In the High Court of South Africa
(Western Cape Division, Cape Town)

Case Number: 13080/2022

In the *ex parte* application of:

ANINE FOURIE	First Applicant
DANIEL DE WET SCHREIBER	Second Applicant

In *re*:

ANINE FOURIE	First Applicant
DANIEL DE WET SCHREIBER	Second Applicant
And	
ABRAHAM STEYN DE WET	First Respondent
ILZE-MARIE DE WET	Second Respondent
THE PRESIDING OFFICER: CHILDREN'S COURT FOR THE DISTRICT OF CALEDON N.O.	Third Respondent
THE MASTER OF THE HIGH COURT, CAPE TOWN	Fourth Respondent

Date of hearing: 11 May 2023
Date of Judgment: 17 May 2023

Before: The Honourable Ms Acting Justice Pangarker

JUDGMENT DELIVERED THIS 17th DAY OF MAY 2023

PANGARKER AJ

Background

[1] This matter came before me as an urgent ex parte application in the Fast Lane Court on 11 May 2023, having been postponed by Ralarala AJ on 4 May instant for purposes of service of the application on the respondents in the main application, which consists of Parts A and B respectively. Loots AJ on 26 August 2022 dealt with Part A and granted an Order ("the Order"), the details of which I refer to later herein. After reading the Court file, I requested applicants' counsel and attorney to see me in chambers in light of questions or aspects which I intended to raise. After highlighting these aspects, the matter stood down for a short while and thereafter I proceeded to deal with the ex parte application in open Court.

[2] Before addressing the issues in the matter, it is prudent to set out the history and circumstances which lead to the current application. To this end, I summarise broadly the facts set out in the main application which lead to the Loots AJ Order on 26 August 2022. I note that as this matter involves one minor and one dependent child, it is appropriate that certain family details and identities are not disclosed, hence some names and surnames are referred to by their initials only.

The involvement of the applicants

[3] The applicants are married to each other and reside in Somerset West. The first and second respondents in the main application are married to each other and reside in Caledon. Both couples were very close friends and acquaintances of the late ML and EL, who were the parents of two boys, whom I shall refer to in this judgment respectively as J and E ("the children" or "the boys"). EL, their father, died tragically in 2018 and their mother, ML, passed away in July 2022, after losing a lengthy battle with

cancer. Their parents' tragic and untimely demise, four years apart, meant that in July 2022 the two boys were left orphaned.

[4] ML had executed a Last Will and Testament in 2021 in which she appointed the applicants as the testamentary guardians of her teenage sons. At the time of her death, J was 17 and E was 13 years old. By 2022, the applicants had long since adopted the roles of uncle and aunt to the children and had forged a relationship with them which was established years prior to their mother's death.

[5] After her death, hospital staff at the medical facility where ML was receiving palliative care, contacted the relevant social worker in the area as the children were consequently orphaned. Whilst the detail is not significant, suffice to point out that the social worker conducted a risk and safety assessment and found the children to be in need of care and protection as defined in section 150 of the Children's Act[1] ("the Act"). The children were thus placed in the 90-day care of another couple referred to as the "safety parents". Further investigations by the social worker ensued and Children's Court proceedings were opened, apparently unknown to the applicants so that when they, as the testamentary guardians, were due to collect the children after the funeral, issues arose between the children's maternal family and the applicants.

[6] In July 2022, the Children's Court placed the children in the temporary safety of the first and second respondents. As an aside, the indication in the main application was that the social worker and/or the Children's Court were not informed that the applicants were the guardians of ML's children.

[7] When it became evident that the applicants were precluded from collecting the

[1] Act 38 of 2005

children and taking up their role as legal guardians in terms of the Will, they approached the High Court on an urgent basis in August 2022 for various relief, including a stay of the Children's Court proceedings. The third and fourth respondents abided the decision of this Court. It is apparent from the record of the Children's Court proceedings, that the presiding officer postponed the proceedings to October 2022.

