



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No: 1821/12

In the matter between

MASHUMI NKENTJANE

APPLICANT

And

NCOBILE GAMA

1ST RESPONDENT

THE SOCIAL WELFARE DEPARTMENT

2ND RESPONDENT

THE ATTORNEY- GENERAL

3RD RESPONDENT

Neutral citation: *Mashumi Nkentjane v Ncobile Gama & 2 Others*
(1821/12) [2014]SZHC 37 (14 March 2014)

Coram: M. S. SIMELANE J

Heard: 7 March 2014

Delivered: 14 March 2014

Summary: Civil procedure: custody; applicable principles; applicant conceding custody to the respondent; application dismissed.

Judgment

SIMELANE J

[1] The Applicant instituted the instant proceedings under a notice of motion dated 29 October 2012, seeking an order of this Court against the 1st Respondent as follows:-

- “(1) Granting custody of the minor child, Temalungelo Nkentjane to the Applicant.**
- (2) Directing the 2nd Respondent to compile a socio-economic report in determining the welfare of the minor child for purposes of granting Applicant custody or determining a fit and proper person between Applicant and Respondent to be granted custody of the minor child Temalungelo Nkjetjane.**
- (3) Costs of this Application in the event of opposition.**
- (4) Any further and/or alternative relief.”**

[2] The Applicant's case is founded on his own affidavit where he states as follows:-

(a) He is the biological father of a ten (10) year old child, Temalungelo Nkentjane who is the subject matter herein who currently resides with her maternal grandparents at Sidvokodvo area opposite Antioch Primary School at a Gama homestead.

(b) That he is maintaining the minor child, though through a garnishee initiated by 1st Respondent a long time ago. The child attends school at St. Joseph's Primary School.

(c) That the child stays with elderly grandparents who can not fully take care of her. She travels long distances to school and at times she is late at school. He says the child wears dirty and torn uniforms. He states that he is employed as a soldier by the Umbutfo Swaziland Defence Force and earns enough to take care of the child. He states that the child will stay at Hlane, his homestead, if given custody of the child, where his other children stay, that he can enroll the child into one of the nearby schools and that he has a steady and reasonable income to maintain the child compared to 1st Respondent who is employed in one of the Factories in Matsapha.

[3] The 1st Respondent filed a notice of intention to oppose on 15 November 2012. The Court issued an order directing the Social Welfare Department to produce a socio-economic report for the Court to determine a fit and proper person between the Applicant and the 1st

Respondent to be granted custody of the child. This order was issued on 7 December 2012.

[4] Thereafter the 1st Respondent filed an opposing affidavit where she alleged as follows:-

- (a) That the child stays at her parental homestead with her aunt, Zodwa Gama a forty year old. She contends that she regularly visits home to check on the child.
- (b) She denied that the child travels long distances when going to school and says she is never late at school. She averred that the child is well taken care of by her aunt and was never sexually abused as alleged by the Applicant.
- (c) That she moved for a garnishee order against the Applicant because he is not a responsible father. She is not earning much but makes some financial contributions for the proper upkeep and welfare of the child.
- (d) That the Applicant is not a fit and proper person to maintain the child because he is failing to maintain his other children and has been deserted by his wife. He stays far away from home.
- (e) The child is a female and Applicant cannot have custody of her at this stage.

- [5] When this case was placed before me for argument on Friday 7 March 2014, the Applicant's Counsel Mr Sithole told the Court that his client has disappeared hence he has not been fully instructed on this matter. He indicated that he is not ready to proceed with the matter. He requested the Court to guide him on what should be done and said he was leaving everything to the capable hands of the Court.
- [6] Mr O. Nzima who appeared for the 1st Respondent moved an application for the application to be dismissed. He stated that the socio-economic report is in favour of the 1st Respondent. He further applied for an order for costs.
- [7] In reply Mr Sithole submitted that he has no objection to the application for the dismissal of the application. He however vigorously opposed the application for the grant of the order for costs. He stated that the Applicant and the 1st Respondent have a child together the one in issue and that a grant of an order for costs will not be fair as it will further deplete Applicant's financial resources, yet he is already struggling financially.
- [8] Notwithstanding the concession by Mr Sithole that custody should remain with the 1st Respondent, I still deem it expedient to interrogate the papers filed of record to ascertain for myself whether this is in the best interests of the child.
- [9] I say this because the High Court as the upper guardian of children has the duty to consider the best interests of each child in custody

cases. Speaking about this duty in our Supreme Court case of **Rose Rautenbach V Reuben Bernard Rautenbach Civil Appeal No. 38/13**, para [3] Ebrahim JA stated:

“It was ordered that the Appellant should forfeit the benefits of the marriage in community of property and it was declared that the Respondent was the sole owner of the property forming the matrimonial home. I am concerned with the nature of the order granted by the learned judge. I call into question whether the learned judge gave consideration to the welfare and status “of the children” of the marriage. Particularly as the status of the children was being called into question, see the case of Williams V Williams, The Gambia Court of Appeal No. 34/2007 at page 30 the Honourable Judge Ota, PCA (as she then was) made the following observations:

‘As the law has developed over the decade the child’s welfare has effectively become the sole consideration at least in the sense that all other considerations are considered in the light of the child’s welfare. As Lord MC Dermott put in JVC (1970) AC 668, ‘These words must mean more than that the child’s welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they connote a process whereby when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interest of the child’s welfare as that term has now to

be understood. That is the first consideration because it is of first importance and the paramount consideration it rules upon or determines the course to be followed.’ ”

[10] It is the law that in determining the best interests of the child in custody cases, it is pertinent that the Court calls for a socio-economic report which is an integral part of any custody case.

[11] The important role that such a report plays in custody cases was aptly captured by **Ota (PCA)** (as she then was) in the Gambia Court of Appeal case of **Williams V Williams (supra)** at **page 38** where she says the following:-

“It is my candid opinion that what the Court ought to have done in the circumstances of this case was to call for the participation of the social welfare office. A Court dealing with a custody case can at any stage of the proceedings call for a welfare report either upon its own motion or at the request of a party. The power to order welfare report lies at the discretion of the Court. A very pertinent weapon in the hands of the Court indeed, as welfare reports are very useful in resolving custody cases, whether contested or not especially those where the proposed arrangements are not satisfactory. This is because even though both parties testify and call witnesses; the welfare report provides the Court with an independent assessment of the facts requisite for a judicial and judicious resolution of the matter. Once appointed the welfare officers are generally expected to

investigate the circumstances of the child or children concerned and the important figures in their lives with a view to providing the Court with factual information on which to make a decision. Although there is no hard and fast rule on how a Welfare Officer should prepare his report, it is expected that he will visit and interview the various parties including the child, at their respective homes and if necessary, extend enquires to the wider family, school, family doctor and other persons whose observations may be helpful. See *Scott V Scott* (1986) 2 FCR 320, 322. The welfare report usually contains recommendations by the Welfare Officer and if it does not, the Court will ask the Welfare Officer for his views at the trial. The Welfare Officer's views command great respect and more often than not the Court will rely upon it but where a Court departs from the recommendations, the Court is required to state the reasons for the departure. See *Stephenson V Stephenson* (1985) FCR, 1140, *Dickinson V Dickinson* (1983) 13 Fam Law 174, *Re W (A minor) Custody* (1983) 4 FLR 492.”

[12] **OBSERVATION**

Based on the social workers' assessment the observations on the Applicant as highlighted on page 44 of the book are as follows:-

- “● Although applicant has adequate accommodation at his home, Hlane. The challenge is that, the homestead

is occupied by two children alone as Applicant only comes home during off days.

- **The Hlane home is daily run by the Applicant's son who is 14 years old. His duties include cleaning, cooking and looking after the home in general. One wonders if this child does ever get time to do his school work, and the coming of the child in question would add more burden to the boy who already has to wake up early to prepare food for his other half-sister and himself.**
- **Although Applicant mentioned that he would request his wife to come back home to look after his children should he be granted custody over the child in question. This statement cannot be relied on since the said wife (sic) also demanding maintenance against the Applicant, failure of which she would not return to Hlane.**
- **The Applicant has displayed to be interested in the life of the child in question yet according to 1st Respondent; applicant had never been interested in the life of the child he just wants the garnish (sic) order cancelled so he can use his money for other things rather than the child. Evident from the fact that he was garnished when the child was about three months old.**

- **During the assessment the Applicant's wife mentioned that she had no problem with the child in question joining them at Hlane. It is worth mentioning that the child stated it clearly that staying at Hlane would affect her school work greatly even if she can school very close to home Dlal'sile. She mentioned that she never got time to study at Hlane as there were always chores to be carried out.**
- **Thus, transferring the child from Luve to Hlane would detriment her progress at school. Even her class teacher confirmed that she is doing very well in class. Hence her removal was observed to be uncalled for.**
- **The Applicant has never been reliable towards payment of maintenance for the child in question and others. This led to the maintenance court order of the initial E400-00 (Four Hundred Emalangeni) which was increased to E1000-00 (One Thousand Emalangeni) and E300-00 (Three Hundred Emalangeni) for another child.**
- **The two children residing at Hlane Applicant's home are a male and female who share a bedroom. One sleeps on the bed (male) and the other one sleeps on**

the floor. This arrangement leaves a lot to be desired.”

