in a manner which was reflective of his duty to always act in the best interests of his minor grandchildren and not his own[31].

[122] On consideration of the matter, I am of the view that Mr. P[...] ought to be ordered to pay the costs of the suit together with all the costs incurred by the curatrix and that such costs should be paid on the scale as between attorney and client. Insofar as the costs of counsel for the Applicants, the curatrix and counsel for the curatrix are concerned, their costs are to be awarded on scale C.

ORDER

[123] In the circumstances, I make the following order:

A. GUARDIANSHIP

[124] The First Respondent, Mr. S[...] J[...] P[...] is removed as the guardian of M[...] and R[...] W[...] (the minor children) with immediate effect.

[125] The First Applicant, Mr. C[...] J[...] W[...] is appointed as the guardian of the minor children as envisaged by the provisions of Section 18(3) and 24 of the Children's Act and the Last Will and Testament of the minor children’s father, the late C[...] J[...] W[...] with immediate effect.

B. PRIMARY RESIDENCE AND CARE

[126] The primary place of residence and primary care of the minor children is awarded to the First and Second Applicants, Mr. C[...] J[...] W[...] and Mrs. B[...] W[...], as envisaged by the provisions of Section 23 of the Children's Act, 38 of 2005.

[127] The Applicants shall take full responsibility for the minor children's school, social, and sporting activities and all decisions regarding the minor children's day to day life.

[128] The minor children are to be immediately placed in the primary residence and care of the First and Second Applicants.

[129] The guardianship, residency and care as referred to in paragraphs [125], [126], [127] and [128] above, is subject to the following:

[129.1] That the Applicants ensure that the minor children continue to attend individual and family therapy on such times and dates as requested by the family therapist Ms. E Visser, alternatively a suitably qualified therapist as nominated by Ms. E Visser ("the family therapist") and the minor children's individual therapists, until such time as the respective therapists indicate that the therapeutic process is completed.

[129.2] The minor children will continue therapy with their current individual therapists, Ms. C de Klerk and Ms. S Klingenberg respectively ("the therapists") and are to attend any further therapy as may be recommended by them to address the findings set out in the reports of Ms. E Visser and Ms. N Du Plooy.

[129.3] That the Applicants, their two minor children and the paternal grandmother attend family therapy sessions on such times and dates as requested by the family therapist, until such time as the family therapist indicates that the family therapy process is completed.

[129.4] The maternal family (i.e. the First Respondent and the maternal aunt, M[...]1 P[...]) , may not have any direct or indirect contact with the minor children outside of the family therapy context as referred to in paragraph[129.5] below, for a period of 2 (two) months from date of this order so that the minor children may settle in their new environment and receive the necessary family and individual therapy.

[129.5] After the period of 2 months referred to above, the family therapist after consultation with the therapists as referred to in paragraph [129.2] above must confirm in writing to the Applicants and the First Respondent whether the minor children are ready, for the maternal family to be reintroduced into their lives in the following circumstances.

[129.5.1] By attending the sport activities of the minor children, on alternative weekends.

[129.5.2] Contact with the minor children on the respective birthdays of the maternal family members', on such times as agreed upon with the Applicants.

[129.5.3] Contact with the minor children on the children's respective birthdays on such times as agreed with the Applicants.

[129.5.4] Telephonic contact on such times as agreed with the Applicants.

[129.5.5] Any further contact as arranged between the Applicants and the maternal family.

C. CONTACT BY THE FIRST RESPONDENT WITH THE MINOR CHILDREN

[130] The contact between the First Respondent and the minor children referred to in above is subject to the following:

[130.1] That the First Respondent attends both individual and family therapy to address the family dynamics, parental alienation and the enmeshed relationship with the minor children.

[130.2] The costs of attending individual and family therapy on the part of the Applicants and the First Respondent, being in the interests of the minor children, are to be borne by the C[...]² J[...]¹ W[...]¹ Testamentary Trust.

