IN THE HIGH COURT OF BOTSWANA
HELD AT LOBATSE

MAHLB-000467-06

In the matter between:

GEORGE ANDRECK **Applicant**
(representing the minors **THATO MOLEMELE, KHOLA DAISY MOLEMELE & BOTLHE MOLEMELE)**

and

CENTRAL DISTRICT COUNCIL **Respondent**

Mr. Attorney T. Joina for the Applicant
Mr. Attorney O. Pusoentsi for the Respondent

JUDGMENT

LESETEDI J:

1. The issue for determination herein revolves around the question of whether a person who has de facto custody of minor children born out of wedlock whose mother is since deceased can by virtue of such de facto custodianship be entitled to institute legal proceedings on behalf of the minor children.

2. The minor children herein are aged 13, 10 and 8 years respectively. They were born of an unmarried mother who died in 2001. All three are girls.

The applicant is an adult male who is employed as a salesman and is residing in Mahalapye village. The respondent is a local authority established under the Local Government (District Councils) Act (Cap 40:01) for the Central Administrative District under which the village of Mahalapye falls.

By way of a establishing his locus standi to act on behalf of the children in the present proceedings, the applicant states that he was the live-in-lover of the children's mother from the year 1992 up to the time of her death. The younger two children lived with him and their deceased mother since their birth. With regard to the eldest child, the applicant states that he has lived with the said child since the time she was aged a year and a half. It is also apparent that even after the death of the mother the children have continued to live with him to date. He is and has always stayed with them in Mahalapye.

On the basis of the above averments, the applicant in his affidavit first described himself as "the lawful guardian" of the children but later as their "de facto guardian".

It emerges from his papers that the children do have a maternal grandmother who resides in Lobatse. The respondent not only

questions his locus standi to institute the proceedings on the children's behalf but goes further to question even the lawfulness of the applicant's exercise of custody over the children. The grandmother however is not party to these proceedings nor has any affidavit from her been filed by either of the parties.

7. It is necessary to lay out some of the pertinent facts forming the background to this dispute at this juncture application. After the children's mother died, the applicant registered the children under the respondent's welfare programme for orphans. In the application he represented that the said children were orphans and that he was their legal guardian. The children were duly registered and did obtain certain benefits under the scheme. A subsequent investigation by the respondent's social welfare office revealed that the applicant had not been entirely candid in his disclosure to the respondent more particularly that he was the legal guardian of the children. The investigation also revealed that the children had a maternal grandmother whom the respondent considered to be the rightful guardian who ought to have made the required application if the children were to be considered orphans. Further thereto, it emerged that the grandmother contended that the applicant did not take the children with her consent after their mother's death.

8. It is also evident from the papers filed of record that although in his application the applicant was not candid enough in disclosing whether he is the natural father of any of the children, the respondent is aware that he is reputed to be the natural father of at least the last two minor children. He has not denied that he is the natural father of the said children. Indeed I understood his Counsel Mr. Joina to be accepting that the applicant is the natural father of those two children who were born well into the relationship.

9. After it emerged that the applicant had not been candid to the respondent and that he was not the rightful person to apply for the childrens enrolment into the orphan's programme, the respondent removed the children from the programme. This was in 2003. The applicant was advised accordingly and the respondent suggested to him that since the children's maternal grandmother was in Lobatse the application for the children should be made by her and that the appropriate local authority should be the authority where the grandmother is located.

10. It is that removal of the children from the programme that has led to this application. The applicant is effectively seeking an order reinstating the children in the programme and declaring the earlier

termination unlawful and unfair. He is also seeking to be reimbursed "for the social welfare expenses since wrongfully" stopped in September 2003. Besides opposing the application on the merits, the respondent has raised two preliminary points of law. These are, (a) that the applicant has got no locus standi to represent the three minor children; and (b) that the application is brought well after the two year limitation of action provided for under Section 4 of the Local Authority Proceedings Act.

11. During argument, it was conceded in respect of the second point that the point may well not be well-founded having regard to the fact that the children to whom any benefit from the application is intended are still minors. In the light of that concession, I need say no more on this point.

12. It is the first point in limine that I now advert my mind to. As a matter of law, the children being minors, lack the locus standi in judicio, that is, they lack the capacity to litigate in their own names or unaided. Due to the disability of minority, they cannot represent themselves. As a general rule therefore, it is their guardian who is the proper person to represent them or to assist them in legal proceedings. **BOBERG'S LAW OF PERSONS AND THE FAMILY 2nd Edition at page 896**

13. There are certain exceptions to the above rule and I will advert my mind to those exceptions later in this judgment. Natural guardianship of minor children born within wedlock lies with the parents whereas natural guardianship of children born out of wedlock lies with the mother. The natural father of a child born out of wedlock has got no natural right of guardianship to the child although in suitable circumstances the court may grant an order awarding it. **W vs S & OTHERS(l) 1998(1) SA 475(N)** cited with approval in **HERBSTEIN & VAN WINSEN'S THE CIVIL PRACTICE OF THE SUPREME COURT OF SOUTH AFRICA. 4th Edition, page 144.** Natural guardianship operates as a matter of law. The legal duty of the guardian is born from the legal recognized blood (fdial) relationship between the guardian and the ward. **E. Spiro's THE LAW OF PARENT AND CHILD 3rd Edition page 37.**

14. There are other situations where guardianship arises other than through the natural relationship of parent and child for instance by way of adoption or by order of court.

15. Guardianship carries with it the legal authority and duty to care for the person or property of the ward. Where the mother of a minor child, born out of wedlock is deceased, or unable to look

after the minor child an exercise legal authority the duty naturally passes to the maternal grandparents of such child. **MOTAN & ANOTHER v JOSEPH 1930 AD 61 at 70.** The child's natural father although having the legal duty to maintain a child born out of wedlock, does not have a legal authority over the child.

16. As a general rule, where a person is neither a natural guardian of a minor child or where such person has not been appointed a guardian, the court may, in exceptional circumstances and in cases of urgency, allow such a person, to bring proceedings on behalf of a minor child in which case the court is also empowered to cure any previous action by such a person pursuant to those proceedings See, **YU-KWAM v PRESIDENT INSURANCE Co.LTD 1963(1) SA 66 T.** This is done by appointing the person a curator ad litem to the minor child and ratifying any previous steps already taken purportedly pursuant to the litigation.

17. In **YU- KWAM v PRESIDENT INSURANCE Co.LTD 1963(1) SA 66 (T),** the applicant not realizing that his marriage was not recognized in the jurisdiction and thinking he was the natural guardian of his minor child instituted action on behalf of the child who had been severely injured in a motor vehicle accident. During the litigation, he realised that the marriage was not valid in terms

of the laws of the Country. He then applied for an order appointing him curator ad litem permission to amend the pleadings to reflect this capacity as the capacity in which he was suing and also sought ratification of the earlier steps he had taken on behalf of the minor child in the litigation. In granting the relief , Claasen J stated at p69 E,

> "I am not prepared to say he [the applicant] has authority to bring action without leave of the Court, but having done so **bona fide** and hearing in mind the close relationship with the minor and the natural duties in the circumstances taking complete charge of her affairs, I would have no hesitation in refusing any petition brought to dismiss the proceedings on the ground of lack of authority but would appoint a **curator ad litem** and grant permission to amend the pleadings."

In invoking the Court's powers an upper guardian of the minor child and ratifying the earlier actions by the applicant, Claren J remarked at p70,

> "The Court being the upper guardian of the minor in this case can step in and ratify **nunc pro tunc** what has been done on behalf of the minor by a person who **bona fide,** but

mistakenly believed himself to be the natural guardian of the minor"

18. The court does have the power, in its capacity as upper guardian of the minor child, to appoint a guardian for a minor child. It also have the power, to where it is necessary in the interest of the minor child, to divest an existing guardian of his or her guardianship and appoint another guardian. See, **EX PARTE VEEN: In RE: INFANT OTLOGETSWE KGOSIETSILE 1978 BLR 43 *(a)*, 52.** Where there is an existing guardian, the power to divest the guardian of his or her guardianship would be exercised in exceptional situations where it is clearly demonstrated that the interests of the minor child require that guardian be divested of such guardianship for instance, where the guardian is either incapable or unwilling to exercise proper guardianship in the interests of the minor child.

19. Reverting to the present case, the facts show that the applicant and the children's mother were not married. While the children did stay with him for a long time, that on its own does not confer upon him the power of guardianship. There is also no evidence that he ever legally adopted these children or that he was ever awarded guardianship of the said children through an order of Court.

