

The expanding role of the curator *ad litem* in protecting children's rights in South Africa

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SUMMARY

The appointment of the curator *ad litem* during litigation in which children's interests are concerned has, over the years, played a critical role in advancing the child's right to be heard and participate in matters affecting them for the advancement of their best interests. Prof Boezaart's seminal article on the role of the curator *ad litem* and children's access to the courts set out a comprehensive review of the origins, duties and role of the curator. Litigation and resultant court pronouncements subsequent to the article have continued to affirm the importance of the curator's role in matters dealing with the care of children; delictual matters in which children have legitimate financial claims; and acquisition of parental rights and responsibilities of the unborn child. The courts have affirmed the fact that the curator must only be appointed when their presence is necessary and not duplicate the functions of attorneys representing parents or caregivers of the children or the parents or caregivers themselves. The curator represents and protects the interests of the children concerned, prevents conflict with the interests of the parents, guardian or caregiver or represents the child when such parent, guardian or caregiver is unwilling to act in the interests of the child. The courts have held that in highly contested matters, the curator must, as an officer of the court, keep an open mind, remain neutral, and be open to all arguments in the interests of the children concerned. They must not allow themselves to be distracted by contentious issues in litigation and must honour their obligation to provide insight into the wishes and views of children and to apply their legal knowledge to the child's perspective. The curator has also played a critical role in protecting the interest of the unborn child by conducting an objective investigation and ensuring that their interests are fully before the court.

1 Introduction

The right of a child to have their best interests considered to be of paramount importance in matters affecting them is a constitutional right enjoyed by every child in South Africa. The Constitution explicates, in this regard, that “a child’s best interests are of paramount importance in every matter concerning the child”.¹ The right has long been accepted to embody not only a right but also a principle and rule of procedure.²

The procedural component of the right includes the child’s right to be heard (and/or participate) and to have their views considered whenever their best interests are at stake.³ The Children’s Act 38 of 2005 entrenches this right, section 10 provides that:

Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.

In *AB v Pridwin Preparatory School*, in a separate but concurring judgment, Khampepe J eloquently articulated the importance of this right as follows:

A child’s participation right acknowledges their ‘separate personhood’ and the ‘need to take seriously the view expressed by the child’. It is hardly in line with the constitutional recognition of a child as ‘an individual with a distinctive personality’ and with ‘their own dignity’ for a school to submit that it has acted fairly by giving the parents a hearing but not granting the child an opportunity to express their views before they are removed from their school. Of course, the appropriateness of this must be determined in each case and on the basis of the age and maturity of the child, but it should, at least, be the default position under the best-interests standard in this context.⁴

This procedural component of the right is buttressed by a child’s right to access courts⁵ and their right to separate legal representation.⁶

1 S28(2) of the Constitution of the Republic of South Africa, 1996.

2 UN Committee on the Rights of the Child (CRC) *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)* 29 May 2013 CRC/C/GC/14. See, also, *AB and Another v Pridwin Preparatory School and Others* 2020 ZACC 140.

3 As above. *C v Department of Health and Social Development, Gauteng* 2012 ZACC 1; *Centre for Child Law v The Governing Body of Hoerskool Fochville* 2015 ZASCA 155; *J v National Director of Public Prosecutions* 2014 ZACC 1. The procedural component is further buttressed by a child’s right to access courts and their right to legal representation.

S34 of the Constitution provides: “Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum”.

S28(1)(h) of the Constitution provides: “Every child has the right 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”.

4 *AB v Pridwin Preparatory School* para 234.

In the context of litigation, and in respect of children who are unable to provide direct instructions, these rights are usually given effect by our courts by the appointment of the curator *ad litem*.⁷ The curator *ad litem* in turn, and in addition, seeks to ensure that children can participate effectively as well as to protect and promote their best interests.

In 2013, Professor Trynie Boezaart (Boezaart) undertook a comprehensive review of the origin, duties, and role of a curator *ad litem* in her seminal article titled "The role of a curator *ad litem* and children's access to the courts".⁸ The purpose of this article is to build on her work by continuing to explore the developments relating to this vitally important role played by some practitioners. This is done by interrogating several diverse cases where a curator *ad litem* was appointed to protect the interests of children. However, before the cases are discussed necessary background on the legal status of the curator *ad litem* will be highlighted through a discussion of its the common law origins, international law's perspective on the curator *ad litem* and an initial review of the role and children's access to courts.

2 The common law origins

The common law's early uses of the curator *ad litem* were limited to cases where a parent could not assist his/her child or act on his/her behalf. It will be remembered that in terms of the Roman-Dutch Law, *infans* (a child under 7 years old) were deemed not to have the capacity to litigate in their own name and would therefore, and where permissible, be represented by their parents.⁹ The minor (child 7 years and older) was deemed to have limited capacity to litigate in that they were regarded as having no *persona standi in iudicio*¹⁰ and needed the assistance of their parents or guardians to institute legal action.

The curator *ad litem* was appointed to assist these classes of children in litigation only when the parent or guardian was not able to do so, or it

5 S34 of the Constitution: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum". See, also, S 14 of the Children's Act: "Every child has the right to bring, and to be assisted in bringing, a matter to a court, provided that the matter falls within the jurisdiction of that court".

6 S 28(1)(h) of the Constitution: "Every child has the right 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".

7 See generally Pretoria University Law Press *Guidelines for Legal Representatives of Children in Civil Matters* (2016) 9.

8 Boezaart "The Role of a Curator *ad Litem* and Children's Access to the Courts" 2013 *De Jure* 707.

9 Boezaart 2013 *De Jure* 708.

10 "Person of standing in a court. [or] A person having standing to appear before a tribunal to represent himself or his or her principal." See Fellmeth and Horwitz *Guide to Latin in International Law* (2009) 221-222.

was not desirable for them to assist the child. This occurred, usually, in the following four instances:

- The minor is without a parent or guardian (i.e., they were predeceased);
- A parent or guardian cannot be found or is not available;
- The interests of the minor are in conflict with the interests of the parent or guardian, or the possibility of such conflict exists; or
- The parent or guardian unreasonably refuses to assist the minor.¹¹

3 International law instruments

A discussion about the role of the curator *ad litem* would be incomplete without a general overview of the international legal framework. The international legal framework, after all, is frequently resorted to by our courts when unpacking and/or developing the role.

A child's right to participate in all matters that affect the child is recognised (and guaranteed) in several international law instruments. The most notable are the United Nations Convention on the Rights of the Child (CRC)¹² and the African Charter on the Rights and Welfare of the Child (ACRWC).¹³

Article 12 of the CRC states unequivocally that a "child who is capable of forming his or her views [has] the right to express those views freely in all matters affecting the child".¹⁴ This means that the child must be afforded an opportunity to be heard whenever the subject matter affects them either directly or indirectly.¹⁵ Importantly this right is not limited to older children or children who are able to communicate their views verbally. The Committee on the Rights of the Child has said, in General Comment 12, the following:

The Committee emphasizes that article 12 imposes no age limit on the right of the child to express her or his views, and discourages State parties from introducing age limits either in law or in practice which would restrict the child's right to be heard in all matters affecting her or him. In this respect, the Committee underlines the following:

... the Committee [has previously] underlined that the concept of the child as rights holder is '... anchored in the child's daily life from the earliest stage'. Research shows that the child is able to form views from the youngest age, even when she or he may be unable to express them verbally. Consequently, full implementation of article 12 requires recognition of, and respect for, non-verbal forms of communication including play, body language, facial expressions, and drawing and painting, through which very young children demonstrate understanding, choices and preferences.¹⁶

11 Boezaart 2013 *De Jure* 709-10.

12 Convention on the Rights of the Child (CRC).

13 African Charter on the Rights and Welfare of the Child (ACRWC).

14 Art 12(1) of the CRC.

15 *AB v Pridwin Preparatory School* para 238.

...

... States parties are also under the obligation to ensure the implementation of this right for children experiencing difficulties in making their views heard.¹⁷¹⁸

Article 12 of the CRC goes on to require that a child must, in particular, “be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child”.¹⁹ The child may do so directly or through a representative.²⁰ The latter is particularly important when the child experiences difficulties in making their views heard.

Article 4(2) of the ACRWC, similarly, guarantees a child’s right to participate.²¹ It provides that in all judicial proceedings affecting a child,

who is capable of communicating his/her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings.

The African Committee of Experts on the Rights and Welfare of the Children have said the following:

The right of the child to be heard (child participation) is an important principle which places value on the contributions of children to matters affecting them, including the handling of responsibilities. It enables and equips even the youngest members of society to contribute to shaping their lives, families, communities and the wider society at large. By recognising the capacity of children to understand their own environment and world, child participation projects children as active participants in the promotion and protection of their rights and the fulfilment of their responsibilities.²²

The CRC and the ACRWC set the international law benchmark for child participation in legal matters affecting them. This benchmark is affirmed by the Constitution and legislation, most notably the Children’s Act, and is implemented by caselaw as discussed below.

16 Our own emphasis.

17 General comment No 12: The right of the child to be heard, CRC (20 July 2009), CRC/C/GC/12 (2009) para 21.

18 Our own emphasis.

19 CRC para 12(2).

20 As above.

21 Art 4(2) of the African Charter on the Rights and Welfare of the Child is, for present purposes, the most relevant provision for purposes of understanding participation. It is, however, not the only provision that expressly incorporates (and provides for) the right to participate. There are also the following: art 7 (freedom of expression); art 12 (leisure, recreation and cultural activities); art 13 (handicapped children); and art 31 (responsibility of the child).

