IN THE HIGH COURT OF SW`AZILAND

Civil case No: 353/12

In the matter between:

MFANAWENKHOSI MTSHALI **FIRST APPLICANT**

AND

BABAZILE NTOMBI MAGAGULA **FIRST RESPONDENT**
PRINCIPAL SECRETARY
DEPUTY PRIME MINISTER'S OFFICE **SECOND RESPONDENT**
ATTORNEY GENERAL **THIRD RESPONDENT**

Neutral citation: *Mfanawenkhosi Mtshali v Babazile Magagula & 2 Others (353/12) [2012] SZHC 103 (30 April 2012)*

Coram: **M.C.B. MAPHALALA, J**

For Applicant Attorney Xolani Mtsetfwa
For First Respondent Attorney Machawe Sithole
For Second & third Respondents Crown Counsel Gugu Simelane

Summary

Civil Procedure – application for custody of minor child – the court better placed to determine custody as the upper guardian of minor children – the test is the best interests of the minor child – application dismissed with costs.

JUDGMENT

30.04.2012

[1] This is an urgent application for an order directing the first respondent to stop disturbing and/or taking away the minor child Xolani Bacalele Mtshali from Mqolo Primary School; the applicant further sought an order granting him custody of the minor child.

[2] The applicant and first respondent are the biological parents of the minor child Xolani Mtshali born out of wedlock; he is thirteen years of age and presently attending school at Mqolo Primary School.

[3] The applicant alleged that the minor child has been staying with the first respondent at her parental homestead and would occasionally visit him at his home; he alleged that he has been maintaining the minor child, buying him food and clothing as well as paying his school fees.

[4] The applicant further alleged that when visiting him, the child would complain that he does not want to stay at her mother's parental home because he was made to look after cattle when he was not at school; and, that he was not given a chance to study or play with other children. He alleged that the minor child's schooling has been adversely affected with the result that he has repeated classes; he further alleged that the minor

child looked traumatized when he spoke to him indicating that he was being abused.

[5] The applicant further alleged that because of the minor child's complaint, he decided to enrol him at Mqolo Primary School because the school is next to his home at Gobholo. He further alleged that the first respondent has been to the school on the 2nd and 3rd February 2012 to try and force the child out of the school; and, that on the 13th February 2012, the first respondent accompanied by his brother Mduduzi Magagula went to the school and took away the child.

[6] On the 15th February 2012 the applicant accompanied by ten other people went to the first respondent's parental home and broke a window of the house where the child was sitting and forcefully took the child. Subsequently, the first respondent reported the matter to the Social Welfare Department, and they told the applicant to return the minor child to the first respondent but he refused.

[7] This application is opposed by the first respondent. *In limine* she argued that the application is not urgent, and, that the applicant has failed to set out explicitly the circumstances which he avers render the matter urgent and the reasons why he could not be afforded substantial redress in due course. She also argued that the applicant has failed to set out justifiable reasons why

the application was brought *ex parte*. She further alleged that the applicant has approached the Court with dirty hands as he violently and aggressively took the minor child from her without a court order. Lastly, she argued that the application is tainted with material disputes of fact which cannot be decided on affidavits.

[8] 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.

- **Trans-African Insurance Company Ltd v. Maluleka 1956 (2) SA 273 (A) at 278**
- **Federal 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 ASF-96A para 40**
- **Shell Oil Swaziland (PTY) Ltd t/a Sir Motors Appeal Case No. 23/2006 at page 23-24 para 39-40**

[9] In the absence of prejudice to the other party, an application cannot be decided on the preliminary objections raised by the first respondent; the court should proceed and decide the application on the merits. At page 23 His *Lordship Tebbutt JA* who delivered the unanimous judgment of the

Supreme Court in *Shell Oil Swaziland (PTY) Ltd v. Motor World (PTY) Ltd t/a Sir Motors* (supra) approved and adopted the decision of Nelson *Mandela Metropolitan Municipality and Others v. Greyvenour CC and Others* (Supra) where the court held:

> **"The court should eschew technical defects and turn its back on inflexible formalism in order to secure the expeditious decisions of matters on their real merits so avoiding the incurrence of unnecessary delays and costs."**

[10] In the present case, no prejudice would be suffered by the first respondent if the preliminary objections are heard and dealt with together with the merits. In principle issues of custody of minor children are treated as matters of urgency. Both parties have registered the minor child in a particular school and they are fighting over the custody of the child; and, the finalization of the application is paramount. The matter is undoubtedly urgent.

[11] The applicant has proceeded *ex parte* and has stated the reasons why he did this at paragraph 29 of his founding affidavit. However, no prejudice was suffered by the first respondent because when the matter appeared in court, only a *rule nisi*, was issued and the first respondent was given an

opportunity to defend herself on the return date. This objection cannot prevent the court from dealing with the merits of the case.

[12] The objections relating to “dirty hands” and the violent taking of the minor child are some of the factors to be considered by the court when dealing with the merits; but these factors cannot on their own dispose of the matter.