[8] On 26 August 2022, Loots AJ granted the following orders[2]:

> 2. *The proceedings currently pending in the Children's Court for the District of Caledon in relation to the minor children, J…., male, born …, and E…, male, born … (collectively "the minor children") are stayed, pending the outcome of the relief sought in Part B.*
>
> 3. *The first and second applicants **are declared to be the guardians of the minor children** appointed so in terms of the last Will and Testament of the late ML… dated 18 December 2021, read with section 27 of the Children's Act, Act 38 of 2005.*
>
> 4. *The first and second respondents are directed **to place the minor children in the care of the first and second applicants** within 24 hours of the granting of the order[3].*

The relief sought in the ex parte application

[9] In the context of the relief sought in this application, paragraphs 3 and 4 of the Loots AJ Order are relevant. I say this because in their ex parte application, the applicants seek an Order that:

[2] The remaining orders are not set out in the judgment but referred to later

[3] My emphasis

2. *The Court Order dated 26 August 2022 be amended by the inclusion of paragraph 4.1 to read as follows:*

> *4.1 That the children be placed in the legal custody of the first and second applicants.*

[10] I have in addition been requested to consider an alternative Order, handed up in the form of a Draft Order, seeking the following relief:

> *It is declared that any reference to the term "care" in the Order granted by the honourable Mr Acting Justice Loots on 26 August 2022 under the above case number, shall be construed as including the term "legal custody".*

The medical aid Scheme's correspondence and the Scheme's Rules

[11] The first and second respondents gave effect to the Order and in so doing, the status is that the children have been living with the applicants for approximately nine months prior to the date of this application. The children were benefitting from their deceased parents' medical aid, namely the Government Employees Medical Scheme (GEMS) but as both parents passed away, the only way they could continue to benefit was by way of an application for one of the children to become a main member. The alternative option was for the children to become dependents of the medical aid Scheme of the second applicant, who is the main or principal member. I refer to the medical aid Scheme as "the Scheme".

[12] The first applicant explains in her affidavit that despite efforts by her, the second applicant and the Executor of the late ML's Will and deceased estate, to convince the

Scheme that the children are the applicants' dependents and should be accepted as such, the Scheme decided to exclude the children as dependents of the second applicant. Thus, their requests that the two children be regarded as his dependents have been rejected.

[13] On 29 September 2022, the Scheme's Forensic Unit addressed correspondence to the second applicant regarding his request that the children be admitted as his dependents on the Scheme[4]. Certain personal details in the correspondence are excluded from this judgment and I refer only to the relevant parts below. AF2 states as follows:

> *'Request received from yourself (Appointment Nr ___) for inclusion of J and E as child dependents on _____ refers.*
>
> > ***In accordance with _____ Rule 9.3, when including/registering a child, the following definition is applicable – Child*** *means "A principal member's natural child, or a stepchild or legally adopted child, who has not reached the age of 21 years, or a child who has been placed in the legal custody (recognised by law) of the principal member or his/her spouse. The principal officer of the Scheme may according to approved criteria and after proof has been received, grant approval for membership of a child while the legal processes is ongoing to gain custody".*
>
> *According to para. 3 of your court order; you're declared to be a guardian of the minor children based on the last will and testament of the late ML dated 18 December 2021. Guardianship relates only to assisting the child in legal, contractual and administrative matters, including safeguarding their property, as well as refusing or giving consent required. It is important to note that the court did/does not bestow any parental responsibilities and rights (legal custody) upon*

[4] AF2

yourself.

*Therefore, both children **do not**[5] comply with the criteria as set out in the Rules and the scheme.*

Thank you.

…..
OPMED Forensic Department'

[14] Attached to AF2 is a copy of the Scheme's Rules including definitions of words and terms contained therein ("the Rules")[6]. The first applicant explains that the problem is that the medical aid Scheme uses the word **"custody"** and that the Order uses the words **"care"** and **"declared the guardians"**. She therefore seeks that the Order be amended in order to make provision that the Court bestows **"the parental right of custody of the children"** upon the applicants[7]. The first applicant nonetheless makes the averment that the amendment is sought even though, according to the applicants, the Order already granted them what was historically referred to as **"custody"** and is now referred to as **"care"**.

