

IN THE HIGH COURT OF SWAZILAND

CHARLES NDZIMANDZE

Applicant

And

ALLEN HAMSOKWE

Respondent

Civil Case No. 178/2007

Coram

SB. MAPHALALA - J

For me Applicant

MR. S. MDLADLA

For die Respondent

IN ABSENTIA

JUDGMENT

7th February 2007

[1] Before court is an application brought under a Certificate of Urgency for an order that the Respondent return the minor child, Shaka Hamsokwe to the lawful custody of the Applicant. The Applicant also seeks for costs of the application.

[2] The Respondent has filed a Notice of Intention to Oppose dated the 15th January 2007. The matter appeared before Annandale ACJ on the 26th January 2007 where by consent of the parties the matter was referred to the Registrar for allocation on the 8.30am roll, if possible on Tuesday 30th January 2007. Indeed on the said date the matter appeared before me at 10.30am of the 30th January 2007 and there was no appearance on behalf of the Respondent after the matter was recalled at 10.00am. In the circumstances I allowed

Counsel for the Applicant to address me on the **Events** of the application.

[3] The facts of the matter are that the said minor child was born out of wedlock by the Respondent and the Applicant's sister one Phepsile Ndzimandze who died in October 2002. She felt sick and stopped working and came home to stay with the Applicant together with the minor child. They became the Applicant's sole responsibility. Applicant has been maintaining the child and paying school fees for him. At some point Applicant instituted maintenance proceedings against the Respondent.

[-] On the 31st December 2006, the minor child disappeared from Applicant's home at Maphungwane, Siteki. The matter was reported to the police and investigations revealed that the child had made a telephone call to the Respondent. The Respondent was called on the same number and he confirmed that the minor child was with him. On the 13th January 2007 one Mr. Shongwe came to his house. He said he had been sent by the Respondent to discuss the matter of the minor child. However, they agreed that the Respondent should bring back the child to the Applicant before any discussions of custody can start.

[5] The Applicant further avers that since then, nothing has been communicated to him and the minor child has not been brought back to him. The Applicant contends that even though the Respondent is the natural parent of the minor child, he does not have custody of the minor child. The child was born out of wedlock and the mother of the child, who was his sister, had full and uncontested custody and just before her death Applicant took custody of the minor child. The Applicant further avers that until this court, as the Upper Guardian of all minor children has ruled and given custody to the Respondent he remain in custody of the minor child.

[6] In support of the above-cited position *Mr. Mdladla* cited the textbook by *Boberg, The Law of Persons and the Family* at page 459.

[7] I have considered the facts of the matter and the legal authority of *Boberg (supra)* and have come to the considered conclusion that the Applicant would be entitled to an interim order in terms of the Notice of Motion.

SB. MAPHALALA

JUDGE