# IN THE HIGH COURT OF SWAZILAND

**HELD AT MBABANE**

In the matter between: Case No. 1511/2016

**THEMBINKOSI BAFANA MAVUSO** **APPLICANT**

**AND**

**LONDIWE HLOPHE** **1st RESPONDENT**

**THE DEPUTY PRIME MINISTER'S OFFICE** **2nd RESPONDENT**

**SOCIAL WELFARE DEPARTMENT** **3rd RESPONDENT**

Neutral Citation*: Thembinkosi Bafana Mavuso vs Londiwe Hlophe and Others (1511/2016) SZHC 115 [2017] (17/02/17)*

**CORAM**: NKOSI J

**HEARD**: 02/12/16, 08/12/16, 01/02/17, 03/02/17 07/02/17

**DELIVERED**: 17/02/17

## JUDGMENT

[1] This is a matter in which the Applicant by way of motion seeks the following orders:

> ***1. That the Applicant herein be and is hereby granted sole custody and sole guardianship over the Applicant and the 1st Respondent's extramarital minor child, Khayalethu Sivikelwe Mavuso.***
>
> ***2. That the 1st Respondent have access to the minor child over his school holidays and every alternative or second Christmas Holidays at the 1st Respondent's own expense.***
>
> ***3. That an order for maintenance not be made until the 1st Respondent is gainfully employed or self-sustaining.***
>
> ***4. Costs of suit in the event the Application is opposed.***

[2] In his founding affidavit the Applicant states that the minor child is seven years old and is born of a relationship between him and the 1st Respondent. He is candid with the Court in that he further states that whilst the 1st Respondent was pregnant the parties separated and were estranged.

[3] The crux of the contents of Applicant's affidavit are that:

> (a) He initially doubted paternity but however he did undergo DNA Tests after the minor was born which tests confirmed that the child was his.
>
> (b) The minor child is asthmatic.
>
> (c) Due to the fact that the 1st Respondent was neglecting her duties as a parent, that is, leaving the minor in the care of its maternal

grandmother, he assumed custody of the minor, He alleges that the grandmother would, in turn, leave the minor with neighbours the whole day as she is employed.

(d) He further alleges that after he had obtained custody of the minor, the 1st Respondent after exercise of visitation rights, refused to return the minor to him.

[4] There are a number of other allegations raised by the Applicant in his efforts to give the court a picture of the intricacies and difficulties of the relationship between the 1st Respondent and himself. For the record most of these allegations have no bearing on the issue of custody and guardianship. The gist of his representations is that the animosity and hostility between the parties have been manifesting themselves over the period since the 1st Respondent fell pregnant. I must say that there is nothing unique about these revelations and I cannot see how they impact on the issues at hand.

[5] In a nutshell the Applicant's motive for the orders sought seems to be that he is a better parent with better economic stability and that he shall be able to provide a more suitable environment for the minor to be raised under. He claims that the 1st Respondent's current environment is not suitable for the upbringing of the child, stating that the 1st Respondent is unemployed and cannot financially support and provide for the minor; that her circumstances are such that she is currently, ***"cohabiting with her current lover and she and my son are solely dependent on this man for sustenance",*** thus showing his disdain for this arrangement as he continues, ***"1st Respondent has turned my son into a beggar to this stranger/s at their home as I am certain she contributes nothing to the general upkeep of their household"***.

[6] The applicant claims further that the 1st Respondent forcefully took the child when he had custody after she had abandoned custody of the child. However it transpired at the hearing of the matter on the 1st February 2017 that he had himself not returned the child to its mother after visitation and the Court felt duty bound to issue an order to the effect that the child must be returned to its mother forthwith.

This was done.

[7] In the interim, the Court had on the 8th December 2016 ordered that the Principal Welfare officer at the **D.P.M.'s Ministry's Social Welfare Department** (3rd Respondent) issue a comprehensive Socio-Economic Report on this matter in order to assist the Court in the determination of the issues pertaining to custody. This was done and a comprehensive report submitted. Dare I say that the report was somewhat unflattering with respect to the character of the Applicant. However this Court has ruled that the personality of the Applicant as per the report is not relevant to the determination of the matter.

[8] What is of relevance in the socio-economic report is that it paints the 1st Respondent as a person who has the capacity and ability to look after the minor and with due assistance from the Applicant, to fulfill his social and economic needs. The report states that the 1st Respondent has very strong family ties which are supportive of her and the minor by extension. The evidence gathered by the author of the report culminates in an evaluation of the 1st Respondent as a mother and custodian of the child as follows:

- ***The 1st Respondent has love for her child and is willing to nurture him and give him motherly love***.

