IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE   Civil Case No. 2347/2007

ZAMANYAMBOSE MTHETHWA   Applicant

And

MANQOBA DLAMINI   Respondent

Coram   S.B. MAPHALALA - J

For the Applicant   MR. B. SIMELANE

For the Respondent   MR. DLAMINI

JUDGMENT 19th
February 2009

[1] Before court for decision is an application in the long form for an order granting custody of the minor children, Khulile Dlamini and Sadziselweyinkhosi Dlamini to Applicant. In prayer (b) thereof that Respondent be granted visitation rights for the minor children. Further, in prayer (c) that Respondent pays the costs of the application.

[2] The Applicant has filed her Founding Affidavit relating to the material facts in this case.

[3] The Respondent opposes the application and in this regard has filed an Answering Affidavit and counter-application. In the said affidavit points *in limine are* raised. Firstly, that the Applicant has taken the law into her own hands by taking the child Khulile on the pretext that the child came to her and that she claimed she was abused. Applicant has approached the court with dirty hands and the application ought to be dismissed with costs.

[4] In arguments before me Counsel for the Respondent advanced arguments regarding this preliminary point canvassed in paragraph 1, 1.1, 1.2, 2, and 21 of his Heads of Arguments. The general arguments in this regard is that the Applicant without the consent and/or knowledge of the Respondent and without any order of court authorizing her to do so, fetched the child (Khulile Dlamini) from school, hence even to date, the child in question is in the custody of the Applicant.

[5] On the other hand Applicant contends that she did not take the law into her own hands and that she took Khulile in that the child came to stay with her on her own because she felt that she would be more comfortable. She complained to her of certain abuses and she could not drive her child away and let her live a life of misery. She did not force her to live with her, as it was her choice.

[6] Having considered the arguments of the parties regarding this preliminary point I am inclined to agree with the version of the Applicant as outlined above in para [5] *supra.* Therefore I have come to the view that the point *in limine* raised by the Respondent is ill-conceived and is thus dismissed accordingly.

[7] On the merits of the matter Applicant is the biological mother of the two children both girls born on the 4th October 1996 and 14th August 2002 respectively. Respondent is the father of the children. Applicant and respondent have separated and are now living apart hence the application for custody by Applicant.

[8] This court is asked to decide what would be in the best interest of the child under the circumstances.

[9] It is important to record in this judgment that the parties were married in terms of Swazi law and custom in August 2002, when Respondent performed the **tekae** ceremony and they lived as husband and wife at his parental home at Kush area in Manzini District. Two minor children were born out of the union. During the month of March 2006 Respondent and his family forced Applicant to leave the marital home and to return back to her parental home and she has established a place to stay in Mobeni Flats, Matsapha where she stays with her sister.

[10] Reverting to the issue at hand according to the legal authority of *PQR Boberg, The Law of Persons and Family* at page *413* where a minor child in a dispute over custody is born in wedlock - the law regards the father of the child as the **natural guardian** and *prima facie* entitled to custody of such child. The *onus* of proof thus shifts upon the other party to show that the father is unfit to have custody. The law regards the father as *prima fade* entitled to natural guardian with all its incidents.

[11] It is trite law that where the parties are under judicial separation or divorce the court must then intervene by virtue of its inherent jurisdiction and power as Upper Guardian of all minor children and decide which of the parent is a fit and proper person to be granted custody.   To ascertain this position the court

must give weight and paramount consideration to the interests of the minor children.

[12] The position in this country was clearly enunciated by Nathan CJ in the case of *De Sousa vs De Sousa 1979 - 81 S.L.R. 315* at page *318 D - E* where the learned Chief Justice stated the following:

> "It is trite law that in custody cases the prime consideration (own emphasis) is the well being and interest of the child or children. One of the factors to be taken into account, however, is that there is lot of authority for the proposition that, all things being equal, young children should be placed in the custody of their mother. But this consideration should be elevated into a rule (own emphasis) carrying greater weight than the cardinal principle that one must have regard primarily to the best interest of the child".

[13] Having considered the arguments of the parties as I have stated above the Respondent has not demonstrated any characteristics of being unfit and proper person to be awarded custody of the children and the Applicant has failed to discharge the *onus* of proof that the natural guardian of the said children ought to be deprived of the said children.

[14] I have also given due weight to the Socioeconomic Report filed in this matter. The social worker Ms Vierah T. Hlatshwayo has stated the following in her conclusion to the report:

"In conclusion, one has to emphasize that the state has a responsibility to ensure that children are residing under good living conditions. Removing children from a homely environment and placing them under the Applicant might be too stressing on the Applicant. The Applicant needs to be assisted with some counseling so that she can go through the present situation".

[15] In the result, for the afore-going reasons custody of the children is given to the Respondent and the Applicant is granted reasonable access to them. I further order that each party pays his/her costs.

S.B. MAPHALALA

PRINCIPAL JUDGE