[130.3.] The First Respondent's rights of contact with the minor children in terms of this order are subject to:

[130.3.1] his first attending individual and family therapy.

[130.3.2] That when he has contact with the minor children (outside of therapy sessions) and in the absence of the Applicants, he is to ensure that M[...]¹ P[...]¹'s fiancé is not present.

D. FINANCIAL ARRANGMENTS

[131] The Fifth Respondent is directed to pay the monthly pension amounts to the Third Respondent every month on behalf of the minor children.

[132] The Applicants may approach the Third Respondent for a contribution towards the minor children's monthly expenses by such day of each month as directed by the Third Respondent.

[133] The Applicants are to provide a written list of the children's estimated monthly expenses supported by documentary proof, for the Third Respondent to consider.

[134] The Third Respondent will make such monthly payments to the Applicants to the extent of the estimated expenses as approved by the Trustees for the benefit of the minor children.

[135] The Applicants shall account fully every third month to the Third Respondent for all monies received from the Third Respondent, for the preceding three months.

[136] The curatrix is released from her duties and responsibilities in terms of prayers 15.2 and 15.3 of the order granted by Avvakoumides AJ on 17 March 2020.

[137] The court file in this matter shall remain sealed and none of the parties may make the content of the file available to any third party or invite any third party to the CaseLines profile save by written agreement between the parties or order of this court.

E. COSTS

[138] The First Respondent is ordered to pay the costs of suit to date on the scale as between attorney and client. The costs are to include:

[138.1] The costs of the legal representatives for both the Applicants as well as the legal representatives for the curatrix ad litem and the costs of the curatrix ad litem herself.

[138.2] The costs consequent upon the engagement of counsel on scale C which scale is also of application to the curatrix ad litem and are to include the costs consequent upon the preparation of heads of argument.

[138.3] The costs are furthermore to include the costs of the experts Ms. E Visser and Ms. N Du Plooy for the investigation and preparation of their respective reports and for the joint meeting and minutes with Drs Potgieter and Kirsten.

[138.4] The costs are to include the costs reserved on 19 March 2024.

A MILLAR

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

HEARD ON 2 OCTOBER 2024

JUDGMENT

DELIVERED ON: 2 DECEMBER 2024 CURATRIX AD LITEM: ADV. L HAUPT SC COUNSEL FOR THE CURATRIX: ADV. S MENTZ ATTORNEY FOR CURATRIX AD LITEM: SANET DE LANGE ATTORNEYS REFERENCE: MS. N FOURIE COUNSEL FOR THE APPLICANTS: ADV. R FERREIRA INSTRUCTED BY: VDT ATTORNEYS REFERENCE: MR. D FISCHER COUNSEL FOR THE FIRST & SECOND RESPONDENTS: ADV. H GEYER INSTRUCTED BY: GROHOVAZ ATTORNEYS INC. REFERENCE: MS. A GEYER NO APPEARANCE FOR THE THIRD TO SIXTH RESPONDENTS

[1] Thus Spake Zarathustra, by Friedrich Nietzsche, Arcturus Publishing Limited, 2021.

[2] Born on 1[...] J[...] 2009.

[3] Born on [...] M[...] 2015.

[4] Mrs P[...] is still cited in the matter as the Second Respondent although she passed away on 24 January 2024. It has not been placed on record whether or not her estate has ever been reported and no executor has been substituted.

[5] Clause 1.1.1 of the Will of the late C[...]2 W[...] dated 2 May 2019 provides that: “ Die vaste eiendom is onderhewig aan die reg van habitation ten gunste van my skoonouers S[...] J[...] P[...] (gebore 2[...]0[...]1950

and H[...] I[...] P[...] (gebore 1[...] -0[...] -1956) totat my jongste lewende kind die ouderdom van 18 jaar bereik, vry van enige verpligting tot sekerheidstelling. Hierdie reg sal op 'n persoonlike grondslag in my skoonouers S[...] JACOBJUS P[...] (gebore 2[...] -0[...] -1950) en H[...] I[...] P[...] (gebore 1[...] -0[...] -1956) setel en sal nie teen die eiendom geregistreer word nie”.

