IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 125/11**

In the matter between:

JUSTICE ZAKHELE MZIYAKO	**Applicant**
And	
NTOMBIFUTHI MZIYAKO	**1st Respondent**
ELMON DLAMINI	**2nd Respondent**
THE SOCIAL WELFARE OFFICER	**3rd Respondent**
(MANZINI DISTRICT)	
THE COMMISSIONER OF POLICE	**4th Respondent**
THE ATTORNEY GENERAL	**5th Respondent**

Date heard: 21 January, 2011.

Date of judgment: 09 February, 2011.

Mr. Attorney Martin N. Dlamini for the Applicant.

Ms. Attorney T. Dlamini, Attorney General for the Respondents.

JUDGMENT

FAMILY LAW – urgent application for return of children; the best interest of the children and considerations taken into account. **PRACTICE** – need to take care in

drafting notice of motion relating to orders with interim effect. Desirability of litigants in such personal matters to be in attendance. Application granted.

MASUKU J.

[1] I write this judgment under serious protest. The protest stems from the fact that I heard this matter on an urgent basis on 21 January, 2011 and granted the applicant certain relief. In the course of doing so, I delivered an *ex tempore* judgment in the presence of the parties or their representatives. It is recently, when I called for the transcription of the aforesaid judgment that I was, to my great dismay, informed that the recording equipment was on the day non-functional. It is for that reason that I am now called upon to do a work of supererogation, which is an unpleasant task in these circumstances.

[2] I specifically wish to draw to the attention of the Registrar of this Court, in this judgment, the difficulties we sometimes face in the proper production of Court proceedings and in other cases *ex tempore* judgments as a result of the faulty and sometimes non-functioning recording equipment. Not only does this result in irretrievable loss of evidence and proceedings but invariably results in the loss of Court hours because adjournments and postponements are in some instances rendered necessary in order to rectify the faults. I would therefore appeal that this issue be rectified once and for all and that there should be minimal (if at all) disturbances occasioned by the recording equipment.

[3] That said, I turn to the business I am about. As earlier intimated the applicant, a police officer, based at Manzini police station brought this application as a matter of urgency. He sought the following relief:-

1. Dispensing with rules relating to motion proceedings in forms, time limits and service and thereby hearing this matter on urgency.
2. Condoning non compliance of the rules and hearing the matter as one of urgency.
3. Condoning that applicant had earlier filed an urgent Application that was withdrawn but to order that the matter is still urgent.
4. Granting an order for the immediate return of the Applicant's minor children namely ..S M and S M with interim and immediate relief pending finalization of the above matter.
5. Ordering and granting applicant custody of the minor children namely: S M and S M.
6. Ordering and granting 1st Respondent visitation rights as and when she wants to see her children and during school holidays.
7. Ordering the 3rd respondent to investigate and file a report with court within a period to be determined by the court as reasonable.
8. Issuing a Rule Nisi to be returnable to such date as the court may deem fit.
9. Granting costs of this application at Attorney and own Client Scale for unnecessary opposition otherwise no order as to costs is sought.

[4] The salient facts attendant to this application are fairly common cause and they may be summarized as follows:- The applicant and the 1st respondent were married in terms of Swazi law and custom in the year 2000. That marriage still subsists. That union was blessed with two children, whose custody is the subject of this application.

[5] It would appear that the applicant and his wife lived in Manzini where he is stationed with his wife and the said children. In or about September, 2009, the marriage relationship reached its nadir, resulting in the 1st respondent leaving the matrimonial home and returning to her parental home at Nkonjaneni in the Hhohho Region. She left the two children, who were then enrolled in a school in Manzini, with their father.

[6] I should interpose and specifically mention that the 1st respondent who appeared in person during the hearing did not file any papers in response to the applicant's contentions. I however, allowed her even without any

affidavits, to address the Court as I could not exclude her from the proceedings considering that she is unlettered in law and resides in a remote area, far from the seat of the Court and was at any rate required to respond to the application on an urgent basis. She stated that there is a third child with whom she was pregnant at the time of her departure. She claimed that the applicant was failing and/or refusing to maintain that child and that she had initiated appropriate proceedings in the appropriate forum. I advised against obfuscating matters by involving the latter issue which was from all indications receiving attention of the maintenance Courts.

[7] I revert to the salient facts. At the end of the year 2010, the applicant allowed the 1st respondent to take the children to visit her apparently for the duration of the school holidays. The time for the children to return according to the applicant came and he communicated with the 1st respondent on 14 January, 2011, asking her to return the children the following day. He was particularly anxious because this was during heavy rains which may have swelled the nearest river to the 1st respondent's home, namely the Ntintinyane river and thus rendering the children unable to return to the applicant and to resume school on schedule.

[8] After the designated day came and went without the 1st respondent bringing the children, the 1st respondent, on further enquiries by the applicant, for the first time indicated that she was retaining custody of the children and had, it now appears, enrolled them at a school close to her parental home. She refused to return the children to the applicant therefor.

[9] It is the applicant's contention that he had paid the necessary fees for the children to return to their school and attached the receipt thereto anent. He also deposed that the younger child Sinenkhosi, is sickly and is intermittently afflicted by a strange ailment which requires constant medical and psychological care. He contended that it was therefore critical that the children's custody be awarded to him in the interim in particular to have Sinenkhosi easy and ready medical care in Manzini, which is not easily available at the 1st respondent's home area. I specifically record that the 1st respondent denied the alleged sickness.

[10] Before I deal with the issues at hand, I need to point out two issues. First is the joinder of the 1st Respondent's father. It is common cause that the 1st respondent is a married woman who has the *locus standi in judicio* and who can be cited in her own right and needing no assistance from her father as though she was a minor girl. This is particularly so in this constitutional era, in which we now live especially considering that the issues in contention are in respect of the custody of her children in circumstances where she does not see eye to eye with her husband. Her father cannot be a necessary party. I consider his joinder to be unnecessary. I will say nothing more of this matter though.

[11] Second, I am deeply perturbed by prayer 5 regarding the issue of custody. This is particularly so because it would appear that the applicant seeks an out and out order on an urgent basis when the issue of final custody requires a social welfare report, a process that takes weeks if not months to undertake in this jurisdiction. Mr. Dlamini readily conceded that it was inappropriate to seek such a prayer at this stage. I have had occasion to comment on the need to lucidly and carefully draft notices of motion in a manner that is just, fair and equitable and one that ensures that the legitimate interests of all the parties are adequately catered for in the interim whilst the Court investigates the bolts and nuts of the issue at hand.

[12] For example, in *Jika Ndlangamandla v Zeiss Investments (Pty) Ltd t/a Zeiss Bearings and Another*, Civil Case No. 3289/08 at page 17 para 28, I said the following:-

> "It is my considered view that there is generally an abuse of the rule *nisi* procedure by many practitioners in this Court and that there is a very rash and ready resort to apply for interim relief even when that is not necessarily called for. As a result, there are instances in which interim effect of a rule *nisi* is applied for and granted and which, however, prejudices the rights of the respondents in the interim and where there is strictly speaking, no necessity so to do. Extreme care

should be taken in drafting notices of motion in urgent matters and where it is necessary to protect an applicant's immediate interests in the interim. At the same time, the rights of a respondent must be given adequate attention and protection, particularly in *ex parte* applications."

[13] Last, it is important that litigants, particularly those who institute proceedings touching upon marriage and other personal issues of status should present themselves in Court. Very often, the Court wishes to investigate or verify certain issues directly form the party concerned as justice may require only to be told that the litigants is not in Court attending to his other business. Litigants must take personal interest in such matters and not leave everything to their lawyers. They need to be present; to follow the proceedings and for the Court, where necessary, to see them and/or hear from them without a need to adjourn or postpone the proceedings.

[14] Reports from the perspective of your attorney regarding what the Court did or said or the converse, particularly in personal matters; must be eschewed. Litigants ought to see and experience the wheels of justice grinding in their cases. In this case for instance, there is information that was required by the Court from the Applicant but he was not in attendance and this may make information gathering in respect of such cases a trying affair, resulting in adjournments having to be granted to enable the litigant to be in attendance.

[15] From the common cause issues recorded earlier in the judgment, the following critical issues may be deciphered;

1. the 1st respondent left her matrimonial home for reasons that may not be relevant to the issue at hand;
2. she left the two children in the applicant's custody, albeit without an Order of Court regarding custody, for more than 15 months;
3. the children were enrolled in a school in Manzini and were schooling there;
4. the applicant has already paid their school fees for the year. It stands to reason that they have become accustomed to the school teachers, schoolmates and the entire environment;
5. Sinenkhosi, although this is disputed by the 1st respondent, and need not be resolved at this juncture, is stated on oath to be generally unwell. The applicant attached a document from the Raleigh Fitkin Memorial Hospital as testimony and indicated that he had more hospital records appertaining to his health and would produce them in due course, regard had to the urgency of the matter.
6. On the balance, the applicant has deposed to this fact on oath and has attached some hospital records. Furthermore, he is the one who lived with the child in question and would be expected to be *au fait* with its medical condition than the 1st respondent. For present purposes, particularly having regard to the child's interests, I would, on a preponderance, find that the applicant's case is plausible.