[15] The first applicant contends that inasmuch as the Scheme provides a full dispute resolution mechanism in Rule 24, this is a long process which could potentially cause prejudice to the medical and educational needs of the older child, J. As a result, the applicants thus decided to approach the High Court as a matter of urgency to amend the Order so that it includes the word **"custody"** for purposes of the categorization and definition of **"child"** in the Scheme's Rules.

[5] The bold words and phrases in the correspondence is as
[6] AF3

Urgency and the circumstances of the older dependent child, J

[16] The urgency of this particular application is borne out by circumstances mainly related to the older child who suffered an orthopedic injury during a rugby match on 15 April 2023. He received medical treatment and underwent X-rays and an MRI scan as set out in the annexures to the first applicant's affidavit. A medical certificate issued by a medical practitioner at Helderberg District Hospital on 2 May declared him unfit for eight days and he was disallowed from participating in sport for approximately a year unless advised otherwise.

[17] From the evidence it would seem that J suffered an injury to his cruciate ligament and required the use of a leg brace. The first applicant explains that a quotation for an MRI scan is over R15 000 but eventually Winelands Radiology charged R5 416[8] as the specialist agreed to conduct the MRI scan through the Sports Science Institute. Furthermore, J's mobility is limited and he may have to wait up to three months for surgery at Tygerberg Hospital. In addition, the applicants are concerned about his education and health as he is currently in Matric and has missed school due to being indisposed as a result of the injury sustained.

[18] The applicants complain that the second applicant's medical aid Scheme has applied a rule which has not been updated in line with current legislation[9] and thus refuse that J be admitted as a dependent on such Scheme. To add, the various annexures attached show that the applicants have paid for the medical expenses in relation to, *inter alia*, a consultation with a medical practitioner, X-rays, MRI scan, ultrasound, hospital fees (casualty), and medication, either in cash or per credit card. The cost of leasing a leg brace was unknown at the date of the application.

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[7] Founding affidavit, par 16

[8] AF13

[19] The applicants' case is that the result of the medical aid Scheme's exclusion of the children (more especially, J), is that the applicants are forced to seek public health services when the second applicant is a member of the Scheme and could seek specialist medical attention for J sooner and possibly secure an earlier surgery date. The applicants clarify that the application is not about medical care from the public and private sector.

Aspects raised by the Court

[20] On the issue of service of the ex parte application as required by Ralarala AJ on 4 May, I am satisfied that service was effected electronically on the first and second respondents' attorney. As to the third and fourth respondents, it is noted that they did not participate in the main application and abide the Court's decision. Ultimately, the applicants approached the Court ex parte for very limited relief in the form of an amendment to the existing Order.

[21] I raised the following aspects or questions related to the matter, with counsel: Firstly, whether there remained any pending Children's Court proceedings regarding the youngest child, E; secondly, whether the Scheme should have been cited or joined in the ex parte application; thirdly, the significance, if any, that J has turned 18 years old; and, fifthly, the effect (if any) of the inclusion in an amended Order of the terms **"custody"** and **"legal custody"**, which are referred to in the Scheme's Rules, but not used in the Children's Act.

[22] Counsel submitted and confirmed that the instructions received from her attorney was that in view of the Order granted on 26 August 2022, no further proceedings were due to continue in the Caledon Children's Court, and I accepted this submission. On the

[9] The reference here is to the Children's Act 38 of 2005

question as to whether the Scheme should have been cited in the ex parte application, the submission was that in view of the relief sought – an amendment of the Order to include the Scheme's terminology as per its Rules - there was no need to cite nor join it in the *ex parte* application. The motivation for such submission was that no relief is sought against the Scheme and it was further submitted that if the application is granted, it would still be up to the Scheme to accept or reject the children as dependents of the second applicant.