[6] Clause 5 of the Will of the late C[...]2 W[...] dated 2 May 2019 provides that: “ By gebrek aan ‘n natuurlike voog benoem ek my skoonouers S[...] J[...] P[...] (gebore 20-04-1950) en H[...] I[...] P[...] (gebore 1[...] -0[...] -1956) of indien hulle om welke rede ookal nie die voogdyskap kan of wil aanvaar of voortsit nie, dan my broer C[...] J[...] W[...] (ID 8[...]) as voog(de) van my minderjarige kinders sonder enige verpligting tot sekerheidstelling.”

[7] Their inheritance was placed in a Trust tasked with ensuring that their financial needs are met. The Trust (the Fourth Respondent) is a party to the present proceedings for reasons that are set out in the

judgment.

[8] 38 of 2005. Section 24(3) provides that: “In the event of a person applying for guardianship of a child that already has a guardian, the applicant must submit reasons as to why the child’s existing guardian is not suitable to have guardianship in respect of the child.”

[9] Janse van Nieuwenhuizen J.

[10] The reports are dated 9 August 2023, 19 September 2023 and 4 October 2023 respectively.

[11] The translation is literal. From the context however, it is more likely that Ms C[...] meant that the play was inappropriate.

[12] The reports are dated 2 July and 5 July 2024 respectively.

[13] Since these are motion proceedings, it was directed that the experts concerned depose to affidavits concerning the contents of the minutes and this was done.

[14] 2001

(3) SA 1188 (SCA) at para [36].

[15] See *Schneider NO and Others v AA and Another* 2010

(5) SA 203 (WCC) at 218H-219A.

[16] 2016

(1) SA 511 (SCA) at para [6].

[17] The curatrix spent a great deal of time analyzing the bank accounts of Mr. P[...], M[...]¹ and her fiancé but was unable to shed any light on what happened the surplus or for that matter how the expenses have been calculated. In this regard, and in conclusion of her analysis of the bank accounts of M[...]¹ and her fiancé, she confirmed that they “acknowledged during our consultations that the contributions as set out in their spreadsheets, were not all for the

exclusive use or benefit of the children. The adults also enjoyed these benefits. Both acknowledged that the children's pro rata portion of these expenses are much less than indicated in the schedules."

[18] 1970

(2) SA 376 (C) at 380A-B.

[19] Spangenberg v Engelbrecht NO and Another 2023 JDR 2089 (SCA) at para [12].

[20] 38 of 2005.

[21] Ibid at 218I – 219A.

[22] Soller NO v G 2003

(5) SA 430 (W).

[23] Ibid paragraph [26].

[24] 2007

(5) SA 94 (A) at para [24].

[25] 2002

(6) SA 105 at 110C-D.

[26] Section 28(2) of the Constitution of the Republic of South Africa 1996.

[27] Ms. E Visser expressed the view that the minor children's emotional wellbeing was negatively impacted by the period disruption in their attendance at therapy.

[28] Paragraphs 15.5 and 15.6 of the March 2020 order provides as follows: "15.5 The costs of Part A are reserved for adjudication together with Part B. 15.6 The fees of the curator to be paid by the Third Respondent. The curator ad litem shall be entitled to make recommendations in respect of such costs to the court hearing Part B of the application."

[28] Paragraphs 15.5 and 15.6 of the March 2020 order provides as follows:

"15.5 The costs of Part A are reserved for adjudication together with Part B.

15.6 The fees of the curator to be paid by the Third Respondent. The curator ad litem shall be entitled to make recommendations in respect of such costs to the court hearing Part B of the application."

