IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Case No.09/2015

In the matter between:

THANDA MNGWENGWE **Appellant**

vs

NOMFUNDO S. SIBANDZE **1st Respondent**

LANCET LABORATORIES (MANZINI) **2nd Respondent**

Neutral citation: *Thanda Mngwengwe v Nomfundo S. Sibandze and Another (09/2015) [2015] SZSC 37 (29 July 2015)*

Coram: **S.B. MAPHALALA AJA, M.D. MAMBA AJA and S.A. NKOSI AJA**

Heard: 17 July 2015

Delivered: 29 July 2015

Civil Law – Appeal – appellant appealing against an order compelling him to undergo a second paternity test, the first test having excluded him as the biological father of the

child. Where the integrity of the blood sampling is put in doubt, it is in the best interests of the child that a second test be done. Appeal dismissed.

JUDGEMENT

MAMBA AJA

[1] The appellant and the 1st respondent were once involved in a sexual relationship with one another. That is common cause. The first respondent alleges that a child was subsequently born of this relationship. She named the child Siphosethu Maseko because the appellant had introduced himself to her as a Maseko from KwaZulu Natal in the Republic of South Africa.

[2] It is also significant to note that the Appellant denies that he ever introduced himself as a Maseko to the first respondent. He does not, however, deny that he was at the relevant time involved in a sexual relationship with the first respondent. However, the Appellant alleges that during the time that she dated the first respondent the latter was also dating one Mancoba Dlamini. Mancoba Dlamini has also confirmed this fact. This affair, however, was just for less than a month according to the first respondent, as it began on 17 November 2011 and ended on 3rd December 2011.

[3] The child in question herein was born on 03 July 2012. Although there is a dispute as to whether or not the appellant accepted or admitted being the father of the child, the parties agreed to conduct a blood or DNA test to scientifically ascertain whether or not the Appellant was the biological father of the child. It would appear to me that indeed the Appellant was denying having fathered the child, otherwise I do not see or understand why a paternity test would have been necessary if he was not denying being the biological father. But equally so, he was admitting that he could be the biological father.

[4] The blood specimens for the DNA tests were taken at the second respondent's laboratory in Manzini at the instance of the Appellant. This was on 9 August 2012, just about a month after the birth of the child.

[5] It is common cause that the DNA test results conclusively excluded the Appellant from being the biological father of the child. The first respondent was dissatisfied with the results, notwithstanding that she had together with the appellant signed the standard form at the 2nd respondent's laboratory signifying that everything had been done above board during the taking of the blood specimens for the DNA test, she approached the appellant and told him that she was not happy with the

results. She requested him that a second test be done. He refused. The first respondent then filed an application before the Court *a quo* wherein she, *inter alia*, sought the following order:

> '1… Compelling the [Appellant] to undergo a paternity test at the instance and expense of the [1st respondent] and at an independent and/or [1st respondent's] preferred clinic at a date convenient to all parties to be fixed by the above Honourable Court.'

[6] As the basis for her application, the first respondent stated that she reasonably believed that the blood specimen submitted for DNA testing had infact not been that of the appellant but that of his cousin who was also present in the bleeding room in Manzini. The first respondent stated that at one stage she was absent from the said room after she had to go home to get her National Identity Card. When she went home for her card, she left the child with her mother together with the appellant and his cousin in the bleeding room. On her return, her mother informed her that the appellant had called her aside and spoken to her behind closed doors, leaving the child and the appellant's cousin in the laboratory with the nurse. She was informed by her mother that when she returned she found the child crying hysterically and assumed that it was because blood had been extracted or drawn from her. The allegations were confirmed by her mother. The first respondent also stated that on her return she noticed

that the nurse ‘was panicking and very much unstable’. She stated that although blood samples or specimen had been taken from the appellant, this specimen was not that sent for the DNA testing. All these allegations are denied by the nurse who took the blood samples. The Appellant also denies this. In short, both deny any wrongdoing in the taking and submitting of the blood samples or specimen for the DNA or blood tests.