[23] In respect of the second Draft Order, counsel submitted that a declaration along similar lines as the amendment sought, may be considered to be more appropriate in the circumstances. In view of my ultimate finding in this matter, I was not of the view that a formal amendment of the application was necessary in respect of the applicants' alternative Draft Order handed up.

[24] Having regard to the submissions on certain aspects which I raised, I appreciate that as the application and argument evolved, this judgment does necessitate a discussion of Rule 3.9 of the Scheme's Rules and AF2. However, as correctly submitted on behalf of the applicants, this is not a matter where findings are sought to be made about the correctness or otherwise of the Scheme's Rules in respect of the inclusion or exclusion of these children as dependents of the second applicant.

[25] In my view, even though the relief sought warrants an exercise in the interpretation of the words and terms **"care"**, **"custody"** and **"legal custody",** it is proceeded with against the backdrop of the Children's Act, the Order granted by Loots AJ and the specific circumstances involved in this matter. For all of the above reasons, I am therefore satisfied that the second applicant's medical aid Scheme, need not have been cited in this ex parte application. The remaining aspects which I raised with counsel are addressed later in the judgment.

Discussion and findings

[26] Given the facts which lead to the launch of the main application, it is evident that paragraph 3 of the Order is a declaration that the applicants are the **guardians** of ML's two minor children, and secondly, in paragraph 4 thereof, that the children would be placed in the applicants' **care**. We know that the first and second respondents complied with the Order in that the children were placed in the applicants' care and consequently, that they were in their care at the time of the Scheme's correspondence to the second applicant and they remain in the applicants' care.

[27] It is evident that the Scheme, in reaching its decision that the children do not meet the criteria set out in its Rules, rely on Rule 3.9, thereof. Furthermore, its view as expressed in AF2 is that in terms of paragraph 3 of the Order, the second applicant was declared to be a guardian of the minor children based on the Last Will and Testament of their late mother, ML.

[28] The author of AF2 then states that guardianship relates *"only to assisting the child in legal, contractual and administrative matters, including safeguarding their property, as well as refusing or giving consent required."* The author emphasizes that the Court did not bestow any parental responsibilities and rights (legal custody) upon the second applicant, and therefore the children do not comply with the criteria set out in the Rules of the Scheme.

[29] Having regard to the content of AF2, it is thus apparent that the Scheme, based on its understanding of the Order read with Rule 3.9, has excluded the children from becoming dependents on the second applicant's medical aid fund. The Scheme's Rule 3.9 defines a **"child"** as follows:

'A principal member's natural child, or a stepchild or legally adopted child, who has not reached the age of 21 years, or a child who has been placed in the legal custody (recognised by law) of the principal member or his/her spouse[10]. The principal officer of the Scheme may according to approved criteria and after proof has been received, grant approval for membership of the child while the legal process is ongoing to gain custody.'

It is furthermore evident that the Scheme considered that the latter definition of **"child"**, that is, being a child who has been placed in the legal custody (recognized by law) of the principal member or his spouse, was relevant to the children in this matter.

[30] There is no dispute nor issue that the second applicant, as the principal member of the Scheme, along with the first applicant as his spouse, were declared to be the legal guardians of the children in terms of the Order. As a matter of completeness, I point out that the first applicant falls within the definition of **"spouse"** and thus **"dependent"** in terms of the Scheme's Rules 3.44 and 3.18, respectively.

[31] Having regard to AF2, I agree with the author's description and understanding of guardianship. I also note with interest that the Scheme's understanding of what guardianship entails is in line with the definition of guardianship as described in section 18(3) of the Act. The author of AF2 states, correctly so, that such children would not fall within the definition of **"child"** who may be included as a dependent on the principal member's medical aid Scheme in view of the definition of **"child"** in Rule 3.9. Ultimately, this application to vary the Order has no bearing on the guardianship declaration in the Order[11].

[10] My emphasis
[11] Paragraph 3 of the Order

[32] According to my understanding of AF2, the writer bases the exclusion of these two children from the Scheme's criteria in Rule 3.9 on two grounds: firstly, because the second applicant was awarded guardianship of the children by the Court, an aspect which I addressed above; and, secondly, the Court did not bestow any parental responsibilities and rights (legal custody) on the second applicant in respect of the children. It is in respect of the latter aspect where I find that my understanding of the Order and terminology relevant to this matter, differs from that of the author of AF2 on behalf of the Scheme.

[33] With respect to the author of AF2, I point out that the correspondence makes no reference to paragraph 4 of the Order, which states as follows:

> *The first and second respondents are directed to place the minor children in the care of the first and second applicants within 24 hours of the granting of the order*[12].

With regard to paragraph 4 of the Order, counsel has referred me to section 18 (2) read with section 1(1) and (2) of the Act.

[34] Section 18 (2) states that:

> *(2) The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right –*
> *(a) to care for the child;*
> *(b) to maintain contact with the child;*
> *(c) to act as guardian*[13] *of the child; and*
> *(d) to contribute to the maintenance of the child.*

[12] My emphasis
[13] My emphasis

[35] It is submitted on behalf of the applicants that the Order indeed granted care to the applicants and that while the Scheme has used terminology such as **"custody"**, which is not in accordance with the Act, I must have regard to the definition of **"care"** in section 1(1) of the Act. It is submitted that in terms of section 1(2) of the Act, **"custody"** includes **"care"**.

[36] Having regard to the view held in AF2 that no parental rights and responsibilities were awarded to the second applicant, and counsel's submissions, my discussion on the "**care"** and "**custody"** issue thus commences with a consideration of section 18 (1) of the Act. This section grants a person either full or specific parental responsibilities and rights to a child. These responsibilities and rights are then described in section 18(2) which I have set out above. Thus, it should for all intents and purposes be evident from section 18(2)(a) that caring for (or, to care for) a child is regarded in law, as a parental right as well as a parental responsibility which is bestowed upon a person. I must also emphasize and perhaps state the obvious that the Children's Act is the current legislation which defines parental responsibilities and rights in relation to children.

[37] To the extent that AF2 is thus silent about paragraph 4 of the Order, I may therefore conclude that the Scheme does not equate the granting of **"care"** to the second applicant, as bestowing upon him any parental responsibilities and rights in respect of the children. The question thus has to be asked, what does "**care"** mean in relation to a child and in terms of the applicable legislation? The answer is found in section 1(1) of the Act which defines **"care"** as follows:

> ***'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 child's education and upbringing, including religious and cultural education, 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

(j) generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child."

[38] From the above definition, it is evident that **"care"** includes the provision of a suitable place for the child to live, but the interpretation exercise does not end there. My discussion in the preceding paragraphs refer, and if regard is had to the meaning of section 18 (2), then it is so that I should adopt the approach to interpretation of the provision of a statute as expressed by the learned Wallis JA in **Natal Joint Municipal Pension Fund v Endumeni Municipality**[14], where the SCA stated as follows:

"The present state of the law can be expressed as follows: Interpretation is the

[14] 2012 (4) SA 593 (SCA) 603 at F-G and 60-4 A-D – footnotes are excluded from the above extract of the judgment

process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make the contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.[15]"

[39] It is evident from the Preamble to the Children's Act that, amongst other reasons for its enactment, there existed the need to introduce changes to the existing law relating to children. One of the motivations for these changes was to recognize that children were to be provided the necessary protection and assistance to encourage them to assume their roles and full responsibilities within the broader community, but in addition, it was that children should live and grow in a peaceful and harmonious family environment to shape his or her full development[16].

