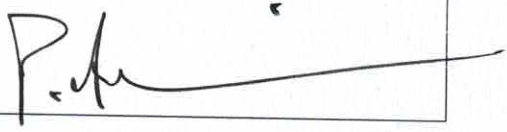


IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 10 JUNE 2025
SIGNATURE 

Case no. 2023-128967

In the matter between:

BLIND SA

and

**FILADELFIA SECONDARY LSEN SCHOOL
SCHOOL GOVERNING BODY OF FILADELFIA SECONDARY
LSEN SCHOOL
MEC FOR EDUCATION: GAUTENG
MINISTER OF BASIC EDUCATION**

Applicant

First Respondent

Second Respondent

Third Respondent

Fourth Respondent




JUDGMENT

The judgment and order are published and distributed electronically.

VAN NIEKERK PA, AJ

INTRODUCTION:

- [1] Applicant is a registered non-profit organisation with key mandate to promote and facilitate the dignity and independence of blind and partially sighted South Africans. Applicant facilitates the employment, education, community mobility and the provision of braille services for visually impaired South Africans and furthermore monitors the living and learning circumstances of blind and partially sighted learners enrolled at various schools throughout South Africa.
- [2] First Respondent is a public-school catering to day learners and boarders with various physical disabilities including blind and partially sighted (visually impaired) learners. First Respondent is located at Soshanguve, Gauteng. Second Respondent is the School Governing Body ("SGB") of First Respondent constituted in terms of Section 23 of the South African Schools Act 84 of 1996 ("Schools Act") and is vested with the governance of First Respondent in terms of Section 16 of the Schools Act.
- [3] Third Respondent is the Member of the Executive Council, Department of Gauteng, the responsible bearer of the Constitutional and Statutory duties and powers bestowed upon the Member of the Council of Education in Gauteng.
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- [4] Fourth Respondent is the Minister of Basic Education cited in his official capacity as the Political Head of the Department of Basic Education and ultimately responsible for the acts and omissions of officials within the Department of Basic Education.
- [5] Applicant applies by way of motion procedure for relief which is framed in the Notice of Motion as follows:

- "1. That STANLEY MALEMATJA, an attorney in the employ of the Centre for Child Law, be appointed as the curator ad litem for all the learners enrolled at the Filadelfia LSEN Special School and Hostel;
2. That the curator ad litem in addition to his common law powers and duties, be authorised and empowered to:
 - 2.1 Investigate the circumstances of all learners enrolled at the Filadelfia LSEN Special School, including those who are boarders, with a view to identifying any rights violations and reporting back to this court with his finding and recommendations;
 - 2.2 Have unfettered access to all the learners enrolled at the Filadelfia LSEN Special School for purposes of consulting and obtaining their views and/or wishes;
 - 2.3 Interview any person or official who has any relevant knowledge that may assist the curator ad litem in fulfilling his mandate;
 - 2.4 Have access to any documents (including official documents and medical records) that may assist the curator ad litem in fulfilling his mandate;
 - 2.5 Have access to the premises of the Filadelfia LSEN Special School and its hostel;




- 2.6 *Appoint any person to assist him in his investigation and reporting;*
- 2.7 *Take photographs of the physical premises of the Filadelfia LSEN Special School and its hostel (provided that learners are to be photographed except with their consent); (sic)*
- 2/8 *Approach a Judge in Chambers, on notice to all parties, to amend and/or include any power that will ensure or better serve the efficient and effective investigation.*
3. *That the curator ad litem is directed to compile a report within 60 days of this order or as soon thereafter as may be directed by this Honourable Court;*
4. *That the costs of this application be paid (sic) any of the respondents who oppose the application, on an attorney client scale;*
5. *Further and/or alternative relief".*

[6] The relief sought by Applicant are opposed by the Third- and Fourth Respondents. On behalf of the Fourth Respondent a point *in limine* was raised of misjoinder, but for the reasons that follow it is not necessary to deal with this point as raised by the Third- and Fourth Respondents. The application is not opposed by the First- or Second Respondents.

