IN THE SUPREME COURT OF SWAZILAND

APPEAL CASE NO.01/09

In the matter between:

CYRIL KHANYILE **APPELLANT**

VS

CATHERINE ZEE MASUKU **RESPONDENT**

FOR THE APPELLANT FOR

THE RESPONDENT **BANDA CJ EBRAHIM JA MAGID AJA ADV. FLYNN MR. Z. SHABANGU**

JUDGMENT

EBRAHIM JA:

The appellant instituted an action against the respondent in the Court *a quo* seeking an order -

"*(a) Directing and ordering the respondent to grant the applicant reasonable access to his minor children, to wit, Sibusiso Khanyile and Yoliswa Khanyile and in particular such access to include:*

(i) one weekend every month, commencing at 18:00 hours on Friday and ending at 18:00 hours on Sunday;

(ii) two weeks during the long December and June school holidays and one week in other school holidays.

(b) *Costs of suit, in the event of the respondent opposing the application.*

(c) *Further and/ or alternative relief.*

The application was opposed by the respondent but was eventually settled and an order by consent was entered into by the parties on the 23rd April 2008.

The Court Order granted by the court by consent was in the following terms:

"*By consent of the parties, it is hereby ordered that:*

1. The respondent is to grant the applicant reasonable access to his minor children, to wit, Sibusiso Khanyile and Yoliswa Khanyile, and in particular such access to include:-

/. /. one weekend every month, commencing at 18:00 hours on Friday and ending at 18:00 hours on Sunday;

1.2. *Two weeks during the long December and June holidays and one week in the other school holidays;*

1.3. *Access to the children is to be supervised by respondent over a period on three months and if there are no problems availing, applicant is to be granted unsupervised access;*

1.4. *Applicant to give respondent a week's notice of his intention to have access to visit the children;*

1.5. *l^eave is granted to each one of the parties to approach the Court to review the order if and when circumstances have changed on notice to the other party*".

The appellant was dissatisfied with the respondent's alleged lack of compliance with this order and filed an application under a certificate of urgency for an order directing and compelling the respondent to comply with prayers 1.1 and 1.2 of the consent order granted on the 23rd April 2008 and further that the respondent be ordered to purge her contempt for failing to comply with the terms of the order failing which she be placed in custody for contempt of court. The appellant also sought a variation of prayer 1.3 of the Court Order granted by the Court *a quo* to read, that

> '*The applicant be granted unsupervised access and after three months the Social Welfare Department to give a report on whether or not the applicant should be granted permanent access to the children*".

The appellant also sought an interim order that this prayer operates forthwith as an interim order pending the finalisation of the matter before the Court *a quo.*

The respondent opposed this application stating that she had not failed to comply with the order made by the Court *a quo* and that there had been no intentional, wilful *mala fide* disobedience or non compliance with the Court order. The learned Judge *a quo* agreed with this contention and dismissed the appellant's application with costs.

It is against this decision that the appellant appeals on the following grounds:

> "*1. That the Honourable Court a quo erred in holding that the respondent was not in contempt; 2. That the Honourable Court should have held that the respondent implements the order*".

In my view the answer to the appellant's grounds of appeal can best be determined by what the appellant said in his founding affidavit. In particular I draw attention to the following passages:

At page 10 paragraph 14 of the record the appellant states:

> "*On 14th June 2008, I and my wife arrived at Hub Spar, at Man^ini approximately 9.00am. The respondent's sister Lobusuku Masuku arrived shortly thereafter with my two (2) children*".

At page 11 paragraph 19 of the record the appellant in his founding affidavit states:

> "*At this point we had made our way back to the hotel we had booked in at Timbali Lodge. I thereafter received a callfrom Mr. Sidumo Mdladla who advised thatLobusuku and the children were on their way*".

At page 14 paragraph 30 appears the following in the appellant's founding affidavit:

> "*It is my submission that the fact that the respondent insists on me spending a day with the children is a clear and blatant disregard of a Court Order entered into by consent. The behaviour of the respondent or her sister*

undermines the integrity of the court and should not be condoned. It is for this reason that I have brought the matter back to court to have the respondentpurge her contempt or be incarcerated".

Against the background of these facts the learned Judge *a quo* concluded:

"*On the facts of the case I cannot come to any finding that there has been intentional, wilful and* mala fide *disobedience or non compliance with the Court Order. It appears to me the respondentfollowed the consent order*".

