



IN THE HIGH COURT OF ESWATINI
JUDGMENT

Case No. 801/2019

HELD AT MBABANE

In the matter between:

FRED KUNDA

1st Appellant

KF & J INVESTMENT

2nd Appellant

And

SINDI MHLANGA

Respondent

Neutral Citation: *Fred Kunda and Another vs Sindi Mhlanga* (801/2019) [2022]
SZHC 89 (21/06/2022)

Coram: **J.M. MAVUSO J.**

Heard: 30 September, 2021.

Delivered: 21 June, 2022.

SUMMARY: *Maintenance of minor children – Appeal from Judgment of the Mbabane Principal Magistrate Court handed down by Her Worship F. Nhlabatsi – Appeal by Respondent in the Court a quo, based on four grounds – Appellant’s first ground is that the Court a quo erred in law by granting prayer 2.4 of the Amended Notice of Application, as it was not supported by any evidence, allegations and or averments – The second ground is that the Court a quo erred in law in ruling that Applicant’s application succeeds in terms of the Amended Notice of Motion in that the amendment was never allowed by the Court – In support of the above ground, it is stated that, the prayers in the amended Notice of Motion are not supported by the averments in the Founding Affidavit and it is alleged that no evidence was adduced or affidavit filed in support of the “new prayers” or why it was necessary that maintenance escalate at 15% per annum retrospectively – The third ground of appeal, is that the Court a quo erred in law in ignoring the fact that the children are beneficiaries in a Trust that owns property that could be used to generate income – The fourth and last ground of appeal is couched in the following terms, that, the Court a quo erred in ordering that funds owed by the 2nd Appellant be used wholly for the settlement of the personal debts of the 1st Appellant – Court finds the appeal to be without merit, and accordingly it is dismissed with costs on the ordinary scale.*

JUDGMENT

J.M. MAVUSO-J

[1] This is an appeal against the Judgment of the Principal Magistrate Her Worship, F. Nhlabatsi.

[2] The issue before the Court *a quo*, is found in paragraph (15) of the Court's Judgment. It is expressed in the following terms:

“The subject matter of these proceedings is an immovable property in (sic) which the Applicant seeks to obtain a right over, on behalf of the two minor children as a source of income to meet the 1st Respondent's parental obligation.

At paragraph 20 of the aforesaid Judgment, the Court *a quo*, observed that;

“The case involves in the narrowest sense, a dispute about the payment of a maintenance obligation. There is little doubt that the payment of maintenance is an important factor in the ability of a custodian parent to provide for the needs and interest of the minor children.....”

I have no doubt in my mind that the Learned Principal Magistrate, commented on the aspect of custody, as a result of the prayer for custody, made by the Applicant, in her papers emanating from the fact that the 1st Appellant had left her with the children possibly for ever. The prayer for custody is contained in prayer 2.4 of the Notice of Application and is repeated in the Amended Notice of Application, as prayer 2.5.

[3] To better understand the appeal before this Court, it is necessary for the Court to outline the following:

- (i) Appellant is a Zambian National whose residence in the country of Eswatini, was legitimised by a temporary residence permit, which is said to have expired in July 2016.
- (ii) Whilst resident in Eswatini the 1st Appellant registered the 2nd Appellant. 1st Appellant is the sole director, of the 2nd Appellant.
- (iii) The 1st Appellant now lives in Zambia his native country and the prospects of his return to Eswatini are said to be minimal, if any. This assertion is born out of the fact that:

(a) When he left the country, he is said to have taken all his movable property and personal belongings, with him.

(b) He is said to have sold the only immovable property registered in the 2nd Respondent's name. The property is;

**Certain: Lot No.2139, Mbabane
Extension 18 situate in the
urban area, District of
Hhohho.**

**Measuring: 1338 (one three three eight)
square metres.**

Held by: Deed of transfer 652/2003

(c) He is also said to have closed the business operations of the 2nd Appellant, at Sidwashini.

[4] Prior to the 1st Appellant's departure from Eswatini, there was a maintenance order, requiring him to contribute a sum of E1000.00 (one zero zero zero Emalangeni) per month beginning February 2013, later, in 2016, by consent,

it was varied to E1500.00 (one five zero zero Emalangeni). The Order was for the maintenance and upkeep of the party's minor children TAKONDWA and TAONGA KUNDA. In terms of the maintenance order, 1st Appellant was separately, required to cater for, all school related expenses.

[5] When the 1st Appellant left the country for his native country, (no date is given by the Respondent, as to when this was) no agreement was reached by the parties as to how the maintenance contribution for Takondwa and Taonga, (who are twins) was to be effected.

