



IN THE HIGH COURT OF SWAZILAND

Civil case No: 136/11

In the matter between:

NOKUKHANYA MABUZA

APPLICANT

AND

BHEKI ZWANE

RESPONDENT

Coram:

M.C.B. MAPHALALA, J

Neutral citation:

*Nokukhanya Mabuza v Bheki Zwane (136/11) [2012]
SZHC 100 (30 April 2012)*

For Applicant
For Respondent

Attorney Ntsika Fakudze
Attorney Ncamiso Manana

Summary

Civil Procedure – application for custody of the minor child – both parties gainfully employed – applicant married to another man - respondent single – the test is the best interests of the minor child – custody awarded to respondent, applicant entitled to reasonable access – no order as to costs.

**JUDGMENT
30.04.2012**

- [1] An urgent application was brought for an order directing the respondent to return the minor child, Melokuhle Zwane to the applicant.
- [2] The parties are the biological parents of the minor child who was born out of wedlock on the 13th June 2005. The relationship between the parties subsequently ended in 2006. The applicant is now married to another man; and they live at their marital home at Nhlambeni. Both parties are teachers by profession.
- [3] The applicant alleged that when she was working and living at Ngudzeni High School, she caused the minor child to live with her mother in Nhlangano so that he could attend a better pre-school. She alleged that she hired a maid to take care of the child. Subsequently, she left Ngudzeni High School to work at Kaphunga High School so that she could stay at her marital home and commute to school daily.
- [4] She alleged that on the last week of November 2010, just before the minor child graduated from the pre-school, the respondent unlawfully and without her consent or court order took the minor child from his maternal grandmother.
- [5] She further alleged that her sister Nomcebo Tsabedze told her that the respondent after taking the child stripped and paraded him naked in

town to the offices of the Social Welfare Department in Nhlngano where he told them that he found the child naked and unattended. However, no confirmatory affidavit has been filed by Nomcebo Tsabedze or the Social Welfare officers to verify the allegations made by the applicant.

[6] She further alleged that she did not take any action against the respondent because the schools were closed, and she allowed him to spend sometime with the minor child with the hope that he would return him when schools opened in January 2011. She also met the respondent in January 2011 and he promised to return the minor child on the 17th January 2011, but this did not happen; later, he told her that he had already registered the minor child at Bahai Primary School.

[7] She alleged that since birth the minor child has been in her sole custody; and, that she was responsible for his support and maintenance.

[8] The applicant also alleged that the respondent is not married and will not be able to provide the minor child with a stable environment since he may be exposed to respondent's female friends who have no filial attachment to the minor child. She further argued that as the natural mother and guardian of the minor child, she has the right to his custody.

[9] The application is opposed by the respondent who has raised five points *IN LIMINE*: First, that the applicant has failed to make the necessary and requisite prayer directing the Social Welfare Department to prepare a report on the basis of which the court would make its ruling on the custody of the minor child. Secondly, that the applicant has failed to join the Deputy Prime Minister's office in the proceedings as well as the Attorney General; thirdly, that the applicant has failed to include the requisite prayer for the return of the minor child to her before instituting custody proceedings; fourthly, that the papers filed of record do not establish a cause of action for custody in as much as the child was not residing with the applicant but his maternal grandmother; and, fifthly, that the grounds raised for enrolling the matter on urgent basis are baseless as, *ex facie* the founding affidavit, the minor child has been enrolled at Bahai Primary School, and, lastly, that the papers filed of record do not disclose the influences which are not conducive to the child's proper upbringing.

[10] It is worth mentioning that the respondent's counsel did not deal with the Points *in Limine* in his Heads of Argument as well as during submissions. It is trite law that technical objections to less than perfect procedural steps should not be permitted in the absence of prejudice to interfere with the expeditious decision of cases on their real merits. This principle was enunciated in the case of *Trans-African Insurance*

Company Ltd v. Maluleka 1956 (2) SA 273 (A) at 278; and it was confirmed and adopted in the case of *Federated Trust Ltd v. Botha* 1978 (3) SA 645 (A) at 654, *Nelson Mandela Metropolitan Municipality and Others v. Greyvenour CC and Others* 2004 (2) SA 81 (SE) at 95F-96A para 40. This principle has also been adopted and applied by the Supreme Court of Swaziland in the case of *Shell Oil Swaziland (PTY) Ltd t/a Sir Motors* Appeal case No. 23/2006 at pages 23-24 para 39-40.

[11] It is now settled law that the object of the Rules of Court is to secure the expeditious completion of litigation before the courts and not to open the floodgates to technical objections in the absence of prejudice to the parties. Where prejudice is caused or likely to occur to the other party, the court has a duty to minimise or remedy the prejudice as circumstances dictate but always bearing in mind the object for which the Rules of Court were designed. *Harms JA* in the case of *DF Scott (EP) (PTY) Ltd v. Golden Valley Supermarket* 2002 (6) SA 297 at 301 para 9 stated the following:

“... Rules of Court are designed to ensure a fair hearing and should be interpreted in such a way as to advance, and not reduce, the scope of the entrenched fair trial right (Section 34 of the Constitution).”

[12] No prejudice has been caused to the respondent consequent upon the alleged shortcomings by the applicant as reflected in the Points *in*

Limine. First, the court has remedied the absence of a prayer for a socio-economic report and the non-joinder of the Deputy Prime Minister's office responsible for Social Welfare by directing them to file the socio-economic report; the report has since been filed of record. Secondly, at the commencement of the hearing, an application was made from the bar to amend the prayer for custody, and, counsel for the respondent did not oppose the application for amendment. Lastly, the basis for the urgency was fully stated in paragraph 18 of the Founding affidavit; the respondent does not dispute that schools were about to open, hence, the need for the return of the minor child to the applicant. The fact that the respondent had registered the child at Bahai Primary School did not do away with the urgency because it is common cause that the respondent had taken the child without the consent of the applicant who was taking care of the child.

[13] It is common cause between the parties that the minor child was staying with his maternal grandmother in Nhlanguano when the respondent took him to his residence at Mahwalala in Mbabane; at the time, the applicant was residing at her marital home at Nhlambeni after relocating from Ngudzeni High School to Kaphunga High School. When considering this matter, it is the duty of the Court to determine what would be in the best interests of the child.

[14] The Social Welfare Department has filed a report recommending that custody of the minor child should be awarded to the applicant because she is married and will be able to provide the child with a stable environment; the report further states that the applicant has qualities of being a caring, loving and supporting mother. Whilst the report acknowledges that the applicant is married to another man, it states that the husband does accept the minor child to live at their marital home.

[15] The respondent is single and stays at his parental home with his sister Lindiwe Zwane, the minor child and his elder child born on the 21st December 2000; the latter child's mother died in 2006. The respondent is a teacher at Bahai High school in Mbabane. The report further states that the respondent has love for the minor child but he is unable to use his communication skills with the applicant; the report further states that the respondent sometimes leaves the minor child to visit his girlfriend with whom they have a minor child. Similarly, the report discloses that the applicant's husband does not stay at the marital home on full time basis; and, that she visits him at his workplace at Mhlume during school vacations.

[16] The report further states that the minor child loves both parents; that custody should be given to the applicant, and, the respondent should be given reasonable access to the minor child preferably during school

holidays; that the respondent should contribute a monthly maintenance of E1,000.00 (One thousand emalangeni) to the applicant for the upkeep of the minor child.

[17] It is trite law that in custody cases, the prime consideration is the well-being and interests of the minor child; and, each case must ultimately be decided on its own facts:

- **Barstow v. Barstow 1979-1981 SLR 90 at 96**
- **Fakudze Thoko and Another v. Mdlovu Phillip 1987-1995 (1) SLR 63 at 66**
- **Marques v. Marques 1979-181 SLR 200 at 204**
- **De Souza v. De Souza 1979-1981 SLR 315 at 318**

[18] Under the Roman Dutch Common Law, the custody of a legitimate child was normally subject to the natural father of the child, and, an illegitimate child is subject to the custody of the mother; the father has no right to the custody of an illegitimate child unless the court for good cause shown deprives the mother of the custody and gives it to the father. The father is, however, entitled to the access of the child.

[19] However, it is now settled that in custody cases, the prime consideration is the well-being and interests of the minor child. Many factors are

taken into account in coming to a proper decision including the age of the minor child, the occupation of the parties and their character, the love and care shown to the child, the marital status of the parties; the list is endless. Each case is decided on its own facts.

[20] In the present case, the minor child has been staying with the respondent for the past five months, and, there is no allegation or evidence adduced by the applicant that during this period, the child has not been properly treated by the respondent. The child resides with the respondent in Mbabane, and, the child attends school at Bahai Primary School; and, the respondent also works nearby at Bahai High School.

[21] There is no evidence either by the applicant or the Social Welfare Department that Bahai Primary School is not a good school; the school is not very far from where the respondent and the minor child reside. On the contrary, from the applicant's marital home to Bahai Primary School is a long distance for a minor child to commute on a daily basis.

[22] Besides visiting his steady girlfriend with whom they have a minor child, there is no evidence that the respondent is a person of bad character with many illicit love affairs. The respondent has paid lobolo for the girlfriend which indicates that he intends to marry her. He stays with his elder child who is also attending school in Mbabane as well as

his sister. He strikes me as a very responsible father who loves and cares for his children.

[23] It is not in dispute that the applicant is married to another man, and, that she stays at her marital home with her marital family. This is a very important factor weighing heavily against the applicant; it would be different if she was still single and staying on her own.

[24] In the circumstances, there is no evidence which necessitates that the child should be uprooted from his father's home which is situated not far from his school, and be sent to live at the marital home of the applicant which is very far from the school. There is also no need to subject the respondent to expensive transport costs in conveying the child from the applicant's marital home to the school over and above the E1, 000.00 (One thousand emalangen) monthly maintenance proposed by the socio-economic report. The respondent is capable of looking after the child financially on his own.

[25] The interests of the child would be better served if custody is awarded to the respondent. In the circumstances, I make the following order:

(a) The application made in respect of the return of the minor child Melokuhle Zwane to the applicant is dismissed.

- (b) Custody of the minor child Melokuhle Zwane is awarded to the respondent.
- (c) The applicant shall have reasonable access to the minor child Melokuhle Zwane.
- (d) No order as to costs.

M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT