

DUDZAI FARIRAI RACHEAL MUKONDORONGWE
versus
FORBES MUKONDORONGWE
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE; 19 June & 19 September 2024

Chamber Application

Mr *R. A Sitotombe*, for the applicant
Mr *L Ziro*, for the first respondent
No appearance for the second respondent

MUCHAWA J: This matter was filed as a chamber application for the appointment of a curator *ad litem* in terms of r 61(2)(b) of the High Court Rules, 2021. The specific order sought is as follows:

1. “The chamber application for the appointment of a curator *ad litem* is hereby granted.
2. Caleb Mutandwa is hereby appointed as curator *ad litem* for the two minor children namely Mutsawashe Mukondorongwe born on the 27th of August 2009 and Forbes Kunashe Mukondorongwe born on the 15th of May 2017 in the applicant’s intended application.,
3. The applicant and first respondent shall contribute an equal share to the costs of appointment of curator *ad litem*.
4. The first respondent shall pay the costs of suit on an attorney client scale if he opposes this application.”

The applicant and first respondent were married on 28 August 2004, in terms of the then Marriage Act [*Chapter 5:11*]. The marriage was blessed with three children namely;

- (a) Vanessa Mukondorongwe who was born on 6 August 2005, now a major;
- (b) Mutsawashe Mukondorongwe born on 27 August 2009; and
- (c) Forbes Mukondorongwe born on 15 May 2017.

It is the applicant’s averment that the parties have been on separation since February 2017 as the first respondent had moved in with his girlfriend and had cut off all communication and was not supportive to the children except buying food. She claims to have single handedly

paid for the lying in expenses for the last child, paid all bills, school fees for all the children, catered for all their medical aid and clothed them.

The applicant has since relocated to the United Kingdom in search of greener pastures and has been there since February 2020. She says she temporarily left the children in the custody of her niece, one Tanaka Tumbu and has continued to look after the children.

The first respondent did file an application interdicting the applicant from taking the children to the United Kingdom plus a final order of custody. The application was struck off the roll.

The applicant now intends to file an application for custody of the minor children and also an order compelling first respondent to sign and surrender all the necessary documents to enable the minor children to travel to the United Kingdom and stay with her.

This application is a precursor to the applicant's intended application stated above whose draft order I have already laid out above. This is by operation of law.

The first respondent opposed the application only in respect to the prayer for him to contribute an equal share to the costs or the alternative that he pays costs on a higher scale for such opposition. This means that it is only paragraphs 3 and 4 of the draft order which he is opposed to.

The Master of the High Court is not opposed to the granting of the application for appointment of Caleb Mutandwa as curator *ad litem*.

The parties filed heads of argument on the question of costs only. The only issue for resolution is whether the parties should contribute equally to the costs of appointment of *curator ad litem*.

The Applicant's Submissions

Mr *Sitotombe* started off by laying out the role of a curator *ad litem* by relying on the case of *DK v BDK. RM and Anor*, High Court of South Africa, Gauteng Division Case No. 2022/6381 at p13 para 37 wherein LIEBENBERG J stated;

“The curator is there to represent the interests and advance the case of the child concerned. A curator *ad litem* is to speak for the child concerned and not just on the child's behalf, to enable their voice to be heard.”

The payment of costs for a curator *ad litem* was equated to the parents' duty to pay tuition fees, medical fees and buy food, amongst other things.

Section 81(1)(d) of the Constitution of Zimbabwe was relied on as imposing a legal obligation on every biological parent of a child to take care of their own child.

Section 81(1)(a) of the Constitution is pointed to as endowing a child with the right to be heard in all matters.

At the international level, the Convention on the Rights of a Child in Article 12(2) is said to state a child's capability to frame its own views and that it should be given an opportunity to express itself either through representation or an appropriate body.

At the regional level, the African Charter on the Rights and Welfare of the Child in Article 4(2) is said to reinforce the same view.

Rule 61(2)(b) of the High Court Rules is argued to be the mechanism of giving effect to the child's right to be heard indirectly through a curator *ad litem*, who once appointed acts for the child to advance child's rights. Cases such as *AFM in Zimbabwe v Josiah Garamukanwa* HH 468/17 were referred to in setting out the rationale for appointment of a curator *ad litem*.

Mr *Sitotombe* contended that it was never envisioned that a child would pay his own costs for a curator as section 81(1)(e) of the Constitution proscribes child labour. It was averred that the duty to pay is covered under the child's right to parental care as set out in section 81(1)(d).

For explanations of what the right to parental care entails, cases such as *Sadiqi v Muteswa* HH 249/20 @ p 7 were referred to. Therein parental care was defined to include financial contributions and influencing and shaping the life of a child.

The case of *Dawson v Ushamba* HH 335/14 was pointed to in which Tsanga J said the following;

“It is both parents constitutionally who have the obligation to provide parental care and additionally, who have responsibility to take care of their children in terms of education, health and shelter.”

It was argued that this responsibility extends to ensuring that a child's best interests are secured by having a curator *ad litem* appointed on its behalf.

In wrapping up his case, Mr *Sitotombe* argued that as the applicant and first respondent are the minor children's parents, they should equally contribute to the costs of the appointment of a curator *ad litem* as this is an extension of the child's right to parental care. An order made in the case of *Zireva v Musonza & Anor* HC 4202/23 was pointed to as an example of when the court ordered both parents to equally contribute.

Secondly as the first respondent has not pleaded incapacity, in his notice of opposition, the court is urged to order him to pay his half share of the cost related to the appointment of a curator *ad litem*.

