

**IN THE HIGH COURT OF LESOTHO**

**HELD AT MASERU**

**CIV/APN/331/2021**

In the matter between

**JULIA SEBOKA**

**APPLICANT**

**AND**

**THE MASTER OF THE HIGH COURT**

**1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL**

**2<sup>ND</sup> RESPONDENT**

**KATLEHO JONKOMANE**

**3<sup>RD</sup> RESPONDENT**

**'MATUMELO JONKOMANE**

**4<sup>TH</sup> RESPONDENT**

**FIRST NATIONAL BANK LESOTHO (PTY) LTD**

**5<sup>TH</sup> RESPONDENT**

Neutral Citation: Julia Seboka v The Master of the High Court & 4 Others  
[2022] LSHC 74 Civ (03 June 2022)

**JUDGEMENT**

**CORAM: BANYANE J**

**HEARD: 14/04/22**

**DELIVERED: 03/06/22**

**Summary**

Review of a decision by the Master of the High Court - revoking the applicant's guardianship appointment - appointment and removal of guardians to minor children under the Children's Protection and Welfare Act - powers of the Master of the High Court - whether they extend to cancellation of an appointment on grounds that the family acted contrary to law - no such power exists and Master's decision therefore *ultra vires* - natural guardian at liberty to challenge the decision before a competent court.

## **ANNOTATIONS**

### **Cited cases**

#### **Lesotho**

1. Matebesi v Director Immigration and Others LAC (1995-1999) 618
2. Motsamai Morie v Lesotho National General Insurance Company Limited CIV/T/360/12 [2021] LSHC 103
3. Rammokoane and Others v Principal Secretary Ministry of Defence CIV/APN/71/16
4. Rabotsoa v Principal Secretary for Communication CIV/APN/126/14
5. Jase v Jase & Others CIV/APN/284/94
6. Matli v Tsikoane and Others CIV/APN/145/00
6. Ntsane Mosuhli v Tseliso Selematsela CIV/APN/14/90

#### **Other jurisdictions**

1. Master v Talmud 1960(1) SA 236
2. Rossuter v Barclays Bank 1933 TPD 374
3. Wood v Dawies 1934 CPD 250
4. Ex parte Macrobers No 1946 TPD 336
5. Joffe & Co Ltd v Hoskins & Another 1941 AD 431
7. Van Rooyen v Werner (9 SC 425)
8. Bloem v Vucinovich 1946 AD 501
9. Venter v R 1907 TS 910
10. Volschenk v Volchenk 1946 TPD 486
11. R v La Joyce (Pty) Ltd and Another 1957 (2) SA 113 (T)

## **Statutes**

1. The Children's Protection and Welfare Act 2011
2. The Interpretation Act of 1977
3. The Administration of the Judiciary Act 2011

**BANYANE J**

**Introduction**

**[1]** This is an application for review of a decision of the Master of the High Court in terms of which she revoked the applicant's appointment as guardian of her minor nephew, K.

### **Background facts**

**[2]** The facts giving rise to this application may be summed as follows. The applicant herein is the sister to Molahlehi Jonkomane (hereinafter the deceased), the father to the minor child K. The deceased was married to 'Matumelo Jonkomane, the mother of this child. Sometime in 2011, the deceased got involved in a car crash that seriously injured him to an extent that he was, after the accident, crutches bound. He subsequently lived with his sister, the applicant. In 2013, he instituted Divorce proceedings against his wife in the Mapotu Local Court. Divorce was granted and custody of the minor child was awarded to its mother Matumelo Jonkomane. Following the divorce, the applicant continued to nurse and look after her brother until he departed this world in 2018. These facts are common cause. It is further common cause that prior to his demise, the deceased received compensation from Road Accident fund, and he took out an investment policy with Old mutual.

### **The dispute between the parties**

**[3]** The crux of the dispute between the parties in this matter relates to administration of this policy and monies accruing thereunder.

**[4]** It is the applicant's case that K was identified by the deceased as a beneficiary under this policy and her as guardian to his child's estate. She avers that the Jonkomane family council endorsed this decision by appointing her as K's guardian. This was on the 11<sup>th</sup> of February 2019. It is common cause that following the appointment, the applicant has been responsible for management of funds received under the policy.

