HB 234/18
HC 2515/17

SEBSON SIBANDA

Versus

AMOS HOVE

And

WIDERS TAMBANEMOTO

And

THE MASTER OF THE HIGH COURT, N.O.

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 19 JUNE & 20 SEPTEMBER 2018

Opposed Application

B. Masamvu for applicant
A. Sibanda for respondents

MAKONESE J: This is an application for guardianship of a minor child. The minor child, a female, was born on 9 May 2001. The application is made in terms of the Guardianship of Minors Act Chapter 5:08). The essential requirements in an application of this nature are:

(a) there must be a minor child
(b) applicant must show that he has the best interests of the minor child, and
(c) it is in the best interest of the minor child for the order to be granted.

The application is opposed by the respondents. The 1st and 2nd respondents contend that the applicant is not a suitable person to assume guardianship of a child. The 3rd respondent has filed a Master's report in terms of Order 32 Rule 249 of the High Court Rules, 1971. The report draws this court's attention to the fact that the child will soon be turning eighteen years and will be able to make her own decisions upon the attainment of the age of majority. This court as the upper guardian of all minor children is enjoined, however, to make a determination on the basis

of the averments contained in the affidavits and the voluminous attachments filed with the application.

Factual background

The applicant was customarily married to the minor child's mother sometime in 2014. The applicant works and resides in Australia. Applicant and the minor child's mother never lived together as husband and wife. She died of natural causes on the 25th June 2016. 2nd respondent is the biological father of the minor child. Sometime in the year 2000, 2nd respondent married the minor child's mother, Barbara Hove, also in terms of African law and custom. The relationship did not last for a long period and around 2004 the parties had certain misunderstandings leading to the break –up the relationship. 2nd respondent indicates that he has never denied paternity of the minor child and considers himself as the sole surviving parent. 1st respondent is the minor child's grandfather. Barbara Hove was his biological daughter. There is no dispute that at all material times the minor child in question has been under the care and custody of the 1st respondent. The minor child has lived all her life with 1st respondent at number 3 Forest Avenue, Redcliff. I must point out that, strangely the 1st respondent's wife supports the applicant's claim for guardianship. She argues that the interests of the child will be well served if the child is taken out of the jurisdiction of this court, to reside with the applicant in Australia. She makes unsubstantiated allegations that 1st respondent had an improper association with the minor child. In support of her version of events she produced copies of "**whatsapp"** messages which she says were transmitted by 1st respondent to the minor child. 1st respondent's wife claims that applicant has in the past sent money to her to cater for the needs of the minor child. This court shall not dwell much on what appears to be a sour relationship between 1st respondent and his wife. If evidence existed of an improper relationship between applicant and the minor child, the matter ought to have, in the normal course of events have been reported to the police. In this matter the court shall be guided by the interests of the minor child.

Facts not in dispute

It is not in dispute that the applicant was customarily married to the minor child's brother for a brief period between 2014 and 2016. The parties did not live together as husband and wife for any period of time. At the time of the death of Barbara Hove in June 2016 the minor child was in the custody of 1st respondent. 2nd respondent accepts responsibility for the minor child. He denies that he at some point he ever denied paternity. He confirms that the 1st respondent has virtually been responsible for the minor child's upkeep for her entire life. It is not in dispute that the only connection between the applicant and the minor child is that he was married to her mother for a brief period of two years. It is important to observe that the applicant attempted to fraudulently obtain a birth certificate for the minor child for the purpose of illegally removing her from the jurisdiction of this court. The applicant was arrested and appeared before a magistrate at Esigodini on 28th September 2017 on allegations of contravening section 27(2) (a) of the Births and Death Registration Act (Chapter 6:02), that is, supplying false information to registry officials. He was convicted and sentenced to pay a fine. This court views the conviction of the applicant in a serious light. The offence was carefully planned and it was fortuitous that applicant did not succeed in his criminal scheme. Had he been successful he would have illegally removed the minor child from the country.

The legal position as regards guardianship

The applicant works and lives in Australia. This court is being asked to make an order for the child to have a non-resident remove her from the country away from the jurisdiction of this court. In essence the application is for the child to join the applicant in Australia. As indicated earlier the minor child's biological mother died in June 2016 and since then the child has been living with 1st respondent to date. The child did her primary schooling at Goldridge and Russell schools in Kwekwe.

There is no biological relationship between the minor child and the applicant and there is no prohibition between the child and the applicant in so far as sexual relationships are concerned. It was not denied by the applicant that he once kidnapped the child from school and remained

with the child for two weeks. He stayed with her on his own in a bachelor flat. The respondents are concerned that the applicant may have possibly abused the child during that stay.