22 ACERWC General Comment on Article 31 of the African Charter on the Rights and Welfare of the Child on ‘The Responsibilities of the Child (2017) para 19.

4 An initial review of the role of the curator *ad litem* and children's access to the courts

The courts have interpreted the common law, in light of the Constitution, the Children's Act and international law, as it relates to the role of curator *ad litem* in a wide array of cases, including determining the welfare of children in a same-sex adoption matter;²³ investigating the circumstances of children of a convicted, and due to be sentenced, primary caregiver;²⁴ determining the welfare of children in inter-country adoption matters;²⁵ presenting argument on behalf of a child caught up in a parental responsibilities and right dispute;²⁶ and more.

The Constitution introduced an inclusive approach to children's participation in legal proceedings. Section 28(1)(h) of the Constitution provides that every child has the right to have a legal practitioner assigned to them at state expense in civil proceedings affecting the children. The Constitutional Court has interpreted this right to include the appointment of a curator *ad litem*, particularly in cases where there is a risk of injustice, and it is necessary for the curator to represent the interests of the children.²⁷ The Children's Act legislates children's right to participate in section 10 as stated earlier in this article. Du Toit notes that the Act makes a child's right to participate a central theme by providing children with opportunities, throughout the Act, to participate and express their views.²⁸

The Constitutional Court has expressed the role of a curator *ad litem* as one that enables children's voices to be heard.²⁹ Boezaart points out that once the curator *ad litem* have conducted their investigation and engaged with the child, the report that they produce for the attention of the court highlights facts or circumstances that are pertinent to the application.³⁰ The report should also represent the best interests of the child by putting forward arguments that can reasonably be made in the child's favour.³¹

Boezaart evaluates the various reasons that contribute to the developing role of the curator *ad litem* and highlights the following. International law requires that children participate in legal proceedings

23 *Du Toit v Minister of Welfare and Population Development* 2003 2 SA 198 (CC).

24 *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC); and *S v S (Centre for Child Law as Amicus Curiae)* 2011 7 BCLR 740 (CC).

25 *AD v DW (Centre for Child Law as Amicus Curiae and Department of Social Development as intervening party)* 2008 3 SA 148 (CC).

26 *S v J* 2011 3 SA 126 (SCA).

27 Boezaart 2013 *De Jure* 712; and *Du Toit v Minister of Welfare and Population Development* para 201G–H.

28 Du Toit "Legal Representation of Children" in Boezaart (ed) *Child Law in South Africa* (2017) 113–4.

29 *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) para 53.

30 Boezaart 2013 *De Jure* 716.

31 As above.

affecting them to protect their best interests. The obligation set out in the Constitution that children have legal representatives assigned to them in civil matters at state expense, which is read and interpreted with the paramountcy of the best interests of the child set out in section 28(2). The Children's Act plays a crucial role with its reiteration of the paramountcy of the best interests of the child; provisions on child participation; provision ensuring that children have access to courts and have the right to be assisted in bringing matters to court. Boezaart also notes the increase in public interest litigation dealing with matters affecting the rights and welfare of children and Legal Aid South Africa's prominent role in ensuring children's access to justice in the courts.

Since Boezaart's article, there have been notable judgments that continue to highlight the significant role that the curator *ad litem* plays in ensuring children's vital participation in matters affecting them and in so doing promoting their best interests. Selected judgments will be discussed below and their influence on how the role of the curator *ad litem* should be viewed will be highlighted.

5 The curator *ad litem* and civil matters involving the care of children

Litigation involving the interests of children is ... not of the ordinary civil kind. It involves the making of a value judgment based on the court's findings of facts and in the exercise of the court's inherent jurisdiction as the upper guardian.³²

This is a statement of the High Court in the matter of *Muller v Muller*,³³ involving the divorce of the parties and subsequent determination of the care and contact of their children. In so doing it highlights its mandate when children are caught in the middle of litigation before it. The matter was heard in November and December 2018 while judgment was handed down in March 2019. The court was required to make a finding in relation to the children's care and contact arrangements in the midst of an intense dispute between the parents and the involvement of various experts and a curator *ad litem*.³⁴ The court's findings included the manner in which the curator conducted her work as well as the responsibilities of a curator.

Prior to the matter being before the court, multiple interim orders had been obtained which had an impact on the children. These were made between December 2017 and September 2018. This included the appointment of a curator *ad litem* for the children to facilitate adherence to recommendations made by a clinical psychologist. The curator was

32 *Muller v Muller*, unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria, Case No 57215/2017 (delivered on 13 March 2019) para 110.

