

THE HIGH COURT OF SWAZILAND

KHOLWAPHI DLAMINI

Applicant

And

NDUMISO MAMBA

Respondent

Civil Case No. 2425/2005

Coram: S.B. MAPHALALA - J

For the Applicant: MR. M. SIMELANE

For the Respondent: MR. J. HENWOOD

RULING

(On urgency) (7th July 2005)

[1] The only point for determination presently is the point of law in limine of urgency brought by the Respondent. The Applicant has moved an urgent application for an order, inter alia, that the Respondent hands over to the Applicant, her child Ndzeleni Mamba forthwith. The said child was born out-of-wedlock between the Applicant and the Respondent. It appears from the affidavit of the Applicant that

there is now a tug -of - war over the said child. The said application was filed with the Registrar of this court on the 5 July 2005. The Notice of Motion indicates that if Respondent intended to oppose this application, he was to file his Notice of Intention to Oppose on Tuesday the 5th day of July 2005 on or before 1700hrs. It further provides that he was to file his opposing papers before the date of hearing, (which I take it to mean the 5th July 2005). Respondent's attorneys received the papers at 3.15pm on the 5th July 2005.

[2] The matter appeared before me yesterday where Mr. Henwood for the Respondent moved this objection from the bar stating that this matter has been brought with extreme urgency such that his client did not have a chance to draft and settle his opposing affidavits. He contended that the peremptory provisions of Rule 6 (25) have not been met in this case. He referred the court to the relevant paragraphs in the Applicant's Founding affidavit and stated that the said paragraph fall far short in meeting the requirement of Rule 6 (25) (a) and (b). He further cited the celebrated case of Humphrey H. Henwood vs Maloma Colliery and another - Civil Case NO. 1623/93 to buttress his arguments. He urged the court to allow his client to file his affidavits and the matter to come back to court on Wednesday next week for full arguments after all the required affidavits have been filed. He contended that the child in question will only be returning to school in South Africa on the weekend of the 23rd July 2005.

[3] On the other hand Mr. Simelane for the Applicant held a contrary view and he vigorously opposed what was said by Mr. Henwood. He relied on what is said by a certain writer Vivienne Goldberg, "The Right of Access of a Father on an Extramarital Child: Visited again", an article found in the South

African Law Journal, Vol. 110 Part II at page 261. The gravamen of Mr. Simelane's argument if I heard him correctly is that a mother of an illegitimate child is entitled to custody of the child ante omnia. It suffices that she has filed an application and in that case the court is obliged to grant her interim relief forthwith.

[4] I have considered these arguments carefully and I am of the considered view that it will not only be fair and just to also hear the other side but also proper to follow the principles of natural justice. As it has been shown above Applicant approaches the court on an extremely urgent basis and it is incumbent on her to make out a case justifying the urgency with which it was brought (see Luna Mauber Vervaarmigers (EDMS) BPK vs Makin and another t/a Makins Furniture Manufactures 1972 (4) S.A. 1366 and Partcor Quarries CC vs Issrqff 1998 (4) S.A. 1069 (E) at 1075). In the circumstances of the present case I will allow the Respondent to file his opposing affidavits in this matter. I will make no order on the issue of custody for now.

[5] In the result, the Respondent is to file his opposing affidavit on or before close of business on Monday the 11th July 2005, and the Applicant to file her Replying affidavit, if any, on or before close of business on Tuesday 12th July 2005 and the matter to appear before court on Wednesday the 13th July 2005 at 8.30am. I make no order as to costs.

SB MAPHALALA

JUDGE