CHIPO USORE
and
WELLINGTON MUBATANHEMA
versus
SAMSON CHIGWADA
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA J
HARARE, 15 and 23 July 2020

CHAMBER APPLICATION FOR GUARDIANSHIP

CHIRAWU-MUGOMBA J: This matter was placed before me as chamber application with the following relief sought.

a. The applicants Chipo Usore and Wellington Mabatanhema be and are hereby appointed joint legal guardians of a minor child A.A.C born 12th Of August 2007.

b. That there be no order as to costs.

I raised a query over lack of compliance with O32 R249 (1) (b) (2) that is the appointment of a curator *ad litem.* On the 18th of June 2020, one Tapiwa Gerald Muguwe was appointed as curator for the minor child. I note in passing that the rule is sequential that before filing a substantive application, a curator should be appointed first. I however condoned the appointment of a curator after the filing of a substantive application since this would be served on him and he would be required as he did to compile a report.

The application

The applicants are married to each other in terms of an unregistered customary law union. The mother of the minor child, A.A.C (born on the 21st of August 2007) one Gracious Chiwera (the deceased) passed away in Harare on the 18th of November 2019. In support, a copy of her death certificate was attached. The 1st applicant is a nephew of the deceased though it was not explained in detail the exact nature of the relationship. The deceased was married to the 1st respondent. After her death, the applicants took custody of the minor child with the consent of the 1st respondent. The latter stays in Mutasa District, Mutare. The applicants are facing difficulties in handling the affairs of the minor child in incidences where

the 1st respondent as the natural guardian is required to act. In such instances, the applicants are asked to produce a certificate of guardianship. The applicants are desirous of including the minor child as a beneficiary to their employment benefits. They also sometimes travel out of Zimbabwe as a family and they thus require a certificate of guardianship to enable them to travel with the minor child. It will affect the child psychologically if she is left behind. It will be in the best interests of the minor child if the applicants are appointed joint guardians. The 2nd applicant deposed to a supporting affidavit.

The 1st respondent deposed to a supporting affidavit that essentially confirmed the averments of the applicants.

The curator ad litem's report

The salient points of the report are as follows. The curator prepared the report after meeting the applicants, the 1st respondent and the minor child. The applicants are staying with the minor child including meeting all her needs. The child is happy to be staying with the applicants and is properly taken care of. The 1st respondent is also happy to have the minor child stay with applicants especially that the 1st applicant has assumed the traditional role of being the 'mother'. The applicants have the means to look after the minor child. The report concluded that the minor child is still young and needs guidance and support in her daily life. The applicants are able to closely monitor the child and give her support and guidance. It will be in the best interests of the minor child if the applicants are appointed joint legal guardians especially in view of the fact that the 1st respondent is not always available. In the event of an emergency that requires parental or the guardian's consent, the applicants will step in.

The law

Section 9 of the Guardianship of Minors Act [*Chapter 5:08*] deals with applications for guardianship. In terms of s 9 (1) in instances where the minor has no natural guardians, such an application may be heard at the Magistrate Court sitting as a Children's Court. It follows that where one of the parents is alive, such an application can only be made to and heard in the High Court – see In Re *Nherera,* HH-117-15.

It is trite that the award of guardianship to a third party is done under very exceptional circumstances, see In *Re Maposa,* (2007) (2) ZLR 333 (H). In *Kutsanzira* v *The Master of the High Court,* 2012 (2) ZLR 91(H), GUVAVA J (as she then was) stated as follows in a case in which the father had 'consented' to being divested of his guardianship rights: - (at page 3)

> "The Act provides primarily for the situation where a minor has no natural guardian or tutor testamentary and sets out a procedure to allow a third party to be appointed as guardian in their stead. It should be noted that the procedure outlined in s 9 of that Act specifically requires that an inquiry be conducted to determine who should be appointed as guardian. In the case of *In re Gonyora* 2001 (2) ZLR 573 it was held that in making the appointment of guardian the court must consider the minor child's best interests. Although in this case the court was dealing with a child whose parents were deceased the same principles must be taken into account even in a case such as this where one of the parents is alive."

The learned Judge continued:-

> "It seems to me therefore, that the power to divest a parent of guardianship is a common law power which is exercisable by the courts very sparingly……..The Inquiry into guardianship, like that of custody, cannot in my view, be one –sided. In other words, it is not only an inquiry into the advantages that will accrue to the child if its guardianship is granted to the applicant but also an inquiry into why the respondent must be deprived of his guardianship. …….An inquiry into guardianship is an inquiry into the suitability of a parent to discharge the legal obligations imposed by law on the guardian of a minor child. It is not an inquiry into issues like where the child will live or how and where it will be educated as those inquiries relate to issues of custody."

It is therefore imperative that an inquiry be held to make a proper determination – see also In Re *Chimhanzi*, HH-10-11. It is also imperative that the applicant provides details that will enable a court to make a proper determination – see *Saungweme vs. The Master of the High Court, N.O.*

Whist the courts have dealt with joint guardianship and custody, it has been in the context of either the Matrimonial Causes Act [Chapter *5:11*] see *Maarschalk* v *Maarschalk*, 1994(2) ZLR 113, *Berens* v *Berens*, 2009(1) ZLR 1 and *Beckford* v *Beckford*, 2006(2) ZLR 377 or where the contest is between the mother and the father of the child – see *Sadiqi* v *Muteswa*, HH-249-20. The Guardianship of Minor's Act does not envisage appointment of joint guardians but a guardian – see generally s9.

Application of the law to the facts

In *casu*, the applicants have not indicated in terms of which law they have made the application. The circumstances of the applicants are unknown. The founding affidavit is replete with sweeping statements, for instance the claim that they wish to have the minor child included in the employment benefits is not supported by proof of employment. There is no information that points out to where the child is going to school or her living arrangements. Infact the major reason for seeking guardianship is so that they travel with the minor child. Awarding guardianship to a third party on the basis of ability to travel will make

a mockery of the role of the High Court as being the upper guardian of all minor children. It will create an impression that guardianship to a third party is awarded upon mere request.

There are no details as to the circumstances that have made the 1st respondent to consent to being divested of guardianship. His affidavit does not give details as to his reasons why he has consented to such a drastic solution for the child. The mere fact that the minor child has been staying with the applicants since the death of her mother is not enough. The personal circumstances of the 1st respondent remain largely unknown.

The report by the curator does not take the matter any further. It is an upgraded version of the founding affidavit but gives no information on the particular circumstances of the applicants and those of the minor child. In particular it does not state the reasons why the 1st respondent seeks to be divested of guardianship.

The applicants and the curator have not stated why joint guardianship is sought and the legal basis upon which it should be granted.

In the result, the application has no merit and should be dismissed.

The Registrar is directed to bring this judgment to the attention of the Master of the High Court.

DISPOSITION

a. It is ordered that the application be and is hereby dismissed.

b. There shall be no order as to costs.