IN THE HIGH COURT OF SWAZILAND

Civ. Case No. 442/96

In the matter between:

BARBARA ZODWA NDZIMANDZE	Applicant
and	
GEORGE HEITZMANN SENIOR	Respondent
CORAM:	S.W. Sapire A.C.J.
FOR APPLICANT	Adv. H. Fine
FOR RESPONDENT	Adv. Khumalo

Judgment

(6/3/96)

The applicant, a major Swazi spinster residing at Extension 6 Township in Manzini seeks an order on motion, and as a matter of urgency directing the respondent to return and deliver to her her minor children Jackie Heitzmann a girl aged 10 and George Heitzmann a boy aged 8. She also seeks a restraining order order interdicting the respondent from interfering with the applicant's exercise of custody over the minor children "pending further order of this Court" (sic).

She also seeks a further order that the relief sought in the second prayer should operate as a rule nisi calling upon the respondent to show cause on; the 30th of February' 1996 why the interim order should not be made final. The Notice of Motion also has a prayer for costs and alternative relief. The prayers (c) and (e), are defective proceduraly and they are completely vague and unintelligible in their present form as to their import and effect.

The substance of the relief, however, which the applicant seeks is an order directing the respondent to return the minor children to her in Swaziland. Whether this is to be a final order or an interim order will depend on the outcome of the application made by the respondent for the custody of the children.

It is akin to an application for an interim spoliation order.

The application arises in the following circumstances:

The respondent is an Austrian currently resident in South Africa. The respondent is the father of the two minor children who bear his surname. The parties were however never married and the children are accordingly illegitimate. The word "illegitimate" with reference to children bom to parents who are not married to each other is sanctioned by long use, but it does not seem appropriate to refer to any human being, especially an innocent child as being illegitimate.

The applicant claims that she as the mother of the children and as their guardian has a right to custody and parental power over the children. This is so because she was not married to respondent, the father. This right includes the right and obligation to have the children stay with her. The

respondent subject to whatever limited rights he may have to inform the Court as upper guardian of circumstances which make it necessary in the best interest of the children to interfere with the applicant's rights, and apart from his obligation to support the children has no right or obligations as the children are concerned.

During 1995 the children were living with the applicant in Swaziland and attending school at St. Michaels Primary School. Prior thereto however the children were in custody of the respondent in South Africa and attending school there with the applicant's consent and by agreement between the applicant and the respondent.

At the end of the school year 1995 the respondent came to Swaziland and requested of the applicant that the children . visit him in South Africa for the December Christmas holidays. To this the applicant consented and respondent took the children with him on the express

undertaking that he would return them to the applicant in Swaziland on the 15th January 1996 in time for the opening of schools in Swaziland on the 26th January 1996.

The children were not returned to Swaziland on the 15th January 1996 and according to the applicant some days thereafter the daughter called from a public telephone and was able to tell the applicant that the respondent has enrolled her and her brother in a school in South Africa. She was cut off before she could tell the applicant which school it was.

The applicant immediately instructed attorneys to telephone the respondent and enquire from him why he had delayed in returning the children and whether or not he had any intention of returning them to the applicant. It appears that applicant's attorney was informed by the respondent that he had no intention of returning the children at all and that he was about to apply for the custody of the children.

Such an application has in indeed been made and is pending before this Court. This application is being opposed and without prejudging the matter in anyway, it does seem to me that on the law as it stands the respondent may encounter some difficulty in persuading a court that he as the "illegitimate" father is entitled to custody of the minor children. The question is not however to be considered at this time but a recent judgment in South Africa B. v S - 1995(3) SA 571 (A) should be referred to.

The applicant lists a number of extra-curial efforts she has made to have the children returned to her.

These have been visited with no success. She also lists the grounds of urgency and why she considers that it is in the interest not only of herself but of the minor children that they be returned to her forthwith.

Prima facie the applicant has a strong case for the relief she seeks and in this she also must have the Sympathy of the court.

The respondent has filed a replying affidavit in -which he- refers to his application for custody of the two children. In support of his application he has a made a number of allegations against the

applicant which in his opinion established that the applicant is not a proper person to exercise custody over the children. The evidential basis for these allegations is in dispute. He also refers to two supporting affidavits in which the two minor children state under oath that they do not want to live with the applicant for reasons which are stated in the affidavits. While the respondent submits that these

statements cannot just be ignored, the circumstances under which these statements were made requires thorough examination. It is not beyond the bounds of possibility that some influence may have been exercised by the respondent over the children in order to get them to sign the affidavits.

The up shot of the matter however is that both the respondent and the children are in South Africa while the applicant remains here in Swaziland.

The question which arises is whether this court can make any order at all to assist the applicant.

In the second edition of "Pollak on Jurisdiction" by Pistorius at page 145 paragraph 9.2.4, the question of jurisdiction to entertain claims for delivery of a minor child is dealt with. The author observes that a court entitled to deal with the claim for the custody of a minor child might not be able depending upon the location of the child to make an effective order requiring the respondent to deliver the child to the parent to whom custody has been awarded. Where both the minor and the respondent are present in the area where the court exercises jurisdiction, the court has power to order delivery and also where the minor but not the respondent is so present: The author refers to cases of Leyland vs Chetwind (1901) 18 Sc 239 Kromaerski vs Kromaerski 1906 Ts 97 and Van Rensburg vs Rensburg 1957 (2) SA 283. On the other hand, where the respondent is present but not the child, the doctrine of effectiveness has been held to preclude the court from exercising jurisdiction. There are however more recent decisions to the contrary of which the most recent are Mattews vs Mattews 1983 (4) SA 136 and Desai vs Desai which do not follow that of Ceronio vs Synayman 1961(4) SA 294.

None of the cases however to which reference is made deal with the situation where the court to whom the application is made, has made no previous order in regard to the minor child, and both the minor child and the respondent are not physically present or resident in the area of jurisdiction of the court.

It seems that the question of effectiveness must be decisive, as any order made by a court in these circumstances requiring the delivery of a child would be ineffective. Any order which may be made in these circumstances regarding the custody of the children or requiring the respondent to return the children to the applicant cannot be enforced without seeking a further order from a South African Court. The South African Court as a guardian of all minors present in its jurisdiction will make its own decision on the matter and will not necessarily follow any decision which may be made by this court.

In other words the whole issue would have to be tried in South African Court in any case.

Dr. Fine for applicant has however argued that the court has jurisdiction by reason of the respondent having submitted thereto. Evidence of such submission is that the respondent has instituted the application which he seeks custody of the two children. It seems that he has by so doing recognised that this court would be the proper court to decide these issues between the parties regarding the custody of the minor children.

The present application is indeed interlocutory and anteontecedent to that instituted by the applicant himself. Although Pollock says at pages 8 and 9 of the work I have just cited that in previous edition of his book it was suggested that where the principles of effectiveness and submission conflict so that the judgment of the court cannot be effective against the party who has submitted the principle of effectiveness prevails. Later decisions however indicate that the court will assume the jurisdiction where there has been a submission.

On the other hand the respondent has made himself amenable to the court's jurisdiction by launching an application for custody and his refusal to comply to with an order which may be made by this court

regarding the custody could be disregarded as a contempt of the order of this court.

The court can visit sanctions on the respondent in regard to his application for custody and in this way give some effect to an order. It may be that the respondent will have to go to another South Africa to enforce any order I may make or to seek relief afresh; but this should not deter this court from coming to applicant's assistance in a matter where the respondent has already recognised and submitted to the jurisdiction of this court in relation to the very matter in issue.

The respondent has indicated that pending the outcome of this application it will not be in the best interest of the minor children to be returned to Swaziland because he has enrolled them in schools in the Republic of South Africa and they are strongly disinclined to be returned to their mother. I am not satisfied that on these papers on the evidence presently available that I can make any decision in regard thereto.

It is also true that the difficulties are of the respondent's own making in that he has retained the children in the Republic of South Africa contrary to his express undertaking to return them at the end of the vacation i.e. the 15th January 1996. Certainly he is in breach of this undertaking. The proper course for him would have been if he had difficulties in returning the children, to have negotiated with the applicant and if unsuccessful to have approached this court. What he has done however is to have unlawfully taken upon himself to place them in new schools and generally kept them outside the country of their birth and outside the effectiveness of any order of this court can make. The respondent's replying affidavit was attested to at Oshoek. This seems very strange indeed and it may indicate that he is wary of crossing the border to make himself subject to the jurisdiction of this court. I must stress however that no conclusion one way or another can be made regarding the behaviour of the parties and the best interests of the children remains an unresolved issue at this stage.

But for the present the applicant is entitled to an order pending the outcome of the respondent's application that the respondent return the children to her and to remain with her pending the outcome of the application.

The order I make is as follows:

a) The respondent is ordered to return the minor children Jackie Heitzmann and George Heitzmann to the applicant in Swaziland forthwith.
b) The children are to remain with the applicant pending the outcome of the application made by the respondent for custody of the minor children.
c) This order may be served by delivery of the same personally by any official entitled and empowered to serve process of the Supreme Court of South Africa.

The cost of this application will be reserved for court hearing the respondent's application.

S.W. SAPIRE

ACTING CHIEF JUSTICE