[15] See also South African Airways (Pty) Ltd v Aviation Union of South Africa and Others 2011 (3) SA 148 (SCA)

[16] My summation of the last paragraph of the Preamble to the Children's Act

[40] Aside from the Preamble, section 2 of the Act deals with the Objects or purpose of the Act. While several objects are identified, these include and are not limited to: the promotion and preservation of families; to give effect to the constitutional rights of children, such as family or parental care; to strengthen and develop community structures; to provide care and protection to children who are in need thereof; to protect children from abuse, maltreatment, discrimination, exploitation and more, and to recognize that the best interests of the child is of paramount importance in all matters involving that child[17].

[41] Thus, applying the **Ndumeni** objective approach to interpretation and giving the language of section 18 (2) read with the definition of **"care"** in section 1(1), its ordinary and grammatical meaning within the context and purpose for which the provision was enacted, it is clear from the language used in the section that caring for (or to care for) a child, maintaining contact with him/her, acting as his guardian, and maintaining him/her, are rights and responsibilities which are afforded to a person. There can be no other interpretation or meaning afforded to section 18(2) of the Act.

[42] Furthermore, I am of the view that in bestowing such section 18(2) rights and responsibilities upon a person, some of the objects of the Act, such as the strengthening of families, giving effect to the child's constitutional right of family care[18], and promoting the development and well-being of the child, are sought to be achieved. I must also add that to care for a child includes the responsibility of ensuring that his/her best interests are of paramount concern in all matters involving that child and section 28(2) of the Constitution entrenches this child rights principle[19].

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[17] I have not listed all the objects of the Act – see section 2(a) to (i)

[18] See Section 28(1)(b) Constitution of South Africa, 1996

[19] Section 28(2) Constitution must be read with the section 1(1) definition of "care" par (j); see also R v H and Another 2005 (6) SA 353 (C) par 10

[43] Should there remain any doubt that the applicants were bestowed the rights and responsibilities of care on 26 August 2022, then one need only read paragraphs 5 and 6 of the Order which should dispel such doubt. In terms of these paragraphs, the first and second respondents in the main application,[20] were ordered to hand over all personal documents related to the children, including their birth certificates, identity documents, passports and the like; as well as all their possessions, including but not limited to school requirements and bank cards.

[44] In my view, paragraphs 5 and 6 of the Order entrenches the fact that the applicants were to have the care of the children as the items and personal documents belonging to them would be required by them to guide, direct and secure the children's education; guide, assist and advise them in decision-making; accommodate any special needs of the child(ren) and so forth, which are but some of the responsibilities to be undertaken by a person who has the care of a child[21].

[45] This brings me then to the words or term **"legal custody**", which is contained in the Scheme's Rule 3.9 and AF2. Rule 3.9 requires that a potential dependent child who does not fall within the first three categories, must be a child who has been placed in the *"legal custody (recognised by law) of the principal member or his/her spouse"*. Inasmuch as Rule 3.9 speaks of **"legal custody (recognized by law)"**, such terminology is not accordance with the words or terms used in the Children's Act, which came into operation on 1 April 2010.

[46] However, the Scheme Rules must be read with the Medical Schemes Act (MSA)[22], which does not define **"child"** but defines a **"dependent"** as including **"dependent children"**. There is no definition attributed to the term **"dependent**

[20] Who were the safety parents of the children at the time
[21] See definition of "care" in section 1(1) of the Act
[22] Act 131 of 1998

children" in the MSA[23].

[47] As indicated during argument, the purpose of this amendment application is not to take issue with the Rules of the Scheme as they stand, but rather to seek relief which brings paragraph 4 of the Order within the ambit of the Scheme's Rules so as to not prejudice the children, especially J. The Scheme's use of the words **"custody"** and **"legal custody"** must thus be considered with reference to section 1 (2) of the Act which states that:

> *(2) In addition to the meaning assigned to the terms **'custody'** and **'access'** in any law, and the common law, the terms **'custody'** and **'access'** in any law must be construed to also mean **'care'** and **'contact'** as defined in this Act.*

[48] In my view, section 1 (2) should be interpreted widely and not restrictively. To attribute a meaning to **"custody"** other than that referred to in section 1(2) because the word **"custody"** appears in a document or written instrument, which is not law or the common law, would be to approach the interpretation of the section in an insensible manner, which Wallis JA warned against. The import of section 1(2), when considering the language used in the context of the Act as a whole and the circumstances of this matter, would or should dictate that **"custody"**, where it appears in the Rules of the medical aid Scheme, also means **"care".** In addition, the question may well be asked where else would one find the definition of **"custody",** which affords parental rights and responsibilities to persons in relation to children? The answer lies in the Children's Act.