33 As above.

34 *Muller v Muller* para 2.

appointed, and her duties included overseeing the process with the respective therapists; representing the children in all applications/actions related to the case; issuing directives as and when necessary in the best interest of the children; referring the parties and/or the children to other experts; assessments or therapy if she considers it necessary; reporting to the court about the progress of the process and making recommendations in the best interests of the children.³⁵

In September 2018, the curator, through an *ex parte application*, sought the children's removal from the care of their mother (who had the children in her care pending the finalisation of the divorce).³⁶ The basis put forward for the removal, and resultant separation of the siblings was the active process of severe parental alienation by the children's mother against the father.³⁷ The children were removed on the basis of the curator's application and placed in separate care environments, resulting in the children experiencing additional anxiety, frustration and trauma.³⁸

The court, in writing the current judgment, had some very strong criticism of the way the curator conducted her work, including the *ex parte application* and the impact of the order obtained.³⁹ In addition to the fact that the curator, in her *ex parte application*, did not disclose all the information necessary for the court at the time to make an informed decision, the court also found an issue with the evidence that she used to base her argument of parental alienation on. She relied on reports by two social workers without applying basic evidentiary principles.⁴⁰ The social workers, in recommending the removal and separation of the children, did not consider alternative options and investigate the trauma that such action would have on the children. They also did not consider the guidelines set out in Chapter 9 of the Children's Act and the impact that the removal and separation would have on one of the children with special needs or the youngest child reliant on the mother's care.⁴¹ The court rightly adopted the view that the *ex parte application* was ill-considered and misdirected.⁴²

The court, in considering the above failures of mandate, took the opportunity to discuss and highlight the role of the curator *ad litem* as an officer appointed by the court.

The curator plays the important role of ensuring that checks and balances are in place, particularly in high-conflict matters.⁴³ They must therefore keep an open mind and remain neutral and open to all arguments and inputs made by experts, and investigate and present all

35 *Muller v Muller* para 33.

36 *Muller v Muller* para 38.

37 *Muller v Muller* para 39.

38 *Muller v Muller* para 42.

39 *Muller v Muller* para 40.

40 *Muller v Muller* para 61–66.

41 *Muller v Muller* para 65.8.

42 *Muller v Muller* para 68.

43 *Muller v Muller* para 71.

arguments in the interests of the children concerned even if these arguments do not align with their preferences as long as the best interests of the children have been advanced.⁴⁴

The curator, like the legal representative, provides insight into the wishes and views of the children concerned and applies legal knowledge and perspective to them. The curator must not be drawn into the litigation arena. This includes deposing to an affidavit under oath, as in the *ex parte application*, and thereby making herself a litigant, exposing herself to being subpoenaed by the parties and ultimately placing herself in a position in which

she may have a conflict of interest between protecting the interests and rights of the ... children on whose behalf she has been appointed on the one hand, and on the other hand her own interests as an officer of the court.⁴⁵

The curator must instead file reports to the court in order to exercise her functions, express views and make recommendations.⁴⁶

These pronouncements contribute to the growing enunciation and clarification of the curator's mandate within the South African judicial system particularly in relation to the protection and advancement of children's best interests.

6 The curator *ad litem* in delictual matters affecting children

The role of curator *ad litem* has also found relevance in delictual matters where children have legitimate financial claims as a result of the wrongful conduct by another. The curator comes in as an actor whose mandate is to ensure that the interests of the children concerned are fully considered in the consideration of the case and the ultimate determination of financial claims. Such delictual matters include claims of damages against the Road Accident Fund (RAF).⁴⁷

When a court is faced with a claim against the RAF involving children who have either suffered loss of support or damages, it has the duty to uphold the best interests of the children involved. The Constitutional Court has noted that "it is the duty of the [High Court] to consider the

44 As above.

45 *Muller v Muller* para 74.

46 *Muller v Muller* para 75.

47 The RAF, established in terms of the Road Accident Fund Act 56 of 1996 (RAF Act), is an organ of state that compensates plaintiffs for loss or damage caused by the driving of motor vehicles. The powers and functions of the RAF include investigating and settling claims arising from loss or damage caused by the driving of a motor vehicle; managing and utilising the money of the RAF in order to exercise its powers and duties; and obtaining re-insurance for any risk assumed by the RAF in the performance of its functions in terms of the RAF Act.

specific best interests of the children”.⁴⁸ It further noted that it is the duty of legal officers of the court to assist the court with all relevant information at their disposal to equip the court to make a best interests determination.⁴⁹