- ***The 1st Respondent has the best interest of the child in question at the forefront by showing great willingness to live with the child even though the applicant may not have been helping her in the past.***

- ***The 1st Respondent was found to be without a steady job but shown great determination and maintains the child through the support and financial support from her family members and boyfriend.***

- ***The 1st Respondent has shown to be very responsible over her life and moreover that of the child in question as she enrolled the child in school and ensured that his needs are catered for even in the Applicant's absentia.***

- ***The environment which the 1st Respondent lives under appears to be more conducive for the child in question considering the exposure, relations and enjoyment of the rights of the child in question.***

- ***The 1st Respondent had given opportunity to the Applicant to live with the child and only acted upon ensuring the wellbeing and protection of the child in question, unfortunately he was exposed to battering.***

[9] On the other hand as I have mentioned the report does not augur well for the Applicant as it depicts him as a person who is not in a position to provide the comfort, love and amenities necessary for the child's upbringing.

[10] Before I get to the submissions made by counsel, I need to state briefly that in her answering affidavit the 1st Respondent denies most of the allegations made by the Applicant as regards the important issue of whether or not she did at some point abandon custody of the minor. Denying that she abandoned custody she states that what occurred was that, when the minor was about 4 years old, she approached the Applicant and advised him that she needed to attend a tertiary college and requested he temporarily look after the child until she completes her education. She claims that she did attend college, The Birch Cooper Institute, completed her diploma within the agreed 18 months wherein she then took full custody of the child.

[11] In her affidavit the 1st Respondent elects not to engage in the lengthy details of the love relationship between the Applicant and her which deteriorated into one of hostility and aversion. This has obviously left the child in the middle so to speak.

[12] Given the above scenario, and being fully aware of the underlying evidence with respect to whom it is between the parties that is the suitable parent, I asked both counsel to address me on the old adage ***"een moeder maakt geen bastard"*** This simply means that in days of old the parental

power was vested in the mother in so far as the parents were unmarried and the child was considered illegitimate. Even though the status of illegitimacy was abolished under the provisions of the constitution. The principle that a child born out of wedlock is best left in the custody of its mother is still accepted as being morally correct in our modern society. ***THE CHILD PROTECTION AND WALFARE ACT OF 2012*** embodies this age old principle under section 200 (3) which provides as follows:

> ***"The Children's Court shall consider the best interests of the child and the importance of the child being with his mother when making an order for custody or access"***.

[13] The principle provides that the Court in its exercise of its inherent common law powers as the upper guardian of all minors within the Kingdom, may declare that the mother's rights as the natural guardian be taken away for good cause shown. In such instances the Court must regard the interests of the child as paramount and treat the mother's right as being a prima facie one (see ***PQR Boberg "The Law Of Persons And The Family" 1977 Juta at page 334 – 337***).

[14] In ***September V. Karriem 1959 (3) SA – 687*** the Court stressed the primacy of the child's interests. In ***Ex parte Van Dam 1973 (2) SA 182*** the learned Margo. J supported this principle of the child's interests as per ***Spiro on "The Law of Parent and Child" 3rd*** where the learned author "***goes so far as to say that if the interests of the minor illegitimate child so demand, custody if not even guardianship may be awarded to the natural father".***

[15] To capture the essence of the common law principal reference can be made ***to Myers V. Leviton 1949 (1) SA 203*** where the learned ***Price J*** stated:

> "***There is no one who quite takes the place of a child's mother***. ***There is no person whose presence and natural affection can give a child the sense of security and comfort that a child derives from his own mother- an important factor in the normal psychological development of a healthy child".***

[16] In essence ***"It is often said that the best person to look after young children is their mother. So far as mere physical well-being is concerned, I do not think this is a matter of any importance. Few mothers are capable of attending to the bodily needs of their offspring as efficiently as an institution-trained nurse. But that is not the end of matter. Experience goes to show that a child needs both a father and a mother, and that, if he grows up without either, he will, to some extent, be psychologically handicapped. But the maternal link is forged earlier in the child's life than the paternal, and if not forged early may never be forged at all. The psychological need of a father, on the other hand, only arises later. It seems to me that if the father is awarded the custody of these young children they will in all probability, notwithstanding the loving care which they will undoubtedly receive from their paternal grandmother, grow up as motherless children, with all the attendant psychological disadvantages. If on the other hand, the mother is awarded their custody, at any rate during their years of infancy, they will not necessarily grow up as fatherless children, for the relationship between a father and his young children is never one of continuous intimacy, but is necessarily intermittent. The children will realise that they have a father, notwithstanding that they do not see him every day. And when they reach the age at which a father becomes an important factor in their lives, there will be nothing to hinder the forging of the paternal link" per Broome J in DUSTERVILLE V. DUSTERVILLE 1946 NPD 594 AT 597".***

