In Re ALICE MAENZANISE
(For her appointment as the legal guardian of P.A.N a minor)

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA J
Harare, 21 November 2019, 6, 7 and 14 January 2020

**Chamber Application**

CHIRAWU-MUGOMBA: Zimbabwean culture has idioms replete with meaning. One of them questions the sincerity of a bachelor in wiping mucus from a child of an unmarried woman unless he has ulterior motives. After reading the chamber application seeking guardianship by a third party over a minor child P.A.N and interviewing the applicant's legal practitioner, curator *ad litem*, the biological parents of the child and the child, I asked myself the same question upon noting that the applicant's own child was resident and attending school in Zimbabwe though having been born in and being a UK citizen. Applicant's other child attended school in Zimbabwe up to advanced level. This is the same Zimbabwe that the applicant seeks to 'rescue' the minor child from and yet ironically her own child at the time of the application was resident in Zimbabwe being looked after by the applicant's sister. On the 21st of November 2019, I dismissed the application with no order as to costs. I have been requested to give reasons and these are they.

The facts of the matter are as follows. The applicant is a UK citizen having migrated in the year 2000. She resides in West Yorkshire. She sought to be appointed guardian of the minor child so that she would be able to travel and eventually live with her. The authorities in the UK require that she be appointed guardian if she is to exercise these rights over the minor child. In her application she made reference to the 2013 Constitution specifically s171 (1), 81(2) (3) and the UN Convention on the Rights of the Child as well as the African Charter on the Rights and Welfare of the Child. I note in passing that despite calls to legal practitioners to refrain from drafting affidavits for litigants that read like heads of argument, this practice continues unabated. The relationship between the applicant and the minor child is that the former is a sister to the mother of the latter. That makes the minor child a niece to the applicant.

The personal circumstances of the applicant are that she is married to one George Miti in terms of the Marriage Act [Chapter *5:11*]. He is the Dean of students at Africa University in Mutare, Zimbabwe. He is in support of the application as he deposed in his supporting affidavit. The applicant has two children. Of the two, one is studying in the UK and the other is resident in Zimbabwe and stays with the applicant's sister one Sophie Maenzanise. The major basis for the application is that the minor child's parents have fallen on hard times financially. They used to run a thriving farming business and supplied major supermarkets. They were able to send their children to good private schools and give a good life to them. However they have not been spared the economic woes bedevilling Zimbabwe. They have accrued debts and they have extant court orders against them. The minor child attended Arial school for primary education and went to Wise Owl for part of her secondary education. She was moved from that school to attend UMAA Institute due to the financial hardships. The applicant claimed that she is responsible for payment of fees and other requirements. If she is granted the order she seeks, the minor child will benefit from a good education system in the UK as well as free National Health Service that covers medical and dental care. The applicant is a support worker for a company called Able Community Care though self-employed under an agency agreement. She will be able to offer accommodation to the minor child as well as assist her to pursue her love for hockey, swimming, tennis and basketball. Applicant claimed that she is a devoted member of her church and she would create an environment in which the minor child would be able to pursue her Christian faith.

The applicant claimed that she enjoys a good relationship with the minor child. She travels to Zimbabwe as often as she can so that she can enjoy a fruitful relationship with the minor child.

The applicant attached supporting affidavits from the minor child's biological parents. James Tendayi Ndoro the biological father expressed support for the application. He confirmed the applicant's assertions that he used to run a thriving business but it had fallen apart. He claimed that there is a strong bond between the applicant and the minor child. Grace Ndoro, the biological mother also averred that the family had fallen into debt and she expressed support for the application. One Nyasha Adelaide Ndoro a sister to the minor child deposed to an affidavit describing the yesteryear of a 'good life' in Zimbabwe when her parents had the means and how the minor child had lost out on the good life and that going to the UK would serve as compensation. One Ashley Kudzai Ndoro, the minor child's other sister also deposed to a supporting affidavit confirming the difficult financial situation that

her parents faced. One Tanaka Maenzanise, the applicant's child deposed to an affidavit averring that she once stayed with the Ndoro family and at one stage she attended the same school as the minor child. She painted a picture of a close relationship between the applicant and the minor child. I note in passing that her affidavit was signed in Sittingbourne, 'Harare' having been cancelled and 'notary public' was cancelled and replaced with 'solicitor'. This is in clear breach of the provisions of the High Court ( Authentication of documents) Rules of 1971 in particular section 3 (a) that such should be signed before a notary public.

The curator *ad litem* one Josias Mandevere who is a legal practitioner filed his report which is rather curious. The report contains an introduction and background as well as the law on guardianship. He made what he termed 'observations' on the applicant's founding affidavit and that of George Miti. He reviewed the supporting affidavits of the biological parents and interviewed them. He did the same for the minor child. He also made observations on the supporting affidavit of one Tanaka Maenzanise, the applicant's son. In his report the curator stated that the major reason why the applicant and the child's biological parents wanted guardianship to be awarded to the applicant is that the parents had fallen on hard times financially. They all held the belief that the child would be better off in the UK. He concluded that it would be in the best interests of the minor child if guardianship was to be awarded to the applicant. The court has noted that legal practitioners do not make the best curator *ad litems.* The rules are very clear that a curator's report should be an investigative one, see R249 (3). In my view there is no need for a curator to outline the law on guardianship but to conduct an investigation on the application that would have been served on her or him. The report should outline factual findings that assist a court to make an informed decision. In my view, the issue of whether or not the order sought is in the best interests of the child is not a conclusion to be made by the curator but by the court after taking into account all the circumstances of the case including the report. After all the 'best interests' standard is a legal consideration, see *Grant vs Jefta and others,* HH-366-18.

Before making a decision, I invited the applicant's legal practitioner Caleb Mutandwa, the biological parents, the minor child and the curator *ad litem* for separate interviews in my chambers. In my view the minor child who was 17 years at the time of the application was mature enough to express her own views. This is also in keeping with the internationally recognised right of a child to be involved and be heard, see *Saungweme* v *The Master of the High Court NO*, 2016(2) ZLR 639.

The issue at stake is one of whether or not the court should grant guardianship to the applicant who is a third party. The court notes that such applications are becoming frequent due to migration and economic hardships that are being faced in Zimbabwe. S.M Chenney in 'Principles *of family law',* states as follows:-

> "The common law of guardianship was deeply rooted in medieval concept of land holding. The law was disjointed and incomplete. 19th century commentators distinguished as many as 13 different kinds of guardianship all involving the attribution of some rights over the child's property or person to the guardian. ……..guardians have what (it would seem) custody in the wide sense …i.e. they have all the parental rights and duties (including those relating to a child's property)[1]"

The rights of a guardian have been set out in a plethora of cases. The consolidated South Africans Children's Act[2] sets out what a guardian is expected to do as follows:[3]

> "(3) Subject to subsections (4) and (5), a parent or other person who acts as guardian of a child must—
> (a) administer and safeguard the child's property and property interests;
> (b) assist or represent the child in administrative, contractual and other legal matters; or
> (c) give or refuse any consent required by law in respect of the child, including—
> (i) consent to the child's marriage;[4]
> (ii) consent to the child's adoption;
> (iii) consent to the child's departure or removal from the Republic;
> (iv) consent to the child's application for a passport;[5] and
> (v) consent to the alienation or encumbrance of any immovable property of the child."

Section 60(3) of the 2013 Constitution sets out under the broad realm of freedom of conscience the expected role of parents and guardians that they have, "the right to determine, in accordance with their beliefs, the moral and religious upbringing of their children, provided they do not prejudice the rights to which their children are entitled under this Constitution, including their rights to education, health, safety and welfare".

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[1] At page 320-321

[2] Number 38/2005 as amended

[3] In section 18(3).

[4] Child marriage is outlawed in Zimbabwe. See *Mudzuru and anor v. Minister of Justice, Legal and Parliamentary Affairs and others*

[5] In *Dongo vs. The Registrar-General and Anor* SC 6/10, it was held that the acquisition of a passport is not a juristic act.

In section 80(2) under the rights of women, it is stated that , " women have the same rights as men regarding the custody and guardianship of children but an act of parliament may regulate how those rights are to be exercised.

Section 81(2) reinforces the paramouncy of the best interests of the child standard.

In the matter of *In Re Maposa,* 2007 (2) ZLR 333 (H) CHEDA J (as he then was) considered an application by a third party for guardianship and stated as follows: -

> "At common law, the rights, liabilities and duties of parents are inalienable, see *Boylan v Hunter (1922) SC 80* and *Brooks vs Blount* (1923) 1 KB 257. Although such practice is now part of our law, the principle is founded on equity which results in a third party, in the form of a relative or a stranger, putting himself *in loco parentis* towards a child by undertaking the office and duty of a father or mother, thereby assuming a judiciary relationship with the said child. Therefore whilst it is trite law that guardianship of a minor child can be granted to one parent to the exclusion of the other, the courts should **be slow in granting that status to a third party** ( my emphasis)."

In *Kutsanzira* v *The Master of the High Court,* 2012 (2) ZLR 91(H), GUVAVA J (as she then was) stated as follows:-

> "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 it 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."

The authorities are all agreed on the notion that granting of guardianship to a third party is done in exceptional circumstances more so when one or both parents of the child are alive. That is the reason why this court as upper guardian of all minor children makes decisions on such applications as opposed to the Magistrate Court that deals with applications only in instances were both parents of a minor child are deceased, see *In re Nherera,* HH-117-15. Applicants often ignore the drastic nature and the legal implications of such an order. It means that the parent(s) who are still alive lose all control over the child. In a world with vices such as child abuse and trafficking, it is incumbent upon a court to be extremely cautious in its approach. Although s 80 (2) of the Constitution gives equal guardianship rights to women and men, I do not read it to place third parties at the same pedestal as the natural parents. The context of that section should be viewed from the concerns that the Guardianship of Minors Act [*Chapter 5:08*] gave an unfair advantage to fathers in guardianship matters.

The court noted that there was a deliberate effort to place misleading evidence by the applicant and the biological parents of the minor child. In paragraph three of her founding affidavit, the applicant stated that, *'In Zimbabwe, I reside at House Number 586 Glen Norah A, Harare'.* In the very next paragraph she then stated that she has been staying in the UK and is a UK citizen. The claim to be residing in Zimbabwe was meant to create an impression that she spends a lot of time in Zimbabwe. The biological parents of the child carried on with this misleading of the court by claiming that whenever the applicant visits Zimbabwe, she stays with them and the minor child. This was meant to create a false narrative of a supposedly close bond between the minor child and the applicant. On the other hand the minor child stated that when the applicant is in Zimbabwe, she spends most of her time in Mutare where her husband George Miti works at Africa University. The 'bonding' sometimes occurs when the applicant and the minor child travel to Mutare together. The contradictory evidence gives the impression of a rehearsed play. There was no evidence placed of a strong bond apart from the mere say-so of the applicant, the parents and applicant's child. There was no evidence that the applicant provides financial support to the minor child. In any event, guardianship goes beyond financial support which falls under the duty of custody.

As already stated, the views of P.A.N where solicited. She is a young woman who is ambitious in terms of what she hopes to achieve in life. She is doing well in school as even evidenced by the school report from the supposedly 'inferior' school that she is currently attending as appears on page 42 of the record. For term one in 2019, she scored two As and a C. Those are very good grades by any standards. I solicited the views of the parents and the minor child on any possible problems that P.A.N might be facing in relation to school and none where provided. It is not enough for applicant to claim that the minor child will be better off in school in the UK without detailing what the apparent problems that she faces in Zimbabwe are. I am fortified in this view by the observation by TSANGA J in the *Saungweme* case (*supra)* @page 640 that,

> "However, what is notable about this application is a lack of detail as to the exact nature of problems that have been encountered relating to the child's ……education qualifications that would justify a surrender of guardianship were it to be permitted…."

Upon inquiring from P.A.N what her views I expected an exuberant response. The minor child was hesitant and gave a luke-warm response. This is not surprising given the fact that the minor child could not point out to any circumstances in Zimbabwe that justify granting guardianship to a third party. She is well settled and she even has her own bedroom that is her private space.

Although the biological parents seemed willing to give up their guardianship, that willingness cannot on its own be too significant, see *Maphosa* and *Saungweme* cases *(supra).* The biological parents berated themselves over their fall from grace and how they have 'failed' the minor child. The curator confirmed that the application is premised on financial issues. The court noted that the evidence on their financial hardships sought to create another false narrative. On page 43 is a warrant of execution against immovable property with the minor child's father being the defendant. What is significant is that in that matter judgment was granted in 2014. There is no explanation as to what occurred since then. Other matters bear 2015 and 2016 dates. There is a letter of demand of US$490 313.07 from ZAMCO against the father. Nothing else was presented on what has happened to that matter. Some acknowledgments of debt were also attached but these debts accrued before 2019. The court noted that it is not as if the parents suddenly fell into debt in 2019. The whole application was premised on the supposed difficulties that the parents are facing but there was no evidence on the circumstances of the child that would justify granting guardianship to the applicant. It read like a routine 'I want to be appointed guardian because the UK authorities require this' and not that there were any exceptional circumstances. In my view it would set a very dangerous precedent if a court is persuaded to grant a drastic order on the basis of economic hardship of parents without a clear link of the impact on the child. If the applicant loves the minor child as she claims, there is nothing that can stop her from paying fees for her at a foreign university. Applicant's assertion of a 'free' education in the UK is not backed by any evidence. A perusal of supporting documents in relation to the applicant's child who commenced university education in the UK shows that what she was offered was a tuition and maintenance loan and not a grant, as appears on pages 32-37. Significantly on page 34 under frequently asked questions two of them are as follows, ***how is interest on my loan calculated*** and ***when do I pay back my loan?*** If the applicant's own daughter is not entitled to free education in the UK, why would the minor child if they go to the UK under the guardianship of the applicant be entitled to free education?

The applicant failed to show exceptional circumstances that would justify the order she seeks and accordingly I dismissed the application with no order as to costs.

*Machinga and Mutandwa,* applicant's legal practitioners.