The court will have to satisfy itself that the best interests of the child or children involved are met when it is provided with sufficient factual information, such as: the relationship between a plaintiff and the child; the financial circumstances of the plaintiff and their ability to adequately safeguard and distribute the money received from the RAF on behalf of the child; the personal and financial circumstances of the child involved; an explanation and justification for the mode selected and agreed on to administer the funds; and the views and wishes of the child concerned.⁵⁰

Persons with the duty to place such information before the court are the plaintiffs (parents, guardians or caregivers of the child concerned), their legal representatives who are also acting on behalf of the children as well as the RAF legal representatives. In instances where the court does not have such information then the appointment of a curator *ad litem* may become necessary:

The critical question is ...whether the information before the High Courts [is] sufficient to consider the interests of the children, or whether the appointment of a curator to present this information is necessary. In exceptional circumstances – where there is insufficient information about the children, or whether the information before the court leaves some doubt regarding the children’s well-being – the court may need to appoint a curator to conduct an independent assessment of the children’s interests.⁵¹

A court cannot proceed to finalise a matter without the necessary information to determine how a particular decision would affect the children concerned. Two notable High Court judgments provide further guidance on when the appointment of a curator *ad litem* is necessary, particularly in relation to RAF matters and how they should perform their functions once appointed.

On 26 September 2018, Tuchten J of the Pretoria Gauteng Division of the High Court handed down judgment in the matter of *Ex Parte: Molantoa obo R & M and Others*⁵² where the main question to be explored was when a curator *ad litem* should be appointed for a child in a matter involving the RAF.

Tuchten J, and other judges of the Gauteng Division of the High Court, were concerned about the high number of applications made to them for

48 *Van der Burg v National Director of Public Prosecutions (Centre for Child Law as Amicus Curiae)* 2012 8 BCLR 881 (CC) para 68.

49 As above.

50 Centre for Child Law, Further Amicus Curiae Submissions in the matter of *K obo MK v Road Accident Fund; M obo CM v Road Accident Fund* 2021 ZAGPJHC 40 para 6.3.

51 *Van der Burg v NDPP* paras 71–2.

52 *Ex Parte: Molantoa obo R & M* 2018 ZAGPPHC 953.

the appointment of curators for children in RAF matters.⁵³ The judgment notes that at the time the Division had at least one hundred and sixty cases (160) against the RAF set down on its roll and that it was routine for an application to be brought for the appointment of a curator *ad litem* when a plaintiff was a child.⁵⁴ The applications usually sought orders from the court empowering the curator to settle the case if need be after consent of the court has been obtained and to pursue a vehicle for the administration of the funds such as a trust.⁵⁵

The concerns about these applications focused on the question of their necessity particularly since granting such applications meant the inclusion of additional paid professionals, in most cases advocates, whose job was to represent the interests of the child plaintiffs.⁵⁶ Two questions weighed heavily, namely what work does the curator actually do? What value do they add to the case?⁵⁷

As the court heard and examined arguments, it became clear that a majority of the work carried out by the curator *ad litem* duplicates the work carried out by attorneys representing plaintiffs, i.e., parents acting on behalf of their children, in RAF matters or advocates instructed by the attorneys.⁵⁸ The reasons raised for the preference to apply for the appointment of curators include children being far away from the seat of the court which made taking instructions costly and logistically difficult, an argument that the court rejected as a basis for appointing a *curator* instead of a correspondent or investigator.⁵⁹ The second reason was that attorneys feared accusations of being negligent in the performance of their duties towards children such as giving negligent advice on settlement agreements and settling without authority.⁶⁰ The court also rejected this argument and held that an "attorney who gives negligent advice is liable because he give such advice; it matters not whether he gives such advice to his lay client or a curator."⁶¹

The court went on to highlight the findings of the case of *Martin v Road Accident Fund*⁶² that the duty of the curator *ad litem* is to represent and protect the interests of the child and such curator is appointed to avoid conflict of interest with the parent, guardian or caregiver⁶³ or if they are unwilling to act.⁶⁴ In the cases before the court, none of the relatives of

53 *Ex Parte Molantoa* para 2–3.

54 *Ex Parte Molantoa* para 3.

55 As above.

56 *Ex Parte Molantoa* para 5.

57 As above.

58 *Ex Parte Molantoa* para 6.

59 As above.

60 *Ex Parte Molantoa* para 7.

61 As above.

62 *Martin v Road Accident Fund* 2000 2 SA 1023 (W).