[6] Upon discovery of the fact that the 1st Appellant was selling “*the immovable*” property, with no agreement on how the twins were to be maintained, after his departure, the Respondent, under a certificate of urgency, moved an application in the Court *a quo* in which she sought the following orders:

***“1. Dispensing with the normal Rules of this Court relating to service, form and hear this matter urgently.*”**

2. *Granting an interim order with immediate effect and calling upon the Respondents in the main matter to show cause on a date to be set by the Honourable Court why the following order should not be made final;*

2.1 *Interdicting the transfer of the following property to anyone pending the determination of the future maintenance of TAKONDWA and TAONGA KUNDA;*

*Certain: Lot No.2139, Mbabane
Extension 18 situate in the
urban area, District of
Hhohho.*

*Measuring: 1338 (one three three eight)
square metres.*

Held by: Deed of transfer 652/2003

2.2 *That the proceeds of the sale of the property be held in trust by the duly appointed conveyancer to await further direction relating to disbursement of same.*

2.3 That the maintenance order granted on the 29th July 2015 be made operational with an escalation interest of 15% per annum until the children attain majority to be paid with school fees.

2.4 The Applicant be granted custody and sole guardianship over the children TAKONDWA and TAONGA KUNDA.

3. Costs of suit.

4. Further and/or alternative relief (sic).

5. If the Respondent objects to the grant of the order he be given the right to anticipate the Rule within 48 hours.”

[7] I have written the orders sought by the Respondent, in her urgent application before the Court *a quo*, because one of the Appellant’s grounds of appeal, the first ground, as a matter of fact, touches on prayer 2.4 of the Amended Notice of Application.

[8] After launching the urgent application, seeking the above prayers, Applicant proceeded to institute another application, similar to the previous one. The difference between the two, is that the notice of the second application is an amended version of the first one. For purposes of differentiation from the previous application it is “*headed*” Amended Notice of Application. I will deal with the Notices of Application hereunder, when I consider each ground of appeal.

[9] The Appellants, who were Respondents, in the Court *a quo*, have lodged an appeal based on four (4) grounds. In the notice of appeal, the grounds are listed as follows:

“Grounds of Appeal.

- 1. The Court *a quo* erred in law in granting prayer 2.4 in terms of the Amended Notice of Application as it was not supported by any evidence, allegations and or averments.**
- 2. The Court *a quo* erred in law in ruling that Applicant’s application succeeds in terms of the Amended Notice of Motion in that the amendment was never allowed by the Court.**

2.1 The prayers in the amended Notice of Motion are not supported by the averments in the founding affidavit.

2.2 No evidence was adduced or affidavit filed in support of the “new prayer” or why it was necessary that maintenance escalate at 15% per annum retrospectively.

3. The Court *a quo* erred in law in ignoring the fact that the children are beneficiaries in a Trust that owns property that could be used to generate income.

4. The Court *a quo* erred in ordering that funds owned by the 2nd Appellant be used wholly for the settlement of personal debts of the 1st Appellant.”

[10] (i) Starting with the first ground of appeal namely that;

“The Court *a quo* erred in law in granting prayer 2.4 in terms of the Amended Notice of Application as it was not supported by any evidence, allegations and or averments”.

- (a) The Respondent's prayer 2.4 in the amended Notice of Application, dated 20/02/2018 reads as follows:

“In terms of the Court Order dated the 29th July 2015 the 15% variation is calculated as follows (a yearly schedule factoring the escalation is provided) which is now due and payable excluding related school expenses to cater for the parties’ children until they attain majority in the year 2030.”

The equivalent of prayer 2.3 of the Notice of Application, in the amended Notice of Application, is also prayer 2.3 which states as follows:

“The maintenance order granted on the 29th July 2015 be made operational with an escalation interest of 15% per annum until the children attain majority to be paid with school fees.”

The Court notes that the prayers are very much similar, save for the fact that, in the amended application, a schedule of the increased amount, for each and every year, starting from July 2017 up to and including, the year July 2030; has been provided, factoring in an escalation of 15% for each and every year.

The Court observes that a Founding Affidavit deposed to by the Respondent, is attached as evidence to her Notice of Application. In the amended Notice of Application, there is no affidavit attached, notwithstanding the fact that it is stated in the notice, that Respondent's Founding Affidavit would be attached in support thereof. The Court is of the considered view, that the non- attachment of the aforesaid affidavit could be due to the fact that the matters are so materially the same, such that reliance could be made (in the amended application) on the affidavit filed in support of the Notice of Application without any prejudice being occasioned to the Appellants, Respondents then. Further support for the Court's view comes from the Appellant's second ground of appeal. The statement by the Appellant contained in his second ground of appeal, to the effect that:

“The prayers in the amended Notice of Motion are not supported by the averment in the Founding Affidavit.”

to the Court, suggests that Appellants accepted that, there was a Founding Affidavit at least in the notice of application.

- (b) According to the record of the proceedings 1st Appellant did not oppose this application in the Court *a quo*, then. In actual fact he went on to comply with the aforesaid Order until 2016, when he started defaulting. From the date of issue of the Order up to the date of hearing of this appeal, from the record, there is not the slightest indication of the 1st Appellant ever having applied for a rescission of the Order, he now complains of.

- (ii) Appellant’s second ground of appeal is that:

“The Court a quo erred in law in ruling that Applicant’s application succeeds in terms of the amended Notice of Motion in that the amendment was never allowed by the Court.

2.1 The prayers in the amended Notice of Motion are not supported by the averment in the Founding Affidavit.

2.2 No evidence was adduced or affidavit filed in support of the “new prayers” why it was necessary that maintenance escalate at 15% per annum retrospectively.”

Before dealing with the above purported ground of appeal, it is apposite for the Court to state that, it observes a great similarity of the prayers in the “*Notice of Application*” and the prayers in the “*Amended Notice of Application*”. As stated above, the difference between the application and the amended application, if any is that in the amended notice of application in addition to spelling out the 15% escalation, a chart is set out, to show, a year on year maintenance contribution expected from the 1st Appellant, in which a 15% increase, of the previous years contribution is showed. The amendment, if it be one, was so cosmetic that, it did not bring about any change save to inform Appellants of the contribution they were required to make, on

a monthly basis, per year and also to show the net – contribution per year, beginning in July 2017 ending in July 2030.

In justifying its decision, the Court *a quo*, at paragraph 8 of its Judgment, made reference to the case of **Terblance v Terblancing 1992(1) SA 500(w) at 504 C-D** where it was stated that the Court, has;

“Extremely wide powers in establishing what is in the best interest of minor or dependent children. It is not bound by procedural structures or by the limitations of evidence presented or contentions advanced by the respective parties. It may in fact have recourse to any source of information, of whatever nature, which may be able to assist it in resolving custody and related disputes.”

At paragraph 9 of its Judgment, reference is made to the case of **September v Karriem 1959 (3) SA 687 at 689 A** where Herbststein AJP stated as follows:

“If the Court is of the opinion that it should interfere with the rights of the parents, because the interests of the children demand such interference, it should be at large to act in the manner best suited to further such interest.”

[11] This Court is of the considered view, that when granting prayer 2.4, confirming the consent order of the 29th July 2015, raising 1st Appellant’s contribution from E1000.00 (one thousand Emalangeni) to E1500.00 (one thousand, five hundred Emalangeni) and also factoring in the 15% escalation, the Court *a quo* acted in the best interest of the children for the following reasons:-

- (i) At the time, the order being appealed against was entered, the Court *a quo* had issued an order, sometime in May 2013 calling upon 1st Respondent to make a maintenance contribution of E1000.00 (one thousand Emalangeni) per month from February 2013, by consent the order was varied to E1500.00 (one thousand five hundred Emalangeni).

- (ii) Since January 2016 the 1st Appellant, who was the Respondent in the Court *a quo*, admits having been in breach of the Court order. He failed to pay school fees for the minor children.
- (iii) With the evidence of 1st Appellant relocating to his native country, Zambia, permanently, in order to ensure the continued maintenance of the children, taking into account the rise, in the cost of living, the Court *a quo*, surely, acted in the best interest of the children more particularly because of the difficulty, the Respondent would have encountered in bringing the 1st Appellant to this Court's jurisdiction, for any further maintenance related orders.
- (iv) I now turn to the figure by which the 1st Appellant's contribution was to increase on a yearly basis. This is said to be 15% (fifteen percent) per annum. The reason why an escalation was prudent has been explained above. On the percentage of the increase, this Court observes that an application for same was brought *ex parte* before His Worship Magistrate Sifiso Vilakati. On the 10th August 2016, his Worship issued a rule *nisi* with interim effect, calling upon 1st

Respondent (1st Appellant herein), amongst other prayers, to show cause why;

“The maintenance order, granted on the 29th July 2015, should not (sic) be made operational with an escalation interest of 15% per annum until the children attain majority to be paid with school fees.”

On the face of the Filing Notice, prepared by Mbuso E. Simelane & Associates, Applicant’s then attorneys, it shows that the Order attached thereto was received by the 1st Appellant, Fred Kunda who appended his signature on the space provided for recipients, acknowledging receipt of the Order, sometime on the 21st September 2016. No explanation is given by the 1st Appellant why he did not oppose the escalation percentage nor the application as a whole. As it is, the rule *nisi*, calling upon him to show cause why, his maintenance contribution should not escalate at the stated rate, until the children reached the age of majority or became self-supporting was not opposed. To approach this Court in the aforesaid circumstances is absurd.

[12] The Appellant’s third ground of appeal is that:

“The Court erred in law in ignoring the fact that the children are beneficiaries in a trust that owns property that could be used to generate income.”