In my view this finding is unassailable. The appellant in his own sworn affidavit provides sworn testimony which leads to the conclusion that the respondent did make efforts to comply with the consent order. What appears to have been the case is that she had a different perception on how the access order was to be satisfied. In H.R. HAHLO THE SOUTH AFRICAN LAW OF HUSBAND AND WIFE, 4th EDITION of page 473 the learned author states:

> "*The way in which an order as to custody and access may be enforced depends on the terms of the order. Where it imposes specific obligations in one of the spouses,* mala fide *failure to comply with it amounts to contempt of court*".

I am of the view that the affidavit sworn by the appellant in this matter is not indicative of a wilful, intentional and deliberate or *mala fide* attempt on the part of the respondent to circumvent the consent order agreed to between the parties for the reasons I have outlined above.

Clearly, however, there is a dispute between the parties on what each understands the position to be on the issue of access. It seems to me that it was open to the appellant to have applied to the court for a variation calling for a clearer and precise order outlining the nature of the access required.

In LEDER V GROSSMAN 1939 WLD 41 at 44 Schreiner J remarked that the non custodian spouse has a right of

access, whether that is mentioned in the order or not, and the mention of the right gives no added sanctity. The effective extent of the right in any particular case is governed by the test of reasonableness H.R. HAHLO 4th EDITION THE SOUTH AFRICAN LAW OF HUSBAND AND WIFE at page 266 and the authorities cited therein.

On the appellant's own evidence there was an attempt made by the respondent to satisfy the terms of the consent order. The parties are not in agreement what the nature of the supervision should be.

The learned Judge *a quo* in his judgement stated:

> "*(10) They applied that substantive parts of the agreement be deleted and substituted with new provisions. The court refused the application stating that it was* functus officio *and could not substantively change the court*

order in the absence of anything before it suggesting that the original order was not the one intended by the parties "

The learned Judge appears to have reached this conclusion as it was the appellant's submission before him that when the court has made a consent order it becomes *functus officio.* Reliance was placed on the case of *EX PARTE* WILLIS AND WILLIS 1947(4) S.A. 740 where the following was expressed in the headnote:

'*A judge on having uttered a definitive judgment is therefore* functus officio *so that he cannot thereafter alter, supplement, amend or correct the judgment, except where through some mistake the order did not express the true intention and decision of the court or where it was ambiguous, or where, through an oversight, the court had omitted to include in its order something which was accessory to the principal*".

In the case of EX PARTE WILLIS AND WILLIS what transpired was that-

"*In divorce proceedings between the applicants an agreement between them with reference to their property rights was filed of record as a consent paper*

and embodied in the order of Court. Subsequently, the parties altered the terms of the agreement, and applied to have the whole clause in the consent paper which had incorporated in the order deleted, and the new agreement substituted, and also for correction of the inaccurate description of the property", (my underlining)

What is clear from the papers in this case is that what the appellant sought from the Court *a quo* was:

"5 That prayer 1.3 of the order referred to herein above be hereby varied,

to read, to wit:

"*the applicant be granted unsupervised access and after three (3) months the Social Welfare Department to give a report on whether or not applicant should be granted permanent access to the children*".

It is clear, however, that:

"A.n order as to custody, guardianship or access may always be varied by the court, in its capacity as upper

guardian of all minors. This applies even where the order was made in terms of a consent paper, for no agreement between the parties can prejudice the interests of minors".

in H.R. HAHLO THE SOUTH AFRICAN LAW OF HUSBAND AND WIFE, 4th EDITION at page 470 and 471.

It seems to me that it is open to the parties to approach the Court *a quo* with a view of obtaining a clear and precise order which specifies in detail what the nature of the access is to be particularly taking into account the nature of the supervision and also the fact that the appellant is residing in South Africa whilst the respondent resides in Swaziland. There is a divergence of opinion between the parties of what interpretation should be placed on the wording of the order and

it seems to me that common sense dictates that they should seek clarification and if necessary variation to satisfy the intentions of the parties.

In this regard all the appellant has sought in terms of relief from this court is that '*The Honourable Court should hold that the respondent implement the order*". He did not state

in specific terms that the learned judge erred in failing to grant variation of the order. All he asked for is that "*the Honourable Court should have held that the Respondent implement the order*", that, is not saying that the court erred in not entertaining the application for variation. The application for that relief is not therefore properly before this Court.

It is for these reasons that I am of the view that the appeal must fail as regard the first ground of appeal and also on the second ground of appeal.

In the result the appeal is dismissed with costs.