IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 1474/99

In the matter between

GARTH MANNIE GOLDMAN	APPLICANT
And RENATA GOLDMAN (Born Reck)	RESPONDENT
Coram	S.B. MAPHALALA – J
For the Applicant	MR. S. SIMELANE
For the Respondent	MR. MABILA

JUDGEMENT

(26/07/99)

Maphalala J:

On the 16th June 1999, the applicant brought an urgent application where he was granted a rule nisi returnable on the 2nd July, 1999 to the following effect:

1. Directing the respondent to restore the children, Korve, Aloysia and Rue-anna to custody of the applicant forthwith, failing which authorizing the Deputy Sheriff for the district of Hhohho to take such steps as may be necessary to restore the said children to the custody of the applicant. The order was to operate as an interim order with immediate effect.
2. Rule nisi was to issue calling upon the respondent to show cause on the 2nd July 1999, why the above should not be made final?

The matter came before court on the 18th June 1999, after the respondent had filed opposing papers where applicant after his custody had been restored not to remove the children from the jurisdiction of this court until the issues before court were properly dealt with. Prior to that applicant had filed an application to have the respondent for contempt of court as she had not complied with the initial order of the 16th June 1999. On the 18th June 1999, the parties entered negotiations to try and resolve the matter out of court, unfortunately, that was not be. The said negotiations were not successful and the

matter as that time took a nasty twist where applicant attempted to obtain a confirmation of the rule after the respondent's attorney were served with the notice of setdown within a ridiculously short time. However, that move was thwarted by the timely intervention of Mr. Manzini from the respondent's attorneys and the matter was postponed to 24th June 1999, to hear both sides. My views of the conduct of applicant's attorney are reflected in my ruling of the 24th June 1999. The issue on the 24th June 1999 was whether or not applicant can remove the children to South Africa whence they were taken from by the respondent. The court after hearing submissions entered an order that applicant should not take the children with him to South Africa until the matter has been argued on the merits. The matter was to come back for arguments on the return date of the rule nisi issued on the 2ndJune 1999. Unfortunately, the matter was not heard on that day as I was indisposed and was postponed to the 4th July 1999, and on that day for some reason the matter did not take off and was postponed to the 15th July 1999. It emerged in the interim that the applicant had already taken the children to South Africa writing his attorneys a letter explaining his actions. However, I am not going to comment on the contents of that letter as it does not form part of these proceedings. This then changed the nature of the proceedings. Despite the court's reservation that the matter proceed in view of the fact that applicant was now outside the jurisdiction of the court, the parties however, urged the court to hear submissions for whatever it was worth.

The history of the matter is that the parties were married to each other on the 25th May 1990, in Mbabane in community of property and the marriage still subsists. There are four minor children born from the marriage relationship from with ages ranging from 8 years to 3 years. They are all girls. It appears to be common cause that in early 1997, the marriage relationship between the parties encountered severe difficulties. According to the applicant it was because of respondent's irrational behaviour. This is denied by the respondent. It is also common ground that in January 1999, the applicant left Swaziland and moved to Pretoria in the Republic of South Africa with the four children. It also seem to be common ground that divorce proceedings were instituted by the applicant for divorce where summons were issued out of the High Court of South Africa, Transvaal Division. The respondent has entered an appearance to defend the summons. The issue of custody is sought in prayer 2 of the summons filed in that court on the 9th April 1999, under Case No. 10213/99. It also appears from the papers that a family advocate was appointed in terms of Regulation 6 of the Regulations in Mediation in Certain Divorce Matters Act (Act 24 of 1987) (South Africa) who according to his/her interim report interviewed both the applicant and respondent on or about the 15th June 1999, and recommended that the children be returned to the plaintiff and that both parties attend another consultation at his/her office in order to discuss the reasons for the defendant's behaviour. However, this report is hotly contested by the respondent who holds the view that such interview never took place as she was here in Swaziland and this document is nothing but a forgery.

These therefore, are the material facts in this case. The matter came for arguments on the 15th July 1999.

It was contended for the applicant that applicant was granted interim custody in South Africa pursuant to divorce proceedings which are still to be determined by that court in South Africa. Respondent's conduct in removing the children from South Africa is akin to a spoliation in view of the order by the court in South Africa and thus the status quo ante should be restored. It is contended by the applicant that the matter is being dealt with in South Africa. A notice of intention to defend was filed by the respondent in that court and no plea has been filed to challenge the issue of whether South African courts have jurisdiction in this matter. Mr. Simelane for the applicant is of the view that since the court in South Africa is seized with the matter as we speak it would not be for this court to delve into the best interest of the children. We will have a situation where there will be two conflicting judgements. We might find a judgement in favour of the applicant and a judgement in favour of the respondent in Swaziland pertaining to the subject matter. One party might find that his/her judgement has become brutem fulmen in the court which pronounced it. His view is that there is nothing to stop the respondent to file a special plea in South Africa challenging that court's jurisdiction.

Further, it contended on behalf of the applicant that the issue of custody cannot be determined by the court on the papers as they stand. The court has to follow the procedures laid down in Rule 43 of the High Court Rules where the court in appropriate circumstances may call viva voce evidence. Where the evidence of a social welfare officer may be sought to assist the court to determine who is the proper parent to be granted custody in their best interest.

