

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIVIL TRIAL NO 4403/09

In the matter between:

Manzini Roster Khumalo

Applicant

vs

Mandla A. Dlamini

Respondent

And

Another

Coram

MCB MAPHALALA, J

For Applicant

MR . M.N. MANANA

For Respondent

MR . J. SHEKWA

JUDGMENT
(07 JANUARY 2010)

The Applicant instituted an urgent Application against the Respondents for the following relief:

- (a) That an order be and is hereby issued dispensing with the normal forms and time limits and treating this matter on urgent basis.

- (b) That an order be and is hereby issued interdicting and restraining the First Respondent from burying the deceased minor child Naledi Lerato Dlamini at his parental home.
- (c) That an order be and is hereby issued giving the rights to bury the said deceased minor child to the Applicant.
- (d) That an order be and is hereby issued restraining the Second Respondent from releasing the body of Naledi Lerato Dlamini to the First Respondent.
- (e) Costs of Application.
- (f) Further and/or alternative relief.

[1] A Rule Nisi was issued by this Court on the 31st December 2009 in terms of Prayers (a), (b) and (d) returnable on the 7th January 2010.

[2] It is common cause that the Applicant and First Respondent were married to each other in terms of Civil Rites on the 11th August 1989; and, a final decree of divorce as between the parties was issued on the 6th August 2001 by the Manzini Magistrate Court.

[3] Custody of the minor children Naledi Lerato Dlamini, the deceased, and Tebogo Manelisi Dlamini was given to the applicant in terms of a Divorce Settlement agreed to by the parties and made an Order of Court.

[4] The Applicant alleges that at the time that the marriage was solemnized, the Applicant was already pregnant with the deceased child. Neither dowry nor the penalty for impregnating the Applicant was paid to her family by the First Respondent in terms of Swazi Law and Custom. However, since the marriage between the parties is by Civil Rites, I will decide this Application on the basis of the Common Law.

[5] Applicant alleges that since their birth, she has been responsible for the maintenance of the minor children without the assistance of the First Respondent. The latter has denied this in his Answering Affidavit. However, the Applicant has annexed to this Application an affidavit deposed to by the First Respondent on the 5th October 2007; Paragraphs 2 and 3 of the Affidavit read as follows:

“I was previously married and later divorced from Ms Manzini Roster Khumalo. Two children were born of the said marriage namely Naledi Lerato Dlamini and Tebogo Manelisi Dlamini....

My former wife has throughout the lives of our children, financially maintained them. This included catering for all their school expenses as I was unable to do so. She has continued to do so even after leaving Swaziland to live and work in the United Kingdom.”

[6] Ironically, the First Respondent in his Answering Affidavit admits that he deposed to this affidavit but states that it was a fabrication by himself intended to obtain visas for the minor children so that they could join the Applicant in England to pursue their education there. I don't believe this particularly because the Affidavit was signed and sworn to before a Notary Public.

[7] It is common cause that after the decree of divorce had been granted the Applicant bought a home at Ngwenya Village. She then migrated to England for employment and left the minor children in the care of a minder Sisi Ndlovu; the latter has deposed to a Confirmatory Affidavit which is annexed to this Application. The minder and children were residing at Applicant's home at Ngwenya Village.

- [8] The deceased child died on the 20th December 2009 in a traffic accident; and, the Applicant was at her place of employment in England. The minder Sisi Ndlovu and Applicant's sister asked the First Respondent to assist them in identifying the body in his capacity as the father to the deceased.
- [9] The First Respondent caused the body of the deceased to be taken to the Second Respondent's mortuary pending burial; he completed all necessary documentation and signed them signifying that he was the person who had brought the deceased. By implication, he is the only person who could sign documentation releasing the body of the deceased from the Second Respondent.
- [10] The two families have reached a deadlock as to the place of burial of the deceased; each of them wants to bury her. The Applicant argues that she has the right to bury her partly because she has the custody over the deceased and partly because she was solely responsible for the support and maintenance of the deceased during her lifetime. She further argues that the First Respondent cannot be heard to seek burial rights over the deceased when he failed to be a parent to her during her lifetime and that he never bothered to support and maintain her.
- [11] The issue before Court relates to the burial rights of the parties. The First Respondent on the other hand argues that he has the right of burial in his capacity as the biological father; and that after his divorce with the Applicant, he retained guardianship over the deceased and that the deceased followed his domicile. He further denies that he failed to support the children; however, he did not submit any proof in the form of receipts for the school fees he allegedly paid at Mjingo High School, Bahai High School, Cefups College and Mathew Phosa College where

the children were schooling. He has not even annexed a Confirmatory or Supporting Affidavit to prove that he maintained and supported the children.

