IN THE HIGH COURT OF SWAZILAND
HELD AT MBABANE

CIV. APPL. NO.431/11

In the matter between:

NOKUTHULA MDLULI

And

STANLEY MNISI **1st Respondent**

THE DEPUTY PRIME MINISTER **2nd Respondent**

THE ATTORNEY-GENERAL **3rd Respondent**

THE REGISTRAR OF THE HIGH COURT **4th Respondent**

THE CLERK OF COURT, MAGISTRATE'S COURT FOR THE DISTRICT OF HHOHHO **5th Respondent**

Date of hearing: 18 February, 2011
Date of judgment: 3 March, 2011

Mr. Attorney S.V. Mdladla for the Applicant
Mr. Attorney N. Manzini for the 1st Respondent
Ms. Attorney N. Ngubeni for the 2nd to 5th Respondents

J U D G M E N T

CONSTITUTIONAL LAW: Provisions of section 35 (4) of the Constitution for referral of case from sub-ordinate Court of High Court-when applicable. High Court's power to issue enforcement orders in respect of review and supervisory powers. **COURTS:** When does a Court become *functus officio* and exceptions thereto. Magistrate's Court powers to rescind its judgments and orders. **PRACTICE:** Urgency in cases relating to minor children especially custody cases. *Lis alibi pendens* - and Court's discretion when applicable. Need to set out evidence in affidavits in support of orders sought in notice of motion.

MASUKU J.

Background and nature of relief sought

[1] Presently serving before Court is an application by the applicant in which she seeks an order to protect her constitutional rights accorded her by section 21 of the Constitution of Swaziland and further seeks this Court to intervene in a cause serving in the Magistrate's Court in Mbabane by exercising its powers of review as set out in section 152 of the Constitution of Swaziland. The relief sought is, for convenience set out in full below:-

1. Dispensing with the usual forms and procedures relating to the institution proceedings and directing that the matter be heard as one of urgency.

2. Declaring that the actions of the 2nd Respondent are offensive and contrary to provisions of Section 21 of the Constitution of Swaziland in that they will lead to Applicant being denied proper hearing.

2.1. That the 2nd Respondent or his officials currently compiling and/or preparing the Social Welfare report, be

interdicted and/or restrained from proceeding with the investigations and/or filing the said report.

2.2. That the 2nd Respondent be directed to compile the said report in a fair and transparent manner and to provide the Applicant with an opportunity for a fair hearing as provided for in the Constitution.

3. That the honourable court make directions as to the hearing and the finalization of the matter and that the honourable court supervises the hearing of the matter in terms of Section 152 of the Constitution of Swaziland, alternatively, if it is so deemed by the above honourable court, it takes over the matter and decide on the issues as the upper guardian of all minor children.

4. That pending the finalization of this matter and the matter at the Magistrates Court, the 1st Respondent be directed to restore custody of the minor child to the Applicant.

5. That prayer 4 hereinabove operate forthwith as an interim order.

6. That the 6th Respondent, the Clerk of Court of the Magistrates' Court for the District of Hhohho be directed forthwith to transmit the record of the matter to the High Court of Swaziland.

7. That a Rule Nisi do hereby issue, calling upon the Respondents to show cause at such time as this Honourable Court may direct, why an order should not be made final in terms of prayers hereinabove.

8. That the Respondents pay costs of this application.

9. Granting further and/or alternative relief.

[2] The matter appears to be accompanied by a high degree of acrimony particularly between the applicant and the 1st respondent. It would appear that the applicant apprehends that the other respondents, particularly the 2nd respondent, in carrying out

assessment duties and functions relating to the custody of her child with the 1st respondent, is going about those duties in a manner allegedly prejudicial to her interests.

[3] It is imperative though to commence by briefly narrating the setting in which the present application takes place. The applicant and the 1st respondent were previously married. It would appear that their marriage relationship reached a nadir which culminated in the applicant launching proceedings for divorce and ancillary relief before the Mbabane Magistrate's Court.

[4] The correctness of the events which followed that order and ancillary issues are the subject of serious legal disputes but it would seem settled that the said Court, on 25 February, 2009, granted the applicant a final decree of divorce and reserved the question of the proprietary consequences of the marriage for settlement by the parties after which an agreement would be filed by their respective representatives.

[5] It would further seem, and this is common cause, that the Court *a quo* then proceeded, at a later date, to issue an order for custody in favour of the applicant and maintenance in the sum of E 2,000.00. What then happened from there is really surprising. The 1st respondent, for the first time, challenged the competence of the decree of divorce, the maintenance order issued and crucially, the order relating to custody of the minor child of the marriage.