[7] The application was opposed by the appellant who stated that, he, having been scientifically excluded as being the biological father of the child, to subject him to do a second test under the circumstances would constitute an invasion of his privacy, dignity and bodily integrity. He said the tests were done properly and professionally and the first respondent had failed to allege sufficient or compelling facts for the relief she was seeking.

[8] The Court *a quo* delivered its judgment on the application on 30 January, 2015 and found in favour of the first respondent; ie, it ordered that the parties should submit themselves for the DNA testing, to determine the paternity of the child. The appellant appeals against this order.

[9] In his notice of appeal, the appellant argues that the judge in the court *a quo* failed to exercise the discretion vested in him in that he exercised it capriciously and based on a wrong principle. The appellant also states

that the judge based his decision on inadmissible and contradictory evidence and also showed bias in favour of the first respondent. Lastly, the Appellant states in his notice of appeal that the case of the first respondent was merely based on suspicion and this should not have persuaded the judge to make the order that he made.

[10] When the appeal was called on 29 June, 2015, Counsel for the appellant applied for a postponement of the matter to enable the appellant to make an application to lead further evidence in this appeal. Counsel informed the Court that this evidence had been recently discovered by the appellant and was crucial and necessary for a just adjudication of this appeal. We allowed the application and the matter was postponed to the 13th day of July, 2015, and the appellant was ordered to have filed his papers by that date. This was done.

In his affidavit in support of the application to lead new evidence, the appellant states as follows:

> '5. The new evidence shows that the learned judge *a quo* did not exercise the discretion vested in him judicially because he was exercising no discretion at all since he was operating under direction and control by the former Chief Justice and the former Minister of Justice.
>
> …

6.1 On or about 28 April 2015, I learned that the former Chief Justice and former Minister for Justice were interfering with this matter at the High Court. I learned of this from statements made by the Registrar of the High Court Ms Fikile Nhlabatsi.

6.2 I learned that in between the months of October and November 2014, the Chief Justice was insisting that this matter (involving myself and the 1st Respondent) be given to Judge Mpendulo Simelane to hear it. It would appear that this was part of a plan by the former Minister for Justice and the former Chief Justice to have me discredited by being shown to be corrupt. In turn this would have been used as a justification to the Judicial Services Commission not to renew or extend my contract. This was because they viewed me as the Prime Minister's ally;

…

6.4 The Registrar was directed to hand over the file to Judge Simelane who was also ordered to handle the matter. It appears from Ms Nhlabatsi's statements that at some point Judge Simelane expressed frustration after it got revealed that he had met with the former Chief Justice and former

Minister of Justice at the former Chief Justice's residence where he was told to do the case;

6.5 Judge Simelane had at some point early last year or mid-year called Ms Nhlabatsi and confided in her that he did not want to do the case because he had worked with the Commissioner whilst he was the Registrar of the High Court. Judge Simelane had asked Ms Nhlabatsi to take the file and keep it in the hope that it would be forgotten;

6.6 Sometime in October 2014 and after being instructed by the former Chief Justice and the former Minister for Justice to do the case, Judge Simelane informed the Registrar that he was under pressure from the former Minister and the Chief Justice and he was now going to proceed with the case. Following the meeting and the pressure exerted on him by the former Chief Justice and former Minister, Judge Simelane asked the Registrar to call the attorneys for a date and she did so;'

The appellant also states that the relevant file was not kept at the Registry, like all other files at the High Court. He also states 'that the file was allocated to Judge Simelane as soon as the application was issued

and before the filing of any papers in Court'. I do not, frankly, know what is meant by this. Applications are initiated by a notice of motion that is filed with the Registrar of the High Court. The file is only opened once the Notice of Application or Motion is received. This is common practice and common cause.