63 The court went into a detailed discussion on how a caregiver has the power and mandate to assist a child in an action against the RAF. The court gave an interpretation of the Children's Act that recognises this role (see paras 12–2 of the judgment).

the child plaintiffs showed an unwillingness to act.⁶⁵ They all made the effort to obtain the necessary legal assistance for the child and cooperated in the conduct of the case.⁶⁶ The court noted that because some of the plaintiffs were far from the court, or that the relatives were poor and of poor education, was no reason to appoint a curator.⁶⁷ This just placed a great burden on the attorney to ensure that all the necessary information is collected and that the parties in the case understood the matter.⁶⁸

The finding of the court in relation to this aspect was summed up as follows:

... 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.⁶⁹

The second judgment dealt with the misconduct of an attorney dealing with two RAF matters and how the curator *ad litem* was drawn into this misconduct and distracted from their actual mandate and therefore did not represent the interests of the children they were appointed to assist. The two cases of *K obo MK v RAF; M obo CM RAF*⁷⁰ were dealt with in one judgment by the Johannesburg Gauteng Local Division of the High Court.

The two cases, dealing with claims for loss of support against the RAF on behalf of children, came before the court for purposes of making settlement orders of court. It however came to the attention of the court (while it was perusing the court files) that the amounts being sought from the RAF had already been paid out pursuant to out-of-court settlements between the RAF and the attorney. The money had been paid into the attorney's trust account who then immediately paid herself fees out of the amount received from the RAF. This was all done without a court order⁷¹ and without the fees being taxed by the Taxing Master.

The judgment deals extensively with the irregularity of the above, and related, actions, particularly the impact that they had on the child

64 *Martin v RAF* para 23.

65 *Ex Parte Molantoa* para 32–44.

66 As above.

67 As above.

68 As above.

69 *Ex Parte Molantoa* para 25.

70 *K obo MK v RAF* 2021 ZAGPJHC para 40.

71 As required by the Contingency Fees Act 66 of 1997 in terms of the court's interpretation.

plaintiffs. One of the issues that the court found great displeasure in was the manner in which a curator *ad litem* was appointed in one of the cases and the substandard work carried out by the curator on behalf of the children. The court reported that the RAF registered approximately 19 000 cases per year from the period 2017 to 2020.⁷² This highlighted the urgency and importance with which it was necessary to understand how to best address the needs of child plaintiffs in RAF matters.⁷³

The case in question involved a claim for funeral expenses and for loss of support of two children who had suffered the death of their mother in a road accident.⁷⁴ The claim against the RAF was made by the attorney on behalf of the children's aunt with the children being the second and third plaintiffs for the loss of support.⁷⁵ A trial date was allocated and the attorney prepared to take judgment by default due to the withdrawal of the RAF attorneys.⁷⁶ The application for the default judgment painted a picture of an attorney who had a profound lack of insight into the children's circumstances and the duty owed to the children and the court.⁷⁷ The affidavit and that of the children's aunt contained sparse information on the children.⁷⁸

The court bemoaned the fact that a curator *ad litem* was only appointed 9 months after the action against the RAF was instituted and suspected that this was done for the purposes of expediting the settlement of the matter.⁷⁹ The curator's initial affidavit was disappointing to the court, to say the least, the court noted that the curator's affidavit only contained two sentences of hearsay information that were clearly indicative of the fact that he had had no contact with the children and no particulars were given of their care circumstances and their caregiver.⁸⁰ The court was perturbed by this and noted the following:

The apparent lack of investigation and care in reporting to this Court as to the needs and circumstances of vulnerable children by an officer of this Court who purports to act as a curator *ad litem* is, to my mind, worthy of further investigation by the Legal Practice Council (LPC).

One of the duties of [the curator] as set out in the order which appointed him to his position as curator *ad litem* was personally to negotiate a settlement on behalf of the children. It was specifically provided in the order that in the context of his negotiations, he was to obtain the approval of a judge in chambers before accepting an offer. This is in keeping with the practice in this Division. The aim of this judicial oversight is obvious – it protects the children. But [the curator] never negotiated the settlement. It appears that it

72 *K obo MK v RAF* para 25.

73 *K obo MK v RAF* para 25.

74 *K obo MK v RAF* para 28–31.

75 *K obo MK v RAF* para 31–3.

76 *K obo MK v RAF* para 36.

77 *K obo MK v RAF* para 37.

78 *K obo MK v RAF* para 37–8.

79 *K obo MK v RAF* para 35.

80 *K obo MK v RAF* para 42–4.

was never, in truth, anticipated that he would do anything more than led the appearance of approval to a settlement which was actually negotiated and entered into by [the attorney].

...

The duty of [the curator] was to represent the interests of each of the children independently.⁸¹

Much later in the judgment, the court notes the following about the children and the importance of carrying out thorough investigations of their circumstances:

The evidence is available and must be sourced. Children live in communities where they attend schools, and are known by neighbours and family friends who can give independent accounts of the children their relationships and their daily lives. It is imperative that information be sought aimed at satisfying the attorney as to these details such as telephone numbers of the children or their school principals or teachers or siblings or grandmothers and family also of absent parents. Clinics who have treated the children or attended to recording their development can be contacted to verify the children's existence and their health and whereabouts. Each case will require its own method of investigation but the obtaining of proper information ... is an imperative.

