

JUDITH MUTONGWIZO
versus
MASTER OF THE HIGH COURT N.O

IN THE HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA J
HARARE, 21, 24 and 26 September 2018

**CHAMBER APPLICATION FOR CONSENT TO SELL PROPERTY REGISTERED
IN THE NAME OF A MINOR**

T Nyawo for the applicant

CHIRAWU-MUGOMBA J: This chamber application was placed before me curiously titled, “Chamber application for the Master’s Consent in terms of order 32, Rule 249(1) (b). The relief sought was the ‘approval’ for the sale of stand 16834 Ruwa township of Sebastopol measuring 300 square metres held under Deed no. 3534/2009. This property is currently registered in the names of the applicant and her minor child one Ryan Tafadzwa Chipere. The chamber application in its heading completely misses the mark as it is not the role of the Master of the High Court to ‘consent’ to sales of properties belonging to a minor outside the purview of a deceased estate.

The founding affidavit was deposed to by one John Tendayi Mashiri acting through a special power of attorney. It was stated that the applicant is the biological mother and legal guardian of the minor child. The applicant’s maiden name is Mutongwizo but her passport indicates that she uses the surname Chipere. I take judicial notice that a husband’s surname can only be used when persons are legally married. The birth certificate of the child which was attached to the application shows that the father of the child is one Ronald Chipere. The affidavit does not mention what has happened to the father of the child. I am mindful of the fact that the 2013 Constitution in section 80(2) affords equal guardianship rights to mothers and fathers and I expected that the father if alive would be an interested party.

It is also stated that the applicant seeks the ‘consent’ of the respondent, i.e. the Master of the High Court in his capacity as the upper guardian of the minors to ‘ratify’ the sale of property owned by the minor and the applicant. This averment is problematic in two respects.

Firstly, the High Court in terms of section 81(3) of the 2013 Constitution and not the Master of the High Court is the upper guardian of all minor children. Secondly, a sale can only be 'ratified' provided that it has already been entered into. I did not read the affidavit as suggesting that the sale of the property had already been concluded and was now awaiting ratification. There is also nothing in the affidavit to suggest that the 50% share of the proposed sale will be safeguarded in some way to protect the interests of the minor child who has real rights over half of it. All there is are averments that half of the proceeds of the money realised from the sale will go towards the minor child's educational expenses.

Initially I raised a query that the applicant needed to comply with the provisions of Rule 249(1) (b) and R249 (2) and Rule 249(3) in sequence. I have noted that many applications involving minor children are being filed without complying with this rule. There also seems to be almost a casual attitude towards this rule.

Rule 249(1)(b) states as follows, '*In the case of any application in connection with a minor, a chamber application, annexing the written consent of the person proposed to be so appointed, shall first be made for the appointment of a curator ad litem*'. (My emphasis)

Rule 249(2) states as follows, '*A copy of a chamber application in terms of sub rule (1) shall be served on the Master, who shall make a written report to the judge*'. (My emphasis)

Rule 249(3) states as follows, '*After the appointment of a curator ad litem following a chamber application in terms of sub rule (1), a copy of the substantive application shall be served on him/her and after s/he has conducted such investigation as may be necessary, s/he shall prepare a written report which shall be filed with the registrar and a copy served on the applicant and all other interested parties*'.

Simply put, the procedure and the justification is as follows:-

1. The applicant identifies a potential *curator ad litem* and obtains written consent from this person.
2. Applicant files a chamber application annexing this written consent and seeks an order that this person be appointed a *curator ad litem*.
3. This chamber application for the appointment of a *curator ad litem* is served on the Master who is expected to make a written report to the judge. It is pertinent to note that this report is not for the applicant but for the judge. This report pertains to the application for appointment of a *curator ad litem*. It could be that the Master has misgivings on the proposed *curator ad litem* and all this should be stated as applicable

in the report. At this stage, the Master is not being called upon to file a report on the substantive application but to confine her or himself to the proposed appointment of a curator. I have noted that some officers in the office of the Master seem not to be aware of their role in relation to this application and end up commenting on the substantive issues which application will not yet even be before the court.

4. After the appointment of the proposed *curator ad litem*, (the court can also decline to appoint such person as proposed), the substantive application (it could be for guardianship or selling of property belonging to a minor as in this case) is then served on her or him. The substantive application must cite the *curator ad litem* in their capacity as such. S/he is expected to conduct such investigation as necessary and must file a written report with the registrar of the High Court. It is pertinent to note that a *curator ad litem's* role is to assist the court to make a decision which is always based on the best interests of the child. Therefore such report must be a thorough and an impartial assessment and not a conclusion on the relief sought. The report must be served on the applicant and other interested parties. The rules do not define who an interested party is but it is anyone who has a real and substantial interest in a matter. To note also is that the Master is now out of the equation unless they have been served with the *curator's report* since the notion of who an interested party is remains open to interpretation and at the curator's discretion. The Master is not expected to do anything because the ball will now be in the court of the *curator ad litem*.

An application for the appointment of a *curator ad litem* can also be opposed (See Rule 249(4)).

On the 29th of June 2017, NDEWERE J granted an order in which one Arnold Taruvinga was appointed *curator ad litem* for the minor child. There is attached to the application a 'Master's' report which is not signed and has a blank date supposedly in March 2018. What is curious to note is that this report should actually have been part of the documents in support of the application for the appointment of the *curator ad litem*.

The appointed *curator ad litem* deposed to an affidavit (and yet the rule requires a report) on the 6th of March 2018, almost nine months since his appointment. In this affidavit, the *curator ad litem* states that he conducted 'precise investigations' but does not state where and how and his findings. Instead he strangely states that he 'gives' his consent to the disposal of the property owned partly by the minor child. It is not his duty to 'consent' to the

proposed sale. His role is to conduct an investigation and furnish the court through the registrar of his findings to enable the court to make an informed decision. He brazenly concludes by stating that, 'Accordingly I grant consent to the sale of the property'. This affidavit shows that the *curator ad litem* does not appreciate his role at all. Apart from lack of information on the investigations, there is marked silence on the status of the other interested person, i.e. the father of the minor child. It is not stated why the applicant claims to be the legal guardian of the minor child when the birth certificate shows that there is a father of this child. There is no information or suggestions on what to do with the 50% proceeds in terms of concrete proposals to safeguard the funds to assist the court in making a determination. Such proposals must of necessity be part of the court order.

I am not satisfied that on the papers as they are, that it will be in the best interests of the minor child to grant an order authorising disposal of the immovable property.

The registrar is directed to bring this order to the attention of the Master of the High Court.

Accordingly, it is ordered as follows:-

- a. The matter be and is hereby removed from the roll.
- b. There shall be no order as to costs.

NyawoRuzive, Applicant's Legal Practitioners