During oral argument before this Court Counsel for the Respondent argued that the purported trust **Motobola Kabanda Family Trust Protocol No.14/2011** was non-existent in as much as it was not and has never been registered. In support of his argument, Counsel drew the Court’s attention to a hand written letter, dated the 1st March 2012, written by the 1st Appellant, addressed to Attorneys **MJ Manzini and Associates**, directing that the said trust should not be registered with the Deeds Office. Hereunder are contents of the aforesaid letter:

***“Fred Kunda
Box 6037
Mbabane***

1st March, 2012.

***The Attorneys
MJ Manzini & Associates
3rd Floor, Lilunga House
Box A204
Swazi Plaza***

Dear Sir,

MUTOBOLA KABANDA FAMILY TRUST PROTOCOL NO. 14/2011.

I write to confirm that the above mentioned Trust should not be registered with the Deed Office.

This is because I, Fred Kunda do not want to be part of the trust anymore.

I also do not want the name Motobola Kabanda to be used.

I thank you for your consideration

Yours faithfully,

***Fred Kunda
Signed
01/03/2012”***

If the Court *a quo*, was to be called upon to consider any benefit for the children, under the purported Motobola Kabanda Family Trust, it surely could not do so, as the purported trust, at the very instance of the 1st Appellant was never registered and therefore non-existent, as properly argued by Respondent’s Counsel.

[13] (i) The Appellant’s fourth ground of appeal is that:

“The Court a quo erred in ordering that funds owned by the 2nd Appellant be used wholly for the settlement of the personal debts of the 1st Appellant.”

In the Amended Notice of Application, Applicant’s prayers are set out as follows:

“(1) Dispensing with the normal Rules of this Honourable Court relating to service, form and hear this matter urgently.

(2) Granting an interim order with immediate effect and calling upon the Respondent in the main matter to show cause on a date to be set by the Honourable Court why the following order should not be made final;

2.1 Interdicting the transfer of the following property to anyone pending the determination of the future maintenance of TAKONDWA and TAONGA KUNDA.

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2.2 That the proceeds of the sale of the property be held in trust by the duly appointed conveyancer to await further direction relating to disbursement of the same.

2.3 That the maintenance order granted on the 29th July 2015 be made operational with an escalation interest of 15% per annum until the children attain majority to be paid with school fees.

2.4 The Applicant be granted custody and sole guardianship over the children TAKONDWA and TAONGA KUNDA.

3. Costs of suit.

4. Further and/or alternative.

5. If the Respondent objects to the grant of the Order he be given a right to anticipate the Rule within 48 hours.”

(ii) The order of the Court *a quo* is recorded in paragraph 2.1 of its written judgment. It is expressed as follows:

“On the foregoing, it is this Court’s considered view that the 1st Respondent cannot avoid parental responsibility in order for him to

exercise a well-structured form of parental responsibility and the best interest of the two children, the Applicant is granted a final order in terms of prayers 2.1; 2.2; 2.3; 2.4; 2.5 and 3 of the Amended Notice of Application.”

- (iii) As more fully appears from the above, the Court *a quo* never ordered that;

“funds owned by the 2nd Applicant be used wholly for the settlement of the personal debts of the 1st Appellant.”

- (iv) During oral argument it was argued on behalf of the Respondent that the 2nd Appellant was the 1st Appellant’s alter ego. See: The case of Sipho Mkhombe and Purple Rain (Pty) Ltd in Re: Purple Rain (Pty) Ltd and Sam Mkhombe; The National Commissioner of the Royal Eswatini Police Service, The Commissioner General of His Majesty’s Correctional Services, Koseltronics Investment (Pty) Ltd, Attorney General in Re: Purple Rain (Pty) Ltd and Purple Rain (Pty) Ltd and Kosel-CCTV (Pty) Ltd t/a Kosel Systems Koseltronics Investment (Pty) Ltd and Sipho Mkhombe; High

Court Civil Case 901/2021 cited in support of the foregoing argument. From the papers before Court it is clear that the 1st Appellant had full control of 2nd Appellant, as a sole director and shareholder of the latter.

In **AD and DD v DW and CW [2007] ZACC 27 Case No. CCT 48/07**, the South African Constitutional Court is said to have endorsed the view that the interests of minors should not be held to ransom for the sake of legal niceties the best interests of the child should not be mechanically sacrificed, on the alter of jurisdictional formalism.

[14] Having made the above factual and legal observations, pertaining to the appeal, I come to the conclusion that the appeal is without merit and it is accordingly dismissed with costs.

J.M. MAVUSO J

HIGH COURT OF ESWATINI

For the Appellant: S.M. JELE ATTORNEYS

For the Accused: ZONKE MAGAGULA & CO. ATTORNEYS