A child is entitled to the dignity of not being merely a name on a piece of paper or the subject of a hearsay instruction.⁸²

When the matter eventually made it before the court in January 2020, the presiding officer raised the fact that payment had already been made by the RAF to the attorney and, *inter alia*, raised questions as to why the settlement had been reached and received without the curator seeking court approval.⁸³ The matter was postponed for the parties to respond to the court's queries.⁸⁴ It is at this point that the curator *ad litem* submitted a second affidavit clarifying the first one, he stated the following:

- He believed that the settlement offer was in the interests of the children.
- He believed that the attorney had acted in the children's best interests and that he ratified all the attorney's decisions in relation to the settlement and payments.
- He admitted that he had not obtained the necessary judicial consent for the settlement agreement.⁸⁵

A further postponement was granted by the court to allow the RAF to make submissions on various issues. The curator used this opportunity to file a third affidavit stating the following:

81 *K obo MK v RAF* para 44–6.

82 *K obo MK v RAF* para 113–4.

83 *K obo MK v RAF* para 49–50.

84 *K obo MK v RAF* para 52.

85 *K obo MK v RAF* para 56.

I wish to amplify and add to my previous report as the amicus curiae raised certain points:

GRANDMOTHER:

- 1.1. I consulted with the grandmother through a translator.
 - 1.2. She claims to only have finished school to standard 6.
 - 1.3. She believes the money should be paid out to her to manage on behalf of the children.
2. THE CHILDREN:
- 2.1 I consulted with the children.
 - 2.2 On asking what their opinion was on where the money should go they claimed not to have given the matter thought and could not react thereto.
 - 2.3 Later in the presence of their grandmother they telephonically claimed that it would not bother them if she managed the money.⁸⁶

The court did not seem impressed with this third attempt and noted that this was the first attempt at engaging with the children and their caregiver and this was only as a result of the court's intervention.⁸⁷ Furthermore, it appeared that there was a dispute between the grandmother and the aunt (who launched the application) as to who should administer the funds.⁸⁸

The court, after examining all of the facts before it, made the following important findings in relation to the responsibility of the curator *ad litem* to children in RAF matters.⁸⁹ It amounts to an injustice to not facilitate a child's expression of their views and needs in matters involving the source of their support.⁹⁰ The attorneys in the matters must be perceptive of the needs of the children and the RAF must hold them to this obligation.⁹¹ This may, in appropriate circumstances, require the appointment of a curator *ad litem*.⁹² The curator *ad litem* would then play the crucial role of ensuring that the court has information before it relevant to help it put in place protections of children's rights and interests and ensure that public funds are properly and efficiently used.⁹³ A curator should not be appointed for the purposes of expediency and to lend an appearance of legitimacy to the process followed by the attorneys and RAF.⁹⁴

The curator *ad litem* must, as highlighted in the discussion of *Muller*, not allow themselves to be dragged into unscrupulous conduct by parties or legal representatives in litigation. Their role is to be independent of

86 *K obo MK v RAF* para 58.

87 *K obo MK v RAF* para 60.

88 As above.

89 *K obo MK v RAF* para 131.

90 As above.

91 As above.

92 As above.

93 As above.

94 As above.

these volatile situations and focus on the protection of the interests of the children involved, anything else would be unethical conduct of an officer of the court and subject to judicial (and professional) censure.

7 The curator *ad litem* representing the interests of the unborn child

Boezaart, in her article, notes that it is customary to appoint curators *ad litem* for unborn children such as in instances where their hereditary interests are involved.⁹⁵ Such an appointment was made in the matter of *Ej v Haupt*.⁹⁶ in which the High Court, Pretoria handed down judgment on 11 August 2021. The matter dealt with the acquisition of parental responsibilities and rights by a same-sex couple that conceived a child through artificial fertilisation using a home insemination kit.⁹⁷ The question before the High Court was whether section 40 of the Children's Act makes provision for a spouse in a civil union to automatically acquire parental responsibilities and rights of a child born to the other spouse during the course of the union but does not have a genetic link to the first spouse.⁹⁸ Section 40 provides the following:

Rights of child conceived by artificial fertilisation

- (1)(a) Whenever the gamete or gametes of any person other than a married person or his or her spouse have been used with the consent of both such spouses for the artificial fertilisation of one spouse, any child born of that spouse as a result of such artificial fertilisation must for all purposes be regarded to be the child of those spouses as if the gamete or gametes of those spouses had been used for such artificial fertilisation.
- (b) For the purpose of paragraph (a) it must be presumed, until the contrary is proved, that both spouses have granted the relevant consent.
- (2) Subject to section 296, whenever the gamete or gametes of any person have been used for the artificial fertilisation of a woman, any child born of that woman as a result of such artificial fertilisation must for all purposes be regarded to be the child of that woman.
- (3) Subject to section 296, no right, responsibility, duty or obligation arises between a child born of a woman as a result of artificial fertilisation and any person whose gamete has or gametes have been used for such artificial fertilisation or the blood relations of that person, except when –
 - (a) that person is the woman who gave birth to that child; or
 - (b) that person was the husband of such woman at the time of such artificial fertilisation.