[17] When counsel for the Applicant addressed me on this principle of our law I did ask of her whether the applicant acknowledges that the 1st Respondent loves the child. The answer was in the affirmative. Secondly as to whether the 1st Respondent is a good mother to the child. Again the answer was in the affirmative. Also acknowledged was that the 1st Respondent has no visible disabilities that would in any sense interfere with her abilities as a mother.

[18] It will be noted that the acknowledgement by the Applicant that indeed the 1st Respondent is a good mother (also as per the socio-economic report) was only countenanced by the assertion that there is a pending criminal case against the 1st Respondent's fiancé and that 1st Respondent and her fiancé cannot provide a stable environment because they are not married.

[19] As for the first objection by Applicant, all that can be said is that the complaint seems to hinge on a clash of personalities where it is alleged that certain unpalatable cellphone communications took place between the Applicant and the 1st Respondent's fiancé the latter being the antagonist. This element of hostility is best reserved for the two men. The mere fact that the matter has been addressed in terms of the law is sufficient for this Court to rule such objection as being immaterial for the determination of custody. All that this Court can say is that the two gentlemen should not engage in acts which may disrupt the natural balance needed by the respective families in order to canvass a conducive environment in which to raise their respective children.

[20] As regards the second expostulation it was argued by counsel for the Applicant that, since the 1st Respondent and her fiancé are not married, their home environment is unstable and, as such, is unsuitable for raising the minor child. This assertion was countered by counsel for the 1st Respondent who lamented this argument on the basis that the Applicant himself is not married to the person he is cohabiting with. I cannot see how a perception that an unmarried couple provide an unstable home environment for children can be expounded in any event. Stability is surely a matter that must be determined by the particular circumstances of each case. In this matter the socio-economic report does not point any dire picture of instability but instead does the contrary.

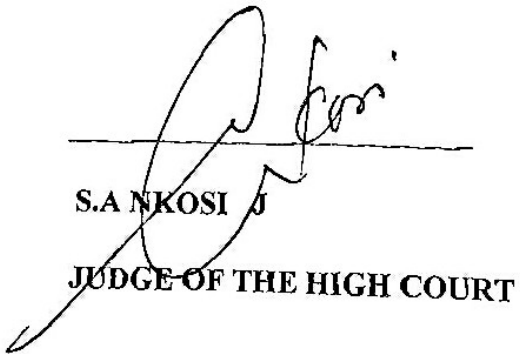
[21] Given the above facts, and the principle enshrined in Section 200 (3) of the ***CHILD PROTECTION AND WALFARE ACT 2012*** as supported by the socio-economic report, which report I dare say was compiled at the behest of the Applicant (and rightly so), I cannot discern any conscionable reason as to why I should change the status quo.

[22] Having said that, I however must state that I was immensely impressed by the level of commitment that Applicant has demonstrated in this matter. There is hardly any doubt in my mind that he is a committed and dedicated father whose son is very dear to him. He has demonstrated that the welfare

and status of the minor is all important. However he has failed to demonstrate to this Court in what respects the 1st Respondent is lacking in order for the Court to deviate from the principle that the best place for a young child is in the bosom of its maternal parent, that is, its mother.

[23] I therefore pronounce that the best interests of the child are that mother retains sole custody of the minor. However I have taken into account the fact that the father must not be alienated from his child. Therefore, again in the best interests of the minor, I rule that the father shall gain the obligatory status of being the guardian of the minor with all the antecedent duties that status bears, which includes but is not limited to the duty to support the child. Also as a father he has the right to reasonable and unfettered access to his child and an appropriate order on such access shall be given unless the parties agree on a suitable and reasonable schedule of visitations by the minor to the Applicant.

[24] The Applicant's application is thus dismissed with the costs antecedent from the 2nd day of December 2016 being the date when Counsel for the 1st Respondent represented 1st Respondent in Court. No costs order is made in respect of the other Respondents.



**S.A NKOSI J**

**JUDGE OF THE HIGH COURT**

For the Applicant : X. Mdluli

For the Respondents : B. Ngcamphalala