[6] By application dated 12 February, 2010, the 1st respondent approached the Magistrate's Court seeking essentially an Order setting aside the decree of divorce, the custody and the maintenance orders. The pith of the 1st respondent's contention in support of the said rescission application was that the decree of divorce was dealt with on an unopposed basis when the 1st respondent had in fact entered an appearance to defend. It was further contended on the 1st respondent's behalf that the applicant had not made any averments entitling her to the custody and maintenance. It was specifically alleged that the provisions of Order VII Rule 3 (4) had not been complied with by the applicant in her aforesaid claim.

[7] This application was vigorously opposed by the applicant. I shall not traverse the grounds of opposition thereto and I need not. It would appear that this application remains pending before the Court *a quo.* The 1st respondent did not appear to be lacking in his zeal. He thereafter approached that Court on an urgent basis, by application dated 7 December, 2010, seeking an Order granting him access to the said minor child "and/or to have interim custody of the minor child namely Siphosethu Aldrin Mnisi, pending finalization of this application". He also applied for committal of the applicant to gaol for an alleged contempt of that Court's order on the grounds that he was not afforded access to the said child by the applicant as had been ordered by the trial Court.

[8] The Magistrate's Court, by an Order dated 16 December, 2010, granted "interim custody" of the child to the 1st respondent and postponed the matter to 26 January, 2011. On 20 January, 2011, the applicant launched a salvo of her own. She approached that Court, in essence claiming restoration of the custody of the minor child to her and ancillary relief. This application stands opposed.

[9] It would appear, from all indications that the 2nd respondent is now engaged in a process of assessing the question of who, between the two protagonists, should have custody of the child on a "final basis". I use these words in paranthesis deliberately for the reason that it would seem to me on first principles that the Court *a quo* had granted custody to the applicant herein. Whether that Court could, having pronounced a final Order in that respect, itself reopen the issue or do so as at the behest of a party and consequently issue another Order is a serious moot legal point and one I intend to deal with in due course, for it appears to me to be the main and decisive issue between the parties.

[10] It is in the process of determining whether it is the applicant or the 1st respondent who should be awarded custody of the minor child, who at the present moment is with the latter per the Order dated 15 December, 2010, that the applicant states that the 2nd respondent has engaged in conduct that the applicant contends violates her rights accorded by the Constitution.

[11] In particular, the applicant contends that the 2nd respondent's officers exhibited naked bias against her and her attorneys, in that in contradistinction to the 1st respondent's, her attorneys are not being kept abreast of the developments of the entire assessment process. She also claims that she has been confronted by the 2nd respondent's officers with questions which were raised by the 1st respondent in previous Court proceedings, suggesting that the said officers are not dealing with the two protagonists on an even keel. It is in this respect that the Court is being required by the applicant to intervene in terms of section 35 as read with section 152 of the Constitution.

[12] I should mention that crucially, the 2nd respondent's representatives, notwithstanding the damning allegations of bias against them, have not sought to raise even one feeble finger in their defence or in explaining their conduct. They have, in the face of such disconcerting allegations (whether or not they be true), chosen, it would appear, upon advice, not to enter the arena, but to sit in the grandstand as it were, watch the proceedings and abide by the decision of the Court. It is a serious thing for allegations of partiality and bias to be leveled at public officials and odious when these

allegations remain unchallenged as they are *in casu.* This docile attitude, unfortunately tends to reinforce the truthfulness of the allegations leveled. I say no more of this issue.

Implications of section 35 (4) of the Constitution

[13] Mr. Manzini, for the 1st respondent, raised points *in limine* against the Orders sought. It was urged upon the Court that the applicant cannot, in the circumstances, properly approach this Court for the relief sought for the reason that the questions raised by the applicant could be properly dealt with by this Court if they had been referred to this Court by the Magistrate's Court in line with the provisions of section 35 (4) of the Constitution. Short of such referral, it was argued, this Court may not deal with such question as the jurisdictional facts placing the matter before this Court are wanting. Is this contention sound and supportable in the present circumstances?

[14] In order to grasp the gravamen of the argument, it would be well to commence with a quotation of sections 35 (1), (2) and (3) of the Constitution. They read as follows:

"(1) Where a person alleges that any of the foregoing provisions of this Chapter has been, is being, or is likely to be, contravened in relation to that person or a group of which that person is a member (or, in the case of a person who is detained, where any other person alleges such a contravention in relation to the detained person) then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction -

(a) to hear and determine any application made in pursuance of subsection(l);
(b) to determine any question which is referred to it in pursuance of subsection (3);

and may make such orders, issue such writs and make such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of this Chapter.

(3) If in any proceedings in any subordinate court to the High Court any question arises as to the contravention of any of the provisions of this Chapter, the person presiding in that court may, and shall where a party to the proceedings so requests, stay the proceedings and refer the question to the High Court unless, in the judgment of that person, which shall be final, the raising of the question is merely frivolous or vexatious."

