IN RE JUVENILES

TENSON MAKANDENI
and
RUTENDO MAKANDENI
and
CHRID MAKANDENI
and
PRUDENCE MUZVUZVU
and
SIMBARASHE MURAISI
and
TAFADZWA GARIREKUFA
and
VAIDA WAKENI
and
VICTOR WAKENI
and
VEDELINE WAKENI
and
VIOLA WAKENI
and
VITALIS WAKENI

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 1 February 2019

Review Judgment

CHITAPI J: The 6 records with the above references were dealt with by the same magistrate sitting as a Children's Court on 23 May 2017. They are enquiries carried out by the court in terms of ss 19, 20 and 21 of the Children's Court. In all the cases the court determined on application by a probation officer that the juveniles involved were children in need of care. The

court further determined that each of the children be placed under the foster care of persons mentioned in the orders. I have no qualms with the orders made in substance serve that there are procedural issues which require correction.

In all cases, the magistrate endorsed the order made on a Form 8. The form appears to be a standard form. It refers to an enquiry being conducted by the "Juvenile Court." I have considered the provisions of the Children Court Act [*Chapter 5:06*] and noted that the Act establishes Children's Courts, the officers of those courts and the procedures to be followed. Sections 3-5 of the Children Court Act is apposite in this regard. Children's Courts are established for any area in Zimbabwe. Every magistrate courts is designated a Children's Court (not a Juvenile Court) in respect of its area of jurisdiction. It is again the Minister of Justice who designate magistrates to preside over the Children's Court. It is therefore not up to the designated magistrate presiding in the Children's court to style the court a Juvenile Court.

The Children's Act defines a child in s 2 as:

"child" means a person under the age of 16 years and includes an infant. An infant is defined as "infant" means a person under the age of seven years. There is no definition of a "juvenile" in the definition section. There is however a definition of "young person" which provides that it means a person who has attained the age of sixteen years but has not attained the age of 18 years. The reference to juveniles is provided for in s 40 of the Children Act. The provisions of s 40 provide for the reception into and retention in any training institute of person under 21 years in regard to which a court of a foreign State which has an agreement with Zimbabwe to receive and retain such person in a local training institute, would have made an order for such reception and retention. For reasons not apparent it would appear that in regard to foreign States, the word juveniles is used to describe persons therefrom who are below 21 years. In Zimbabwe the law provides for definition of "infants", "child" and "young person." In making the observations above, I do not seek to interrogate the contradictions or other shortcomings of the Children's Act as it is not the function of the court to engage in academic debate. I only made the observations to justify my taking issue with the reference to the Juvenile Court having been the

one that made the orders because no such court is designated for the functions that the magistrate exercised. To this end, the order should apty reflect "In the Children's Court for the Province of Manicaland Holden at Chipinge." This amendment relates to all the 6 records.

The next observation is that the order purports that it is made in terms of the Children's Protection and Adoption Act, 1972 and that the court specifically made the orders in terms of s 21 (1) (a) of that Act. This is a misnomer because the Children's Act replaced the Children's Protection & Adoption Act in 2001. The Children Act was intended to bring the local law into sync with international instruments like the United Nations Convention on the Rights of the Child (UNCRC), the African Charter on the Rights and Welfare of the Child (ACRWC) and other such instruments. Again I do not purport to debate whether or not the Children's Act, achieves its ends. I will for purposes of this review conscientize the magistracy that they cannot make orders under a repealed enactment. To this extent therefore, the orders are corrected to reflect that the enquiry to determine whether the child concerned is "a child in need of care" was done in terms of s 19 of Children's Act, and the order similarly made in terms of s 20 (1) (a) (ii) of that Act. I cannot overemphasize the need for a correct citation of legislation. It must be obvious to any trained legal mind. The court orders are life records and they should therefore be authentic as well as verifiable. It is therefore improper and a dereliction of duty for the court to perfunctorily craft court orders. A slavish adherence to, and completion of forms without updating them to relate to current law can have undesirable consequences in that the court order mad be deemed as invalid as it relates to a repealed enactment. It is also a source of embarrassment to the judicial officer to be told after the event that the purported law which he or she invoked does not exist.

