



IN THE HIGH COURT OF SWAZILAND

Civil case No: 60/2013

In the matter between:

MUSA ABEDNEGO SIMELANE

APPLICANT

AND

PRINCIPAL SECRETARY

DEPUTY PRIME MINISTERS OFFICE

FIRST RESPONDENT

ATTORNEY GENERAL

SECOND RESPONDENT

Neutral citation: *Musa Abednego Simelane v Principal Secretary Deputy Prime Ministers Office and Another (60/2013) [2013] SZHC32 (2013)*

Coram:

M.C.B. MAPHALALA, J

For Applicant
For Amicus curiae
For Respondents

Attorney Z. Magagula
Attorney M. Sibandze
Senior Crown Counsel Selby Gama

Summary

Civil Procedure – custody – application for the return of a child taken to a place of safety in terms of the Children Protection and Welfare Act of 2012 – Sections 24 and 25 of the Act discussed – application dismissed with costs

JUDGMENT
28 FEBRUARY 2013

- [1] This application was brought on a certificate of urgency. The applicant seeks an order directing the first respondent to return to him Mbali Simelane a girl aged fifteen years. He further seeks an order for costs on a scale as between attorney and own client.
- [2] The applicant is the natural father and sole guardian of the child; she was born within wedlock, and, her mother died in 2005. The applicant married another woman on the death of his first wife.
- [3] On the 19th December 2012, Social Welfare Officers arrived at the homestead of the applicant in the company of a police officer and took away the child with them; the child was with a maid Simangele Lubisi.
- [4] The applicant argued that the respondents acted unlawfully in taking the child from his custody in his absence and without his consent or a court order. He argued that the matter is urgent on the basis that she was due to enrol at Mawelawela Juvenile School for her Form IV on the 22nd January 2013, and, that he was not aware of her whereabouts and the conditions under which she was being kept. He argued that the child was enrolled at Mawelawela Juvenile School where she was doing Form III.
- [5] The application is opposed by the Respondents. They deny that the child went missing and argued that she was taken by social welfare officers to a safe place;

they argued that social welfare officers are empowered by law to take whatever action is necessary in the best interests of the child in terms of the children Protection and welfare Act of 2012.

[6] They denied that the child was previously enrolled at Mawelawela Juvenile School and argued that she was schooling at Masundvwini High School in 2012; they attached a copy of her Form III Certificate.

[7] The respondents further argued that the matter was not urgent on the basis that the applicant became aware of the matter on the 19th December 2012, and, that he had not done anything until the 18th January 2013.

[8] In his replying affidavit the applicant argued that the respondents have not complied with the Children Protection and Welfare Act of 2012. It was argued on behalf of the applicant that the respondents were obliged to obtain a court order authorising them to take the child or having taken her away without the order, they were obliged to approach the court within forty eight hours to justify their actions.

[9] He admitted that the child was previously attending Masundvwini High School; and, that due to her unruly behaviour, he obtained a permit from the Principal Magistrate of the Manzini Magistrates' Court directing that the child should attend school at the Juvenile Centre commencing in January 2013. He further

argued that the child had agreed to attend school at the centre as a day scholar. He conceded that the issue of urgency has been overtaken by events.

[10] After the filing of the answering affidavit, an interlocutory application was lodged by Lulama Sibandze seeking an order that she should be admitted to the present proceedings as *amicus curiae*; the application was not opposed by the parties, and, it was subsequently granted by the court. She is a widow and resides at Goje Township in Ezulwini. She explained that her brother-in-law Dumisa Sibandze had a child named Bonisile Sibandze. Together with her husband Ray Sibandze, they took over the guardianship of Bonisile Sibandze and supported her as their own child. In due course Bonisile Sibandze married the applicant; however, she died in 2006 leaving behind two children including Mbali Simelane who is now twenty three years of age. She alleged that prior to the death of their mother, the children used to visit her; and, that she subsequently lost contact with them.

[11] In 2012 Lulama received persistent telephone calls from Mbali Simelane who pleaded with her to come and fetch her. Eventually she drove to her school, and, that is when she gave her a detailed account of her abuse at the hands of her stepmother with the complicity of the applicant. The abuse included beatings by her stepmother resulting in bruises and marks all over her body; in addition , she was made to walk long distances to school and not given money to buy herself lunch; and, that she depended upon other children who shared

their money and lunch with her. Back home she would be made to perform chores until it was time to sleep. At one time her stepmother forced her to eat from a dust bin; and that she was never given money to buy sanitary pads, and, she was forced to improvise using newspapers. Her paternal grandmother, at one point, bought her sanitary pads and her stepmother chastised her grandmother for doing that.