[15] It would appear, on a reading of the above provisions, that this Court has original jurisdiction to hear matters related to the protection and enforcement of the fundamental rights and freedoms set out in Chapter III in two different circumstances. First, is where the issue is

raised directly to the High Court for determination. Second, is where the said issue is referred to this Court by a Court subordinate to this Court. For the latter to apply, it is apparent, from sub-section (3) above that the issue or question for referral, which must necessarily relate to an alleged or alleged contraventions of the provisions of Chapter III, must arise in the course of any proceedings before such subordinate Court.

[16] From a close reading of sub-section (3) above, the referral to this Court, it would further appear to me, arises in two different circumstances. In the first place, a discretion is reposed in the presiding officer, to *mero motu* stay the proceedings and refer same to this Court. This should happen where a constitutional question touching upon the contravention of the fundamental rights and freedoms arises in the course of proceedings before that Court. That a discretion is given to the presiding officer, in my view, must be seen from the use of the word "may" occurring therein. It hardly need be said that as in all other instances where a discretion is reposed, such discretion, relating as it does to a constitutional function, shall not be exercised capriciously but judicially and judiciously, with a view to

ensuring the preservation and enforcement of the fundamental rights and freedoms encapsulated in Chapter III.

[17] The second instance for referral arises where a party to such proceedings before the subordinate Court so requests. In this event, the Court, it would appear to me, exercises no discretion. It is compelled to refer such proceedings and the pointer to the mandatory nature of the referral in this part of the provision, is to be found in the nomenclature employed, particularly the word "shall" occurring in the third line. The mandatory nature of the referral of the proceedings, is not, however open-ended, with the officer having no say completely once a referral has been requested.

[18] In this regard, he or she has to ensure that the said referral has not been made in exercise of frivolous or . vexatious intentions or for the purpose- of procuring nefarious results, e.g. to delay the proceedings; engaging in fishing expeditions or to harass the opponent or the subordinate Court. This list is, by no means exhaustive. Once vexatiousness and/or frivolity can be shown or are apparent, then the subordinate Court, may decline to make such referral, the request to

so refer by a party to the proceedings notwithstanding. Such decision to refuse the referral for reasons of the frivolous or vexatious nature of the request, is however, final, admitting of no appeal according to the section under scrutiny.

[19] I am of the view that Mr. Manzini is not correct in his understanding and interpretation of section 35 (3) relating to referrals. I say this for the reason that the conduct complained of in the instant matter did not take place or arise during the proceedings before the subordinate Court. In point of fact, the conduct of the 2nd respondent complained of took place away from the sanctity and full glare of the subordinate Court and certainly not in the course of actual proceedings before that Court.

[20] It would seem to me that the referral becomes necessary where the issue of the contravention of the rights and freedoms in Chapter III actually arises in the course of proceedings serving before that Court and which would ordinarily require the subordinate Court to rule thereon but for the provisions of section 35 (3). An example would do. If in the course of a criminal matter, an accused claims that his right to

a fair hearing has been or is about to be infringed, then the referral would be in order as that question requiring immediate determination arises during the course of proceedings before the said Court.

[21] If on the other hand, a suspect, during Court proceedings escapes and is when caught seriously assaulted such that he suffers grave injuries and claims that one or other constitutional rights and freedoms were infringed thereby, nothing could stop that person approaching this Court directly for appropriate relief in terms of section 35 merely because the incident took place during the continuance of proceedings before that Court. He would certainly be entitled to approach this Court directly for enforcement of his rights allegedly contravened or likely to be contravened thereby.

[22] If I am incorrect on this, Mr. Mdladla pertinently made reference to the provisions of section 152 of the Constitution, which was also referred to in the application and which provide as follows:

> "The High Court shall have and exercise review and supervisory jurisdiction over all subordinate courts and tribunals or any lower adjudicating authority, and may, in exercise of that jurisdiction, issue orders and

> directions for the purpose of enforcing or securing the enforcement of its review or supervisory powers".

[23] The Black's Law Dictionary describes "Supervisory control" as The control exercised by a higher court over a lower court, as by prohibiting the lower court from acting extrajurisdictionally and by reversing its extrajurisdictional acts'. It will be clear when I proceed further with this judgment that there were some acts and proceedings embarked upon by the subordinate Court at the parties' behest which were extra-jurisdictional in nature and/or effect, hence calling for this Court necessarily to exercise its review and supervisory powers envisaged in section 152 aforesaid.

[24] Review, on the other hand, is described in the same text as, 'Consideration, inspection, or re-examination of a subject or thing; plenary power to direct and instruct an agent or subordinate court, including the right to remand, modify, or vacate any action by the agent or subordinate".

[25] In that regard, it becomes very clear that this Court may, at the instance of an aggrieved party intervene and correct any anomaly in

order to enforce its review and supervisory powers. This is the very exercise that the applicant urges this Court to embark on and it would be incorrect and preposterous to hold that this Court would have to come to the aid of such a party only through a referral.

