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

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

CASE NO: 3198/18

26/9/2018

In the *ex parte* applications of:

THITHI REBECCA MOLANTOA

Applicant

obo

T[....] R[....]

and

O[....] M[....]

and

**OTHER APPLICANTS LISTED IN APPENDIX
ON BEHALF OF CHILDREN**

JUDGMENT

Tuchten J:

- 1 Section 14 of the Children's Act¹ recognises the right of children to be assisted in vindicating their rights in court. This right was recognised at common law and is now entrenched by s 28 of the Constitution,² which recognises in specific content that children, ie persons under the age of 18, have special needs which require special protection.
- 2 This judgment concerns the appointment of curators *ad litem* (whom I shall mostly call curators) to protect the interests of children in actions brought against the Road Accident Fund (the Fund). Those cases concern claims by children for damages arising from the driving of motor vehicles in the Republic.³ The damages they claim. In turn, are said to result from bodily injuries suffered by the child itself or for loss of the support to which the child is entitled.
- 3 This Division has set down on its trial roll every day of the week during term time *at least* one hundred and sixty cases against the. Fund. It has become routine, where the plaintiff is a child, for an application to be brought in the unopposed motion court for the appointment of a curator *ad litem* to ratify steps already taken by the child in its action and to represent It further in the

¹ Act 36 of 2005. section 14 reads; "Every child has the right to bring, and to be assisted in bringing. a matter to a court. provided that matter falls within the Jurisdiction of that court."

² Section 28 of the Constitution Reads:

(1) Every child has the right—

(a) to a name and a nationality from birth;

(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;

(c) to basic nutrition, shelter, basic health care services and social services;

(d) to be protected from maltreatment, neglect, abuse or degradation;

(e) to be protected from exploitative labour practices;

(f) not to be required or permitted to perform work or provide services that—

(i) are inappropriate for a person of that child's age; or

(ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;

(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be—

(i) kept separately from detained persons over the age of 18 years; and

(ii) treated in a manner, and kept in conditions, that take account of the child's age;

(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and

(i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section "child" means a person under the age of 18 years.

³ Section 17 of the Road Accident Fund Act, 56 of 1996

proceedings. Often such orders sought include prayers empowering the curator to settle the case, usually after the consent of a judge has been obtained, and the creation of protection such as a trust to administer any award made to the child following upon the action.

- 4 I have often granted such orders but have recently become uneasy about whether they are necessary. Other Judges in the Division have told me that they share my concerns. For this reason, with the permission of the Judge President, I convened a special court to which I adjourned matters which came directly before me in the unopposed motion court during August 2018. Other judges before whom such cases came similarly adjourned those cases for consideration by me. I approached the Centre for Child Law (CCL), which consented to act as *amicus curiae* in the special hearing. I am most grateful for the assistance provided by Ms Ozaah, who represented the CCL before me. In addition, the Fund itself briefed counsel to represent it at the hearing.
- 5 The curators appointed are in most cases advocates practising in Pretoria. The orders which appoint them usually provide in effect that the Fund will pay their fees *if* the child is successful in the action. Usually, these orders are taken without opposition from the Fund. My concern about the necessity for such applications is that they create an additional tier of paid professionals retained to represent or protect the interests of the child plaintiff. But what work does the curator actually do? What value does the curator actually add to the case?
- 6 I gained the distinct impression during argument and informal discussions with other judges that much, if not all, of the work done by curators simply duplicates the work done by the attorneys of record or by persons such as advocates who are instructed by such attorneys. Counsel were unable to point to any work which the curator did which was not done, or could not have been done, by or on behalf of the attorney who accepted the instruction to represent the child in the litigation. In almost all such cases the attorney briefs counsel to represent the child in the trial. In some cases, it was suggested that the appointment of a curator was justified

because the child was resident far from the seat of the court and taking instructions was made costly and logistically difficult. In my view, this argument is unsound. Circumstances might justify an attorney in appointing a correspondent or investigator to do work which would be too costly or inconvenient for the attorney of record to perform. But that is no basis for appointing a curator.

- 7 It emerged from the debate before me that attorneys are routinely confronted by practical problems . The Fund questions their authority to represent the child. Attorneys fear that they will at a later date be required to defend themselves against accusations that they have given negligent advice which has resulted in a settlement lower than was justified; or have settled without authority. They view the appointment of such curators as some protection against these risks.
- 8 I doubt that the remedy selected will be effective. An attorney who gives negligent advice is liable because he gives such advice; it matters not whether he gives such advice to his lay client or to a curator. The appointment of a curator will not immunize the attorney from the risk. If the person assisting the child in the conduct of the case who authorises the settlement is empowered to do so, then the attorney need not on that score fear that he will be found to have acted without authority. In a proper case, where the Fund unreasonably refuses to recognise the authority of the attorney to represent the child, the attorney can approach the court for a declaratory order.
- 9 So the issue of principle before me is whether the children whose actions are before me require as a matter of law the appointment of curators *ad litem* to assist them in their actions.
- 10 The nature of the responsibilities assumed by the curator *ad litem* was dealt with very fully in *Martin NO v Road Accident Fund*.⁴ The function of such a curator is not always the same. The duty of this curator is to represent the child in the case then pending and to watch and protect the Interests of the child in the case as a good and prudent parent would have done. The

practice is to appoint legal practitioners **as** such curators. The essential purpose of the appointment is to avoid a conflict of interest.

- 11 It is generally accepted that the biological parent of a child is empowered to assist the child in actions against the *RAF*. But in some of the cases before me, biological mothers have sought the appointment of such curators. There is authority for their stance. In *ex parte Donaldson*.⁵ the court held that although the widowed mother of the child could herself act for her child

... a woman parent In the position of the applicant of the applicant is entitled to apply to court for the appointment of some suitable male person to act as *curator-ad-litem* to her minor daughter as is contemplated in the present case.

- 12 In the past. not only were women not regarded as adequately equipped to assist their children In litigation, but women were not eligible for appointment as curators *ad litem*.⁶ But while the cases before me *do* not make the gender point asserted in *Donaldson*, in many of them the argument is made that the applicant does not have the necessary expertise to advise the child on the subtleties and complexities of high court litigation. The applicant in these cases is sometimes a mother, often a grandmother and often a relative. More often than not a female relative. So much for the. gender point in *Donaldson*. No rational person would make the gender point today In this respect, times have changed. For the better.

- 13 I think that the answer to the present problem lies in s 32 of the Children's Act Section 32 reads:

(1) A person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely, temporarily or partially, and ud1ng a care-giver who otherwise has no parental responsibilities and rights

⁴ 2000 2 SA 1023 W at 1034-1-37

⁵ 1947 3.SA 170 Tat 174

in respect of a child, must, whilst the child is in that person's care-

- (a) safeguard the child's health, well-being and development; and
 - (b) protect the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation, and any other physical, emotional or mental harm, or hazards
- (2) Subject to section 129, a person referred to in subsection (1) may exercise any parental responsibilities and rights reasonably necessary to comply with subsection (1), including the right to consent to any medical examination or treatment of the child if such consent cannot reasonably be obtained from the parent or guardian of the child
- (3) A court may limit or restrict the parental responsibilities and rights which a person may exercise in terms of subsection (2).
- (4) A person referred to in subsection (1) may not-
- (a) hold himself or herself out as the biological or adoptive parent of the child; or
 - (b) deceive the child or any other person into believing that that person is the biological or adoptive parent of the child.

14 A *care-giver* is defined in s 1 of the Children's Act

'care-giver' means any person other than a parent or guardian, who factually cares for a child and includes-

- (a) a roster parent;
- (b) a person who cares for a child with the implied or express

⁶ See the reference to *Martin ND, Infra*

consent of a parent or guardian of the child;

- (c) a person who cares for a child whilst the child is in temporary safe care;
- (d) the person at the head of a child and youth care centre where a child has been placed;
- (e) the person at the head of a shelter.
- (f) a child and youth care worker who cares for a child who is without appropriate family care in the community; and
- (g) the child at the head of a child-headed household,

15 The task of a care-giver is self-evidently to care for the children under her care. What is the content of *care*? Again s 1 of the Children's Act supplies the answer.

'care', In relation to a child, includes, where appropriate-

- (a) within available means, providing the child with-
 - (i) a suitable place to live;
 - (ii) living conditions that are conducive to the child's health, well-being and development; and
 - (iii) the necessary financial support;
- (b) safeguarding and promoting the well-being of the child;
- (c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards;
- (d) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act;
- (e) guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity

and stage of development;

- (f) guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development;
- (g) guiding the behaviour of the child *in* a humane manner;
- (h) maintaining a sound relationship with the child;
- (i) accommodating any special needs that the child may have. and
- (g) generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child.