[12] It was alleged that the applicant was complicit to the physical, emotional and verbal abuse inflicted on the child by the stepmother, and, that he did not intervene. Sometime in November 2012, Mbali arrived at Lulama's house and told her that she could not take it anymore and, that she had decided to leave her father's home. The applicant came to collect her but she became hysterical and related to him in front of Lulama, her son Andzile and her nephew Attorney Musa Sibandze the abuse that she had suffered at the hands of her stepmother; she accused the applicant of being complicit.

[13] The child had resisted going back to her father's homestead and urged him to shoot her instead of living the miserable life. During the following week two officers from the Correctional Services came to collect the child allegedly for counselling promising to return her after an hour; however, they did not return the child. She learnt subsequently that the child was incarcerated at Mawelawela Women's Prison on the pretext that she was a delinquent;

however, he later removed the child and brought her to his home despite the child's complaint of abuse.

[14] Lulama Sibandze argued that she loved both children and that she was willing and able to care for them and give them material and emotional love and the support they need. She urged the court to dismiss the main application and grant her custody of the two minor children Simangele and Mbali, if not finally, then in the interim, while the court deals with the merits of the matter.

[15] The applicant admitted that the child went to Lulama Sibandze's home but argued that it was without her consent; he further admitted that the child resisted going with him when he came to fetch her. He denied ever threatening to shoot the child. He also denied that the child was being abused; however, he did not answer to the specific allegations of abuse mentioned by the child at the hands of her stepmother or the allegations of his complicity to the abuse.

[16] The applicant admitted that the child was previously attending school at Masundvwini High School; he further admitted that he subsequently decided to enrol the child at Mawelawela Juvenile School as from January 2013 due to her unruly behaviour. However, he did not give the specific nature of the alleged "unruly behaviour". Incidentally the applicant does not deny the allegations made by Lulama Sibandze that the child did not only resist going with the

applicant but she invited him to shoot her than endure the abuse at the hands of her stepmother.

[17] It is apparent from the evidence that the child was in fact abused as alleged and that the applicant was in complicity. The child did not only run away from the applicant's home but she repeated the allegations of abuse in the presence of Lulama Sibandze, Lulama's son Andzile, Lulama's nephew Attorney Musa Sibandze as well as the applicant himself. The child even invited the applicant to shoot her than endure the abuse by her stepmother.

[18] As indicated in the preceding paragraphs, the applicant did not only fail to deal with the specific allegations of abuse raised by the child as well as his alleged complicity but he admitted removing the child from Masundvwini High School to Mawelawela Juvenile School where she would attend school with convicted juveniles.

[19] The evidence of Lulama Sibandze has not been disputed that together with her late husband, they looked after the child's mother Bonisile Sibandze; and, that she was willing and able to look after both children Simangele and Mbali Simelane. Lulama has further undertaken to give the children all the love and support they need both materially and emotionally.

[20] The applicant argued that the child was taken away from his custody in contravention of sections 24 and 25 of the Children Protection and Welfare Act of 2012. Section 24 (1) thereof provides the following:

“24. (1) Any police officer, social worker, chief or any designated member of the community working with children who is satisfied on reasonable grounds that a child is in need of care and protection may take a child and place the child into places of safety in the manner prescribed...

25. (1) Subject to section 26, a child who is taken into a place of safety under section 24 shall be brought before the children’s Court within forty-eight hours... in order to review the appropriateness of the taking of the child.

(2) If it is not possible to bring a child before a magistrate or children’s court within the time specified under subsection (1) the child may be brought before a magistrate who may direct that the child be placed in –

(a) a place of safety; or

(b) the care of a fit and proper person, until such time as the child can be brought before the Children’s Court.”

[21] In view of the evidence before court, the social welfare officers were entitled to take the child into a place of safety; the failure to bring the child before court as

envisaged by section 25 (1) of the Act is not in the circumstances of this matter prejudicial to the interests of the child.

[22] In the case of *Nokukhanya Mabuza v. Bheki Zwane* Civil case No. 136/2011 (HC) at paragraph 17, I had occasion to reiterate the general principle of law with regard to custody:

“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....”

[23] The court as the upper guardian of minor children is better placed to determine who is better placed to advance and protect the interests of the minor children. Having regard to the evidence before me, I find that Lulama Sibandze should be given custody of Mbali Simelane.

See the cases of *Mfanawenkhosi Mtshali v. Babazile Ntombi Magagula* civil case No. 353/02 (HC); *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* 1979-1981 SLR 200 at 204; *De Souza v. De Souza* 1979-1981 SLR 315 at 318.

[24] Accordingly the following orders are made:

- (a) The application is dismissed with costs on the ordinary scale.
- (b) Custody of Mbali Simelane is awarded to Lulama Sibandze.

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