



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No. 261/2009

GARETH EVANS

Applicant

And

LISA EVANS

Respondent

Coram
For the Applicant

S.B. MAPHALALA - J
Advocate Van der Walt

(Instructed by Currie and
Sibandze)

For the Respondent

MR. Z. JELE

JUDGMENT
18th March 2009

[1] This is an application brought on a Certificate of Urgency for the variation of an order of this court issued on the 29th January 2009.

[2] The Respondent opposes this application and has filed an Answering Affidavit dated 4th February 2009, as well as a counter application dated the 9th February 2009.

[3] The application for the variation of the order of court is brought in accordance with Rule 43 (7) of the Rules of court.

[4] The Respondent has raised a point that the procedure adopted by the Applicant is not provided for in the Rules of court, in that the Rule 43 application, and which may be varied by an application in terms of Rule 43 (7) is not in place. The court does not have the power or right to vary any order or position unless it varies an order issued in terms of Rule 43. No such order exists in this instance.

[5] The Respondent further argue that the approach adopted by the Applicant is a hybrid approach and if the court does not uphold the preliminary point that this

procedure is not permissible, then the Respondent has filed an Answering Affidavit/sworn statement as well as a counter application/sworn statement.

[6] The Applicant advanced contrary arguments in court as well as in the Heads of Arguments. The essence of the Applicant's argument is that the court as an Upper Guardian of minor children is perfectly entitled to vary its orders in the interest of the minor children.

[7] Having considered the arguments of the parties on this point it appears to me that Mr. Jele for the Respondent is correct on the question of procedure. However, the court as an Upper Guardian of minor children when approached by one party can issue an order in the best interests of the minor children. There would be nothing untoward in the court in examining the application to see how the interests of the minor children will be safeguarded.

[8] For these reasons the order for variation is granted as proposed by the Applicant. The order to read as follows:

- (1) That the parties retain joint custody;
- (2) That the children stay with each parent for three consecutive days;
- (3) That neither party may remove either of the children from the jurisdiction of this court without the written consent of the other party;
- (4) Implicit in (3) above, that the children's passports remain in the custody of the Royal Swaziland Police until and unless such consent is obtained;
- (5) Costs to be costs in the trial proceedings.

[9] I wish to comment *en passant* that the Rule 43 application should be enrolled for arguments as soon as possible to safeguard the interests of the minor children.

S.B. MAPHALALA
PRINCIPAL JUDGE