[26] The exercise of this Court's review and supervisory power is not contingent, it would seem to me, only on a referral. A party can and is entitled, in appropriate cases, to directly approach this Court for its intervention. I accordingly find and hold that this matter is properly before this Court. To this extent, I am of the view that the 1st respondent's point ought to fail and it is so ordered.

Urgency

[27] Mr Manzini had also raised the point relating to urgency, arguing that this matter is not urgent or sufficiently urgent to justify the departure from the ordinary provisions of the Rules. I indicated to him at the nascent stage of his address that his argument was doomed to fail and he abandoned that ill-fated journey before he embarked on the first mile, to his credit.

[28] My principal reason for saying so will be briefly stated. First, the matter served before me on urgency on 11 February, 2011 and I put the parties to terms to file their respective sets of papers. By enrolling the matter as one of urgency, and calling on the filing of further papers, the Court ruled on urgency, even if it can be said that this was by necessary implication. It was not open to the respondents, on the return date, to again attempt to bark the tree of urgency, when the Court had already enlisted the matter as one of urgency and thereby enrolled same.

See my remarks in *Hellenic F. C. v The Swaziland National Football Association And Four Others Case No.* 1751/09; *William Andrew Bonham v Master Hardware (Pty) Ltd t/a Build It And Two Others* ***In re*** *Master Hardware (Pty) Ltd v Ryan Moyes Neuil* Civil Trial 294/08 at page 7-8.

[29] Furthermore, on a proper reading of the applicant's papers, I am in any event of the firm view that the applicant did make out a case for urgency in the founding affidavit and the question of the lack of urgency was not even faintly suggested or raised by any of the res pondents at the initial hearing. It was in appreciation of those

circumstances that I accordingly found it fit to enroll the matter as one of urgency. Even looking at the matter in retrospect, I still stand by my decision in that regard as having been eminently correct and called for in the circumstances.

[30] More importantly, there is a paradigm shift that is required and which has to take place in the Court's mind in cases dealing with the interests and the well-being of minor children, including the question of custody. This calls for the deliberate eschewing of sterile formalism on the part of the Court. In *B v B* 2008 (4) S.A. 535 (W), Mashidi J. said:

"It is trite law that the interests of minor children are of paramount importance. . . A matter such as the current matter where there is need to remove uncertainty about the future, safety and well-being of minor children, will always be urgent. See *Terblanche v Terblanche* 1992 (1) S.A. 501 (W). I therefore deemed it necessary to deal with this matter as one of urgency."

[31] In the case of *J v J* 2008 (6) SA 30 (C), Erasmus J. made the following pertinent remarks:

". . . In *A D and D D v D WAnd Others v Law Centre For Child Law as* ***Amicus Curiae;*** *Department for Social Development as Intervening Party,* 13 (13) the Constitutional Court endorsed the view of the minority in the Supreme Court of Appeal that the interests of minors should not be lield at ransom for the sake of legal niceties and held

that in the case before it the best interests of the child' should not be mechanically sacrificed on the altar of jurisdictional formalism."

[32] I endorsed the above remarks in the case of *Gareth William Evans v Lisa Evans* Case No. 261/09 at page 11 [para 15] by saying the following:

"I am of the view that the above excerpts apply with equal force in this jurisdiction and that strict legal formalism should not stand in the way of substantive justice when issues relating to the interests of minor children are being determined by the Court. If necessary, legal inhibitions and hurdles should be removed in the Court's quest to establish the all-important question of the interests of minor children. This relaxation should, in my view, include application of the Rules relating to urgency as propounded in the afore stated cases.

I stand by these remarks and am of the view that they should apply in cases involving minors, without inviting laxity on the part of applicants' practitioners in the general observance of the provisions of the Rules of Court.

[33] There is yet another important consideration that must, to my mind hold sway in the event I am held to have erred and that the above considerations do not assist the applicant. It is this: In the case *Shell Oil Swaziland v Motorworld t/a Sir Motors* App. Case No. 23/06, the Court of Appeal admonished Judges of this Court against the practice of dismissing matters before them on high technical points apparently in a bid to avoid grappling with the substantive matter on the merits of it.

[34] I view the matter regarding the desirability of deciding what appears to be an uncertainty regarding the custody of the minor child a matter of great moment to this Court, giving especial attention to the fact that at law, this Court is the Upper Guardian of all minors. Once a matter involving what appears to be prejudicial issues which are likely to affect the proper and comely development of a minor child, this Court should eschew a temptation to allow legal obstacles to constitute landmines in the Court's quest to deliver justice efficiently in the interest of the minor child in question.

[35] In a judgment, hot from the oven delivered on 28 Febraary, 2011, Ota J. made the following trenchant rem=irks regarding putting form

ahead of substance in *Phumzile Myeza And Two Others v Director of Public Prosecutions and Another* Case No.728/2009 at page 37 [para 45].

