



IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO. 980/2023

In the matter between:

ITUMELENG MOEMA

Applicant

And

LINDELO MNGOMEZULU

1st Respondent

THE PRINCIPAL SECRETARY

DEPUTY PRIME MINISTER'S OFFICE

2nd Respondent

DEPARTMENT OF SOCIAL WELFARE

3rd Respondent

THE CHIEF IMMIGRATION OFFICER

4th Respondent

THE NATIONAL COMMISSIONER OF POLICE

5th Respondent

THE ATTORNEY GENERAL

6th Respondent

Neutral Citation: *Itumeleng Moema v Lindelo Mngomezulu & 6 Others*
(980/2023) [2023] SZHC 272 (03 October 2023)

CORAM:

N.M. MASEKO J

FOR THE APPLICANT:

ATTORNEY MS. J. DLAMINI

FOR THE 1ST RESPONDENT:

ATTORNEY MR. K.S. SIMELANE

FOR THE 2ND – 6TH RESPONDENTS:

ATTORNEY B. ZULU

DATE HEARD:

04/05/2023

DATE OF *EX TEMPORAE* RULING:

05/05/2023

DATE OF WRITTEN RULING:

03/10/2023

Preamble:

Civil law – Civil procedure – Points *in limine* were raised in a matter which concerns the welfare of a minor child who is a South African citizen and who at the time of the launch of these proceedings was prima facie unlawfully and illegally in the country contrary to the order of Manoim J, issued on the 09/02/23 and the Immigration laws of the Kingdom of Eswatini, because the mother the 1st Respondent has without any passport or relevant documentation brought the child into the country. This emerged as a matter of fact when the points *in limine* were argued on the 4th May 2023, where it became clear that the 1st Respondent brought the minor child into Eswatini without any documentation being produced either on the South African Immigration and on the Eswatini Immigration. It was therefore on the basis of these factors which led to my dismissal of the points *in limine* raised by the 1st Respondent, which is now the subject of appeal before the Supreme Court.

RULING ON POINTS IN LIMINE

MASEKO J

- [1] On the 3rd May 2023, the Applicant launched urgent motion proceedings for an order in the following terms:

PART A:

1. Dispensing with the normal procedures in relation to applications prescribed by the rules of this Honourable Court and permitting that this matter be enrolled as one of urgency.

2. Condoning the Applicant's non-compliance with the said Rules of Court.
3. That the Third Respondent is hereby ordered to prepare and file before Court a socio-economic report in relation to the minor child Sebatso Milani Swati Moema within 72 hours upon receipt of the Court order.
4. That the Fourth Respondent must prepare and file before Court within 72 hours upon receipt of the Court order:-
 - 4.1. The Immigration records on the movements of the minor child's passports being South African Passport No: AO7430680, and South African Passport No. AO7430680, and South African Passport No. AO3651796; and
 - 4.2. A full report on how the minor child was granted Eswatini Dependent's Pass No: TZ604/2018 and all documents that were submitted in the application for such Dependent's Pass.
5. That the reliefs sought in terms of paragraphs 3, 4, 4.1 and 4.2 above operate with immediate effect, pending the finalization of the relief sought in Part B of this application.

PART B:

6. Declaring that Dependent's Pass No: TZ 604/2018 is void and of no effect in terms of Section 7 of the Immigration Act, 1982.
7. That the minor child is an illegal immigrant in Eswatini, and that she be forthwith returned to the Republic of South Africa in the care of the Applicant.
8. That the First Respondent be granted reasonable access to the minor child pending the determination of the issue of custody in the South African Courts.
9. That the Fifth Respondent and/or his duly authorized officers must assist in giving effect to prayer 7 above.
10. That the costs of this application be borne by the party who opposes the relief sought.