[13] On the other hand the observation of the Social Welfare officer on the 1st Respondent on page 59 of the book are as follows:-

- “● That 1st Respondent has been able to provide support for the child since birth evident from the fact that she was able to place the child with the aunt when she got married to her deceased husband and after the failed marriage she is still responsible for all her children.**
- 1st Respondent has a very strong bond with her child and all her children who are very much attached to her. Separating any of the children from her would be traumatic and detrimental for both mother and children who are closely knitted together.**
- 1st Respondent has always had the best interest of the child at heart evident from the care she ensured for the child since birth. She wants what is best for the child’s future, progress and well-being.**
- 1st Respondent is observed to be of a sound mind. She was able to move on with her life after the abusive relationship with the Applicant. Presently she is leading her own life without a man in her life. She has achieved a lot without a man in her life.**

- **She fully understands that Applicant’s access to the child is also essential and has always tried to make sure that (sic) child visits the Applicant during school holidays.”**

[14] In conclusion the socio-economic report says as follows on page 63:

“In conclusion, it is highly imperative for the State to ensure that all women and children are fully protected from all forms of abuse and harassment. The State thus, has to put all measures in place to ensure that this obligation is met. The State also has to ensure that children are protected and provided with resources that will promote and protect all children. Parents who expose (sic) those children are brought up in healthy and conducive environments.

As a result, the 1st Respondent deserves to be granted the custody of the child in question. This is due to the fact that she has displayed positively that she loves and has the Best Interests of the child in question at heart. She has a very strong sense of responsibility towards the child and granting her custody would ensure a proper upbringing and promote child development. This will also be in respect of allowing the views of the child to be recognized since she also voiced out that she did not want to stay at Hlane.

Should the 1st Respondent be granted the custody, this will be in respect of the United Nations Convention on the Rights of a Child of 1990 which provides that all actions taken by States shall take full account of the Best interest of the Child. The African Charter on the Rights and Welfare of the Child also provides that primary consideration on all actions concerning the child shall serve the best interest of the child. Thus granting custody to the mother will undoubtedly serve the best interest of this child.”

[15] It is clear that the socio-economic report is in favour of the 1st Respondent and as such the best interests of the child favour that the child remains with the 1st Respondent. Moreover the 1st Respondent already has custody of the child who is still very young and continuity is an overwhelming consideration in custody cases, especially in cases like this one where the circumstances show no reason for a transfer of custody. The effect of change of care and control in a child’s development and his future mental and physical health is more often than not highly detrimental if not outrightly disastrous. As the Court stated in **D V M (Minor Custody Appeal) (1983) Fam 3 per Omrod LJ,**

“It is generally accepted by those who are professionally concerned with children that particularly in the early years, continuity of care is a most important part of a child’s sense of security and that disruption of established bonds are to be avoided wherever it is possible to do so.”

[16] It is for this reason that courts are generally reluctant to transfer custody even as an interim measure in the absence of a welfare report. See **Elder v Elder (1986) 1 FLR 610**. It is for the above stated reasons that I hold that the Applicant's Counsel was well advised to concede this fact.

[17] On the issue of costs it is my view that costs should follow the event in this case. I say this because the Applicant not only dragged the 1st Respondent to Court but also conceded the application. This he did only after the socio-economic report which is obviously adverse to him was filed by the social welfare department. In my view the issue of his financial challenges cannot impinge on the question of costs in these circumstances.

CONCLUSION

[18] I hereby order as follows:

- (1) The Applicant's application fails and is hereby totally dismissed.

- (2) The Applicant must pay the 1st Respondent's costs.

M. S. SIMELANE
JUDGE OF THE HIGH COURT

For the Applicant : Mr. Sithole
For the 1st Respondent : Mr. O. Nzima
For the 2nd Respondent : Mr. Nkhambule
(Crown Counsel)