[49] According to section 1(2), '**custody''** is construed to also mean **"care'',** and while the Act no longer refers to **"custody"** of a child, specific provision has been made

[23] I accept that in terms of section 24 read with Chapter 5 of the MSA, a medical aid Scheme must make provision for its own Rules which govern its business and any other provisions related thereto, and which members must

in section 1 (2) for circumstances where the word **''custody''** was or is still used. As a matter of completeness, I point out that the Cambridge dictionary defines "**custody"** as *"the legal right or duty to care for someone or something, especially a child after its parents have separated or died'* and the *"right or duty to care for someone or something, as for a child whose parents have separated or died"*[24]. It is thus apparent that the English dictionary definition of **"custody"** corresponds with the definition of **"care"** in section 1 (1) and (2) read with section 18(2) of the Act. There is thus no doubt that a child who is in the custody of a person is a child who is in the care of such person and that the latter exercises such right and responsibility in relation to such child.

[50] As for the Scheme's requirement that the child must be in the **"legal custody"** of the principal member, there can be no uncertainty that the applicants were awarded care, and thus custody, by the High Court. It bears mentioning that the High Court is recognised as the upper guardian of all minor and dependent children, and in the circumstances of this matter, it granted the Order awarding the applicants the parental rights and responsibilities of guardianship and care[25]. As such, and in the absence of anything to the contrary, J and E were thus children who were "*placed in the legal custody (recognized by law) of the principal member or his/her spouse"*[26] on 26 August 2022.

Remaining aspects and conclusion

[51] The older child, J, who sustained a serious injury and in respect of whom the applicants incurred multiple medical expenses[27], turned 18 in February 2023. It bears mentioning that at the time of the granting of the Order and AF2, he was a minor, and is still dependent on the applicants as he is currently a Matric learner. I have thus referred

adhere to.

[24] 'Custody' noun (care) at *dictionary.cambridge.org*

[25] See H v Fetal Assessment Centre 2015 (2) SA 193 (CC) par 64

[26] See Rule 3.9 of the medical aid Scheme's Rules

to him as a "**child"** throughout this judgment and notwithstanding the attainment of the age of majority.

[52] This is a matter which necessitated the applicants' approach to this Court on an urgent *ex parte* basis as the medical aid Scheme in question had excluded the children from becoming dependents of the second applicant's medical aid fund and in circumstances where J had suffered a serious injury. As no orders were sought against the Scheme and it has not participated in these proceedings, it is hoped that the medical aid Scheme has regard to paragraph 4 of the Order of Loots AJ read with the provisions of the Children's Act referred to in this judgment.

[53] In conclusion and in view of my discussion and findings, I am more inclined to grant the relief which follows the alternate Draft Order handed into Court, with the necessary changes as set out in the Order below.

Order

[54] In the result, I grant the following Order:

1. The application for an amendment of paragraph 4 of the Order dated 26 August 2022, is hereby granted in that paragraph 4.1 is added to such order, which reads as follows:

> *'4.1 It is declared that the reference to "care" in paragraph 4 of the Order shall be construed to also mean and include the terms "custody" and "legal custody".'*

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[27] See AF4 - 13

2. There shall be no order as to costs.

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M PANGARKER
ACTING JUDGE OF THE HIGH COURT

For first and second applicants: Adv C Tait

Instructed by: Du Plessis and Hofmeyr Inc.
JK van Wyk
Somerset West

First to Fourth Respondents: No appearances