It is further contended that the best interests of the children would be best served by having both parents contribute to the costs of the appointment of a curator *ad litem*.

On the costs related to this application, it is averred that it is trite that costs follow the cause. Paragraph 4 of the draft order had prayed that if the application is opposed, then the first respondent would pay costs on a higher scale. It is conceded that as the first respondent consented to the appointment of Caleb Mutandwa as a curator *ad litem*, that prayer should read that each party pays its own costs of suit.

First Respondent's Submissions

The first respondent lays out a very simple case and prays that the application for appointment of a curator be granted without an order for costs contribution by him.

His case is that it is the applicant who is seeking to alter the status quo by applying for custody of the minor children in the main application and she should have assessed and provided for all incidental costs such as the appointment of a curator *ad litem* and for the Master's report.

The first respondent further avers that he already has custody of the minor children and should not be saddled with the additional with the additional costs of a curator *ad litem*.

Both the curator *ad litem* and the Master are said to serve the court, and their services are not for the benefit of the parties.

I was referred to the South African case of *JJV v JV DIV 117/2022* in support of the argument that even in a constitutional democracy, an applicant can still pay the costs of a curator *ad litem*. In that case though the counterclaim was dismissed, the applicant was still ordered to pay costs of a curator *ad litem*.

It is argued that the interpretation of the right to parental care to include costs is wrong as this is just the right of a child to be looked after by the parents.

Mr *Ziro* further argued that the applicant is legally represented and employed in the United Kingdom and she has not demonstrated an inability to pay.

Applicant's Reply

It was emphasized that the appointment of a curator is by operation of law and not by election of the applicant. Also, that the curator is a representative of the minor child. Counsel for the first respondent was said to have limited the import of the term "parental care" which was extensively dealt with in *Dawson v Ushamba supra*.

Unlike the curator *ad litem*, the Master is said not to be a representative of the minor but just an ordinary litigant.

The averment by the first respondent that he has been looking after the children was said to be best dealt with in the main application, particularly as nothing has been stated in the opposing affidavit.

As for the South African case of *JJV v JV DIV 117/2022*, Mr *Sitotombe* makes reference to the learned authors Herbstein and Van Winsen who state that in dealing with the appointment of a curator in terms of s 6(1) of the Divorce Act of South Africa, the court may order the parties, or one of them to pay for the representation of the child.

Mr *Sitotombe* therefore insisted that the first respondent be ordered to pay half of the costs of the appointment of a curator *ad litem*.

Analysis

Under s 19 which falls under the National Objectives of the Constitution of Zimbabwe, 2013 it is provided under subsection 1 that the state must adopt policies and measures to ensure that in matters relating to children, the best interest of the children concerned, are paramount.

Under subsection 2(a), the State is directed to adopt reasonable policies and measures, within the limits of resources available to it to ensure that children enjoy family or parental care, or appropriate care when removed from the family environment.

The above objectives are buttressed in section 81 wherein they are given as rights. In particular s 81(1)(a) provides for a child's right to equal treatment before the law, including the right to be heard.

Section 81(1)(d) then provides for a child's right to family or parental care or to appropriate care when removed from the family environment.

Section 81(1)(f) provides for a child's right to education, health care services, nutrition and shelter.

Section 81(2) restates that the best interests of the child are paramount in every matter concerning the child.

In *casu* I have to place the children's best interests at the centre. They are entitled to be heard and the law has already provided in terms of R 61(2)(b), that in a case for the custody of a minor child, a curator *ad litem* should be appointed and their role is to represent the child's best interests.

The right to parental care should not be narrowly construed. In *Sadiqi v Muteswa supra* this was said to include financial contributions but to extend influencing and shaping of the child's life.

In *Dawson v Ushamba supra*, it was held that both parents have the obligation to provide parental care and also take care of their education, health and shelter.

In the South African case of *Heystek v Heystek* 2002 2 SA 754 (T) 757 E – G, it was held as follows;

“The Constitutional notion of parental care and the paramountcy of the best interest of the child require an additional shift from an antiquated Germanic parent and child relationship, which formed the substratum of the common law, to the rights of the child, which includes parental care and family care. Common law needs to be aligned to serve the constitutional imperatives of the child in a heterogenous society.”

It is my considered opinion that where a child’s right to be heard is provided for through a curator *ad litem* who has to have fees paid and both parents have the capacity to pay, none having pleaded incapacity, then they should both contribute. This advances the best interest of the minor children. I have considered too, that such costs are being paid here in Zimbabwe. They are therefore within the capacity of both parents to meet.

The applicant’s distinction of the Master’s fees and those of the curator *ad litem*, is sound. The curator *ad litem* is in a class of his own. He is the representative of the minor children, who is to be appointed by operation of law.

The justice of this matter and the best interest of the children are best served by granting the applicant’s prayer.

Accordingly, I order as follows;

1. The chamber application for the appointment of a curator *ad litem* is hereby granted.
2. Caleb Mutandwa is hereby appointed as curator *ad litem* for the two minor children namely Mutsawashe Mukondorongwe born on 27 August 2009 and Forbes Kunashe Mukondorongwe born on 15 May 2017 in an intended application for custody and incidental relief.
3. The applicant and first respondent shall each contribute 50% or equal shares to the costs of the appointment of a curator *ad litem*.
4. Each party shall bear its own costs of suit.

MUCHAWA J:

Mtetwa & Nyambirai, applicant’s legal practitioners
Takaindisa Law Chambers, first respondent’s legal practitioners