

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION , MTHATHA**

CASE NO.439/2015

In the matter between :

Z. G. S.

APPLICANT

And

X. V.

1ST RESPONDENT

THE FAMILY ADVOCATE , MTHATHA

2ND RESPONDENT

THE MAGISTRATE , MR NKANYUZA N.O

3RDRESPONDENT

**THE MINISTER OF JUSTICE & CORRECTIONAL
SERVICES , RSA**

4TH RESPONDENT

JUDGMENT

PAKADE J:-

[1] This is an application for review to set aside the decision of the Magistrate , the third respondent in terms whereof he awarded custody of the minor child to the father of the child , the first respondent .

[2] The mother of the child died and the applicant, her aunt, who is the maternal

grandmother of the child having been aggrieved by the Order of the magistrate, brought this review application on an urgent basis.

[3] The mother's child, A. was married to the first respondent but divorced on 8 February 2012 and custody of the child was awarded to the A. .Upon her death on 12 May 2013, the first respondent requested custody of the child from the applicant who refused to release the child to him. Subsequent approach to the family on the same request was met with the same refusal. Thereafter, the first respondent successfully applied for custody of the child in the Children's Court.

[4] On 26 February 2015, this Court set aside the decision of the third respondent and ordered that the minor child remain in the custody of the first respondent pending determination of this application upon a proper report having been furnished by the family advocate on his or her investigation of the custody, care and primary residence of the child.

[5] At the commencement of the hearing, Mr Mtshabe, counsel for the first respondent, submitted in *limine* that the applicant, being the maternal grandmother of the child and having not been appointed a guardian nor executor to A. 's estate or appointed a curator, has no *locu standi in judicio* to bring this application in terms whereof she claims that the child be returned to her and/ or her family . Mr Matebese , counsel for the applicant , countered that submission and relying on **section 22 and 23 of the Children' s Act , 38 of 2005** submitted that the applicant has a vested interest in the child by virtue of being his maternal grandmother .

[6] I must consider the submission of counsel in turn but before doing so I need to reflect on the relevant provisions of the Children ' s Act in so far as they protect the interests of children having regard to the fact that the Children's Act supplement the rights which a child has in terms of the Bill of Rights .

All organs of state in any sphere of government including officials, employees and representatives of organs of state are enjoined to respect, protect and promote the rights of children contained in this Act¹. In all matters concerning the care, protection and well-being of a child, the standard that the best interest of the child is of paramount importance must be applied².

[7] Anyone listed in section 15 of the Act has a right to approach the court and allege that a right in the Bill of Rights or the Children's Act has been infringed or threatened and the court may grant appropriate relief including declaration of rights. The following are such persons:

- (a) a child who is affected by or involved in the matter to be adjudicated;
- (b) anyone acting in the interest of the child or on behalf of another person who cannot act in their own name ;
- (c) anyone acting as a member of , or in the interest of , a group or class of persons ; and
- (d) anyone acting in the public interest.

[8] The applicant approaches the Court as a relative of the child who was in *loco parentis* over the child after the death of the child's mother who was custodian thereof. The applicant is the one left by the mother of the child to be the custodian to take care of, protect her and ensure that her best interests are safeguarded. She had a right to come to court and seek review of the order of the magistrate which interfered with the care, protection and best interests of the child which were safeguarded by her. In my view, it cannot be said that she has no *locu standi* to vindicate the rights of her grandchild. Further, she had a right in terms of section 15 (1) (c) to act on behalf of S. family which also would have been entitled to come to court to vindicate the rights of this child.

[9] Having disposed of *locu standi*, I must now answer the question whether, armed with the same *locu standi* to vindicate the rights of a child she is

¹ S 8 (1) and (2) of the Children's Act, 2005

² S.9

precluded from claiming guardianship over the child unless she has been appointed a guardian. I say this because of the view I take that the applicant has approached the court alleging that she was given guardianship rights by A. before her death and the court has also powers in terms of section 15(1) to grant appropriate relief including a declaration of guardianship rights to the applicant.

In my view, the fact that she has not been appointed a guardian is neither here nor there as she has been exercising guardianship rights over the child after the mother's death and has approached the court to declare her a guardian as the relief that the court may grant in a application brought in terms of section 15 to give effect to the best interest of the child. In essence the court can grant the applicant guardianship of the child in terms of the relief sought as an alternative in paragraph 3 of the Notice of Motion. Any submission to the contrary negates the best interest of the child principle and is untenable.

[10] Further, the applicant, as an interested person who is in *loco parentis* of the child is entitled to invoke the provisions of section 23 and apply for an order granting her on such conditions as the court may deem necessary, contact or care of the child. The following requirements will be compelling to the court to grant the application:

- (a) the best interest of the child;
- (b) the relationship between the applicant and the child and any other relevant person and the child ;
- (c) the degree of commitment that the applicant has shown towards the child ;
- (d) the extent to which the applicant has contributed towards the expenses in connection with the birth and maintenance of the child ; and
- (a) any other fact that should , in the opinion of the court be taken into account .

[11] A.'s parents passed away and she had to stay with the applicant for eight years before her marriage to the first respondent. The applicant had close

contact with her and had to finance her education over and above providing her with means of sustenance.

[12] It is not necessary for purposes of deciding the point involving *locu standi* to also consider the requirements of section 23. It suffices to find that the applicant has *locu standi* in *judicio* to approach this court in vindication of the rights of the child.

The following order is made:

1. That the point in *limine* is dismissed with costs.
2. That the hearing of the main application must be set down as soon as possible

L.P.Pakade

JUDGE OF THE HIGH COURT

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10 MARCH 2016

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15 MARCH 2016