[11] At paragraph 6.11 the Appellant states the following:

'6.11 The 1st Respondent herself also showed a preference that an aspect of the matter be heard by Justice Simelane. In March 2015 the 1st Respondent applied to the High Court to be granted leave to execute the order granted in her favour notwithstanding the noting of an appeal. In her Founding Affidavit she stated the following: "The Court Order herein was made by the Honourable M. Simelane J and therefore has authority to hear and determine this matter." The 1st Respondent's attorney also reiterated that he wanted the matter to be dealt with by Judge Simelane. I attach an extract from her affidavit marked **"TM2".**'

The Appellant also makes the point that when the first respondent made her application to execute the judgment, on 20 March, 2015, the Duty Judge was Mabuza J and she had the file whilst the Registrar and the first respondent wanted to take it away from her

> to give it to Judge Simelane. Mabuza J had to 'strongly admonish the 1st respondent's attorney for such practice of forum shopping and indicated that she would proceed and hear the application for leave to execute as it is an application that can be granted by any Judge of the High Court. I am advised that the 1st respondent's attorney there and then abandoned the application.'

I note in parenthesis that rule 40 of this Court provides that:

> 'An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from except so far as the High Court or Court of Appeal may order own application… .'

There was therefore no need to apply for leave to execute the judgment.

[12] The Appellant avers that the Judge *a quo* was acting under direction and was not an independent and an impartial Judge as required by the Constitution. He avers further that because of these facts or allegations, he was not given a fair hearing by an independent and impartial judge. The Registrar of the High Court has confirmed all the allegations relating to her.

[13] The trial Judge was also served with the affidavit by the appellant and he has responded thereto. He has denied the allegations made against him by the Appellant. In fact he has gone further and stated that the decision

or judgment he delivered was his and he was not influenced by anyone to render that decision. I am saying he went further than what he was expected or alleged against him simply because there is no allegation by the appellant that the trial judge was improperly influenced or instructed to deliver a certain or specified judgement. All that the appellant has alleged is that the Judge was under the direction of the former Chief Justice of this Court and former Minister for Justice.

[14] The Appellant has emphasised that his case was specifically allocated by the former Chief Justice to judge Simelane. He has, however, not pointed out what was wrong with this allocation. The matter could have been allocated to any judge of the High Court. In my judgment, the appellant's case would be entirely different had he alleged that Judge Simelane was specifically instructed by his handlers to render the judgment he delivered in favour of the first respondent. That, however, is not his case.

[15] I accept of course that what is being insinuated by the applicant is that the decision of the Court *a quo* was not that of the presiding judge but that of his handlers. This is a very serious allegation to make against any judicial officer. Any allegation of impropriety against a judicial officer in handling a case is serious. It can only be legitimately made in those cases where there is clear and cogent evidence in support thereof. Suspicion

can never be enough in such a case. When the appellant says that it would appear that the plan was to have him discredited, I understand him to be saying he suspects that this was the case. Unfortunately though we are left to guess how this plan was going to be executed. The trial judge was not going to declare him the father of the child or even rule that he had had a sexual relationship with the 1st Respondent. That latter issue was not in issue.

[16] The other issue to consider is the fact that the appellant got to know about the allegations he makes on 28 April, 2015. He, inexplicably waited until 29 June, 2015 to make an oral application before the Court to lead this evidence. That is curious to say the least.

[17] In my judgment, even if it were to be accepted that judge Simelane indicated his reluctance to handle the case on account of being overworked or on account of having worked with the appellant in the past, I fail to understand how this could then amount to or be equated to be working under the improper directions of the persons alleged by the Appellant.

