

IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO.10/88

In the matter between:

DANIEL NGQWANE

APPELLANT

vs

COLLINAH NGQWANE

RESPONDENT

CORAM:

DUNN A.C.J.

FOR THE APPELLANT:

MR. SIMELANE

JUDGMENT (17.3.1989)

DUNN A.C.J.

This is an appeal against a decision of the Senior Magistrate Siteki (Mr. Appleby) in a matrimonial action:-

1. awarding custody of the three minor children of the marriage between the parties to the respondent,
2. directing the appellant to pay maintenance for the minor children at the rate of E300.00 per month.

The record reflects that the parties gave evidence before the Senior Magistrate, each alleging that the other was in desertion. The question of the custody and maintenance of the children was not dealt with in the evidence. At the conclusion of the evidence the Senior Magistrate issued the following order:-

Plaintiff to restore conjugal rights on or before 8.2.88 failing which to show cause on 15.2.88 why a decree of divorce should not be granted.

On the return date, the respondent gave evidence of non-return by the appellant, following which the Senior Magistrate issued a final

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decree of divorce. Counsel for the appellant then requested that the question of custody and maintenance of the minor children, which was not subject of the restoration order, be held over for hearing after a report from the Social Welfare department. For some unexplained reason the Senior Magistrate proceeded to issue the order for custody and maintenance in the sum of E300.00. The Senior Magistrate has since left the country and no reasons have been furnished for his decision.

The parties, particularly the appellant against whom the order was made, were entitled to be heard on the matter and the Senior Magistrate should have allowed a post-ponement of the matter for proper evidence to be adduced. The custody and maintenance order cannot stand. I confirm the final decree of divorce. The custody and maintenance order is set aside and the matter is remitted to the Senior Magistrate Siteki for evidence and decision.

B. DUNN

ACTING CHIEF JUSTICE