95 Boezaart 2013 *De Jure* 710.

96 *Ej v Haupt* 2021 ZAGPPHC 556 (EJ).

97 *Ej v Haupt* para 1.

98 *Ej v Haupt* para 4.

Furthermore, a perusal of other sections in the Act revealed that there were no provisions providing for the first applicant's acquisition of parental responsibilities and rights. The applicants, who had been in a civil union since November 2019, elected to conceive a child through artificial insemination done at home.⁹⁹ They used sperm donated by a friend, seemingly occurring outside the regulatory scheme of the National Health Act¹⁰⁰ and its applicable regulations.

The High Court appointed senior counsel as curator *ad litem* for the unborn child. The curator was granted the power to represent the interest of the unborn child; to consult with persons, parties and institutions necessary for the purpose of providing a report to the court on the interests of the child; and to submit the report to the court by a prescribed date. The judgment does not go into further detail on the role of the curator *ad litem* but it goes without saying that precedent has shown (as discussed in cases above) that in instances where the child is not able to communicate their views or wishes it is the job of the curator to conduct an objective investigation and ensure that their interests are fully aired before a court dealing with a matter affecting them and to avoid substantial injustice to them and possibly others.¹⁰¹

Based on its review of the evidence before it including arguments made by the parties, the *amicus curiae* and the curator *ad litem*, the court decided the following. In regards to the child's birth certificate reflecting the names of both applicants as parents, the court took the approach that the Births and Deaths Registration Act¹⁰² as well as its regulations and forms allow spouses in civil unions to be registered as parents of a child born of the gametes of one of the spouses.¹⁰³ Section 40 of the Children's Act is applicable to same-sex couples because the term "marriage" includes a civil union and therefore a "spouse" includes a person in a civil union.¹⁰⁴ Therefore the child born of artificial insemination can be considered the child of both the applicants who will as a result automatically have parental responsibilities and rights.¹⁰⁵ On arguments made that each artificial insemination matter involving same-sex couples should be placed before a court to be considered in the same way as surrogacy applications, the court took the view that this was not necessary and would be an encroachment on the doctrine of separation of powers.¹⁰⁶ If the legislature wanted to provide only court-sanctioned artificial insemination it would have done so in the Children's Act as is the case with surrogacy.¹⁰⁷

99 *EJ v Haupt* para 14–23.

100 61 of 2003.

101 *Du Toit v Minister of Welfare and Population Development* 2003 2 SA 198 (CC) para 3.

102 51 of 1992.

103 *EJ v Haupt* para 55.

104 *EJ v Haupt* paras 57–61.

105 *EJ v Haupt* para 62–6 and 72–5.

106 *EJ v Haupt* para 6–9.

107 *EJ v Haupt* para 76–9.

The court therefore ordered that the child to be born be considered the child of both the applicants. That both the applicants would have full parental responsibilities and rights. The child's birth be registered in the names of both the applicants.¹⁰⁸ The court acknowledged the curator's submissions had been of invaluable assistance.¹⁰⁹

8 Conclusion

The role of the curator *ad litem* in advancing the best interests of the child and ensuring that the child's views and opinions are made known to a court has developed and is more frequently utilised since the advent of the Constitution. The Constitution introduced the child's right to have a legal representative in civil matters as well as section 28(2), which provides for paramountcy of the best interests of the child. The Children's Act legislated these rights. These two rights and principles have guided the work of the curator *ad litem* in varied matters involving children.

The case law has clearly articulated, when a curator *ad litem* is to be appointed for children in such matters, and their roles and responsibilities once appointed. For a curator to be appointed to a matter the court would have to be convinced that it is in the children's best interests and that a conflict of interest, or other good ground, exists with the parent, guardian or caregiver. The role of the curator is to ensure that the court has before it all the information necessary to protect the interests of the children involved, this requires thorough investigations of the children's circumstances, engaging with the children to obtain their views and opinions and engaging with their parents and/or families. Anything less is a dereliction of duty.

108 *EJ v Haupt* para 80.

109 *EJ v Haupt* para 13.