[18] I am in total agreement with the appellant that it was totally unnecessary for Judge Simelane in his affidavit to have a prayer that the application by

the appellant must be dismissed with costs. As the judicial officer whose judgement was under scrutiny, he was not a party in these proceedings. He ought to have remained as the impartial and neutral umpire. His role is simply to furnish the information required of him and no more. In *Director of Public Prosecutions vs the Senior Magistrate, Nhlangano and Another, 1987-1995 (4) SLR 17 at 22G-I* Hull CJ stated the position as follows:

> 'Criminal trials, and applications for review, are of course not adversarial contests between judicial officer and prosecutor. It is wrong and unseemly that they should be allowed to acquire that flavour. Ordinarily on a review, the judicial officer whose decision is being called into question is cited as a party for formal purposes only. He will have no need to do anything beyond arranging for the record to be sent up to the High Court, including any written reasons that he has or may wish to give for his decision.
>
> It may be necessary, very occasionally, for him to make an affidavit as to the record. This is, however, to be avoided as far as possible. It is, generally, undesirable for a judicial officer to give evidence relating to proceedings that have been taken before him. In principle, there may be a need for a Magistrate to be represented

> by counsel upon a review, if his personal conduct or reputation is being impugned but these too will be in exceptional circumstance.'

Although the Learned Chief Justice in the above quoted passage refers to criminal reviews, these remarks equally apply in cases such as the present appeal.

[19] Inspite of this unguarded remarks by the trial judge, I am not satisfied that these remarks taken alone or cumulatively with the rest of the allegations made by the appellant establish that the judge acted improperly in handling the trial herein. The evidence is just not there. What remains is a serious suspicion by the appellant. The suspicion, I have no doubt has been honestly made or arrived at but it remains a suspicion and nothing more. Evidence, and cogent evidence at that, is required to found a ground of impropriety is such a case.

[20] It is fair to say that the Appellant's complaint is all surmise, conjecture insinuations and innuendos. Needless to say that allegations of impropriety against a judicial officer must not only be honestly made but must be reasonable as well. It must be grounded on tangible and verifiable facts. The appellant has also made this unfortunate and outlandish statement:

> 'Despite the fact at the time he heard this matter, Judge Simelane was already under investigation by the Anti-Corruption Commission of which I am the Commissioner, he opted to proceed and hear the application. Furthermore and more importantly he was arrested by the Commission afterwards for among other things sitting and hearing the matter involving the former Chief Justice and the Swaziland Revenue Authority when in fact he had dealt with the matter whilst he was the Registrar. For the reasons I did not and still do not expect the Judge to be independent and impartial when dealing with my matters.'

If the Commission headed by the appellant was indeed investigating the judge at the time, one would have expected the appellant to have moved his recusal at the time. He did not do so. This application is nothing but a recusal application after the judge has finalised the case. Besides, the alleged details of the earlier investigations are not disclosed and this is only made in a replying affidavit. On the second issue, it is common cause that the judge was arrested and is on suspension now. All this occurred after he had tried the matter involving the parties herein. That he might have acted improperly in that case cannot be automatically transferred to this case.

[21] Before I leave this application to lead further evidence by the appellant, I think it is important to note that in his replying affidavit, the appellant did not really advance his case. What was supposed to be a replying Affidavit is, in my judgment an argumentative piece. That is better left for Counsel to present at the proper time.

[22] For the above, reasons I would dismiss the application by the appellant. There is no evidence that the trial judge was improperly influenced in his conduct of the matter herein. I now turn to the substance of the appeal as originally filed.

[23] From the outset, I must state that the appellant has correctly identified the question that must be asked and answered in this appeal. That question is: Did the first respondent make out a sufficient case for the relief that she sought and obtained in the court *a quo*? If the answer is in the negative, then this appeal must be upheld but if the answer is in the affirmative, the appeal must fail.

[24] Stripped to its bare essentials, the case by the first respondent in the court *a quo* was as follows.

24.1 At the material time she was involved in a sexual relationship with the Appellant. They had sexual intercourse and she fell pregnant

as a result thereof. She gave birth to the child in question herein. When she fell pregnant she was not involved in any sexual relationship with anyone else other than the appellant, therefore the child can only have been fathered by him.

24.2 The Appellant admits having had sexual intercourse with the first respondent at the relevant time but disputes that he was the only one that did so as Mancoba Dlamini was also dating her. The appellant accepts of course that he might just be the biological father of the child and thus he submitted himself for blood or DNA testing to determine the issue of paternity.