On the other hand, Mr. Mabila contends on behalf of the respondent that the interim custody by the family advocate in South Africa is not binding until such order has been certified by the Registrar of the South African Court and served on this court. Reference was made to the work of C.F. Forsyth 's Private International Law (3rd ED) at page 360. The report by the family advocate does not indicate when the meeting was held. There is no evidence when the advocate interviewed the parties. According to the respondent such interview was never held. On the 15th June 1999, the respondent was already in Swaziland and thus the report is nothing by a forgery. Therefore, in view of this according to the respondent there is no question of the respondent taking the children unlawfully from South Africa.

It was further argued on behalf of the respondent that this court is the proper court to hear this matter in that the two parties were married in Swaziland and the minor children were all born here in Swaziland. Swaziland is the matrimonial home of the parties. The applicant without consent from his wife decided to migrate with the children to South Africa, In South Africa he lives with his girlfriend. The respondent went to South Africa to take the children and restore the status quo ante. It cannot be said that she acted wrongfully in the circumstances. That cannot be the case. This was part of the res

gestae.

By filing the intention to defend she was not submitting to the jurisdiction of the South African courts. It cannot also be said that the matter is lis pendens as the principle does

not apply where two foreign courts are involved (see C.F. Forsyth (supra) pages 165 -169).
On the issue of Rule 43 it is contended that it is not a legal requisite within the ambit of that rule that a social welfare officer be called.
Mr. Mabila addressed me at great length on the factors to be taken into consideration by the court to determine what is in the best interest of the children. These factors are embodied in the Law of Persons and the Family by Boberg 414 — 419 which for the sake of proclivity I will not repeat here but will allude to in my concluding remarks.
All in all it is contended on behalf of the respondent that this court is properly seized with this matter and that the application be dismissed with costs and the status quo ante restored with costs.
On points of law it was argued on behalf of the applicant that applicant is a South African and therefore respondent is also a South African. As the parties were married in community of property she follows the domicile of her husband. It was argued further that the South African rules as to the filing of a plea are in pari materia with our own rules and thus the dies inducie has expired to file a plea and respondent is more likely to be barred as we speak. Mr. Simelane urged the court to convert these proceedings into proceedings in terms of Rule 43 to reach a just decision in this case.
These are the issues for determination. I have considered the papers filed in this matter and also the useful submissions by counsel in this matter. It is common ground that the parties were married to each other in Swaziland and that their matrimonial home has always been in Swaziland where respondent has a handicraft business and applicant was running his own business until his company went bust. It is common cause that the four children were bom in Swaziland and have always considered Swaziland as their home. It is also not in dispute that applicant took the children to South Africa without the respondent's consent as she was in Germany at that time doing business. It is also not in dispute that a divorce action has been instituted in South Africa by the applicant praying for inter alia the custody of the minor children of the marriage. It appears to me that the matter was referred to the family advocate in terms of Section 4 of the Mediation in Certain Divorce Matters Act 24 of 1982 (South African Act). The function of the family advocate, in a matter in which the custody of minor children is in issue, is to assist the court (S.A.) by placing facts and a balanced recommendation before the court, the family advocate should not take sides in the dispute, nor create the impression that he or she has taken a decision and wishes to prescribe to the court (see Erasmus on his Superior Court Practice B1 - 315 and the cases cited thereat). In my view I cannot detect any fraud in the document by the family advocate in that it may well be that the advocate compiled his/her report after he/she had interviewed the parties and made the report on the 15th June 1999, where respondent alleges that she was already in Swaziland. It is trite law that he who alleges fraud has the onus to prove it. There is no sufficient evidence brought before me to hold that to be the case. That as it may, it is my understanding that a report by a family advocate is not an order of the court but is merely a recommendation

which the court is still to endorse or even disregard within its discretion. Though I must say it does carry some weight to persuade the court to take a certain direction in a matter. Clearly, therefore there is no order of court in South Africa granting the applicant custody of the four minor children.

To me it appears that the proper cause to be followed in this rather ackward case it to convert these proceedings and proceed by way of Rule 43 (1) © of the High Court Rules. As I must frankly state I am not able to determine the question of custody on the papers as they stand. Although the same issue is before the South African court it is my considered view that this court is not precluded to hear the matter as the principle of les pendens is not applicable in the present circumstances. The two parties were married here in Swaziland and four minor children were born out of the union here in Swaziland. The parties together with the children have always regarded Swaziland as their home. Both parties had businesses in Swaziland until applicant's business hit hard times and he was rendered unemployed. The parties are more attached to this court than any other country. Such that one may refer to Swaziland as the lex fori to determine the rights of the parties. The applicant

disturbed the status quo ante by removing the children form the matrimonial home without the consent of the respondent whilst she was away on business in Germany. The explanation given is that the unceremonious move was for him to find employment in South Africa. He has not found one and is believed to be staying with his girlfriend with a brood of four small girls. Such an arrangement I must say does not help in the nurturing of small children. To put salt to an injury, applicant after obtaining an order of this court took the children back to South Africa contrary to the court order. These courts do not make orders in vain. I must say, I take a very dim view on applicant's conduct.

In sum, I hold that the matter proceed by way of Rule 43 (1) © of the High Court rales for the court to fully determine the issues as to who is a better parent in this case. However, as a word of advice respondent is not to sit on her own laurels and let the action instituted in South Africa take its course without attempting to defend it as she might find herself in the long run with a judgement in her favour which has become brutem fulmen. She is advised to take proper legal advice towards that end.

Costs to be costs in the cause.

S. B. MAPHALALA

JUDGE