- 16 Although the CCL and most of the Counsel who appeared supported the proposition that s 32 was not wide enough in its terms to empower a caregiver under s 32(1) who is a family member in relation to the child⁷ to assist the child in her care in an action against the Fund, counsel for one of the applicants submitted that it was not.
- 17 As was so trenchantly observed in *Potgieter v Olivier and Another*,⁸ the Supreme Court of Appeal provided in *Natal Joint Municipal Pension Fund v Endumeni Municipality*⁹ an exposition of the principles of interpretation. It is a unitary exercise that requires the consideration of text, context and purpose.
- 18 Section 32(1) provides in terms that a person who voluntarily cares for a child must safeguard the child's health, well-being and development. Section 32(2) confers upon a voluntary caregiver the power to exercise any parental responsibilities and rights reasonably necessary to comply with subsection (1)".
- 19 Section 32(2) is made expressly subject to s 129. In s 129(4), the care-giver

⁷ Under s 1 of the Children's Act, 'family member', in relation to a child, means,
(a) a parent of the child;
(b) any other person who has parental responsibilities and rights in respect of the child;
(c) a grandparent, brother, sister, uncle, aunt or cousin of the child; or
(d) any other person with whom the child has developed a significant relationship based on psychological or emotional attachment which resembles a family relationship

⁸ 2016 6 SA 272 GP para 30

⁹ 2012 4 SA 593 SCA

is empowered, together with parents and guardians, to consent to the medical treatment of the child. But in s 129(5), the care-giver is omitted from the categories of persons who may consent to a surgical operation on the child.

- 20 A "parent or other person who acts as guardian of a child" is expressly obliged to administer and safeguard the child's property and property interests¹⁰ and to assist the child in administrative, contractual and other legal matters.¹¹ A "parent or other person who acts as guardian of a child" is empowered to give or refuse consent for a child to be married, adopted or obtain a passport and for a child's immovable property to be alienated or encumbered.¹²
- 21 I think it is significant that s 32 is not made subject to s 18. In matters concerning a child, the child's interest are paramount. It must surely have been present to the collective mind of the legislature that the nuclear family (ie biological mother + biological father + biological children) was and is by no means the universal norm in this country. Why would the legislature impose a purely bureaucratic obstacle in the path of the vindication of child litigants' rights? I can see nothing in the scheme of the Children's Act or its purposes which will be retarded if s 32 is interpreted to permit a child's care giver to assist the child in an action against the Fund. An interpretation which recognises such a competence on the part of a care-giver will advance the purposes of the Act.
- 22 Whether or not this reasoning is applicable to other Instances of the exercise of parental power is a matter upon which I express no opinion. And other considerations arise when it comes to the question of protecting the award of monetary compensation to a child. In such a case, the danger of a conflict of interest between care-giver and child, and indeed between parent and child, may be significant.
- 23 Traditionally, curators *ad litem* have been appointed where the interests of the child conflict with those of its parents or where the parent was absent or

¹⁰ Section 18(3)(a) of the Children's Act

¹¹ Section 18(3)(b) of the Children's Act

¹² Section 18(3)(c) of the Children's Act

unwilling to act. In the present cases, far from being unwilling to act, the relative of each of the child plaintiffs who has applied for relief in the cases before me has obtained legal assistance for the child and cooperated in the conduct of the case. In some of those cases, the applicant family member is far from the seat of the court. But that to my mind is no reason to appoint a curator, as was argued. The person offered for appointment as curator is more often than not an advocate practising at the seat of the court. As I have said, it may be that in the exercise of the attorney's mandate, the attorney will be justified in appointing an investigator or a correspondent attorney to do work which the local attorney cannot do. But that is no justification for the appointment of a curator. In some of the cases, the applicant relative is poor or poorly educated. That may place a greater burden on the attorney who accepts the case to explain the nature of the proceedings or the wisdom of accepting a settlement offered. But the appointment of a curator will not eliminate the burden ; it will just pass the burden from the attorney to the curator. It is not a reason to appoint a curator at what amounts to public expense.

24 It is as well to make clear with what this judgment deals and does not deal. This judgment deals with applications by adult family members to appoint curators to assist the child plaintiff in the conduct of its case against the Fund. All the applicants before me are adults, so this judgment does not deal with the situation where the care-giver is another child.¹³ This judgment does not deal with the situation where it is sought to protect an award that is or may be made in favour of the child. Nor does this judgment deal with the case of an incapacitated adult who claims, or on whose behalf it is claimed, that such adult is entitled to be compensated by the Fund.

25 To sum up: a curator *ad litem* will be appointed to assist a child in an action against the Fund where the best interests of the child require that such an appointment should be made. Each case must be determined on its own facts. An adult care-giver who is a family member in relation to a child is

competent to assist the child In its action against the Fund. Where a conflict of interest or other good ground is shown, such a curator will be appointed. Unless and until the reasonable (and not merely speculative) possibility of a conflict arises, no curator will generally be required. The *fact* that the child's care-giver is a family member other than a biological parent is no ground on its own for the appointment of a curator, Nor is the fact that the care-giver is poor or ill-educated.

26 I must deal with another matter that arose during argument Section 24 of the Children's Act empowers the high court to grant guardianship to "[a]ny person having an interest in the care, well-being and development of a child". It seems to me that a care-giver whose authority to assist the child In her care is doubted or otherwise challenged would be well served by bringing an application for guardianship under s 24. I can see no reason in principle why an adult person who has assumed the responsibility of caring for a child and who is otherwise a fit and proper guardian should not use s 24 to eliminate potential disputes and uncertainties in this regard. The employment of s 24 would carry the collateral benefit of saving the public purse the costs of curators *ad litem* who add no value to a case. I was told from the Bar that! in cases where the qualifications or the motives of the applicant for guardianship are in dispute, the family advocate will, if asked to do so by the court, investigate and report.

27 I turn to deal with the individual cases before me.

TR Molanfoa obo T[...] R[....] and O[....] M[....]: case no. 3198/18

28 The. applicant Is the child's maternal grandmother. There are no special circumstances which would justify the appointment of a curator *ad litem* .

EK Myende obo P[....] M[...]: case no. 19736/17

29 The applicant is the child's mother. There are no special circumstances which would justify the appointment of a curator *ad litem* .

LM Baby obo M[....] K[....] V[....]: case no. 20763/17

30 The child's mother instructed the attorney to bring the claim on behalf of the child but has since died. The attorney himself brought the application for the appointment of a curator *ad litem*. But no attempt was made to establish the circumstances of the child and the identity of the child's scare-giver. If those who seek to advance the child's best interests consider, after making the appropriate investigations, that the appointment of a curator is warranted, they may bring a fresh application.

H Grootboom obo R[....] D[....] A[....]: case no. 23715/17

31 The applicant is the child's paternal uncle. There are no special circumstances which would justify the appointment of a curator *ad litem*.

HA Madonsela obo S[....] K[....] S[....]: case no. 27410/16

32 This application was withdrawn by counsel in open court.

NPR Jabu obo N[....] V[....] N[....]: case no. 29084/18

33 The applicant is the child's paternal grandmother. There are no special circumstances which would justify the appointment of a curator *ad litem*,

PM Makwana obo M[....] T[....] M[....]: case no. 37218/18

34 This application was withdrawn by counsel in open court.

BR Moerane obo K[....] H[....] M[....]: case no. 38700/18

35 The applicant is the child's maternal grandmother. There are no special circumstances which would justify the appointment of a curator *ad litem*.

ZJ Nzilane obo E[....] N[....] K[....]: case no. 44272/17

36 The applicant is the child's aunt. There are no special circumstances which would justify the appointment of a curator *ad litem*.

ZV Qiqimane obo B[....] Q[....]: case no. 34805/18

- 37 The applicant is the child's mother. There are no special circumstances which would justify the appointment of a curator *ad litem* .

KV Motlokiwa obo B[....] M[....] :case no. 63778/18

- 38 The applicant is the child's maternal grandmother. There are no special circumstances which would justify the appointment of a curator *ad litem*.

DA Maboka obo T[....] J[....] M[....], O[....] E[....] M[....] and E[....] P[....] M[....]: case no. 79434/17

- 39 The applicant is the children's maternal grandmother. There are no special circumstances which would justify the appointment of a curator *ad litem* .

KR Buthelezi obo N[....] B[....]: case no. 85091/16

- 40 The applicant is the children's paternal grandmother. There are no special circumstances which would justify the appointment of a curator *ad litem*.

MA Ramaila obo M[....] R[....] S[....]: case no. 88298/15

- 41 The applicant is the child' s mother. There are no special circumstances which would justify the appointment of a curator *ad litem*.

SJP Erasmus obo N[....] G[....] B[....] and L[....] A[....] B[....] : case no 96200/16

- 42 The child's mother instructed the attorney to bring the claim on behalf of the child but has since died. The attorney himself brought the application for the appointment of a curator *ad litem* . No attempt was made to establish the circumstances of the child and the identity of the child's care giver. If those who seek to advance the child's best interests consider, after making the appropriate investigations, that the appointment of a curator is warranted, they may bring a fresh application.

NW Ntshangase obo B[....] P[....]: case no. 69360/17

43 The child's mother died many years ago and the father's whereabouts are unknown . Th attorney himself brought the application for the appointment of a curator *ad litem*. But no attempt was made to establish the circumstances of the child and the identity of the child's care-giver. If those who seek to advance the child's best interests consider, after making the appropriate investigations, that the appointment of a curator is warranted, they may bring a fresh application.

M Chamunorwa obo J[....] M[....]: case no. 64249/15

44 The applicant is the child's guardian. He and the child live in Zimbabwe . The submission on the applicant's behalf is that the distance between the seat of the court and the residence of the applicant and the child justify the appointment of a curator because the local attorney will find it difficult to take instructions. If that is so the local attorney should appoint a correspondent or investigator in Zimbabwe. There are no special circumstances which would justify the appointment of a curator *ad litem*.

Order of court

45 Except for those cases Indicated above which were withdrawn in open court, all the applications before me are dismissed. To the extent necessary and for the avoidance of doubt. leave is granted to each of the applicants to bring a fresh application for relief in relation to the representation of the children involved.

NB Tuchten
Judge of the High Court
26 September 2018

For the *amicus curiae*:

Adv K Ozaah

Instructed by

The Centre for Child Law

Pretoria

For the first applicant:

Adv T Ralkane

Instructed by:

KS Dinaka Attorneys

Pretoria

For the second applicant:

No appearance

For the third applicant

No appearance

Pretoria

For the fourth applicant:

Adv L Mgwetyana

Instructed by:

Cingo Attorneys

Pretoria

For the fifth applicant:

Adv GL Shabangu

Instructed by:

Molaudzi Attorneys

Pretoria

For the sixth applicant:

Adv MK Mabote

Instructed by

Ndhima Attorneys Inc

Pretoria

For the seventh applicant:

Adv E Moukangwe

Instructed by

Mphele -and Associates

Pretoria

For the eighth and ninth applicants:

No appearance

For the tenth applicant:

Adv **M** Jacobs

Instructed by

VZLR Inc

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For the eleventh applicant:

Adv JW Makhubo

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Brian Ramaboa Inc
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For the twelfth and thirteenth applicants:

No appearance

For the fourteenth applicant::

Adv **AM** Jardine
Instructed by
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For the fifteenth applicant:

Adv MH Mostert

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For the sixteenth applicant:

Adv N Fourie
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For the seventeenth applicant:

Adv B Nel
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Gildenhuis Malatji Inc
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For the Road Accident Fund:

Adv N Mokopo
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Johannesburg

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

CASE NO: 3198/18

In the *ex parte* applications of:

THITHI REBECCA MOLANTOA

Applicant

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T[....] R[....]

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- 5 HA Madonsela obo S[....] K[....] S[....] case no. 27410/16
- 6 NPR Jabu obo N[....] V[....] N[....] case no. 29084/18
- 7 PM Makwana obo M[....] T[....] M[....] case no. 37218/18
- 8 BR Moerane obo K[....] H[....] M[....] case no. 38700/18
- 9 ZJ Nzilane obo E[....] N[....] K[....] case no. 44272/17

- 10 N Qiqimane obo B[....] Q[....]case no. 34905/18
- 11 KV Motlokiwa obo B[....] M[....].....case no. 63778118
- 12 DA Maboka obo T[....] J[....] M[....], O[....] E[....] M[....] and E[....] P[....]
M[....] case no. 79434117
- 13 KR Buthelezi obo N[....] B[....] case no. 85091/16
- 14 MA Ramaila obo M[....] R[....] S[....].....case no. 88298/15
- 15 SJP Erasmus obo N[....] G[....] B[....] and L[....] A[....] B[....] . . .
..... case no 96200/16
- 16 NW Ntshangase obo B[....] P[....]. case no. 69360/17
- 17 M Chamunorwa obo J[....] M[....] case no. 64249/15