THE HIGH COURT OF SWAZILAND

SAMUEL TSABEDZE

Applicant

And

WINILE MNGOMETULU

Respondent

Civil Case No. 4585/2005

Coram: S.B. MAPHALALA – J

For the Applicant: MR. T. MLANGENI

For the Respondent: MR. K. VILAKATI

JUDGMENT

(26m May 2006)

[1] On the 28 December 2005, the Applicant filed before this court an urgent application that the Applicant be granted interim custody of two minor children of the parties, namely L T and L T; that the Respondent be directed to release the said minor children to the Applicant forthwith and that the Department of Social Welfare be directed to investigate the living circumstances of the said minor children and file a socio-economic report within a period of thirty (30) days from the date of service of the court order.

[2] In the Founding affidavit filed of record the Applicant has made a number of averments, *inter alia,* that he and the Respondent are the parents of the two children in this case. The parties are not married. They have been living together at his home at Zakhele, Manzini. The

older child L A T is not biologically born of the Applicant, however Applicant had brought him up from birth. The biological father is not known. On or about 12th December 2005, the parties had a serious conflict which culminated in the Respondent leaving home and going back to her parental home at Sitsatsaweni area in the Lubombo region. In paragraphs 9, 9.1, 9.2, 9.3, 9.4, 9.5, 9.6 and 9.7 thereof the Applicant has outlined the circumstances showing that the balance of convenience favours him that the children be released to him and further that it would be in the best interest of the children that he be granted custody.

[3] On the other hand Respondent has filed an Answering affidavit opposing the application and also filed a confirmatory affidavit of one Phindile Mdlovu.

[4] The parties also sought the assistance of the Social Welfare office to file a socio-economic report which was duly filed to the court. However, the parties felt that the said report lacked information on a number of issues. As a result of this the Social Welfare Officer E.D. Maphanga appeared before this court to give *viva voce* evidence on those points. In his report the Social Welfare Officer has made recommendation to the following effect:

> **SOCIAL WORKERS RECOMMENDATIONS.**
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> **Starting from the family environment both parents have the responsibility towards the upbringing of their children both parents presently live in homes which quality for human habitation, though the father is financially stable, of which on the other hand their mother will have to depend on his father for financial support until she can start a business of their own the father seems to be fit to be entrusted with the custody of these children, because he has a consistent salary which means he can afford to provide basic needs, such as food, shelter, education and clothing etc.**
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> **It cannot be overlooked that the children are still very young to be separated from their mother, since the upbringing of children cannot be measured in monetary terms only, children need to be loved, by both parents and shown affection and also feel wanted.**

[5] The position in this country was clearly enunciated by Nathan CJ (as he then was) in the case of *De Sousa vs De Sousa 1979 - 1981 S.L.R. 315* at page 375 *(D - E)* where the learned Chief Justice said the following:

> "It is trite law that in custody cases the **prime consideration** (my emphasis) is the well-being and interest the child or children. See eg, *Shawzin vs Laufer 1968 (4) S.A. 657 (A), Fortune* v *Fortune 1955 (3) S.A. 348 (A), Fletcher vs Fletcher 1948 (I) S.A. 130 (A).* One of the factors to be taken into account, however, is that there is a lot of authority for the proposition that, all things being equal, young

children should be placed in the custody of their mother. See the cases referred to in French vs French 1971 (4) S.A. 298 (W). But this consideration should not be elevated into a rule (my emphasis) carrying greater weight than the cardinal principle stated above, that one must have regard primarily to the best interest of the child (my emphasis)".

[6] I find that this view although expressed more than 20 years ago is similar to the view expressed by Willis AJ in a case of recent vintage that of *Ex parte Critchfield and another 1999 (3) S.A. 132* at page *142* to the following effect:

"Even if *Myers vs Levition 1949 (1) S.A. 203 (T)* is taken as the high-water mark of judicial conservation with regard to custody matters in South Africa, it is clear that the so-called "meternal preference" rule has never been a rule of law. (see also *Kennedy vs Kennedy 1929 EDL 257; Steyn vs Steyn 1948 (3) S.A. 127 (T)* at *135; Tromp vs Tromp 1956 (4) S.A. 738* /Vat *738* /Vat *746; Bashford vs Bashford 1957 (1) S.A. 21 (N)* at *24).*

It has rather been a statement of judicial preference or, if you will, a statement of the prevailing practice and, perhaps, prevailing policy. For decades, the law in South Africa with regard to the award of custody is the best interest of the child must prevail

[7] In the South African case of *Van Der Linde vs Van Der Llnde 1996 (3) S.A. 509 (OPD)* it was held, *inter alia,* that in the past mothering was a component of a woman's being, however these days mothering is also part of a main man's being. To paraphrase the words of Hatting J in that case the concept of "Mothering is indicative of a function rather a person and this function is not necessarily situated in the biological mother. This seems to be the current trend in such matters. The learned Judge in that case opined thus:

"Today the man has the freedom to reveal and to live out his mothering feeling. A father can be just as good a "mother" as the biological mother and naturally a mother can be just as good as "father" as the biological father. The quality of a parental role is not simply determined by gender".

[8] Further in the case of *Van Pletsen vs Van Pletsen 1998 (4) S.A. 95 (OPA)* Ancke J expressed himself in more or less the same way as Hattingh J in *Van Der Linde (supra)* where he had this to say:

"To decide which is the most suitable parent to exercise custody over a minor child it is an important consideration which parent can not only offer the most security, but also which parent would be in the best position to attend to the child's physical care and also ensure that the child develops properly on a moral, cultural and religious level. The assumption that a mother is of necessity in a better position to care for a child than the father belong to an era from the past. It is not accepted that "mothering" is not just a component of a woman, but is part of a man's being, and that a father, depending on the circumstances, possesses the capacity and capability to exercise custody over a child as well as the

mother".