**[5]** On the 12<sup>th</sup> of August 2021, the Master of the High Court addressed a letter to the applicant essentially lamenting her dissatisfaction about the

way the applicant is managing K's affairs and finances. In this letter, the Master complains that the applicant does not act in his best interests. This view is based on allegations that ; **a)** she never acts swiftly in releasing monies for purposes of the child's needs; **b)** she has failed to promptly cause for electrification of K's rentable flats built for the purpose of generating income for him, that instead she allowed non-paying individuals to occupy them; **c)** she has neglected this child and failed to buy him winter clothes until winter season came to an end. The master adds that the applicant's appointment was irregular in the first place because the child's mother, as natural guardian is still alive.

**[6]** Based on these accusations, the Master notified the applicant through this letter that she removes her as K's guardian and directed her to submit to her office within 14 days, title documents for the site at Matholeng on which the flats have been built, documents relating to the policy held with old mutual, the deceased's death certificate and other documents as well as an inventory of the K's property and accompanying relevant (title) documents.

**[7]** It is this revocation that the applicant challenges. She does so principally on the ground that in removing her as K's guardian, the Master acted beyond the scope of her powers; alternatively, that even if she has powers to cancel the appointment, she ought to have given her a hearing.

**[8]** The Master vigorously opposes this application. In her answering affidavit she raises certain preliminary objections relating to non-joinder of both K and his mother. She further avers that the proceedings are irregular for non-compliance with practice Direction No.2 of 2021, Rule 12 read with Rule 8(19) of the High Court Rules.

**[9]** Both K and his mother were later joined per an order granted by Monpathi J on 14<sup>th</sup> December 2021. K's mother has not, however, filed any opposing papers but has filed a supporting affidavit to the master's

founding affidavit in an interlocutory application filed on (though it was later abandoned).

**[10]** On the merits of the application, the Master agrees that the deceased selected his son as beneficiary under the policy. She, however, refutes the allegation that the deceased appointed applicant as K's guardian and his estate. She avers that in fact the Jonkomane family was misled into believing that the deceased's wish was to have the applicant as K's guardian.

**10.1** It is her case further that the family nomination is unlawful and improper because the family has no authority, without involvement of a surviving natural guardian, to appoint a third party as guardian.

**10.2** She alleges further that the applicant has failed, dismally, to transparently manage K's affairs. She buttresses this point by pointing out that the applicant has failed, to date, to account for monies which were withdrawn for purposes of buying K's clothes, a heater, television set, a bed and groceries. She avers in this regard that despite several demands to the applicant to account how the withdrawn monies (M8 000.00) and M8 900 respectively have been spent, the applicant fails to so do. Furthermore, the applicant has refused to date, to divulge the investment amount under the policy despite demand to do so nor availed to her office an inventory of the K's estate.

**10.3** In respect of her powers to cancel the applicant's appointment, she avers that since she has powers to appoint a guardian to the estate of a minor, she has power to cancel an appointment which has been erroneously made. She further contends that no right flows from the applicant's unlawful appointment and for this reason, she was not entitled to a hearing.

**[11]** I must point out at this juncture that after the granting of joinder application, the applicant filed her reply. In her reply, she claims to have submitted all the reports requested by the Master. She attached to her affidavit, a handwritten list of what seems to be an account of the monies whose usage is complained of.

### **The parties' submissions**

**[12]** In an endeavour to substantiate their claim and defence respectively, the parties' submissions centre around interpretation of relevant provisions of the **Children's Protection and Welfare Act of 2011** (CPWA) dealing with appointment of guardians.

**[13]** In submitting that the applicant's appointment is lawful and valid, Advocate Mokhathali for applicant contends that guardianship appointment made by any party enumerated under **Section 203(1)** of the CPWA is valid. He cited **Morie v Lesotho National General Insurance Company Limited CIV/T/360/12 [2021] LSHC 103** to submit that a family counsel is entitled in terms of this provision to appoint a guardian and for this reason, the Master's power to appoint is not superior to the power bestowed upon the family in this provision.

**13.1** It is his further argument that the provision authorises parties there listed to make the appointment, with or without the consent of a surviving parent.

**13.2** Referring to section 203(5), he further argues that the applicant's appointment is valid because under this provision a person may be appointed as guardian solely for the estate of a minor and the person so appointed need not have its custody.

**13.3** Having submitted that the applicant was properly appointed, Mr. Mokhathali contended that the CPWA vests no power on the Master to revoke appointment of a guardian. His alternative argument is that even if

she possesses such powers, the applicant was entitled to a hearing before the setting aside of her appointment. He relies on **Matebesi v Director Immigration and Others LAC (1995-1999) 618** for this submission because according to him, the applicant, has, by virtue of her guardianship, acquired certain rights and duties, including conclusion of contracts, investing and making purchases for the benefit of the minor child. These, he says, are existing rights, which clearly have been prejudicially affected by the Master's decision.

**13.4** He buttressed this by reference to provisions of the *Administration of the Judiciary Act of 2011* which speak to the powers of the Master of the High Court. He contends that no provision in this Act authorizes the Master to cancel appointment of a guardian. He submitted therefore, that the master, in purporting to terminate or revoke the applicant's appointment as guardian, stepped beyond the bounds of her powers as conferred by legislation and the decision is invalid and must therefore be set aside because an act of an administrative organ which exceeds or is given beyond the authority conferred upon it, is *ultra vires* and must be set aside.

**[14]** Advocate Molise on behalf of the Master contended firstly that the applicant's counsel erroneously interprets section 203 of the CPWA. According to him, the family has no power or authority to appoint a guardian while a natural guardian parent is still alive.

**14.1** He further submitted that appointment of a guardian under this provision can be valid only if it is made with the involvement of the surviving parent because in terms of section 204(1), on the death of the father of a child, the mother, if surviving, remains the guardian of the child. His construction of the latter provision is that the surviving parent, as of right, automatically becomes the guardian of a minor child when its father passes on.



**14.2** He is of the view that the applicant's appointment was made to the exclusion of K's mother when the law clearly requires that the appointment be made in conjunction with the surviving parent.

**14.3** He concluded that the non-observance of the above quoted provisions, renders the applicant's appointment unlawful and illegal and therefore of no consequence in law.

**14.3 1** Citing the cases of **Minister of Local Government and another v Moshoeshe CIV/A/15/2009**, he submitted that an act done contrary to the law is not only of no effect but must be regarded as never having been done.

**14.3.2** He finally submitted that since no rights would flow from an illegality, the *audi* principle would not in the circumstances, be available to the applicant because firstly, she has no existing rights, secondly, she has not been prejudiced by the impugned decision. He referred to **Rammokoane and Others v Principal Secretary Ministry of Defence CIV/APN/71/16** and **Rabotsoa v Principal Secretary for Communications CIV/APN/126/14**.

**14.4** His second leg of argument is that an appointment for guardianship by a deceased parent must have been made in a will and in the present case, the applicant presented no will by the deceased as proof that indeed the deceased wanted her to be K's guardian.

**[15]** Replying to the last argument made by respondent's counsel, Mr Mokhathali referred the Court to **Oudekraal Estates (Pty) Ltd v City of Cape Town 2004(4) SA 222 (SCA)** to submit that the appointment cannot be ignored as Mr. Molise for respondent seems to suggest because it exists until challenged and set aside in judicial review proceedings.

## **Discussion**

**[16]** The applicant mainly asks this court to declare her as the rightful guardian to the estate of the minor child K, to set aside the Master's decision as unjustified and ultra vires and an order interdicting the Master from demanding the inventories and accounts from her.

**[17]** To prove her appointment as K's guardian, the applicant has annexed a family resolution dated 11<sup>th</sup> February 2019. She further avers that this nomination by the family essentially endorsed the deceased's decision of appointing her as K's guardian. She has, however, made a bare allegation that the deceased appointed her as guardian.

**17.1** Besides the family nomination, she attached a certain undated document from Old Mutual titled "third party declaration" wherein she is named as K's "legal guardian". The problem with this document is that the portion supplied has not been signed by the deceased nor dated. It does not, therefore, prove what the applicant alleges. It is also not immediately clear whether it was prepared before or after the family appointed her. I must state that the appointment letter (by the family) is addressed to Old Mutual and in terms of this letter, applicant is presented as "full" legal guardian of K.

**[18]** Faced with the difficulty that no documentary proof has been supplied on the alleged nomination by the deceased, Mr. Mokhathali for the applicant could not persist with the argument in this regard but was constrained to rely on the nomination made by the family.

**18.1** It is the validity of this nomination that it also hotly contested by the respondent for non-compliance with the provisions of the CPWA.

**[19]** Since the dispute turns on the proper interpretation of the relevant provisions of the CPWA in relation to appointment of guardians and powers of the Master of the High Court in the supervision of minor children's estates, I therefore turn to the CPWA to see how guardianship is

acquired as well as the powers of the Master in so far as appointment and removal of guardians is concerned.

### **Appointment of guardians**

**[20]** Power to appoint guardians has been conferred by the Act to different parties. The Act further provides for rights of surviving parents and testamentary appointment of guardians. It also provides circumstances under which co-guardians may be appointed and how each one of the parties named in the Act may exercise appointment powers. These are dealt with under Part III of the Act which speak to matters relating to custody, guardianship and maintenance of minor children.

**20.1** On guardianship, sections 203 up to section 210 are relevant. They are discussed next.

**[21]** Section 203 (1) describes a guardian as a person appointed to assume parental responsibility over a child by;-

- a) A will made by a parent of the child;
- b) An order of a Children's Court;
- c) By a family; or
- d) The Master of the High Court.

**21.1** Subsection 2 provides that;

“a guardian may be appointed by any of the parties referred to under subsection (1) acting alone or in conjunction with the surviving parent of a child where one of the parents is deceased, or the father of the child born out of wedlock who has acquired parental responsibility for the child, or one of the parents where parents of the child are no longer living together.

**21.2** Subsection 5 provides that a guardian may be appointed in respect of a person or estate of a child or both and subsection 6 provides that a guardian appointed only in respect of an estate of a child need not have actual custody of the child but shall, with the authority of the Master of the High Court have;

- a) the power and responsibility to administer the estate of the child and in particular to receive and recover and invest the property of the child in his own name for the benefit of the child;
- b) take all reasonable steps to safeguard the estate of the child from loss or damage,
- c) the duty to produce and avail accounts in respect of the child's estate to the parent or custodian of the child or to such other person as a Children's Court may direct, or to the Children's Court, as the case may be, on every anniversary of the date of his appointment; and
- d) Produce any account or inventory in respect of the child's estate when required to do so by a Children's Court.

**21.3** Section 204 of the Act speaks to rights of a surviving parent to guardianship. It reads;

"204(1) on the death of the father of the child, the mother, if surviving shall, subject to the provisions of the Act, be the guardian of the child."

**21.3.1** Subsection 2 provides;

"on the death of the mother of the child, the father, if surviving, shall, subject to the provisions of this Act, be the guardian of the child."

**21.4** Section 205 deals with appointment of testamentary guardians and provides that a parent of a child may, by will, appoint any person to be a guardian of the child after the parent's death. The appointed person cannot however, immediately after the demise of the deceased parent, assume their guardianship role but shall act as such after death of a surviving parent, unless the surviving parent has requested otherwise. This is in terms of section 205(4).

**21.5** The Act, however, permits the Court to intervene where the surviving parent is unfit to have legal custody of the child. It allows either the child, the guardian testamentary appointed or a member of the family to make an application to a Children's Court. The latter is conferred with power to make any of the following orders;

- a) refuse to make any order in which case the parent shall remain the only guardian;
- or
- b) make an order that the guardian shall act jointly with the parent

- c) make an order appointing a relative of the child of a person who is willing to act; (or guardian)
- d) make an order that the guardian shall be the only guardian of the child, in which case the Children's Court may order the parent to pay the guardian a financial provision towards the maintenance of the child.

**21.6** Section 206 deals with appointment of a guardian by the Children's Court. It provides that a Children's Court may appoint a guardian on an application made by any person where; **a)** the child's parents are no longer living or cannot be found and the child has no guardian and there is no other person having parental responsibility for him or **b)** where the parents of the child are no longer living together.

### **Requirements of section 203 for appointment of a guardian**

**[22]** As stated earlier, no will appointing applicant as guardian has been presented before this court. The question that then must first be answered is whether section 203(2) confers a discretion on parties enumerated therein to either act alone or in conjunction with parties listed under this provision.

**[23]** To answer this, it is perhaps advisable to keep in mind that, in interpreting statutes, every word and phrase must receive a meaning and that meaning is usually the ordinary meaning of the word or phrase **Venter v R 1907 TS 910 @ 913, Volschenk v Volchenk 1946 TPD 486 @487.**

Mr. Mokhathali for the applicant contends that the word "or" as used in the phrase "or in conjunction with" is disjunctive, thus providing an alternative for parties there stated to either act alone or in conjunction with the surviving parent.

**[24]** It is indeed correct that in the ordinary usage, the word "or" is disjunctive while "and" is conjunctive. See *Interpretation Act of 1977* and Maxwell; *interpretation of statutes* 12ed @ 232. It is also correct that where there is no ambiguity, courts should be slow to depart from the

literal meaning of words. **R v La Joyce (Pty) Ltd and Another 1957 (2) SA 113 (T) at 116.**

**[25]** The question is whether Mr. Mokhathali's construction of this provision gives effect to the intention of the legislature and the scheme of part 3 of the Act.

**[26]** The wording of sections 203, 204 and 205 is clear and unambiguous, in my view and the ordinary meaning of the words there used ought to be given effect to. It seems to me that the three provisions complement each other. They must therefore be read together in order to decipher the intention of the legislature.

**[27]** For a proper construction of sections 203(2), It is logical to first consider sections 204 and 205 because as will become clearer in the discussion that follow, the right of any person appointed by any of the parties listed in section 203 is subject to the recognition of the rights of surviving parents vested in terms of section 204.

**[28]** Section 204(1), as shown earlier, speaks to rights of a surviving parent. As natural guardian, she / he has priority rights over third parties. It is for this reason, i think, that the power of appointment under section 203 is circumscribed in the sense that it must be made in conjunction with the surviving parent as is discussed below.

**28.1** Subsection 3 of section 205 strengthens the position of the natural guardian in that even where the guardian is appointed testamentary by a will, the person so appointed shall act as such after death of a surviving parent unless the surviving parent has requested otherwise. This shows that her / his views on third parties being appointed as guardians are indispensable.

**28.2** A further reading into other subsections of section 205, in particular, subsection (5), confirms, in my opinion, that natural guardianship is not lightly interfered with. It is only in special circumstances that a natural guardian will be divested of her guardianship or custody. Such circumstances include unfitness to have legal custody of the child. Even then, it is the court that is vested with the power to make its assessment and decide whether it is necessary to appoint a 3rd party (e.g. a relative) as co-guardian or authorise the third party to singly act as guardian.

**[29]** Reading section 203 in the light of the specified provisions of the Act, it seems to me that the word 'may' in subsection 2 is used in the sense that anyone of the listed parties is empowered to appoint a guardian. The word "or" does not, however, confer a discretion on the appointing party to make an election of either acting alone or in conjunction with persons so mentioned. An appointment made in terms of subsection 2 of section 203 is subject to the limitation or qualification there stated, namely, where there is a surviving parent of a child where one of the parents is deceased, or the father of the child born out of wedlock who has acquired parental responsibility for the child, or one of the parents where the parents of the child are no longer living together, the parties must act in conjunction with persons just mentioned. In our case, the surviving parent must be part of the decision-making. To put it differently, the fact that a family or other party listed therein is authorized to appoint a guardian, cannot alter the importance and clear provisions of section 204.

**[30]** The proper construction of section 203, in my opinion, is therefore that the parties listed therein can only singly appoint a guardian where there is no surviving parent; but where there is a surviving parent, the appointment must be made jointly with her.

**[31]** Since the surviving parent of a minor child automatically becomes the guardian upon the death of the other parent, as discussed above, it follows in my view that in the nomination of a guardian, all the parties

enumerated in section 203(1) are bound, in so nominating, by the provisions of the Act i.e 203(2), 204 and 205 and 206. In the circumstances of this case therefore, the family council was bound by the Law i.e. section 203(2), in making the appointment. It matters not that the appointment was solely for the estate of the minor. It should have made the appointment jointly with the surviving parent.

**[32]** It follows from the preceding discussion and interpretation of section 204 and 205 that Mr. Mokhathali's construction of section 203(2) must be rejected. It would lead to absurd results if the provision was to be interpreted so as to permit an appointment to the exclusion of a surviving parents when their rights are unequivocally guaranteed under section 204 and may only be curtailed under circumstances specified in the Act e.g under section 205(5) as discussed above.

**[33]** This construction of section 203 is in accord with the position obtaining prior to the promulgation of the CPWA. It is that the father of a child as its guardian had power of administration and management of his minor child's property. **Rossuter v Barclays Bank 1933 TPD 374 @ 383, Wood v Dawies 1934 CPD 250 @ 255-256, Ex parte Macrobers No 1946 TPD 336.** Where the father had died, the mother succeeded to his rights and assumed his duties as natural guardian. See **Joffe & Co Ltd v Hoskins & Another 1941 AD 431@459** where it was held that the surviving mother, in the absence of an appointment of tutors, succeed to the guardianship of minors upon death of their father. Tindall JA in **Calitz v Calitz 1939AD 56 @ 62** agreed with De Villiers CJ in summing up the powers of the father and mother in **Van Rooyen v Werner (9 SC 425)** where he said;

He is the natural guardian of his legitimate children. During his lifetime he alone is entitled to appoint tutors to take his place after his death during his children's minority. coming next to the mother, her rights over control over the person and property of her legitimate children do not arise until the death of the father.



[34] In our jurisdiction, the Court in **Jase v Jase & Others CIV/APN/284/94** considered the question whether a divorced mother should assume full control of her son and his property. In this case, custody of the child had been awarded to the mother at the time of divorce. The grandmother of the child (mother of deceased father) had seized control of the deceased estate for her benefit and the chief had appointed her as heiress.

**34.1** Maqutu J discussed the Customary Law position as follows. The wife on the death of the husband leaving his eldest child a minor, becomes controller of and administrator of the affairs of her house. In other words, women acquired, in Basotho traditional society, the capacity to be guardian over their own children, although this was subject to the advice of the male head of the family. Citing the case of **Bloem v Vucinovich 1946 AD 501**, he concluded that even the father who had on divorce been awarded custody, could not exclude the mother from personal control of the minor in a will by appointing a guardian for the minor child.

**34.2** Having reviewed customary law as well as Roman Dutch Law on the subject, he held that the surviving parent (mother) must be the guardian and controller of the deceased's estate on behalf of her son. He significantly emphasized that although the woman has divorced the father and therefore ceased to be a member of the deceased's family with no right of succession, the issues of guardianship are not about the right to succession but interests of a minor child and that the Court must protect the minor child from despoliation. He concluded that the letter written by the chief appointing the grandmother as heir was invalid and irregular because the family was bound by law, just as the chief was.

[35] With the construction of the relevant provisions of the Act and the cited authorities, I apply the principles on the facts of the instant matter. I start with the alleged testamentary appointment.

**35.1** As stated earlier, the applicant makes a bare allegation that the deceased appointed her as K's guardian. Section 205 clearly requires an appointment be made by a will or testamentary deed. It is therefore not enough for the applicant to simply allege, without documentary proof, that she was appointed by the deceased.

**35.2** Absent documentary proof, I am not convinced that the deceased appointed her. I must add that even if she was so appointed, her appointment and assumption of guardianship would only take effect upon the death of K's mother or authorization of the Court under the provisions of section 205(5).

**[36]** Turning now to the nomination by the family, which, according to her was made as sort of an endorsement of the deceased's wishes on her guardianship, same is invalid for non-involvement of K's mother because as stated earlier, an appointment by either of the parties enumerated under section 203(1) is subservient to the provisions of section 204 and must be made in consultation with or jointly with the surviving parent.

**[37]** For reasons stated, I am unable to agree with the assertion that the applicant was legally appointed.

**[38]** I should add that even in custody matters, surviving parents are divested of their custody right only in exceptional circumstances such as where they are declared unfit to be awarded custody. In **Ntsane Mosuhli v Tseliso Selematsela CIV/APN/14/90**, Kheola J (as he then was) said;

“it is very clear that before the Court can award custody of a minor child as a 3<sup>rd</sup> party, special circumstances or good cause must be shown. It must be shown that the parent is not a fit and proper person to be awarded such custody.”

**[39]** Having concluded as I did, the next issue to be addressed is whether the Master of High Court is vested with power to revoke the appointment. I think not for reasons that follow.

**Does the Master of the High Court have power to revoke guardianship?**

**[40]** The starting point of the inquiry is that the Master of the High Court is a creature of statute and therefore has only such rights and powers as have been conferred to her by the statute i.e see section 4, 6(2) of Administration of Estates Proclamation of 1935 and other provisions on appointment of tutors for minors. See also the case of the **Master v Talmud 1960(1) SA 236 @ 238** where Herbstein J held that section 6(2) (similar to our section 6(2)) is concerned with the Jurisdiction of the Master and that before the Court can make any order in favour of the Master, it must be able to find authority for the act done, within the four corners of the Act, although such power need not necessarily be express.

