

PRINCESS NOXOLE NCUBE
versus
BOB MLUNGISI SIANSOLE N.O.
and
THE MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO; 12 September 2024

Chamber application for sole guardianship and custody

DUBE-BANDA J:

[1] This is a chamber application. The applicant, in her capacity as an aunt to B.U.M. (“minor child”) instituted this application seeking to be declared the sole guardian and custodian of the minor child. The child is four years old, having been born on 15 February 2020. In support of the application, the applicant filed a founding affidavit, supporting affidavits and a number of documents. The *curator ad litem* (“*curator*”) filed a report, and at my instance a further supplementary report was filed. I will deal with these reports later in this judgment.

The Factual Background

[2] The facts that underpin this application are that the applicant is an aunt to the child by virtue of being a sister to its mother. The applicant avers that she is a citizen and has always resided in Zimbabwe. She is in a stable employment and has proper accommodation in Victoria Falls. The mother of the child resides in Bulawayo and has no proper accommodation. She also has no substantial qualifications and is not gainfully employed. In March 2020, she left the child in the custody of the applicant and its maternal grandmother. The applicant avers further that she has always been the financial provider for the child since birth, providing food, clothing and money for its upkeep. The child is currently in pre-school. She says she has developed a strong bond with the child. The applicant further avers that she encounters difficulties every time she travels with the child as she would be required to seek the authorisation of the mother. In case of a medical emergency, she would face challenges as she would have to contact the child’s mother in Bulawayo.

[3] In her supporting affidavit the child's mother consents and supports this application. She avers that she has not stayed with the child since it was four weeks old, and most of the time the child stays with the applicant. She is not aware of the whereabouts of the child's father; she is not employed and has no proper accommodation. She has no means to provide for the child. Further, in his supporting affidavit the applicant's husband supports the application.

[4] The curator's report merely repeats in summary the facts stated in the founding and supporting affidavits. It also deals with the law regarding the concept of the best interest of the child. It is in this context that I raised a query regarding the inadequacy of the report and I directed the curator to file a supplementary report. In the supplementary report the curator states that in coming up with the report he relied on the documents filed in the application, and that he was unable to interview the father of the minor child nor did he interview the mother of the child. He then re-cycles the averments contained in the founding, supporting affidavits and the documents in support of the application.

The application of the law to the facts

[5] The applicant is not a natural parent of the child, and hence she is a third party in relation to the child. Guardianship and custody sought by a third party cannot be granted for the mere asking. In *Usore & Anor v Chigwada & Anor* HH 483 of 2020 the court held that it is trite that the award of guardianship to a third party is done under very exceptional circumstances. In appointing a guardian, the court must consider the minor child's best interests. See *In Re Maposa*, (2007) (2) ZLR 333 (H); *Kutsanzira v The Master of the High Court*, 2012 (2) ZLR 91(H); *In re Gonyora* 2001 (2) ZLR 573; *In Re Maphos* HB 115/07.

[6] 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 Zimbabwe. Section 81(2) of the Constitution underscores this imperative when it says "a child's best interests are of paramount importance in every matter concerning the child". See *Dangarembizi v Hunda* 2018(2) ZLR 132 (H); *In re Sibanda* HH 207/18. The concept of the best interest of the child embodies both the substantive and procedural right. The procedural component of the right includes the child's right to be heard and to have their views considered whenever their best interests are at stake. It is in this context that r 61(2) of the High Court Rules, 2021 says:

"In the case of any application in connection with—
(a)

(b) a minor;
a chamber application, annexing the written consent of the person
proposed to be appointed, shall first be made for the appointment of
a *curator ad litem*.”

[7] *Ex facie* the law requires that a *curator ad litem* be appointed and such curator is to file a report. In terms of the definition of a *curator at litem* as per *Claassen's Dictionary of Legal Words and Phrases* second edition, volume 1 Juta August 2008 a *curator ad litem* “is a curator for the purpose of a suit, i.e., a curator appointed by the court to protect the interests of some party to a legal proceeding who is unable, or is alleged to be unable, to protect his own interests.” It is in this context that the law requires a *curator ad litem* to be appointed in any application in connection with a minor.