[29] The approach of Mr. P[...] is reflected in the replying affidavit in the condonation application in the leave to appeal deposed to on 6 March 2024, in which he states: "11.6 At all relevant times the Second Respondent and I not only believed that the Avvakoumides order is unlawful, invalid and/or unenforceable, but, more importantly, that this order was not in the children's best interests. In substantiation hereof, I point out (again, in general terms) that

the nature and extent of the physical and/or emotional trauma the children experienced as a direct result of the curatrix's directives is a well recorded fact in this matter. 11.7 These issues, and other related issues such as our alleged ignorance of the directives (which directives attempt to force us to subject ourselves to therapy, against our constitutional right), and/or the fact that the curatrix's directive vested the first applicant with de facto parental rights and responsibilities in the absence of a final report to substantiate those directives, and under circumstances where the first applicant does not automatically have such rights, have always been, and will always be, the essential issues in this matter, until these issues have been finally adjudicated on by the SCA or the Constitutional court. 11.8 Being involved with and being responsible for the care of the children on a daily basis before C[...]2' death, and experiencing and seeing the trauma these children experience as a result of, firstly, the first applicant's conduct (since the inception of this matter until this moment in time) and, secondly, the directives and conduct of the curatrix which we verily believed as I still do, that it is my obligation as the children's guardian to, inter alia, protect them from any physical and/or psychological harm that have been and may be caused to them in the future, in accordance with the provisions of section 7(1)(l) of the Children's Act, 38, of 2005. 11.9 It is my constitutional right (and insofar as the children are concerned, my obligation as their guardian) to have these aforesaid issues resolved, in accordance with the provisions of Section 34 of the Constitution. 11.10 My attorney did not deem it necessary to respond to repetitive correspondence from the applicant's attorney and/or did not deem it appropriate to engage in litigation via the barrage of correspondence my attorney receives from the First Applicant and the curatrix's attorneys simultaneously on a constant basis."

[29] The approach of Mr. P[...] is reflected in the replying affidavit in the condonation application in the leave to appeal deposed to on 6 March 2024, in which he states:

"11.6 At all relevant times the Second Respondent and I not only believed that the Avvakoumides order is unlawful, invalid and/or unenforceable, but, more importantly, that this order was not in the children's best interests. In substantiation hereof, I point out (again, in general terms) that the nature and extent of the physical and/or emotional trauma the children experienced as a direct result of the curatrix's directives is a well recorded fact in this matter.

11.7 These issues, and other related issues such as our alleged ignorance of the directives (which directives attempt to force us to subject ourselves to therapy, against our constitutional right), and/or the fact that the curatrix's directive vested the first applicant with de facto parental rights and responsibilities in the absence of a final report to substantiate those directives, and under circumstances where the first applicant does not automatically have such rights, have always been, and will always be, the essential issues in this matter, until these issues have been finally adjudicated on by the SCA or the Constitutional court.

11.8 Being involved with and being responsible for the care of the children on a daily basis before C[...]2' death, and experiencing and seeing the trauma these children experience as a result of, firstly, the first applicant's conduct (since the inception of this matter until this moment in time) and, secondly, the directives and conduct of the curatrix which we verily believed as I still do,

that it is my obligation as the children's guardian to, inter alia, protect them from any physical and/or psychological harm that have been and may be caused to them in the future, in accordance with the provisions of section 7(1)(l) of the Children's Act, 38, of 2005.

11.9 It is my constitutional right (and insofar as the children are concerned, my obligation as their guardian) to have these aforesaid issues resolved, in accordance with the provisions of Section 34 of the Constitution.

11.10 My attorney did not deem it necessary to respond to repetitive correspondence from the applicant's attorney and/or did not deem it appropriate to engage in litigation via the barrage of correspondence my attorney receives from the First Applicant and the curatrix's attorneys simultaneously on a constant basis."

[30] 2011

(3) SA 126 (SCA).

[31] See *Tyler v Tyler* [2004] 4 All SA 115 (NC). *Hyperchemicals International (Pty) Ltd and Another v Maybaker Agrichem (Pty) Ltd and Another* 1992

(1) SA 89 (W).

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