IN THE HIGH COURT OF SWAZILAND

GRACE MNISI

Applicant

And

ROBERT HLOPHE

Respondent

Coram: S.B. MAPHALALA - J

For the Applicant: MR. N. FAKUDZE

For the Respondent: MR. NDLOVU

Civil Case No. 332/2007

JUDGMENT

10th August 2007

[1] The Applicant is the maternal grandmother of the minor child of the Respondent and seeks to be granted custody of the said minor child in an application brought under a Certificate of Urgency for an order in the following terms:

1. Dispensing with the usual forms and procedures relating to the institution on proceedings and allowing this matter to be heard as a matter of urgency.

2. Directing that Respondent return to Applicant's custody the minor child Baphetsile Hlophe.

3. That a rule nisi do hereby issue calling upon Respondent to show cause on a date to be determined by this Honourable Court why:

3.1. Prayer 2 should not be made final.

3.2. He should not be ordered to pay the costs of this application.

4. That prayer 2 operate as an interim order pending the final determination of this matter.

5. Granting further and/or alternative relief as to this court seems meet.

[2] The Respondent is the son-in-law of the Applicant having been married to her daughter in her lifetime and her daughter passed away in the year 2002. The Respondent and his deceased wife had five (5) other children born of their marriage with ages ranging from 28 years to 11 years. The child who is the subject-matter of these proceedings is the fifth born aged 12 years old and is a girl.

[3] In her founding affidavit the Applicant has related all the relevant facts in support of her application before court. The Respondent oppose this application and to that end has filed a Notice to raise a point of law dated 8th February 2007 followed by an answering affidavit dated the 26th February 2007. In the said affidavit two points ***in limine*** are raised, namely that Applicant has applied for the return of a child to her custody yet she has failed to establish that she had lawful custody of the child. The second point

in limine raised by the Respondent is that being the natural father and the only surviving legal guardian of the child, he has custody by operation of the law. He has ***de facto*** custody of the child and that his custody over the child has never been set aside.

[4] In this judgment the two points ***in limine*** stated above in paragraph [3] are to be decided. I shall consider them ***ad seriatim*** hereunder, thusly:

(i) **Whether Applicant has lawful custody.**

[5] The first issue for determination ***in limine*** is whether the Applicant has lawful custody of the child. The Applicant contends that she has and the Respondent contends otherwise. At page 5 of the Book of Pleadings in paragraph 8 of her founding affidavit, the Applicant states the following as having occurred upon her daughter's death:

"The Respondent then took custody of all the children ... my granddaughter would visit me from time to time".

[6] It would appear to me and this regard and I am in total agreement with what is said by Respondent's Counsel that the above-cited averments are mutually destructive. Applicant acknowledges that the children merely visited her and on the other hand she is claiming a return to her custody, something she had never been seized with to begin with. In the circumstances her application to the court is therefore defective and bad in law. Therefore for these reasons the point of law ***in limine*** ought to succeed.

(ii) **The surviving spouse as the legal guardian.**

[7] The second point of law ***in limine*** to be addressed by this court is the argument that being the natural father and the only surviving legal guardian of the child, Respondent has custody by operation of the law. Further that he has ***de facto*** custody of the child and that his custody over the child has never been set aside.

[8] It is trite law that having been conceived in matrimonial union both parents while being alive are vested with custody over their children. This principle of law is stated by the learned author ***E. Spiro, The Law of Parent and Child, 4th edition (1985)*** at page ***39*** as follows:

"Both parents while alive and not being interfered with by an order of court, are possessed of parental power. However, this does not mean their power is equal. In fact the father's authority is superior to that of the mother".

[9] The Applicant's daughter passed on in 2002 and by virtue of her demise, and in law, custody of the children born of the marriage naturally vested in the Respondent as the surviving spouse. According to the learned author ***P.R. Boberg, The Law of Persons and the Family (Juta) 1977*** at page ***464*** the following is stated:

"Death of the custodian parent restores custody to the surviving parent".

[10] See also the following cases regarding the above stated legal principle of the law in cases of ***Short vs Naisby 1955 (3) S.A., Bloem vs Vucinovichi 1964 A.D. 501, Kaiser vs Chamber 1969 (4) S.A. 224.***

[11] In ***Kaiser (supra)*** Tebutt JA at page ***226 - 227 H - I*** states the following:

"The rights of both parents, however, were and ... are subject to a court not otherwise ordering ... it seems to me, however that the court has no jurisdiction to deprive a surviving parent custody at the instance of third parties, except under its power as upper guardian of all minors to interfere with their custody, **but then only on special grounds. Such special grounds include danger to a child's life, health or morals ... it is clear, however that where, at the instance of a stranger or third party the court is asked to interfere with or deprive a surviving parent of his right of custody, the court will not do so except if there are special grounds existing".**

[12] It appears to me that on the facts of this matter the court cannot interfere with the custody of the Respondent on the following grounds:

(i) Upon the Applicant's daughter death, the Respondent naturally and in law was vested with the children's custody;

(ii) Such custody and parental power has not to date been interfered with or set aside by a court of law;

(iii) The present application is not a custody application and indeed to this end, there is not one allegation in the founding affidavit in support of an order of custody;

(iv) The present application is also clearly not one requesting the court to interfere in any way whatsoever with Respondent's legal and natural parental power. Again, to this end there is not one allegation in the Applicant's founding affidavit showing that the father (Respondent) has done anything warranting or justifying an interference by the court; nor has the Applicant made any allegation whatsoever of special circumstances justifying such an interference by the above Honourable Court.

(v) The Applicant has merely, for reasons known to her, selectively chosen to withhold one of Applicant's

6 children, who had come to her on visit, thereby isolating her from her parental homestead, family and siblings, for her own selfish gain.

[13] In the result, for the afore-going reasons the application is dismissed with costs on the ordinary scale.

S.B. MAPHALALA

JUDGE