[9] On the matter of *Ex parte Critchfield and another 1999 (3) S.A. 132* Willis AJ had this to say:

> "It would not amount to unfair discrimination for a court to have regard to maternity as a fact in making a determination as to be custody of young children. On the other hand it would amount to unfair discrimination if a court were to place undue weight upon this factor when balancing it against other relevant factors. The only significant consequence of the constitution of the Republic of South Africa, Act 108 of 1996, when it comes to custody disputes, it that the court must be astute to remind itself that maternity can never be the only consideration of any importance in determining the custody of young children. With regard to the award of custody, the interests of the child must prevail", [at 143 B - C/D and 142 B/C and the authorities therein cited".

[10] In the book Custody and Visitation Dispute - *A Practical Guide - Bosnian/ Swanepoel/Fick/Strydom - Butterworths* at page *105* expressed themselves as follows:

> "Role stereotypes have changed drastically from traditional gender role expectations to greater equality between the sexes. "Mothering" no longer refers to the functions only performed by a mother - it rather describes the function which may be performed by a parent of any gender and refers to care-giving and nurturing".

[11] Further in the same work at page 78 the authors had this to say:

> "One further change is also relevant, that is, the steeply rising divorce rate and the increasing number of disputed custody cases. It is the latter which perhaps gives the most point to the issues which we are examining here. Despite fathers' greater participation in childcare, there remains a deep-seated conviction that the mother is invariably the "natural" parent and should therefore be given priority in custody decisions. This applies especially to those cases where a comparative judgment about a mother and a father is required, such as in custody disputes. The assumption that the mother is almost invariably the fitter person to assume sole parental responsibility has dominated judgments in the past; Fathers were considered unfit unless proven otherwise. The changes in family lifestyle that have occurred in recent times have shown that this is not necessarily so; Fathers can also be adequate caregivers. It follows that the father with the appropriate inclination and personality ought to be considered for sole parenthood as seriously as his ex wife. The same general principle applies here as in custody cases; The individual's sex ought not to debar him or her from consideration. Motivation and personality are of greater importance and an application from a single man ought to be treated in the same was as from a single woman".

[12] In the case of *French vs French 1971 (4) S.A. 298 (W)* Steyn J stated as follows:

"In respect of a young child its sense of security should be presented and protected above all. The child must feel that it is welcome, wanted and loved".

[13] Broome J in the case of *Dunsterville vs Dunsterville 1946 NPD 594* at page *597* stated the following:

"It is often said that the best person to look after young children is their mother ... experience goes to show that a child needs a father and a mother, and that, it he grows up without either, he will, to some extent, be psychologically handicapped. But the maternal link is forged earlier in the child's life that the paternal, and if not forged early may never be forged at all. The psychological need of a father on the other hand only arises later. It seems to me that if the father is awarded custody of these young children they will in all probability not withstanding the loving care which they will undoubtedly receive from their paternal grandmother, grow up as motherless children, with all the attendant psychological disadvantages. If, on the other hand, the mother is awarded their custody, at any rate during their years of infancy they will not necessarily grow up as fatherless children, for the relationship between a father and his young children is never one of continuous intimacy, it is necessarily intermittent".

[14] Further in *Myers vs Leviton 1949 (1) S.A. 203 (T)* at *214* Prince J said:

"There is no one who quite takes the place of a child's mother. There is no person whose presence and natural affection can give a child the sense of security and comfort that a child derives from his own mother - an important factor in the normal psychological development of a healthy child".

[15] Holmes J in *Bashford vs Bashford 1957 (1) S.A. 21 at 24* said the following:

"In my view it is equally clear, on the papers before us, that the mother's home is more in the interests of this very young child, not yet two years old, as it will have the tender surveillance of the mother. It is not necessary to cite authority for the proposition that, in a case like this, other things being equal a child of tender years should be with the mother. Decisions are legion".

[16] Bresler J in *Madden vs Madden 1962 (4) S.A. 654* at *657* stated that:

"Normally young children - the age of ten has sometimes been fixed - should go to the mother".

[17] In view of the above-cited legal authorities, the facts of this matter and the very interesting submissions advanced by both counsel I am of the considered view that the custody of the two minor children in this case should remain with their mother. On the circumstances of the present case I have come to the view that despite the father's greater participation in the childcare, there remains a deep-seated conviction that the mother is invariably the "natural" parent and should therefore be given priority in custody decisions. In a case like this, other things being equal children of tender years should be with the mother

and decisions in regard are legion. In this regard I am in respective agreement with the views by Broome J in the case of *Dunsterville vs Dunsterville (supra)* who stated that **"it is often said that the best person to look after young children is their mother ... experience goes to show that a child needs a father and a mother, and that, if he grows up without either, he will, to some extent, be psychologically handicapped. But the maternal link is forged earlier in the child's that the paternal, and if not forged early may never be forged at all. The psychological need of a father on the other hand only arises later. It seems to me that if the father is awarded custody of these young children they will in all probability notwithstanding the loving care which they will undoubtedly receive from their paternal grandmother, grow up as motherless children, with all the attendant psychological disadvantages of, on the other hand, the mother is awarded their custody, at any rate during their years of infancy they will not necessarily grow up as fatherless and his young children is never one of continuous intimacy, it is necessarily intermittent".** It appears to me that the views expressed by the learned Judge Broome J in this case are apposite on the facts of the present case.

[18] In the result, for the afore-going the application is dismissed with costs.

S.B. MAPHALALA

JUDGE