11. Further and/or alternative relief.

- [2] It is common cause that the founding affidavit and annexures thereto is used in support of this application. The application on a certificate of urgency was duly served on the 2nd to the 6th Respondent on the 3rd May 2023 and it was enrolled for the 4th May 2023.
- [3] The 1st Respondent filed her Notice of Intention to Oppose the Application together with a Notice in terms of Rule 47 (1) being a demand for security for costs. The 1st Respondent also filed a Provisional Answering Affidavit on the 4th May 2023 and further raised the following points *in limine*:
1. Lack of urgency.
 2. Failure to satisfy the requirements of an interdict.
 3. Applicant has no right of audience because he is a peregrinus of this Court with no assets, whatsoever in Eswatini.
 4. Lack of jurisdiction or *lis pendens*.
- [4] These points *in limine* were argued by both Counsel Ms. J. Dlamini and Mr. K.N. Simelane on the 4th May 2023, and I delivered an *ex tempore* ruling on the 5th May 2023. Mr. Simelane thereafter forwarded correspondence requesting for written reasons of the ruling I had made, and these are the written reasons. However, it is necessary that I set out the factual matrix of this matter.

Summary of the History of this Matter

- [5] It is common cause that the Applicant and 1st Respondent are husband and wife and are both South African citizens. Their daughter who is a minor is the subject matter in these proceedings and is also a South African citizen. It appears that the marriage between the Applicant and 1st Respondent developed some problems which eventually forced the 1st Respondent to relocate to Eswatini and in the process she also took the minor child with her.
- [6] The source of these proceedings *in casu* is that the Applicant wants to have custody of the minor child in South Africa, whereas the 1st Respondent wants to have custody of the child and reside with her (minor child) in Eswatini. It appears from the Applicant's founding affidavit that the child travelled to Eswatini with the 1st Respondent in December 2017 for Christmas vacation with the consent of the Applicant. From then onwards there seems to have been reluctance on the part of the 1st Respondent to have the aforesaid minor child returned to the custody of the Applicant.
- [7] The 1st Respondent eventually filed an application before the Gauteng Local Division, Johannesburg in the Republic of South Africa under case No. 2023-008761. The matter came before Manoim J and on the 9th February 2023 for arguments and he delivered the judgment on the 16th February 2023 and granted the following order:-
1. The Applicant's non-compliance with the normal Rules of this Honourable Court relating to service, filing and time limits is condoned and the matter be dealt with as one of urgency in terms of Uniform Rules of Court 6 (12).

2. The minor child is to be returned to the Applicant by the Respondent immediately after the granting of this order.
3. The Applicant is entitled to remove the minor child from the Republic of South Africa and return her to Eswatini. The consent of the Respondent is, for this purpose, waived and the relevant immigration authorities are to allow the Applicant and minor child to depart from South Africa for purposes of this Order.
4. The relevant authorities, which shall include, but not be limited to (a) the Department of Home Affairs of South Africa and/or any other similar authority in South Africa and (b) any embassy and/or consulate of South Africa wheresoever situate are authorised and entitled in terms of this Order, to issue passports and/or any other documentation to, and/or for, the minor child without the consent and/or signature of the Respondent, for the purposes of the minor child returning to Eswatini after the granting of this Order.
5. That, and in the event that the Respondent fails and/or refuses to comply with prayer 2 above, that the Applicant is entitled to enlist the services of the South African Police Service, if necessary, to assist in having the minor child handed over to Applicant.
6. Each party to pay their own costs.

[8] It appears that after the granting of this Order by Manoim J, the 1st Respondent and the minor child travelled to Eswatini on the 17th February 2023. According to the Applicant when the child was taken by 1st Respondent she was at a school named Roedan School wherein she had been enrolled by the Applicant.

[9] In support of his application, the Applicant states that, the child was forcefully grabbed against her will and unlawfully trafficked to Eswatini.

[10] Applicant states further that the child was taken without his consent as he had filed an appeal against the judgment of Manoim J and thus the operation of the order was suspended. Applicant contends that the appeal is still pending before the South African courts.

[11] The Applicant states that when the child was taken into Eswatini by the 1st Respondent, she did not have a passport and therefore was trafficked into the country.

[12] These are the reasons which the Applicant has put forth, of course amongst other reasons as contained in his founding affidavit which have made him to launch these proceedings seeking relief as contained in Part I and Part II of the Notice of Motion.

[13] I have outlined the brief history of this matter in order to demonstrate why I dismissed the points of law raised by the 1st Respondent:-

(i) LACK OF URGENCY

It is common cause that all matters that pertain to minor children are always by their nature urgent. At the time when the child was taken by the 1st Respondent she was attending school at the said Reodean School, this was in February 2023. There are so many activities in between the launching of this application and when the child was brought to Eswatini in February 2023, and these activities in my view have a direct bearing on the educational needs and social

upbringing of the child. It is therefore the duty of this Court as upper guardian of all minor children to treat such matters with the urgency they deserve. This point *in limine* is therefore dismissed.

(ii) FAILURE TO SATISFY THE REQUIREMENTS OF AN INTERDICT

It was submitted on behalf of the 1st Respondent that the Applicant has failed to satisfy the requirements for an interdict in particular with reference to prayers 3 and 4 respectively. I must point out that the relief sought in prayers 3 and 4 is in nature of a mandamus because the 3rd Respondent and 4th Respondent respectively are all departments of the Government of the Kingdom of Eswatini and are therefore public servants. These two departments are creatures of statutes namely the Immigration Act No. 17/1982 and the Constitution of the Kingdom of Eswatini Act No. 001/2005. The ordinary requirements for an interdict be it interim or final do not apply in so far as the public servants who execute their statutory functions is concerned. Section 66 (1) of the Constitution provides as follows:-

66 (1) There shall be a Cabinet which shall consist of the Prime Minister, Deputy Prime Minister, and such members of Ministers as the King, after consultations with the Prime Minister, may deem necessary for the purpose of administering and executing the functions of the Government.

[14] In the Immigration Act No. 17/1982, there is Section 11 which establishes the office of the Chief Immigration Officer and it provides as follows:-

11 (1) There shall be a Chief Immigration Officer and such number of immigration officers as may be necessary for the purpose of this Act.

(2) In the performance of their duties under this Act, the Chief Immigration Officer and Immigration Officers shall act in accordance with such instructions as may be given by the Minister.

(3) The Chief Immigration Officer may delegate to an Immigration Officer in writing any or all of the powers conferred upon him by this Act.

[15] The Department of Immigration falls under the Ministry of Home Affairs whilst the Department fall under the Deputy Prime Minister's Office. The public officers in the Social Welfare Department are the social workers.

[16] In terms of the Children's Protection and Welfare Act No.6 of 2012, as contained in the interpretation Section under Section 2, a social worker is described as follows:-

"social worker means a person working as a social worker in the department of Social Welfare, including a probation officer."

[17] When the papers were served on the 2nd -4th Respondents they did not raise any points *in limine*, but in particular the 4th Respondent went on to produce the report which was eventually filed on the 1st June 2023 by the 6th Respondent, the legal representative of all the Respondents. As I mentioned above herein the 6th Respondent has not raised any points of law in respect of the orders sought against the said 2nd to 4th Respondents. The relief sought under Part I is only against the 2nd to the 4th Respondents and not against the 1st Respondent, there is no relief sought against the 1st Respondent.

- [18] The legal requirements for a mandamus are two-fold, firstly the relief sought must be a duty of public nature i.e. one that must be enforced or executed by a public servant, and, secondly, the said duty must be imperative and not discretionary; and that is, public servants or civil servants are under a statutory duty to perform or execute their statutory mandate when ordered to do so.
- [19] The South African legal requirements for a mandamus are that it must be directed at a person or authority under a legal duty to perform a public or statutory duty and that no other legal remedy could achieve the desired outcome. *In casu* it is only the 3rd and 4th Respondents respectively who could produce the desired reports and no other authority.
- [20] The proceedings *in casu* pertain to the interests of a minor child, and as stated earlier in this ruling, this Court is the upper guardian of all minor children, and this one is no exception. There is no amount of legal technicalities that could stop this Court from enquiring into the well-being and interests of a minor child. During the arguments on the points *in limine* it transpired and was confirmed by Mr. Simelane that when the minor child was brought into the country in February 2023 pursuant to the Order of Manoim J, she was not issued with a passport and or any other documentation issued lawfully by the Department of Home Affairs in South Africa. This was a blatant violation of paragraph 4 of the order of Manoim J.
- [21] As at the 4th May 2023 when the points *in limine* were argued and as at the 5th May 2023 when the interim order was granted, the said minor child was in Eswatini *prima facie* illegally and unlawfully as she had been made

to travel from South Africa into Eswatini without any passport and or documentation issued by the Department of Home Affairs, contrary to the Order of Manoim J paragraph 4 thereof.