[16] I am of the firm view that although this is not a case in which the Court is called upon to finally and definitively decide the issue of custody, particularly as it does not, at this juncture have the wherewithal to do so, still the principle of the best interests of the child should hold decisive sway whilst the issue of final custody remains unsettled. In this regard, this Court should, with the information at its disposal, bare as it may be at this juncture, make a judicial assessment of what is in the children's best interests – is it for the children to return to their father or to start a new life with their mother?

[17] I will state without equivocation that although this is not a case of custody proper, in respect of the applicant's prayer for the children to be returned in the interregnum to his custody, justice demands that the considerations, or those of them that are relevant to the child's best interest in cases of custody proper, should be invoked even at this juncture.

[18] These were neatly enumerated by King J. in *McCall v McCall* 1994 (3) SA 201 (C). These, it would appear, have been accepted and followed as "an instructive and valuable guide". See *Bethell v Bland* 1996 (2) SA 194 (W) at 208 – 209. See also Lawrence Schaefer, The Law of Access to Children; 2007, Lexis Nexis at page 62. His Lordship mentioned the following;

> "(a) the love, affection and other emotional ties which exists between parent and child and the parent's compatibility with the child.
>
> (b) the capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;
>
> (c) the ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity to the child's feelings;
>
> (d) the capacity and disposition of the parent to give the child the guidance which he requires;
>
> (e) the ability of the parent to provide for the basic physical needs of the child, the so-called 'creature comforts', such as food, clothing, housing and the other material needs – generally speaking, the provision of economic security.
>
> (f) the ability of the parent to provide for the educational well-being and security of the child, both religious and secular.
>
> (g) the ability of the parent to provide the child's emotional, psychological, cultural and environmental development;
>
> (h) the mental and physical health and moral fitness of the parent;

(i) the stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the status quo;

(k) the child's preference, if the Court is satisfied that in the particular circumstances the child's preference should be taken into consideration;

(l) the desirability or otherwise of applying the doctrine of same sex matching,…; and

(m) any other factor which is relevant to the particular case with which the Court is concerned."

[19] Issues that come to the fore as being relevant *in casu* include those reflected in (e), (f), (i), (j). I mention the above even though there has been no interview or assessment of the parents' respective situations and the above issues appear to be clear from the common cause issues mentioned earlier in the judgment.

[20] In particular, I note the following issues:

1. the children lived with the applicant, the mother having left them. For present purposes, and by implication, the applicant had interim custody over the children;
2. the applicant, being employed, appears to be in a position to provide for the children's physical need i.e. "creature comforts". The 1st respondent is unemployed from the information at my disposal. Her status in this regard is not however determinative on her suitability and does not necessarily render her a bad or unsuitable custodial parent I must perforce state;
3. the desirability of maintaining the status *quo*. In this regard, the children had lived with the applicant and were enrolled and continue to be so enrolled at Manzini Central Primary School. They have become accustomed to the school teachers and classmates and the easy access to the school afforded them. By contrast, the school in which the 1st respondent has enrolled them

is new to them and so is the environment – teachers and students. It is, from the 1st respondent's *ipse dixit*, 3 km away. More decisively, it is a historical fact of which I can take judicial notice that schools in urban areas are better equipped to provide better education and attract a better calibre of teachers than rural schools;

4. there is also the attached issue of S's health situation which I have commented on above and which in my view points to the return as being most in accord with the children's best interests at this stage, based on the paucity of information at my disposal.

[21] Having regard to the foregoing considerations, it would appear to me that the best interests of the children necessarily require that the children, in the intervening period, should be returned to the applicant with the 1st respondent being afforded the right of reasonable access to them.

[21] The foregoing constitute the reasons why I issued the following Order on 21 January, 2011, i.e.

1. Dispensing with rules relating to motion proceedings in forms, time limits and service and thereby hearing this matter on urgency.
2. Condoning non compliance of the rules and hearing the matter as one of urgency.
3. Granting an order for the immediate return of the Applicant's minor children namely S M and S M with interim and immediate relief pending finalization of the above matter.
4. Ordering and granting 1st Respondent visitation rights as and when she wants to see her children and during school holidays.
5. Ordering the 3rd respondent to immediately investigate and file a report with the Registrar of this Court.
6. Rule Nisi to be returnable on 11 March, 2011.
7. Costs ordered to be in the cause.

DELIVERED IN OPEN COURT IN MBABANE ON THIS THE 21ST JANUARY, 2011.

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T.S. MASUKU

JUSTICE OF THE HIGH COURT

Messrs. Martin N. Dlamini Attorneys for the Applicant

The Attorney General for the Respondents