IN THE HIGH COURT OF SWAZILAND

MUSA SIMELANE

Applicant

And

BONGANI MBUY1SA

1st Respondent

NTOMBIZINI MKHATSUWA

2nd Respondent

Civil Case No. 351/2005

Coram: S.B. MAPHALALA - J

For the Applicant: MR. T. MLANGENI

For the Respondents: MR. M. SIMELANE

JUDGMENT

(11/02/2005)

[1] Serving before court is an application brought under a Certificate of Urgency for an order, inter alia, that Applicant be granted interim custody of the minor child Tebenguni Simclanc, pending finalization of the application for custody. In prayer 3 thereof that the 1st Respondent be directed forthwith to release to the Applicant I he said minor child pending finalisation of the application by the Applicant for custody of the said minor child. In prayer 4 that custody of (he said minor child be granted to the Applicant and costs of suit.

[2] The Founding affidavit of the Applicant is filed in support thereto where he outlines the circumstances of this case. A Birth Certificate of the said minor child is filed as annexure "A" thereto.

[3] The Respondents opposes the granting of this application and to this end the opposing affidavit of the 1st Respondent is filed. A supporting affidavit of the 2nd Respondent is filed thereto.

[4] In the affidavit two points of law in limine have been advanced by the Respondents viz "3 the application docs not satisfy requirements of Rule 6 (25) of the High Court Rules" and "4 it is improper for (lie Applicant to use motion proceedings for this matter as same is full of disputes of fact". When the matter came for arguments Mr. Simelane who appeared for the Respondents abandoned the first point of law in limine and conceded that the matter is urgent and therefore that die'requirements of Rule 6 (25) (a), (b) have been met in ca.su. In the result, no further mention will be made on this aspect of the matter.

[6] On the second point (hat (here arc disputes of facts Mr. Simelane argued that the Birth Certificate purporting to be that of the minor child is of dubious origin in that it does not conform to Section 10 of the Births, Marriages and Deaths Registration Act. No. 5 of 1983.

[7] Section 10 thereof reads as follows: Children born out of wedlock

10. (1) A person who is the father of a child born out of wedlock shall not be required to give information under this Act concerning the birth of such child.

(2) A registration officer shall not enter the name of any person as the father of any child born out of wedlock in a birth information form or any register except at the joint request of the mother and the person who, in the presence of Hie registration officer acknowledges himself in writing to be the father of such child.

(3) Such acknowledgement, if made shall be embodied in the birth information form or notice and the person to acknowledging himself to be the father of such child shall together with its mother and in the presence of the registration officer or the Chief of the area or his Induna or registration information officer sign the birth information form or notice.

[8] Mr. Simelane pointed out a number of defects in the Birth Certificate vis a vis the provisions of the above-cited Section of the Act. The result being thai the Birth Certificate cannot be prima facie evidence that Applicant is the rather of the minor child. Therefore, so the arguments goes, it is holly contested that the Applicant is the natural father of the child as 1st Respondent can made a similar claim of paternity on the facts.

[9] To digress a bit, I find it imperative to sketch a brief history of the mailer in so far as it is common cause. It is common cause that (he minor child has been in the eusftody of the Applicant for 13 years which is the child's age except for brief periods where she visited her grandmother (the 2nd Respondent). It is common cause that the mother of the child died in 1998 and left the child with the Applicant who was her lover at the time. It is further common cause that Applicant paid two cows as required by Swaziland Law and Custom to "buy back" the minor child. The legality or otherwise of such a transaction is debated but what is common cause is that in terms of the judgments of this court it is contra bonos mores and (bus null and void. It is further common cause that during the Christmas holidays the child went to visit her grandmother (2nd Respondent) and ended up in the custody of the lsl Respondent. The latter also claim paternal rights over the said child, thus the present lug of war over the custody of the minor child by the two men who each claim to be a natural father. It is furthermore common cause that the child is now attending school here in Mbabane in the custody of the 1st Respondent.

[10] Reverting to the arguments in this case Mr. Simelane further directed the court to paragraph 10 of the 2nd Respondent where averments arc made that the minor child told her that if she were to be taken back to the Applicant she would kill herself. The 2nd Respondent urged this court to despatch a Social Welfare Officer to investigate this matter. Even in argument, Mr. Simelane persistent on this point.

[11] Mr. Mlangeni advanced arguments au coniraire on all the points raised by Mr. Simelane.

[12] I have listened to the arguments for and against the granting of interim custody to the Applicant and I have also read the affidavit evidence and I am of the considered view that the probabilities favour the Applicant on the facts. In weighing up the factors in determining what is the best interest of the minor child I have sought assistance in the instructive judgement of King J in the case of McCall vs McCall 1994 (3) S.A. 201 (CPD) where the learned Judge expressed himself as follows:

"In determining what is in the best interests of the child, the court must decide which of the parents is better able to promote and ensure its physical, moral, emotional and spiritual welfare. This can be assessed by reference to certain factors or criteria, namely:

a) The love, affection and other emotional tics which exist between parent and child and the parent's compatibility with the child;

b) The capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;

c)The ability of the parent to communicate with the child and parent's insight into, understanding of and sensitivity lo the child's feelings;

d)The capacity and disposition of the parent to give the child the guidance which he requires;

c) The ability of the parent to provide for the basic physical needs of Hie child, the so-called "creature comforts" such as food, clothing, housing and the other material needs - generally speaking, the provision of economic security;

f) The ability of the parent to provide for the educational well-being and security of the child, both

religious and secular;

g) The ability of the parent for the child's emotional, psychological, cultural and environmental development;

h) The mental and physical health and moral fitness of the parent;

i)The stability or otherwise of the child's existing environmental, having regard to the desirability of maintaining the status quo;

J) The desirability or otherwise of keeping siblings together;

k)T he child's preference, if the court is satisfied that in the particular circumstances,t he child's preference should be taken into considerations;

l) The desirability or otherwise of applying the doctrine of same sex matching;

m)Any other factor which is relevant to the particular case with which the court is concerned".

[13] On the facts of the case it is common cause that the child has been in the custody of the Applicant for a period of 13 years. Most, if not all the factors mentioned in McCall vs McCall (supra) are present in the instant case. The lst Respondent has known the child for a short period and I must say it was highly irresponsible for the 1st Respondent to put the child in another school without consulting with the Applicant who was in loco parentis and for all intents and purposes is the de facto father to the minor child. I agree in toto with the submissions made by Mr. Mlangeni that the averments that (he child is contemplating suicide arc rather far fetched in the circumstances of the case. A child of 13 years is highly impressionable. In casu I find that the balance of convenience favours (he Applicant on the facts.

[14] In the result, I grant the interim order as prayed for and further hold that paternity test be carried out to ascertain the biological father of the minor child. In the meantime the matter is postponed sine die and costs to be costs in the cause.

S.B. MAPHALALA

JUDGE