[22] It was therefore on the strength of the prima facie illegal entry of the child into Eswatini that I issued the interim order directing the 3rd Respondent and the 4th Respondents respectively to issue their reports. It is imperative that no matter the state of the sour relationship between the Applicant and the 1st Respondent, the interests of the minor child are supreme and are the prime concern of this Court in so far as it is the upper guardian of all minor children.

[23] Further the Applicant and the 1st Respondent are South African citizens, and so is the child. If the child is to be brought into Eswatini, her original citizenship is affected, therefore her presence in Eswatini must be lawful and legitimate, so that when the child grows into adulthood and decide to revive her South African citizenship, it must be easy for her to do so, therefore all legal requirements for her being in Eswatini can only be ascertained by the involvement of the 2nd to the 4th Respondents' departments. It is on this basis that I issued the interim relief as sought in Part I of the Notice of Motion.

[24] Section 29 (2), (3) of the Constitution provides as follows:-

29 (1) -----

(2) A child shall not be subjected to abuse or torture or other cruel inhuman and degrading treatment or punishment subject to lawful and moderate chastisement for purposes of corrections.

(3) The child has a right to be properly cared for and brought up by parents or other lawful authority in place of parents.

[25] A child's rights are constitutionally recognized and protected. There is no court that can turn a blind eye when the interests of the child are at stake. The Preamble of the Children's Protection and Welfare Act No. 6 of 2012 reads as follows:-

“An Act to extend the provisions of Section 29 of the Constitution and other international instruments, protocols, standards and rules on the protection and welfare of children, the care, protection and maintenance of children; and to provide for matters incidental thereto.”

[26] When the Departments of Immigration and Social Welfare perform their functions which involve inter-counter interaction, these departments do so through their counter-parts in those foreign jurisdictions. In the case *in casu*, the Department of Social Welfare have at their disposal international instruments and protocols by which they interact with their South African counterparts. The Kingdom of Eswatini has strong diplomatic relations with the Republic of South Africa, through these relationships the Department of Social Welfare would be able to secure a social enquiry report of the Applicant's standing and suitability as regards the welfare of the minor child. This point *in limine* is also dismissed as well.

(iii) Applicant has no right of audience because he is a peregrinus of this Court with no assets whatsoever in Eswatini.

[27] This point *in limine* has no merit at this stage since proceedings in terms of Rule 47 (1) i.e. Demand for security for costs were instituted on the 04/08/2023.

(iv) Lack of jurisdiction or *lis pendens*

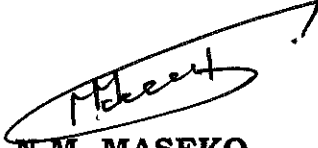
This point has no merit, because this Court has jurisdiction to deal with this matter, owing to the fact that the minor child and the 1st Respondent who is the wife of the Applicant were at the time within the jurisdiction of this Court. This matter is not pending before any court in this jurisdiction. The proceedings before Manoj J in Johannesburg RSA cannot be said to be pending before this Court in the Kingdom of Eswatini. This point *in limine* therefore is dismissed as well.

[28] I must state that in the interim order that I issued on the 5th May 2023, which was extended on subsequent appearances of this matter, I have never issued an order directing the 2nd and/or 3rd Respondents to execute their duties or mandate in the Republic of South Africa or any other foreign jurisdiction. I take judicial notice however that the 2nd and/or 3rd Respondents have their methods to secure or procure a social enquiry report and it is not for this Court to dictate how they should go about executing their mandate.

[29] In the interim I placed time lines for the filing of this Report by the 3rd Respondent, however, owing to an appeal filed by the 1st Respondent against the interim order, I was then advised by Mr. B. Zulu Counsel for the 2nd -6th Respondents that they advised the 3rd Respondent not to prepare the Report pending the determination of the appeal launched by the 1st Respondent against my ruling on the points *in limine*.

[30] The ruling which I handed down on the 5th May 2023 which is now being appealed against by the 1st Respondent is as follows:-

1. The points *in limine* are all dismissed.
2. The 1st Respondent is granted leave to file the Answering Papers in this matter.
3. An order is hereby granted in terms of prayer 4 of the Notice of Motion, however the period for filing of these Reports is extended to five (5) days from date of receipt of this order.
4. The matter is postponed to the 15/08/2023 for a call at 0930hrs.


N.M. MASEKO
JUDGE