[13] The other objection is the existence of material disputes of facts. However, the applicant does not disclose the disputes alleged; hence, this objection has no merit.

[14] On the merits, the first respondent denies that the applicant was maintaining the child at all, and, she submits that since birth, she has been solely responsible for the maintenance of the minor child with the assistance of his family. She further alleged that the minor child enjoyed looking after cattle since he mingled and played with his peers at the grazing land. She denied that the minor child was compelled to look after cattle or that he was denied the opportunity to study his school work. Similarly, she denied that the minor child was abused or ill-treated and stated that he was merely scared of the applicant. She also alleged that the minor chid only repeated one class contrary to the allegations made by the applicant.

[15] She disclosed that several meetings were held both at the Mbabane Police Station as well as at the Social Welfare Department in Mbabane on the disputed custody of the minor child, and that, she was advised to take custody of the child as the mother. She further disclosed that the applicant arrived at her parental home on the 15th February 2012 with a group of friends, broke a window, forcefully and violently grabbed the child through the window; that they assaulted her mother and broke the door and windows of the house where the child was sitting. The first respondent claims that the child was traumatised; the matter was reported to the police and the case is still pending. She further argued that it is prejudicial to the education of the minor child to change schools from Entfubeni Primary school to Mqolo Primary School.

[16] The applicant has filed a replying affidavit in which he denies that he did not support the minor child as alleged or that the minor child enjoyed looking after the cattle since he was able to play with his peers at the grazing land. He further denied that the minor child was scared of him and alleged that he has a good relationship with him. He conceded breaking the window of the house, entering through the broken window and taking the minor child. However, he denied forcefully and violently grabbing the minor child through a window; he further denied that the minor child was traumatised by this incident.

[17] It is common cause that the minor child was staying with the first respondent since birth and that he would occasionally visits the applicant. It is not in dispute that the applicant registered the minor child at Mqolo Primary school without the consent of the first respondent, and, that she and his brother fetched the child from that school on the 13th February 2012. On the 14th February 2012 the child was registered by the first respondent at Entfubeni Primary School where he had been schooling the previous year.

[18] It is also not in dispute that the first respondent as early as the 2nd and 3rd February 2012 when schools opened countrywide, she tried to take the child from Mqolo Primary School; this constitutes evidence that she never consented to the applicant taking the child from Entfubeni Primary School.

[19] Similarly, it is not in dispute that on the 15th February 2012 the applicant and a group of ten friends invaded the parental homestead of the first respondent, broke a window and assaulted the first respondent's mother; the applicant entered through the broken window and took the minor child with him. It is apparent that the applicant did this without a court order or the consent of the first respondent.

[20] There is no evidence before court that the first respondent or her family ill-treated the minor child. It is normal for young boys of the age of the minor child or below that to look after cattle in this country and, this does not constitute abuse or ill-treatment. Furthermore, it is not in dispute that the minor child looks after cattle when he is not at school and during daytime; and, there is no evidence that he is denied the opportunity to study in the evenings.

[21] Furthermore, the violent behaviour exhibited by the applicant is a cause for concern, breaking windows and assaulting a very old woman, as well as entering the house through a window and forcefully grabbing the child. The first respondent alleged that the minor child was extremely traumatised by this incident and made him very scared of the applicant; in the circumstances, I have no reason to doubt the veracity of such an allegation.

[22] The applicant concedes that the Social Welfare Department as well as the police after hearing the parties advised him to return the minor child to the first respondent but he refused.

[23] On the 6th March 2012, this court issued an order directing the Social Welfare Department to compile a Socio-economic report and submit it to Court on the 27th March 2012; when the matter resumed on the 27th March

2012, the report had not been filed and the mater was postponed to the 30th March 2012, but still the report was not filed. The mater was subsequently postponed to the 4th April 2012, and, again the report was not filed; hence, this court decided to proceed with the matter particularly because it involves a minor child and cannot be allowed to pend indefinitely. Furthermore, the report is not binding on the decision of this court but constitutes a recommendation.

[24] The court is the upper guardian of minor children, and, it is better placed to determine custody disputes. It is trite law that in custody cases, the prime consideration is the well-being and interests of the minor child:

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

[25] In light of the evidence tendered, the best interests of the minor child would be better served if custody is awarded to the first respondent; and the applicant would be entitled to reasonable access of the minor child.

[26] In the circumstances I make the following orders:

(a) The application for an order directing the first respondent to stop disturbing and/or taking away the minor child Xolani Mtshali from Mqolo Primary school, and, for the custody of the minor child is hereby dismissed

(b) Custody of the minor child Xolani Bacalele Mtshali is awarded to the first respondent.

(c) The applicant will have reasonable access to the minor child on school holidays.

(d) The first respondent is directed to enrol the minor child at Entfubeni Primary School with immediate effect.

(e) The applicant is directed to pay costs of suit on the ordinary scale.

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M.C.B. MAPHALALA

JUDGE OF THE HIGH COURT