**[41]** The relevant provisions of the Proclamation must be read with those of the CPWA on powers of the Master of the High Court in so far as Administration of Minors' Estates, appointment and removal of guardians are concerned in order to establish whether they confer, either expressly or by implication, powers of revocation of guardianship.

**[42]** Section 40 of CPWA sets out powers and duties of the Master. A closer reading of this provision reveals that she is empowered to administer or confiscate property belonging to children and when she discovers that property belonging to children has been negligently used by a successful heir or any person, may request the concerned person to pay for that property, failing which he / she shall make an application to court for such a person to pay for that property. Other powers are spelled out under section 203(6). This provision essentially clothes her with power to authorize a person appointed as guardian to an estate of a minor child

to perform acts there mentioned. Under the Administration of Estates Proclamation, she is entitled to appoint tutors under section 76.

**[43]** Upon perusal of the both the Proclamation and the CPWA, neither of the two statutes confer powers of revocation of guardianship on the Master. Even where a tutor would have been appointed and granted letters of confirmation by the Master under section 76 of the Administration of Estates Proclamation, she/he would be suspended or removed from office by an order of court in terms of section 101. It is clear in my view that not a single provision in both Acts empowers the Master to remove a guardian. The purported cancellation is therefore not legally sanctioned.

**[44]** The question that must then be answered in the light of this conclusion is whether the applicant is entitled to the reliefs sought. I am of the view that it does not follow from the conclusion above that the applicant is entitled to the reliefs sought. I explain.

**[45]** The applicant asks the Court to declare her the rightful guardian to the estate of the minor child K. I have already drawn attention to the fact that a surviving parent *ex lege* remains the only guardian of the minor child unless a joint guardian is appointed in conjunction with her pursuant to section 203(2) or 205 if she is declared not to be fit and proper. Based on the conclusion that her appointment is not legally sanctioned. She is not therefore entitled to a declaratory in that regard because her appointment was made in total disregard of the provisions of section 203 of the Act.

**[46]** Furthermore, she seeks an order interdicting the Master from demanding that the inventory and accounts for the administration of K's estate. This prayer too is untenable because it is the duty of a person

appointed to administer an estate of a minor to make and submit to the Master an inventory of all property belonging to the person under his guardianship (see for example section 85 of the Administration of Estates Proclamation). It follows in my view that the Master has power to demand that the inventory and accounts be submitted to her office. I should add that under the CPWA, she is even entitled to demand that squandered property be paid up.

## **Conclusion**

**[47]** In the light of the foregoing discussion, the applicant's claim is substantially unsustainable. She cannot succeed to obtain the reliefs sought. The only relief that is grantable is prayer (d) declaring the Master's decision as *ultra vires*. I do not wish it to be understood, however that by

granting this order, I, in anyway recognise the applicant as the lawful guardian. Although I have found that the applicant's appointment is not valid, the decision, however, gave rise to certain consequences, i.e her name has already been recorded in the old mutual documents as the person authorized to administer K's estate. I cannot therefore issue any order (perhaps set the decision aside in these proceedings) because no counterapplication has been filed in that regard. K's mother is however, at liberty to challenge the nomination in a competent court and in appropriate proceedings to seek appropriate orders that will enable her to administer the estate of his minor son because as we have seen in the preceding discussions, even prior to promulgation of CPWA the surviving parent had dominant rights.

**47.1** The case of **Matli v Tsikoane and Others CIV/APN/145/00**, where the court was faced with facts similar to facts in the instant matter, illustrates the nature of proceedings that may be filed. In that case, the mother of two minor children had been divorced to the deceased and awarded custody of the minor children on divorce. When her ex-husband died, the family met and appointed the eldest child as heiress, but due to

her tender age, a relative was appointed as guardian and trustee of the minor child. The mother of the minor children approached the Court seeking among others, an order declaring the resolution of the deceased's family appointing the 3<sup>rd</sup> respondent to accept all monies due to the estate of the deceased, invalid, and that she be declared the rightful person to accept the insurance monies due to the estate for use of these monies for the maintenance and support of the heirs being minor children.

**Order**

**[48]** In the result, the application partially succeeds it is ordered as follows;

- a) The decision of the Master revoking the appointment of the applicant is declared *ultra vires*.
- b) The rest of the prayers are dismissed with no order as to costs.

**P. BANYANE**  
**JUDGE**

For Applicant: Advocate Mokhathali

For 1<sup>st</sup> Respondent: Advocate Molise