[12] The Applicant in her Replying Affidavit sought to dismiss the Answering Affidavit on the basis that it did not have a stamp contrary to the Stamp Duty Act. On perusal of the original Answering Affidavit, I discovered that it was duly stamped; hence, that Point of Law cannot stand.

[13] H.R. Hahlo in *The South African Law of Husband and Wife*, 4th edition at page 458 states:

“Guardianship in its widest sense includes custody, and embraces the care and control of the minor’s person as well as the administration of his property and business affairs. Where custody and guardianship are separated, the custodian parent has the care and control of the minor’s person, while the guardian parent administers his property and business affairs.”

[14] At pages 463 – 464, the learned author has this to say:

“Where, as it happens in most cases, custody is awarded to the mother and no order is made as to guardianship, the father is left with guardianship minus custody. The mother, as the custodian parent, is entitled to have the child with her; to control its daily life; to decide all questions relating to its education, training and religious upbringing; to determine what homes or houses the child may or may not enter and with whom it may or may not associate....By virtue of his guardianship, it is the father’s right and duty to take charge of and administer the property of the minor; invest his moneys; pay his debts; and contract on his behalf in business matters. In legal proceedings the minor must be represented or assisted

by the father, unless the mother obtains leave from the Court to bring or defend an action on the minor's behalf."

[15] P.O.R. Boberg in the Law of Person and the Family, Second edition, at page 459-462 defines custody as follows:

"Custody is that portion of the parental power which pertains to the personal life of the child. Spouses who live together share custody.... But where the consortium is terminated, whether through separation or divorce, custody is... awarded to one parent leaving the other with residuary guardianship...."

An award of custody to a mother entrusts to her all that is meant by the nurture and upbringing of the minor children. In this is included all that makes up the ordinary daily life of the child – shelter, nourishment, and the training of the mind.... The child... passes into the home of the mother, and there it must find all that is necessary to its growth in mind and body.... A custodian parent has... the right to regulate the life of the child, determining with whom he should or should not associate, how he should be educated, what religious training he should receive, and how his health should be cared.

The non-custodian parent has no right to interfere in these matters, though he may petition the court to do so if it appears that the custodian has exercised his discretion in a manner contrary to the interests of the child or in conflict with an Order of Court. Otherwise he is confined to his right of access to the child."

[16] The learned author continues and deal with "residuary guardianship" at page 463 as follows:

"An order awarding the custody of a child to the mother does not and cannot encroach upon the father's paternal power"

save in so far as the exercise of that power would be inconsistent with the mother's custody. He remains the child's natural guardian and retains his power to administer the child's property, represent or assist him in legal proceedings, and authorize him to enter into legal transactions. His consent (together with that of the mother) is still required for the child's marriage. On the other hand, the power to change the child's residence, influence his citizenship or determine his domicile... passes to the custodian parent."

- [17] It is common cause that custody of the deceased minor child was granted to the Applicant. In terms of the Common Law, she is the one who controls the daily life of the child including her place of residence and her health. The First Respondent was only left with the "residuary guardianship" which only entitles him to assist the child in legal transactions where she lacked legal capacity. From this, it follows that the Applicant has the right to bury the deceased child.
- [18] I am further satisfied that the Applicant has been solely responsible for the financial support and maintenance of the deceased as evidenced by the Affidavit deposed to by the First Respondent and annexed to the Founding Affidavit. Similarly, it is apparent from the pleadings that from 2001 when the decree of divorce was issued, the deceased had been under the care of the Applicant until she met her death on the 20th December 2009; she resided at the home of the Applicant and the latter was responsible for her daily life.
- [19] In the circumstances the Rule Nisi is hereby confirmed in terms of Prayers (a), (b) and (d). I further grant Prayers (c) and (e). The costs awarded to the Applicant shall be on the ordinary scale.

M.C.B. MAPHALALA

JUDGE OF THE HIGH COURT OF SWAZILAND