



Civil Appeal Case No.17/2002

In the matter between:

LINDIWE FYNN First Appellant

DICK FYNN Second Appellant

VS

THULANI NXUMALO Respondent

CORAM: BROWDE J.A.

BECK J.A.

ZIETSMAN J.A.

For Appellants: Mr Mnisi

For Respondents: Mr Ntiwane

JUDGMENT

Beck J.A.

By way of an application in the High Court the first appellant, duly assisted by her husband, the second appellant, sought an order granting her the custody of a nine year old girl, Ncedo Nxumalo (also referred to as Noncedo Nxumalo). The child's mother, who was the younger sister of the first appellant, died in the year 2000. The respondent is the child's biological father. He was not married to the child's late mother. The application was dismissed with costs and it is against that order that this appeal has been brought.

There are numerous disputes of fact which cannot be resolved on the papers concerning the wishes of the child's mother with regard to the custody of the child, and concerning the respondent's attitude during the first few years of the child's life with regard to his paternity. What is not in dispute however is the fact that Ncedo has been living with her father, his wife

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and their two daughters for about 4 and a half years prior to the following event that occurred on the 5th February 2002.

In her founding affidavit the first appellant made the following allegations:

"On the 5th February, 2002, Noncedo ran away from the respondent's house at Mhlume and boarded a bus which took her to Ntondozi where I stay. Fortunately when she alighted from the bus I was at the bus terminus. When I asked Noncedo why she was not at school and why she was at Ntondozi, she told me that she no longer wanted to stay with the respondent because she was being ill-treated by both the respondent and his wife."

In his opposing affidavit the respondent had this to say about what occurred on the 5th February 2002:

"8.7. On the 5th February 2002, I received a telephone call from a Mrs Gwebu who advised me that I should not worry as the child was with the 1st Applicant. A Cynthia Barbosa who claimed to be a police woman also called me and advised me not to worry as the child was in 1st Applicant's custody.

8.8. I was taken aback. In the morning of that day my child had gone to school at Mhlume Primary School where she was in Grade III but appeared to be missing later that day.

8.9. I submit that the story that my child ran away is ridiculous, to say the least. She was lured away from home by some conniving adults who wanted her to go to 1st Applicant's home for the following reasons:

8.9.1. The child required to board a bus at Mhlume, and to board another at Manzini before reaching Ntondozi. How did she know which bus to board, given her age?

8.9.2. She had no money to undertake such a trip. Who financed her?

8.9.3. Is it a coincidence that 1st Applicant was at the Ntondozi bus station at the time the child alighted?

8.10. I further submit that the child has indicated that in fact a certain woman whose names are unknown took her to a kombi which she took to Manzini. The bus conductor is

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said to have put her aboard Phakama Bus Service which was destined for Ntondozi and the surrounding areas. She was then met by her aunt, 1st Applicant."

The pertinent questions posed by the respondent in paragraphs 8.9 to 8.9.3, and the information reflected in paragraph 8.10 were not addressed by the first appellant in her replying affidavit in which all she said was:

"Ad Paragraph 8.9, 8.9.1, 8.9.2 and 8.9.3: The contents hereof are denied and I reiterate that the child practically ran away from respondent's custody to our home at Luyengo. I am advised that a lot of what has been said in these paragraphs constitute nothing but unfounded suspicion and speculation and the Court will properly be addressed on these at the hearing of the matter.

Ad Paragraph 8.10: The contents of this paragraph are not known to me and as such I can neither deny nor admit the same."

With the respondent's consent Ncedo remained with her aunt until 4th March 2002, on which date the respondent fetched the child from a school in which the first appellant had enrolled her, and he took her back home to Mhlume.

Material disputes of fact attend the events of 5th February 2002, the circumstances under which Ncedo was allowed to remain with the first appellant for a month, and the events of 4th March 2002 when the respondent fetched the child. The fact of the matter is that when the first appellant launched this application on 21st March 2002 Ncedo was physically back in the respondent's home, and none of the following evidence has been denied by the first appellant:

Ncedo had been living in her father's home for approximately 4 and a half years prior to February 2002. Her father is an electrician who earns E6500 per month. His wife is a schoolteacher who earns E2500 per month. They have two daughters aged 8 and 4. Their home is a commodious three-bed-roomed company house that is situated close to the school that Ncedo attends. The whole family enjoys medical aid cover and there are health care centres nearby, Thobeka, Ncedo's 8 year old-stepsister, and Ncedo are close friends. School reports that cover the years from the day that Ncedo first went to a pre-school in 1997 until December, 2001, the end of her second year at primary school, show that during all these

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years when she has lived with her father Ncedo has been a happy, well-adjusted and well-behaved child who is an enthusiastic and conscientious learner, and who has achieved excellent results in all her subjects.

There is not a shred of evidence to support the first appellant's bald allegations that Ncedo has been ill-treated by the respondent and his wife and that she has been unhappy living with them. The manner of the alleged ill-treatment, its frequency and severity, is nowhere even hinted at, and the assertion that Ncedo is unhappy and has been ill-treated is emphatically denied by the respondent. Her excellent school reports that cover the years that she has been living with her father militate against the unsubstantiated allegations made by the first appellant, and the unexplained circumstances under which the child got from Mhlume to Ntondozi where the first appellant quite fortuitously, so she alleges, met her at the bus stop cast serious doubt on the allegation that she ran away from home and from school that day of her own accord.

Under these circumstances I am in entire agreement with the learned Chief Justice who said in his judgment in the court a quo: "I have read the papers at great length and cannot see how it can possibly be in the best interests of the child that she be taken from where she presently is and delivered to the Applicant. On these papers there is no way in which an order of this nature can be made."

Mr Mnisi, who appears for the appellants, is very properly of the same view and he quite correctly refrained from seeking an order of custody in favour of the first appellant. What he did submit was that we should remit the matter to the court a quo with a direction that a thorough socio-economic investigation be undertaken and that evidence of the findings of such an investigation be heard to enable the court to make a custody order that would be in the best interests of the child.

In a matter such as this it is the child's welfare that is central. The father of an illegitimate child has no inherent right of custody or of access to the child, but if it is in the child's best interests to be in the father's custody such an order will be granted. (Sec: B v S 1995 (3) S.A. 571 (A.D)).

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I do not accept that in the instant case the best interests of the child can be satisfactorily determined on the papers that have been filed, supplemented by the oral evidence of such witnesses as we might direct be called. The areas of dispute are wide and a considerable number of witnesses may be able to give relevant evidence. The matter is best left to be determined by way of a trial if the first appellant considers it to be in the best interests of the child that custody be awarded to the first appellant.

Accordingly the order of the court a quo is confirmed and the appeal is dismissed with costs.

C.E.L. BECK J.A.

I agree

BROWDE J.A.

I agree

ZIETSMAN J.A. Delivered on this 21st .day of November 2002