BACKGROUND TO THE APPLICATION:

[7] Deponent to the Founding Affidavit in avers that it is necessary to appoint a *curator ad litem* with the powers of investigation as framed in the Notice of Motion because of "documented facts and circumstances" which can be summarised as follows;




- [i] Violence between learners and educators as well as between learners at the First Respondent;
 - [ii] Sexual harassment of learners perpetrated by educators as well as sexual activity between learners at the First Respondent;
 - [iii] Educators at First Respondent not being trained in sign language for deaf learners and braille for blind and partially sighted (visually impaired) learners;
 - [iv] Learners at First Respondent not having quality learning materials or no learning materials at all;
 - [v] Various shortcomings in the infrastructure and facilities at the premises of First Respondent including the school grounds being in poor condition, insufficient mattresses and linen, poor quality food for learners living at the school hostels and inadequate supervision at the hostel of the First Respondent.
- [8] The deponent elaborates in the Founding Affidavit on the aforesaid issues, and from a perusal of the Founding Affidavit it appears that the source of information upon which reliance is based for these averments constitute the contents of investigative journal programmes aired on television, newspaper articles, a 2019 report of the South African Human Rights Commission relating to a fire that broke out in the North West School for the Deaf during August 2015, and articles published by an online news provider. From the contents of the Applicant's Founding Affidavit it appears that these sources of information upon which the Applicant relies for the relief which it claims in the Notice of Motion were generally published prior to, and until 2022. There is no direct factual evidence in support of any of the issues as raised in the founding affidavit, and all evidence in this regard constitutes hearsay evidence. Deponent to the Founding Affidavit furthermore
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sets out facts which illustrate that the Applicant attempted to establish communication with responsible officials in the employ of the Gauteng Department of Education to investigate and address the reported issues at First Respondent, which efforts, according to the deponent, were not to the satisfaction of Applicant.

[9] An Answering Affidavit was deposed to on behalf of the Respondents by the Director: Inclusion and Special Schools, of the Gauteng Department of Education ("the Head of Department"). In terms of the Opposing Affidavit the deponent states that she is bestowed with statutory powers in terms of the Schools Act and enjoined by the Schools Act to investigate and deal with the various issues raised by the Applicant in the application. The deponent *inter alia* makes the following averments:

- [i] First Respondent has a governing body, duly constituted in terms of an approved constitution in terms of section 18 of the Schools Act which Governing body has the statutory obligation to govern the First Respondent in terms of section 20 and 21 of the Schools Act;
- [ii] The First Respondent's Governing Body (Second Respondent) consist of various stakeholders as required in terms of Sections 23 and 24 of the Schools Act;
- [iii] In terms of Sections 22 and 25 of the Schools Act, the Head of Department is enjoined to oversee the proper functioning of the Schools Governing Body and if the Schools Governing Body fails to perform any of its statutory functions, the Head of Department must appoint sufficient and alternative persons to perform all such functions.



- [10] In summary, with reference to Sections 16 to 25 of the Schools Act, the Schools Act provides the Governing Body with the obligation to govern the school in a manner prescribed by the Schools Act, under the supervision of the Head of Department. The Head of Department may close the school in terms of section 16(4) of the Schools Act, withdraw functions of a governing body in terms of section 22 of the Schools Act, or dissolve a governing body in terms of section 25 of the Schools Act. The Head of Department is thus bestowed wide powers to ensure that the mandate of the Governing Body is fulfilled in a manner contemplated by the Schools Act in order to achieve the constitutional right to education and dignity of learners, and any alleged violation of these rights are the responsibility of the Head of Department to remedy.
- [11] Deponent to the Answering Affidavit furthermore acknowledge the fact that there were difficulties in terms of the provision of equipment, disciplinary issues, a lack of proper governance and various concerning incidents at the First Respondent up to 2022, but avers that remedial steps were taken by her subsequent thereto including the fact that a new Governing Body was appointed, the Principal and Head-Principal replaced, and various procedures introduced in order to address the issues. The issues were regarded in such a serious light that it received the attention of the Premier of the Gauteng Province. In the Answering Affidavit it is stated thus:
- "25. *I have mentioned above that it is indeed a fact that the school had previously encountered some measure challenges occasioned by learner behaviour and SGB internal squabbles. I point out that all the above challenges have been brought under control as the school is currently functioning well.*
26. *In a nutshell I wish to indicate that the allegations mentioned by the Applicant in the founding papers relating to the management of the affairs of the school are all*
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old matters as interventions have been made by the Department that culminated in the resolution of all the issues.

27. I also wish to point out that during this tempestuous period at the school, measure interventions were put in place to try and address the issues which included the appointment of an administrator who was appointed to temporarily arrest the impasse. Once the intervention measures had help alleviate the challenges, a new principal was appointed to take over the control of the school up to date."

APPOINTMENT OF A CURATOR AD LITEM:

- [12] On perusal of the Notice of Motion, it appears that the purpose of the appointment of the curator *ad litem* is to conduct an investigation and to be directed to compile a report within 60 days of the order. ¹The Notice of Motion is silent on the Applicant's further intentions, once the envisaged report of the curator *ad litem* is finalised. From the Founding Affidavit if further does not appear whether or not the Applicant intends to seek any directives from this Court, having received the report of the curator *ad litem*, nor does it appear from the Founding Affidavit that there is presently any matter pending in this Court which requires the services of curator *ad litem* in order to assist any party to such matter.
- [13] For the aforesaid reasons I questioned Counsel who appeared for the Applicant at the commencement of the proceedings as to the intentions of the Applicant, once the envisaged report of the curator *ad litem* is received by the Applicant. Counsel for the Applicant could not provide any clarity in this regard and indicated that it would all depend on the contents of the report and/or whatever recommendations the curator *ad litem* may make. What is clear from the Notice of Motion as supported by the Founding Affidavit,

¹ Vide: Notice of Motion, prayers 2 and 3



the submissions made by Applicant's Counsel as well as the contents of the Heads of Argument filed on behalf of the Applicant, is the following:

- [i] The purpose of appointment of the curator *ad litem*, at this stage, is to conduct an investigation and nothing more;
- [ii] There is presently no matter before the Court involving any of the parties or which may impact on the interest of any of the minor learners at First Respondent; The necessity to appoint a *curator ad litem* to assist any of the minor learners thus do not exist.
- [iii] Essentially, the Curator *ad litem* will thus be appointed to do a function bestowed on the Head of Department in terms of the Schools Act namely to investigate issues arising at a school, and recommend remedial action to the Governing Body.

[14] Considering the aforesaid, in my view the application to have a *curator ad litem* appointed with the powers and functions as set out in the Notice of Motion, purely for purposes of investigation without any clear intention thereafter cannot be sustained. The appointment of a *curator ad litem* in proceedings affecting a minor child was held to be an order giving effect to Section 28(1)(h) of the Constitution² by the Constitutional Court which stated that in matters where children's interest are at stake, those interests must be fully aired before the Court to avoid substantial injustice to the affected children and possibly others.³

[15] Section 28(1)(h) of the Constitution reads:"

² Constitution of the Republic of South Africa Act, 1996

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




"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".