"The universal trend is that courts are interested in substance rather than mere form. This is because the spirit of justice does not reside in forms and formalities, nor in technicalities, nor is the triumph of the administration of justice to be found in successfully picking one's way between the pitfalls of technicalities. Justice can only be done, if the substance of the matter is considered. Reliance on technicalities leads to injustice. The court will therefore, not ensure that mere form or fiction of law introduced for the sake of justice should work a wrong, contrary to the real truth or substance of the case before it."

I fully align myself with these remarks, which coincide with my own thinking.

[36] The 1st respondent had one other string up his bow. It was contended on his behalf that the present matter is presently serving before the Magistrate's Court and that for that reason, the plea of *lis alibi pendens* applies and which should preclude this Court from dealing with the application presently serving before it. Mr. Manzini, in this wise, noted that there is no doubt from the papers that the matter is pending before that Court when one has regard to prayer 4 of the Notice of Motion. He accordingly asked of this Court to dismiss this application therefor.

[37] This plea was dealt with in the case of *Sikatele And Others v Sikatele And Others* [1996] All S.A. (Tk. S.C.) 445 at 448 In that case, Miller J.A. stated the applicable principles as follows:

"The requirements of the defence are: (a) that there must be pending litigation. . .; (b) that the proceedings must be based on the same cause of action. . .; and (c) that the other proceedings must be pending between the same parties or their privies. . . The onus of proving the requisites rests on the party raising the defence. . ."

See also *Nkosikayithethi Nxumalo And Two Others v Mashikilisana Fakudze And Two Others,* Case No. 2816/08.

I am of the view that whereas the other two requirements are met, it is in my opinion clear that the present proceedings are not the same as those pending before the Magistrate's Court and which Court is not empowered to deal with and decide constitutional matters with a bearing on fundamental rights and freedoms, which this Coifirt has, as seen above.

[38] Furthermore, it is clear that this Court has been approached, in part, in terms of section 152 (2) aforesaid and this Court, notwithstanding that the proceedings may be pending before the

Magistrate's Court, is entitled, in appropriate cases, to exercise its supervisory and review powers and this, as I have said, is such a case.

[39] I should also hasten to add that once the issue of *lis pendens* has been properly raised, the Court in which sucn a plea is raised, is not perforce required to refer the matter to the other forum. I dealt squarely with that very question in *Daniel Jackson Mwaisengela v Nedbank (Swaziland) Ltd And Three Others* ***In Re:*** *Nedbank (Swaziland) Ltd v Tibuke Investments (Pty) Ltd And Another* Civ. Case No. 920/2009. At page 39 of the cyclostyled judgment, I quoted the following excerpt from the learned authors Herbstein & Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th ed, at page 252, where the following appears:

"*Lis pendens* is not, however, an absolute bar. It is a matter within the discretion of the court to decide whether an action brought before it should be stayed pending the decision of the first action, or whether it is more just and equitable that it should be allowed to proceed."

[40] I am of the view, in the first instance that not all the requirements for the application of the defence have been satisfied *ad seriatim* as

should be the case. In any event, it is clear that the Constitution allows this Court, the said plea notwithstanding, to intervene in proceedings before subordinate Courts and exercise its supervisory and review powers. This, as I have said, is such a case.

[41] I therefor decide, if I should be wrong on both findings above, that it is equitable in the instant case, to hear the present application in this Court, notwithstanding that it may be pending before the subordinate Court. It should, in any event not be forgotten that the interests of a minor child are at stake and this Court, being the Upper Guardian of all minors, should act responsibly and be able to intervene and do justice, which is what I intend to do. The proper exercise of this Court's discretion in this, case, involving a minor as it does, requires that this Court proceeds with the application before it.

[42] For the foregoing reasons, I am of the considered opinion that the plea of *lis alibi pendens* should, in the circumstances, not avail the 1st respondent. The present proceedings are properly before this Court and it is, in my view, perfectly entitled to hear and determine same. I

shall therefor proceed to deal with the matter on its merits or decide it on some other basis that I find to be appropriate.

[43] In all the circumstances of this case, I am of the view that the objections *in limine* raised by the 1st respondent herein, are not meritorious and are, in my considered opinion liable to be dismissed as I hereby do. This then paves the way for me to deal with the matter on its real merits which I do presently.

Was the Magistrate's Court entitled to change, alter or review the divorce order and the ancillaries?

[44] As indicated to Counsel during the hearing, there is, notwithstanding all the issues and questions raised by the parties in their papers, only one question to be determined by this Court. The settling of this question, it would seem to me, is potentially decisive of the entire application and may, more importantly, render it unnecessary to decide the main issues raised by the applicant in her papers, including the constitutional questions she has raised.

[45] The question, is whether it was open to the Magistrate's Court, having granted a final decree of divorce, maintenance and custody of the child to the applicant, to itself then change, vary or rescind that Order, even if with the benefit of hindsight it came to the view that, that Order was not properly issued. More importantly, that Court having awarded custody of the minor child to the applicant, was it entitled, because of the groaning and murmurings of the 1st respondent, to then issue an "interim custody" Order, in the 1st respondent's favour as if no Order relating to custody had ever been issued? The above questions are in my considered view, monumental and I turn to address them presently.

[46] I must deal with the above questions from the trite legal position of the doctrine of *functus officio,* namely that generally speaking a Court, once it has duly pronounced its order or judgment on an issue, thereafter ceases to have jurisdiction, to itself review or alter its decision.

[47] This doctrine has recently been the subject of determination in the case of *The Swaziland Motor Vehicle Accident Fund v Senzo Gondwe*

Civ. App. No. 66/2010. In that case, the Supreme Court cited with approval the *locus classicus* judgment of Trollip J.A. in the case of *Firestone South Africa (Pty) Ltd v Genticuro A.G.* 1977 (4) S.A. 298 (A), at p306, where the learned Judge of Appeal adumbrated the applicable principles in the following compelling manner:

"The general principle, now well established in our law, is that, once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it. The reason is that it thereupon becomes *functus officio:* its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter has ceased. . . There are, however, a few exceptions to that rule which are mentioned in the old authorities and have been authoritatively accepted by this Court. This, provided the Court is approached within a reasonable time of its pronouncing the judgment or order, it may correct, alter or supplement it in one of the following cases. . ."

[48] In the Republic of Botswana, Tebbutt A.J.P., (as he then was), had occasion to comment on this very issue in the case of *Monnanyana v The State* [2002] 1 B.L.R. 72 (C.A.) at p78. The learned acting Judge President, after making reference to the *Firestone* case *(supra),* said:

> "In the *Firestone* case supra, the court held that there were four exceptions to the general principle and that the court may correct or alter or supplement its judgment or order (i) in respect of accessory or consequential matters e.g costs or interests on a judgment debt which the court overlooked or inadvertently omitted to grant; (ii) in order to clarify if its meaning is obscure, ambiguous or uncertain, provided it does not alter the 'sense or substance' of the judgment or

> order; (iii) to correct a clerical, arithmetic or other error in expressing the judgment or order but not altering its sense or substance; (iv) making an appropriate order for costs which had not been argued, the question of costs depending on the court's decision on the merits of the case."

In summing up, Ramodibedi C.J. stated the following in the *Gondwe* case *[op cit)* at page 11 [para 11]:

> "I am mainly attracted by the more enlightened approach which permits a judicial officer to amend or supplement his pronouncement or order provided he does not change its sense or substance. I consider that this approach should guide this Court as the highest court in the country so as to enable it to do justice according to the circumstances. This is such a case."

[49] On the facts before it, the Supreme Court held that it had committed an error in the pronouncement of its order and proceeded to alter its judgment accordingly, taking the view that by doing so, it did not change or alter the sense and substance of its judgment, an issue I need not comment on in this case.

[50] The question to determine is whether the Magistrate's Court, having issued its final judgment or order in respect of the matters mentioned above, it was competent and proper for it to have issued an interim custody order. More importantly, did this exercise fall within

any of the exceptions mentioned in the *Firestone* case and accepted in the *Gondwe* case? Did it not thereby change or alter the "sense or substance" of its order or judgment?

[51] In my view, it is a wholesome and inexorable conclusion that the order or judgment issued by the Magistrate's Court in relation to the divorce and its ancillaries was final. Having exercised its powers in relation thereto, it became *functus officio,* having fully and finally exercised its powers and its jurisdiction having come to an end. It was no longer open to it, whatever the circumstance, even if with the benefit of hindsight, it found that it had erred in issuing the orders or judgment it did, to revisit the said order or judgment, save in the limited circumstances brooked in the *Firestone* case *(supra)*. The only issue that may be different in this regard, is that relating to maintenance and which that Court could, after sometime, be able to re-open if a change of circumstances had been alleged and proved by admissible evidence,

[52] The judgment given by a Court of competent jurisdiction is presumed to be correct and valid until it is set aside by an appellate Court. So long as the judgment is not appealed against it is unquestionably valid and subsisting. This is so no matter how perverse it may be perceived to be. It must be obeyed by the persons affected. A Court is powerless to assume that a subsisting order or judgment of another Court of competent jurisdiction can be ignored because the power, whether it is a superior Court in the judicial hierarchy, presumes the order as made or the judgment as given by the latter to be manifestly invalid without a pronouncement to that effect by the competent appellate or reviewing Court.

[53] In this particular context, the Court *a quo's* order in relation to custody, which had been issued in exercise of its powers, and was granted to the applicant herein, was final. It was not then open to that Court, to itself exhibit a vacillating mind by issuing an "interim custody order" in meeting the vociferous cries of the 1st respondent. Once the issue of custody had been settled in favour of the applicant, the 1st respondent, if dissatisfied therewith, had to approach this Court on appeal and state his case. See *Chief Mtfuso II (formerly known as*

Nkenke Dlamini) and Two Others v Swaziland Government Court of Appeal Case No. 40/00 at page 6.

[54] The only application that Court, in my considered opinion, had power to entertain in respect of the application dated 7 December, 2010, was the enforcement of the 1st respondent's rights of access to the child and then only if the Court had indeed established that the 1st respondent's exercise of those rights in that regard were being deliberately frustrated by the applicant. It could, if satisfied therewith, have even granted an Order committing the applicant to gaol for contempt of its order, ordinarily having heard her and having afforded her, as is normally the case, an opportunity to purge her contempt. The reviewing of its custody order was a clearly "no go" area for the Magistrate's Court.

[55] That Court, in my view, committed an error of colossal proportions by revisiting what was in essence, a final order and attempting to grant what was termed an "interim custody" order. This was eminently wrong. Such interim orders proper, are normally granted in cases

where issues of custody have to be determined in the course of pending divorce proceedings but where the interests of justice require that same be determined *pro ha vice.* The same applies to interim maintenance and contribution to costs for the divorce.

[56] By way of example, in this Court, these issues are governed by Rule 43. An interim custody order cannot therefor be properly granted in cases where the divorce proceedings, together with their ancillaries have been finalized by the trial Court, even if one of the parties is genuinely unhappy with the result. That party's remedy clearly lies in appeal.

[57] What is particularly astounding, is that from his application dated 7 December, 2010, i.e. the one for access/interim custody, the 1st respondent, in paragraphs 9 and 10 of the founding affidavit accepted that the trial Court had granted custody to the applicant herein and that the parties, being himself and the applicant, thereafter signed an agreement in that regard which was subsequently made an order of Court on 14 July, 2010. To this extent, it is therefor clear and

accepted even by the 1st respondent that the order in relation to custody, was final.

[58] Furthermore, a reading of the 1st respondent's aforesaid affidavit shows indubitably that his major, if not only complaint was the denial of access to the child by the applicant. There was, in my view nothing said in the founding affidavit that could remotely be said to have formed the basis for the order for interim custody ultimately granted by the Magistrate's Court. It must be recalled in this regard that any orders granted by the Court must ordinarily be predicated on allegations of fact made in the affidavits filed in support of the prayers made. It would be precipitous for Courts to grant orders sought but which have no support from the depositions made.

[59] In this case, the relief of interim custody was not only wrong in law in the circumstances, but there were no proper or at the least, sufficient allegations made in support thereof in the founding affidavit. On this score as well, the Court was not entitled to make the order for interim custody. This situation calls upon this Court to exercise its review and supervisory powers in order to ensure that all extra-

jurisdictional errors are corrected. To this end, this Court is at large to issue orders and directions in order to enforce or secure its review or supervisory powers.

[60] Finally, I wish to briefly consider the Magistrate's Court Act, 1938, regarding the extent of that Court's powers of rescission. Section 21 of the Magistrate's Court Act stipulates the following:

> "21. (1) The court may, on the application of the party in whose favour a judgment has been given, rescind or vary such judgment in the absence of the party against whom the judgment was given.
>
> Provided that such last-mentioned party has received notice of the application and has been given an opportunity to appear at the hearing of the same.
>
> (2) The court may rescind or vary any judgment granted by it which was void *ab origine* or was obtained by fraud or by mistake common to the parties.
>
> (3) The court may correct patent errors in any judgment in respect of which no appeal is pending.
>
> (4) The court may rescind or vary any judgment in respect of which no appeal lies."

[61] It is in my considered opinion abundantly obvious that the order granted, namely for the award of interim custody of the child to the 1st respondent, did not fall within any of the above provisions. There was

no patent error alleged nor was it alleged that same was void *ab origine.* In point of fact, it is clear from the 1st respondent's depositions that he accepted the order granting custody of the child to the applicant and which order I must again say was final. He could not, in the circumstances, seek to have same rescinded by the Court which granted it, when he had accepted it.

[62] The application for interim custody, it must be noted, was launched some six or so months after the final order for custody was made an order of Court. Was it still open to the 1st respondent to have approached the Court for "rescission" after such a long of time? The answer is in my view obvious. It must be recalled that applications for rescission must be brought within a reasonable time in order to bring certainty to the parties and particularly the minor child in this case.

[63] Mr. Manzini has argued that the interim custody was granted by the consent of the parties and should therefor be allowed to stand. The issue of the consent appears to be a contested one. I need not resolve the same though for reasons that I deliver hereafter. In the case of *Bruckman v Bruckman* 1976 (4) SA 204 it was stated that consent by

the parties may not give the Court power to do what it does not, in law have power to do. In this case, it is clear that the Magistrate's Court was not empowered in law to revisit or rescind or vary the final order it had made regarding the divorce and the ancillary issues, particularly the custody. The parties' alleged consent does not, in my view, avail the 1st respondent. Consent by the parties to do something unlawful cannot cloak the Court with power to do what it has no power to do in law.

[64] The legendary Lord Denning succinctly put the situation by making the following lapidary remarks in the case of *M'cfoy v U.A.C.* [1961] 3 All ER 1169:

> "If an act is void then it in law a nullity. It is not only bad but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it so. And every proceeding which is founded on it is also bad and incurably bad. You can not put something on nothing and expect it to stay there. It will collapse."

I find these remarks apposite and fully applicable in the instant case.

[65] It then becomes very apparent that the 1st respondent's "right" to custody of the child is at this stage illegal and at best, seriously

limping, He has no right to have custody of the child, even on an interim basis. The decision to order same was clearly unlawful, even, as I have said, with the consent of the parties. Furthermore, there was, in the circumstances, no reason to order the **2nd** respondent to conduct any socio-economic enquiry in the circumstances. This is because the Court had issued a final order regarding the issue of custody and one which was not appealed against by the 1st respondent.

[66] I particularly note that the Learned Magistrate who granted the "interim custody order", is not the same as the one who issued the divorce order. I must categorically state that the Magistrate's Court is one Court, regardless of who the presiding Magistrate is. The law is such that one Magistrate has no power to sit on appeal over a judgment or order issued by anther Magistrate even if that other one be junior to him or her in rank.

[67] For that reason, the 2nd respondent has no business at all conducting the socio-economic enquiry in the circumstances. Consequently, the allegations of partiality and bias leveled against the office of the 2nd respondent, are in respect of a *brutum fulmen* for lack

of a better word. The said socio-economic enquiry is in the circumstances, totally out of order and should cease forthwith.

[68] In the premises and for the foregoing reasons, I am of the view that the issue of the competence of the so-called "interim custody order" is fully and finally dispositive of al the issues in this matter. For that reason, I find it unnecessary neither to deal with the constitutional questions that were raised nor to issue any directions to the 2nd respondent regarding the conduct of the socioeconomic report it was engaged in.

[69] I have noted that the trial Court committed errors of colossal proportions in the course it embarked upon and in the process, wrongly raised the 1st respondent's hopes about the possibility of re-opening the question of custody. I am of the view that to do justice between the parties, and regardless of the lapse of time, it would be appropriate to set aside all the orders issued by the Court *a quo* after the final orders of divorce and its ancillaries. This, for the avoidance of any doubt, includes the issue of the so-called interim custody.

[70] I shall, however, grant any one of the parties aggrieved by the divorce order and its ancillaries granted by consent, notwithstanding the ordinary time limits, and in order to do justice between the parties, and particularly in the face of the errors committed by the trial Court as earlier stated, to approach the appropriate forum for appropriate relief as accordingly advised.

[71] In view of the foregoing, I am of the considered view that the following Orders are appropriate and called for:

(1) The order issued by the Magistrate's Court granting a decree of divorce, maintenance and custody of the minor child in favour of the applicant herein be and are hereby reinstated and confirmed.

(2) Should any of the parties feel aggrieved thereby, that party be and is hereby ordered within ten (10) days from the date of this judgment, to launch appropriate proceedings in the appropriate forum for the setting aside of any part of the orders mentioned in (1) above.

(3) For the avoidance of doubt, and in view of the order made in (1) above, the 2nd respondent be and is hereby ordered to forthwith cease

conducting the exercise of determining the issue of the custody of the minor child Siphosethu A. Mnisi.

(4) All the other applications before the Magistrate's Court, i.e. for rescission; return of the child to the applicant be and are hereby set aside, with no order as to costs provided that the 1st respondent may, if so advised, pursue his application for access to the minor child on such amended papers as he may deem fit and to which the applicant may, respond as advised.

(5) Each party be and is hereby ordered to pay its own costs.

[72] I particularly grant the costs order in the form directed above in view of the role played by the Court *a quo* in entertaining a matter it did not have power to and issuing orders it did not have the power to grant. I consider that both parties also contributed to this fiasco by consenting to the granting of extra-jurisdictional orders to the powers of the Magistrate's Court.

DELIVERED IN OPEN COURT IN MBABANE ON THIS THE 3rd DAY

OF MARCH, 2011.

T.S. MASUKU
JUSTICE OF THE HIGH COURT

Messrs. S.V. Mdladla for the Applicant
Messrs. C.J. Littler & Co for the 1st Respondent
Attorney-General's Chambers for the 2nd to 4th Respondents