[25] Both parties firmly believe in the scientific accuracy and reliability of the said test and both believed that such test would conclusively determine the issue of paternity. But when the results of the paternity test excluded the appellant from being the biological father of the child, the first respondent then realised that there must have been interference or impropriety in the blood sampling. She laid out her grounds for her suspicion. These include the fact that at one stage she and her mother were out of the bleeding room leaving the baby, the appellant and his cousin with the nurse in there. On her return she noticed the nurse acting fidgety or suspiciously. She says that the appellant had arranged for the blood sampling and is likely to have colluded with the nurse not to

analyse the blood taken from the appellant but that drawn from his cousin.

[26] Finally she submitted that it is in the best interests of all parties to undergo a second paternity test. The Appellant says that the first respondent case was based only on suspicion and to order him to undergo a second paternity test would be a violation of his right to dignity and personal privacy. He argues that the blood sampling was correctly and professionally done and there is no justification for a second test.

[27] The second respondent has submitted that the DNA and in particular the blood sampling was properly done. Second respondent, however, submits that a second paternity test is desirable in order to bring closure to all parties concerned. The second respondent also suggested that the second test must be done at a neutral venue so as to determine also whether or not the second respondent conducted the blood specimen or sampling correctly.

[28] This Court fully acknowledges and respects the rights of the appellant to his dignity and privacy. These are Constitutional rights. The Rights of the child also come to the fore in this equation. These rights are Constitutional too. One of the rights of the child is the right to know his

or her parents. See in particular clause 29(7) of our Constitution. Clause 29(3) provides that a 'child has a right to be properly cared for and brought up by parents or other lawful authority in place of parents.'

[29] Again, sections 17 and 18 of the Children Protection and Welfare Act 6 of 2012 provide as follows:

> '17. A child has a right to a reasonable provision out of the Estate, life, insurance or pension fund of a deceased parent whether or not born in wedlock or orphaned.
>
> 18 (1) A parent or guardian, whether-
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> (a) married or not; or
>
> (b) the parents of the child continue to live together or not,
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> shall not deprive a child of his welfare.

Section 134(2) also provides that a child shall be assisted by his or her parent or guardian in any criminal proceedings.

I have quoted these provisions of our Constitution and Statute Law to demonstrate how the legislature has placed a value on the importance of parentage and the rights of the child that inures from such.

[30] The Court *a quo*, adequately and in a balanced way examined the rights of the appellant vis-a-vis those of the child. It also emphasised the role of the Court in balancing and adjudicating on such rights. It came to the conclusion that, rightly in my judgment, it was in the best interests of both parties and the administration of justice in general that the appellant be ordered to undergo a second blood or DNA test to determine the paternity of the child. I further fully align myself with the remarks of the Court in *M v R 1989(1) SA 416 (OPD)* that in the pursuant of justice and the truth, the court as the upper guardian of all minors has a duty to act in the best interests of the child; it being upper most in the inquiry.

[31] I note that in terms of section 198(c) of The Children's Protection and Welfare Act a children's court is empowered to take a person's refusal to submit to medical test as evidence of parentage. (This is of course not a Children's Court) but this provision is instructive on the issue of parentage.

[32] In conclusion, I accept that the evidence upon which the first respondent's case is based at best on circumstantial evidence and at worst on suspicion. It was very strong nonetheless and on a balance of probabilities, tipped the scales in her favour.

[33] For the above reasons, I would dismiss the appeal but vary the order of the Court *a quo* and order that the blood samples or specimen be conducted by another laboratory other than the 2nd Respondent herein. There is no order for costs of this appeal. It is so ordered.

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M.D. MAMBA AJA

I agree.

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S.B. MAPHALALA AJA

I also agree.

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S.A. NKOSI AJA

For Appellant: Mr. M. Magagula

For 1st Respondent: Mr. N.E. Ginindza

For 2nd Respondent: Mr. N.D. Jele