[8] In such an application it is imperative that the court has before it all the material facts to enable it to make a proper determination that resonates with the best interests of the child. It is in the context that a curator is appointed to assist the court to discharge this important function, A curator is an officer of the court and responsible only to the court. See *Ex Parte Campher* 1951 (3) SA 248 (C). The position of a curator is a responsible one because the court relies heavily on the report in determining whether or not to grant the application. The report that merely summarizes affidavits and documents filed in the application cannot be of assistance to the court. The report must canvas and bring forward valuable material and go beyond what is contained in the affidavits. In fact, r 61 (4) of the High Court Rules, 2021 says the curator must conduct an investigation, this means he or she must conduct an investigation into the affairs and welfare of the minor child. See *Siduna & Anor v Tanyanyiwa & Anor* HH 749/22. In the reading of r 61 (4) summarizing affidavits cannot amount to conducting an investigation. If it were a matter of summarizing affidavits and referring to case law there would be no legal requirement for a curator because the court itself has the competency to summarize the affidavits and peruse case law.

[9] It is important that those who accept appointments to the office of a *curator ad litem* must understand and appreciate the duties of this office and what it entails, otherwise they have no business in accepting such appointments. The function of the *curator ad litem* is to investigate the matter by conducting interviews with the persons having an interest in the matter. In *casu*, the curator did not conduct an investigation as envisaged in r 61(4). He did not meet and interview any interested person in connection with this matter. In general, the child must be informed of the purpose and nature of the application and be interviewed through properly and

carefully structured questions taking into account their age and the sensitivity of the matter. If the child, because of their age or for whatever reason cannot be interviewed the report must give reasons for this and show what was done, if any, to get their views. At this moment it would be inappropriate to determine this application especially when the views of the child have not been solicited, and no reasons are given why its views were not sought. It could have been because of her age, but this must be stated in the report and the safeguards put in place to protect the interest of the child must be stated. The report is silent on this important aspect. Furthermore, the mother of the child was not interviewed. The applicant and her husband were not interviewed. The fact that they filed affidavits is inconsequential, the more reason they have to be interviewed. The report does not bring to the court's attention any facts or circumstances pertinent to this application except to re-cycle the information in the affidavits. A report prepared in terms of r 61(4) is not merely a matter of form, but of substance. This case represents a text-book case of incompetence in discharging the duties of a *curator ad litem*.

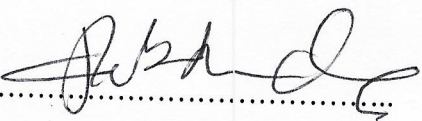
[10] It is important that it be understood that the curator represents the best interests of the child by placing all relevant and material facts and evidence before court and advancing all arguments that can reasonably be put forward on the child's behalf. The *curator* protects the best interests of the minor child, not its wishes nor the wishes of its natural guardian nor the applicant. This application is defective for want of an informative *curator ad litem's* report. An uninformative report is no report and renders the application incomplete. A thorough and detailed *curator ad litem's* report is required.

[11] I am therefore unable, without an informative report to determine whether or not there exists exceptional circumstances to divest the mother of the child of guardianship and vest it in the applicant. Notwithstanding this apparent deficiency, I am not inclined to dismiss this application, for the reason that it turns on the welfare of a minor child. Again, this court being the upper guardian of all minor children has the inherent jurisdiction to regulate its process in a case involving a minor. In general, a court should, where a child's welfare is at stake be slow to dismiss a matter on the basis of an incomplete and incompetent report. It is for these reasons that I am inclined to struck this matter off the roll and order that it must not be placed before a judge until such time a detailed and informative report has been filed.

For the reasons provided I would therefore make the following order:

- i. The application be and is hereby struck off the roll.

- ii. The Registrar is directed not to place this application before a judge until such time that a detailed and informative *curator ad litem*'s report has been filed.

DUBE – BANDA J:  10/09/2024

Mvhiringi & Associates, applicant's legal practitioners