The last point I raise pertains to the need for the magistrate who will have presided over the enquiry and made an order in terms of s 20 of the Children's Act of s 27. In terms thereof, the record of proceedings together with any report that the magistrate may consider necessary to include should be forwarded to the Registrar of this court for placement before the judge in chambers so that the record may be dealt with in terms of s 27 (2). In terms thereof, the judge may confirm, vary or set aside the order of the Children's Court. The judge may also remit the record

back to the Children's Court with instruction on further proceedings to be conducted as may appear to the judge to be necessary in the circumstances.

The 6 cases under review as already noted were concluded on 23 May, 2017. They were only forwarded to this court under cover of a letter from the Clerk of Court *a quo* dated 12 July, 2018. The delay in forwarding the records for review was not explained. In such a situation I can only conclude that the Children's Court concerned was oblivious to or unmindful of the peremptory provisions of s 27 (1) of the Children's Act which provides that the record of proceedings "shall" be forwarded for review by a judge of this court "not later than seven days after the making of orders" which fall under ss 20 and 25 (3).

In order for the proper administration of the Children's Act to be achieved, it is important for the presiding magistrate in the Children's Court to ensure strict compliance with the provisions of the Act. In relation to the times given for forwarding the records for review, there is a sound basis for this. This court is the upper guardian of minors and for this reason, where an order has been made which bears on the rights, well-being and welfare of minors, the High Court must without undue delay be advised of such proceedings so that the court reviews the proceedings and orders made. In this regard s 81 (2) and (3) of the Constitution provide as follows:

> "81 (2) A Child's best interest are paramount in every matter concerning the child.
> (3) Children are entitled to adequate protection by the courts, in particular the High Court as their upper guardian."

Section 27 of the Children's Act must be read together with s 171 (1) (b) which provides as follows:

> "171 Jurisdiction of High Court-
>
> 1. The High Court-
> (a) …..
> (b) Has jurisdiction to supervise magistrates' courts and other subordinate courts and to review their decisions.
> (c) …….
> (d) ……"

I should therefore stress to the magistracy who preside in or are designated to preside in Children's Courts that they must appreciate and strictly adhere to the provisions of the laws which are applied to proceedings in these specialised courts.

The limited time for forwarding records in matters as *in casu* for review is justified by the further need to ensure continued oversight by this court on the safeguards of children's best interests. The review process by this court is a vehicle for ensuring quality control in subordinate courts and is therefore a supervisory tool which ensures *inter-alia* correction of mistakes. An astute magistrate or presiding officer of an inferior court must take interest in and wish for his or her decisions to be subjected to review because this ensures that such judicial officer gains from being properly directed where there have been shortcomings or errors noted on review. A review is not a witch hunt and the approach of this court should always be not to vilify or berate the inferior court but to correct proceedings and educate the inferior court not just for posterity but to promote the flourishing of the rule of law. I hope that this review judgment achieves the noble purpose of bringing it to the attention of the children's court that the statutory time limes in such applications should be strictly adhered to.

For the avoidance of doubt therefore and at the risk of repeating myself, I dispose of the 6 matters on reviews as follows:

a) The proceedings in the Children's Court are hereby confirmed.
b) The orders made therein are altered to the extent that:
    i. The reference to the Children's Protection & Adoption is altered to Children's Act, [*Chapter 5:06*]
    ii. The reference to Juvenile Court is altered to Children's Court.
    iii. The enquiries made shall be deemed to have been made in terms of s 19 as read with s 20 (1) (a) (ii) of the Children's Act.
(c) The Registrar is to avail a copy of this judgment to the office of the Chief Magistrate for dissemination to Children's Courts.