Learned Counsel for the applicant Mr. Joina, appreciating his client's predicament, has urged the court to exercise its power as the upper guardian of minor children and appoint the applicant guardian of these children and ratify the steps already taken in these proceedings. That is not tenable for a number of reasons. Firstly, there is no application by the applicant for such an appointment. Such an application is necessary on notice, to inter alia, the children's grandmother as she appears an interested party. Save for the averments made by the respondent and the applicant's own attorney, the applicant himself has been less than candid to disclose whether he is the biological father of any of these three children, not that such disclosure would have affected his legal status. And, if he is not forthright enough to disclose his biological relationship with the children, the court should in the absence of an explanation be circumspect as to whether he is acting in good faith. I am alive to the clear logic that had he disclosed that he was the biological father of the children, then the respondent would probably not have treated the children as orphans for purposes of its programme as the law looked to him to play his role in contributing towards the maintenance of the children for whom he admitted paternity.

The third reason why the court would not accede to the prayer by Mr Joina is that unlike in the **YU- KWAM** case supra, the applicant did not bring this application having a bona fide belief that he was the guardian of the minor children. He came to court knowing that:

- he was not married to the mother;
- that the children have a maternal grandmother who is alive and who in law has a better claim to guardianship of the children than him;
- that his guardianship over the children, let alone legal custody of the minor children was being contested by the respondent;
- there was no valid ground upon which he could **bona fide** believe that he was the children's legal guardian.

All the above notwithstanding, he did not apply to court for an order either appointing him guardianship of the minor children or at least curator ad litem for purposes of the litigation. He pushed on with this case regardless. For such application to be properly made, it would have been made on notice as pointed out, to the children's maternal grandmother as an interested party. The court would, if the grandmother opposed the application, or mero motu, have required an investigation of the circumstances of at least the children, the grandmother, and the applicant to assist it in making an appropriate order.

22. The applicant having failed to show that is the guardian of the three minor children, and not having been appointed their curator ad litem for purposes of these proceedings, he lacks the locus standi to institute these proceedings.

23. In its papers, the respondent though challenging the applicant's locus standi to bring these proceedings, appears more concerned by his bona fides in bringing this application than a principled stand that the minor children are not entitled to benefit under its programme. In fact the respondent's position seems to be that if the application was brought by the grandmother and it is shown that these children are without support from the natural father(s), the children may well qualify for the programme. But this would have to be with the children living in Lobatse.

24. This is a situation where the issue of guardianship and custody should be treated individually. It would not be appropriate for the court without further enquiry, to make an order that may impact negatively on the welfare of these minor children. Prima facie it appears that these children have lived all if no most of their lives with the applicant in Mahalapye and it is likely that that is the place they are most closely connected to socially. That is the place

they would call home. The circumstances regarding their maternal grandmother and the suitability of her taking over custody let alone retaining guardianship (assuming she is the guardian) has yet to be investigated. If the applicant considers himself no longer able to sufficiently support these children and there is presently no established legal guardian to safeguard their interests, the court in its role as upper guardian of the minor child must intervene, without interrupting the children's current home set up.

25. Although the respondent has succeeded in its challenge of the applicant's locus standi, this application has brought to the fore a pertinent issue regarding the welfare of these minor children whose maternal grandmother (as the apparent guardian) seems not to have taken any legal steps to assert her guardianship over them nor her right to their custody. The benefit to the children arising from these proceedings is that the issue of their guardianship will henceforth be determined and it is the duty of this Court as the upper guardian of the minor children to provide for a framework to determine the uncertainty of these children's guardianship. For the reason, the costs ought not to follow the cause.

The success of the point in limine should also not operate to the prejudice of the needs of the children for any support they may be

entitled to from the respondent's programmes if their defacto custodianship remains uninterrupted.

26. In the circumstances the following order is made;

a. The point in limine that the applicant does not have locus standi to bring these proceedings on behalf of the three minor children, **THATO KHOLA, DAISY AND BOTLHE MOLEMELE** succeeded;

b. A curator ad litem is to be appointed by the Registrar without delay, to:

(i) Proceed to process an application for the above minor children to benefit under the respondent's welfare programme either as orphans or destitutes whichever they would qualify for.

(ii) Investigate the suitability of the appointment of the applicant, the children's maternal grandmother or any other person as the children's guardian.

(iii) Investigate the suitability of any person for the award of custody of the said minor children.

(iv) Obtain the assistance of a social welfare investigation in any inquiry pursuant to this order.

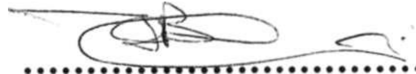
(v) move an application for the appointment of such suitable person(s) as the guardian and or custodian of the said minor children.

c. Pending any final appointment, the applicant to retain custody over the said minor children.

d. Each party to pay the costs of this application.

DELIVERED IN OPEN COURT AT LOBATSE THIS 31 DAY OF OCTOBER 2006

21st October



I.B.K. LESETEDI
(JUDGE)