- [16] From a perusal of Section 28(1)(h) of the Constitution it is clear that the appointment of a curator *ad litem* is effected in proceedings affecting the child. Counsel for the Applicant as well as Counsel for the Respondent referred to various judgments dealing with the appointment of curators *ad litem*, and in all such judgment the curators *ad litem* were appointed in proceedings before a Court, either to provide the minor child with a "voice of the child" during the proceedings or to protect possible conflicting interests between other litigating parties and a child involved.⁴ *In casu*, there are presently no proceedings and none are anticipated.
- [17] None of the authorities referred to by Counsel provides authority for the *in vacuo* appointment of a curator *ad litem* solely for purposes of conducting an investigation.
- [18] I am furthermore of the view that the powers and functions of the curator *ad litem* as formulated in the Notice of Motion is not in the best interest of the learners at First Respondent *inter alia* for the following reasons:
- [i] From a perusal of the Notice of Motion read with the averments contained in the Founding Affidavit, the curator *ad litem* will be empowered to *inter alia* interview minor children on allegations of alleged sexual abuse and sexual practices amongst learners without the consent of their parents and without guidance of a professional trained to conduct such sensitive investigations. In my view, such an investigation by an untrained individual may cause more damage than good.

⁴ See for instance: *KT & Others v JT & Another* 2024 ZAGPPHC 536 (13 June 2024); *Legal Aid Board in re: four children* (512/10) [2011] ZASCA 39 (29 March 2011)



- [ii] The natural parents of the learners involved are the legal guardians of those learners. They have a vested interest in the matters raised in the Founding Affidavit and the appointment of a curator *ad litem* with the powers and functions as framed in the Notice of Motion clearly infringe on their rights and obligations as guardians of the children. They have not been joined in the proceedings and have therefore not consented to the appointment of a curator *ad litem*.
- [19] The Applicant has adequate alternative remedies available. Insofar as the Applicant aver that either the Second Respondent, Third Respondent or Fourth Respondent failed in their respective constitutional duties or statutory obligations under the relevant sections of the Schools Act to provide the necessary infrastructure, means, or otherwise to facilitate the special needs of learners at the First Respondent, or to create a learning environment conducive to the best interest of the learners, such a failure (if it can be established as a fact) can be addressed by way of a review application under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) as their failure to comply with their statutory duties falls squarely under the definition of "decision" in PAJA. Information which the Applicant wish to obtain from Second Respondent or Third Respondent can be obtained either by way of review proceedings (requesting a record) or through the Promotion of Information Act.
- [20] The investigation which Applicant envisage the curator *ad litem* to conduct as framed in the Notice of Motion, and the responsibility to take measures to address any shortcomings identified at First Respondent is a statutory duty which falls on Third Respondent in terms of the provisions of the School Act read with the Constitution of the Republic of South Africa. If Applicant can demonstrate non-compliance with these duties and/or obligations, Applicant is entitled to call for the record of all decisions taken to
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address the alleged issues raised by Applicant in the founding affidavit and any demonstrated failure to do so is reviewable under PAJA.

- [21] In the premises, I am of the view that the appointment of a curator *ad litem* is not only incompetent, but also not in the interest of the learners at First Respondent.

COSTS:

- [22] Applicant is a non-profit organisation and acts in the public interest. Notwithstanding the fact that the relief as claimed by the Applicant will not be granted, I am of the view that it would be unreasonable and not in public interest to mulch the Applicant in any costs for *inter alia* the following reasons:

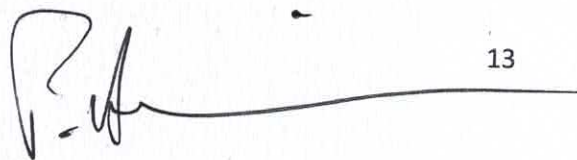
- [i] The Applicant should not be discouraged from instituting legal proceedings when and if the Applicant is *bona fide* of the view that the interest of any person falling under the category of persons whom the Applicant represents are prejudiced;
- [ii] *Prima facie* it appears that the Applicant has attempted to establish a line of communication with the Third- and Fourth Respondents, without any measurable success prior to the launching of this application. In my view a measure of reasonableness on the part of the Respondents could have avoided this litigation;
- [iii] Applicant is a public interest entity⁵.

- [23] In the result, the following order is made:

- [i] The application is dismissed;
- [ii] No order is made on costs.

⁵ *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14



A handwritten signature in black ink, consisting of a large, stylized 'P' followed by a series of loops and a long horizontal stroke extending to the right.

P A VAN NIEKERK

ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA