

ENICA CHENGA (in her application for guardianship of C. C. C)  
versus  
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE  
CHIRAWU-MUGOMBA J  
HARARE, 24 and 31 October 2018

**CHAMBER APPLICATION FOR THE APPOINTMENT OF A GUARDIAN**

*R. Tinarwo*, for the applicant.

CHIRAWU-MUGOMBA J: I have previously stated in *Mutongwizo v The Master of the High Court N.O* HH 573-18 the need for legal practitioners to comply with the rules of this court especially when the rights of minor children are at stake. This court is the upper guardian of minors by design so that there is assurance that whatever is done on behalf of minor children conforms to the best interests of the child standard. This is a standard that is recognised in the Convention on the Rights of the Child (CRC) that Zimbabwe signed and ratified on 11 September 1990. The standard finds resonance in various child rights theories.

In this matter the applicant seeks that she be appointed guardian of her brother's minor child one C.C. C. The minor child has been accepted at St Benedict's Catholic School in the United Kingdom where she intends to continue her education and pursue her university education. To enable her to attend the school, she will need a legal guardian based in the U.K to be appointed. The applicant is based in the U.K and is willing to be appointed as guardian of the minor. In her founding affidavit, the applicant lays out the basis upon which she should be appointed as the guardian. Her brother is married to the mother of the minor child. She (applicant's sister-in-law) abandoned the minor children and her sibling in 2005. Her exact whereabouts are not known except that she is believed to be in South Africa. Her brother has since then been taking care of the two children. The applicant claims to be very close to her niece C.C.C. who wishes to study chemical engineering. The applicant is a citizen of the U.K and she is employed as a cognitive behavioural therapist. She can therefore afford to

take care of C.C.C who stands a better chance of studying in the UK if applicant is appointed as her guardian. The applicant's brother who is father to C.C.C has through an affidavit expressed support for the appointment of the applicant as the guardian. A sister to the minor child's mother has also through an affidavit expressed support for the appointment of applicant as a guardian.

The applicant has attended to a query raised previously by ZHOU J on the need to serve the application on the mother of the minor child. This was done through an order of substituted service and subsequently an advertisement in the Herald newspaper.

Whilst courts do not want to stand in the way of progress, it is important that rules be followed especially in relation to minor children. The current world is one full of vices such as trafficking, sexual abuse and many others. The child once guardianship is granted will be removed from Zimbabwe hence will no longer have the protection of this court as her upper guardian. That is why it is critical that in matters involving appointment of a guardian, a *curator ad litem* be appointed. An order bestowing guardianship is drastic since the guardianship rights that the natural father of C.C.C has will be extinguished once the applicant is appointed as guardian.

The rights of a guardian have been set out in a plethora of cases. The consolidated South Africans Children's Act<sup>1</sup> sets out what a guardian is expected to do as follows:<sup>2</sup>

- “(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;<sup>3</sup>
    - (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;<sup>4</sup> and
    - (v) consent to the alienation or encumbrance of any immovable property of the child.”

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<sup>1</sup> Number 38/2005 as amended

<sup>2</sup> In section 18(3).

<sup>3</sup> Child marriage is outlawed in Zimbabwe. See *Mudzuru and anor v. Minister of Justice, Legal and Parliamentary Affairs and others* CCZ 12/15

<sup>4</sup> 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.

Given the onerous responsibility bestowed upon a guardian, the issue of schooling can be described as one of among many responsibilities that a guardian has. The applicant is therefore mistaken in her belief that all that is required from her is to ensure that the child gets an education. I am sceptical about whether or not the natural father of C.C.C is aware of what he has to give up if the application is granted.

I will reiterate what I expressed in the *Mutongiwo* case on the need to comply with R249.

“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*".

The report by a *curator ad litem* in this matter is very crucial in assisting the court to determine whether or not it will be in the best interests of the child to divest guardianship from her father and bestow such on the applicant.

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

**Disposition**

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.

*Chinamasa, Mudimu and Maguranyanga*, applicant's legal practitioners