In deciding on whether guardianship should be awarded to the applicant, the court must ascertain and determine the best interests of the child. The applicant's affidavits are long and elaborate. They are based on allegations that border on character assassination of the 1st and 2nd respondents. The applicant seeks to have an order of this court taking away guardianship from the biological father and grandfather of the minor child. More importantly, this court is being asked to make an order that a teen girl leaves the country to take up residence in a foreign land and live with a person who for all intents and purposes is literally a boyfriend to the mother's child. It has to be noted that the customary marriage was for an insignificant period. The applicant alleges that he is single. A teen girl would be extremely vulnerable if applicant and the minor are to live together in a foreign land. This matter involves the interests of the child as the paramount consideration. The papers filed of record show that the child has always had a family. This was long before the applicant got into the child's mother's life. There is proof that 2nd respondent is the father of the child. By virtue of the birth certificate bearing the names of the father's child as the 2nd respondent this resolves the matter. It is not in the interests of the minor child for guardianship to be awarded to a stranger. There is a stronger natural and legal bond between the biological father and the minor. The minor child has lived with her grandparents for the greater part of her child wood. She may only be removed from this environment if compelling circumstances have arisen.

It is provided under section 3 of the Guardianship of Minors Act as follows:

"Where the parents of a minor –

(a) are living together lawfully as husband and wife; or
(b) Are divorced or are living apart and the sole guardianship of the minor has not been granted to either of them y the High Court or a judge.

> the rights of guardianship of the father shall be exercised in consultation with the mother, and if a decision of the rights of guardianship of the father on any matter relating to guardianship is contrary to her wishes and in her opinion likely to affect the life, health and morals of the minor to his detriment, the mother may apply to a judge in chambers, who may make such order in the matter as he thinks proper."

It is clear that the intention of the legislature is to accord the natural parents of the minor with certain rights relating to custody and guardianship. It is also envisaged that the High Court as the upper guardian of minor child as shall act in the best interests of the child. The 2nd respondent has recognizable rights under the Guardianship of Minors Act. It is my view that it is extremely undesirable to grant rights of guardianship to a third party whose relationship with the minor child is opaque and may expose the minor child to abuse. As a general rule, the courts should be slow to allow third parties to remove minors from the jurisdiction of this court, unless the court on serious consideration deems it fit that to do so would be in the best interests of the minor child. In *Gonyora (Guardianship Application)* HB-11-15 MUTEMA J spelt out the need for the courts to be extra cautious when dealing with guardianship of minor children. He observed that:

> *"Experience has taught us that orphaned minor children must by all means be protected against the vagaries and avarice of certain members of society, relatives or not, hence the need for magistrates in enquiries of this nature to think outside the box and make exhaustive enquires in the interests of the innocent children who might end up destitute on the streets as a result of inadequate fact finding."*

The applicant states in his heads of argument that the application is in terms of the Guardianship of Minors Act, but does not state in terms of which section the application has been brought. This is understandable because there is no provision which envisages an application of this nature. Section 3 and 4 of the Guardianship of Minors Act are the relevant sections that deal with applications for guardianship. The court must therefore be guided by the clear legislative intent as expressed in the law. In *Cruth* v *Manuel* 1999 (1) ZLR 7 (S) MUCHECHETERE JA, (in a dissenting judgment) summarised the position as follows:

> *"The rights of the legitimate parents and those of the mother of a child born out of wedlock cannot be interfered with ordinarily. Third parties (including the father of a child born out of wedlock) are placed in the same category and one can only interfere with those rights in the interests of the child whom they are not being exercised properly. In my view it should first be appreciated that it is the rights of the parents and the mother which the third parties would seek to interfere with, and they cannot interfere with another's rights if the other person is exercising them properly …"*

The applicant is clearly a third party in this matter. He cannot place himself in the same position as the 2nd respondent who is the father of the minor child. One is a biological father and the other is a step-father. The onus is on the applicant to prove on a balance of probabilities that it is in the best interests of the minor child that guardianship should be awarded to him. In any event, as I indicated in this judgment, the application is not provided for under sections 3, 4 and 5 of the Guardianship of Minors Act. To that extent the application is incompetent and not provided for under the law. The application has no merit.

In the result, and for the aforegoing reasons, the application is dismissed with costs.

Dube-Tachiona, Tsvangirai, applicant's legal practitioners
Mhaka Attorneys for respondents' legal practitioners