

# IN THE HIGH COURT OF SWAZILAND

CIVIL CASE NO.2395/05

In the matter between:

NOAH BAFANA MCHOBOKAZI

APPLICANT

AND

ALFRED MATHUNJWA

1<sup>ST</sup> RESPONDENT

LENAH MATHUNJWA

2<sup>nd</sup> RESPONDENT

CORAM: MATSEBULA J

FOR APPLICANT: MR. MAHLALELA

FOR RESPONDENTS: MR. JELE

## RULING ON POINTS OF LAW

FEBRUARY 2006

By notice of motion moved at the instance of applicant, applicant prays for the following relief:

- (a) That he be granted custody of the minor child named Sebenele Mchobokazi.
- (b) Costs of application.

Applicant filed a founding affidavit wherein he states *inter alia*, that he is the biological father of the child in question. The child was born on 21<sup>st</sup> June

2002. It is common cause that the mother of the child died during the birth of the minor child. Applicant and deceased were married in terms of the Swazi law and custom - a marriage certificate is annexed as "NB2".

It is applicant's evidence that an agreement was reached between him and the maternal grandparents of the minor who are the respondents in the case. This agreement was reached that the child was still very young and should be in the custody and care of the maternal grandparents.

In his paragraphs 7, 7.1(2) (3) (4) (5) plaintiff sets out all the necessities he provides for his child. These paragraphs are partly admitted by the 1<sup>st</sup> Respondent and others denied 1<sup>st</sup> Respondent avers that applicant was contributing an amount of E1000.00 per month and stopped in September 2003.

On the whole, considering the answering affidavit of 1<sup>st</sup> Respondent the court is satisfied that applicant was making a meaningful contribution towards the maintenance of the minor child whilst it was in the custody of 1<sup>st</sup> and 2<sup>nd</sup> Respondents. Respondents' former attorney who subsequently withdrew as attorney of record was MAHLALELA AND ASSOCIATES. The Respondents then engaged the services of ROBINSON BERTRAM.

Mr. Jele who now appears for Respondents and have filed heads of argument dealing with preliminary points. In his preliminary points, Mr. Jele admits what is common cause i.e.

- 1.1. That applicant is the natural father of the minor child.
- 1.2. That Phikie Mchobokazi was the mother and that she died whilst giving birth to the child.
- 1.3. The deceased was the daughter of 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
- 1.4. That applicant and 1<sup>st</sup> and 2<sup>nd</sup> Respondents reached an agreement that the minor child remains with in the custody of 1<sup>st</sup> and 2<sup>nd</sup> Respondents in view of the fact that she was still an infant.

Mr. Jele then deals with Respondents' opposing affidavit. Mr. Jele states that they deny that applicant was contributing towards that maintenance of the minor child; save for the medical contribution and he refers to in paragraph 6 of Respondents' answering affidavit. In their paragraph 6 the Respondents deal with the hiring of the maid and payment of her wages that she was last paid in November 2003.

As I have indicated above in my ruling, I am generally satisfied that Applicant was meeting his obligation to maintain the minor child.

In paragraph 4.1 of Mr. Jele's heads of the preliminary points he makes a bold statement that applicant has failed to provide maintenance for the child and that he has approached the court with dirty hands. In paragraph 4.2 he states that applicant has also refused to hand over the child's birth certificate notwithstanding that Respondents have sole custody of the minor child. Mr. Jele then ushers in the doctrine of clean hands as he interprets it and he refers to:-

**(a) PHOTO AGENCIES (PTY) LTD VS THE COMMISSIONER OF THE ROYAL SWAZILAND POLICE AND THE GOVERNMENT OF SWAZILAND 1970-76 SLR 398 @407.**

**(b) FIKILE MTHEMBU VS WELILE MABUZA CIVIL CASE NO.3645/2005.**

Both the above cases were decided by this Court. In the Photo Agencies case certain goods viz arms and ammunition were imported in violation of Section 81(1) as in contravention with Section 113(1) (K) and 113(K) of the **CUSTOMS, EXCISE AND SALES DUTIES ACT 21/1971** Section 27(1) and (2) and Section 30(3) of the **ARMS AND AMMUNITIONS ACT 24** of 1964; and section 5(2) of the **EXPORTATION AND IMPORTATION RESTRICTION ACT 46/1939 LAW OF CONTRACT.**

The goods in question so alleged the applicant had been consigned from Brazil to Mbabane via Johannesburg and had arrived in Swaziland in error and that it was never intended to import them into Swaziland but that the address in Mbabane was used in order to avoid a breach of the embargo which had been placed by the United Nations Organisation upon the supply of ARMS AND AMMUNITIONS to South Africa by its member countries. Applicant denied any fraudulent intent or intention to embarrass or prejudice the Kingdom of Swaziland and further contended that the UN Security Council resolutions in question were neither mandatory in character nor part of the domestic law of Swaziland.

The applicant is a South African registered company having no branch or office in Swaziland who sought an order from the High Court against the Commissioner of Police who had ordered the seizure of the goods on their arrival by air in Swaziland.

In the Fikile Mthembu case - a fairly recent decision of this court. It was held that a person should not by reason of the subtlety of the civil law and contrary to the dictates of natural justice, derive advantage from his own bad faith.

In both the case cited above, the doctrine of dirty hands is of application, if not

directly then by the necessary implication. In order for this court to decide whether the *ratio decidendi* in the cases cited above are of application to the present matter one must go into the merits and particular circumstances of those cases.

In the cases of the application and 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the applicant is the biological father of the minor child concerned; and as such not only he but also the minor child is entitled to reasonable access to each other. Applicant is also entitled to custody of the minor child taking into account the particular circumstances relating to the interest of the minor child; whereas in the Photo Agencies case the applicant brazenly admitted that it used a false address in Swaziland in order to overcome and circumvent the resolution of the UN Security Council. By doing so it became enmeshed in the web of deceit of its own creation. Applicant was consequently not entitled to seek or be granted relief by a Swaziland court. The facts in the Fikile Mthembu case are; briefly: Fikile Mthembu sought an order against her partner restraining him from *inter alia* using the premises used jointly by the partners, assessing the partnership accounts and funds etc. From her affidavit it emerged that the trust account of the partnership had been fiddled with by both the applicant and the respondent. The Court held correctly in my view that applicant had dirty hands which she had to purge first before approaching the court for a relief. By purging her dirty hands simply means in the legal parlance she had to ask the court to be condoned.

I find the present case distinguishable.

(a) It is common cause that applicant is legally entitled to the custody of his own biological minor child.

(b) He has deposed to an affidavit that he has hired:-

- (i) a maid Mrs. Mhlanga to take care of the minor's needs and he pays her.
- (ii) He has been paying money to the Respondents for the needs of the minor child.
- (iii) He buys her clothes.
- (iv) He has established a medical scheme for the minor child.
- (v) Opened a banking account on her behalf etc.

I cannot find on the evidence before me that applicant is approaching the court with dirty hands. As to whether or not there is dispute of fact, I don't propose to deal with that in the particular circumstances of this case. The main consideration in this matter is the interest of the minor child. The court, in the interest of the minor child is enjoined to refer the matter to oral evidence at any stage of the hearing.

The preliminary points are dismissed. In the particular circumstances of this case, I make no order as to the costs and costs will be reserved until the main notice of application is heard.

**J.M. MATSEBULA**  
**Judge**