

**IN THE SUPREME COURT OF ESWATINI**

**JUDGMENT**

**Case No. 06/2019**

**HELD AT MBABANE**

In the matter between:

**SIKHUMBUZO DLAMINI**

**Appellant**

and

**SAMKELISIWE DLAMINI**

**Respondent**

**Neutral Citation:** *Sikhumbuzo Dlamini vs Samkelisiwe Dlamini* (06/2019)  
[2021] SZSC 50 (04/06/2021).

**Coram:** **M.J DLAMINI JA, R.J. CLOETE JA, AND S.J.K  
MATSEBULA JA**

**Heard:** 24TH March 2021 and 14<sup>th</sup> April, 2021

**Delivered:** 4<sup>th</sup> June, 2021

**SUMMARY**

*Civil Law - Procedure - Appeal from High Court as a Court of first instance - Court a quo issued custody and maintenance orders in respect of the children of th Appellant and Respondent - the Children 's Protection and Welfare Act examined - Children's Court is established under the Act and has jurisdiction in custody and maintenance matters in respect of Children.*

*Held - the High Court has no jurisdiction over maintenance, custody and welfare of children as a Court of first instance.*

*Held further - the Supreme Court has no jurisdiction to hear and determine the merits of the appeal because the appeal is based on judgements and orders issued by a Court that had no jurisdiction.*

*Held further - if the litigants wish to pursue the matter further, the matter should start de nova at the Children's Court- A Rule of the High Court is subservient to an Act of Parliament.*

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**JUDGMENT**

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**S.J.K. MATSEBULA - JA**

- [1] The matter relates to the custody and maintenance of three children. In this matter there is both an appeal and a cross-appeal from the judgement of the High Court. The proceedings were instituted at the High Court as a court of first instance. Several applications were heard and determined by the Court

*a quo* regarding the custody, maintenance of the children, interpretation of the judgement of the Court *a quo* and contempt of the Court *a quo*'s custody orders.

### **HISTORICAL BACKGROUND**

[2] The parties are married to each other and from the marriage three children were born. The marriage still subsists but the parties are living separate from each other after experiencing serious matrimonial disagreements and loss of affection for each other. Actions for divorce orders have been instituted in the Magistrates Court.

[3] In an urgent application to the High Court, this being where the proceedings were being instituted for the first time, the Respondent's attorney herein (Applicant at the High Court) at paragraph 2 of the certificate of urgency, states:

**"The matter is urgent because of the suffering of the children of the marriage who are subjected to (*sic*) because of the limited resources available to me to take care of their daily needs. There is an urgent need for this Honourable Court to intervene in the enforcement of the statutory protection prescribed by the Children's Protection and Welfare Act 6/2012 which places a responsibility on the parents to protect children from neglect, abuse, exploitation and instead of**

**demands that they be provided with guidance, care and proper maintenance"**

[4] The above is quoted for the purpose of showing that the Respondent's attorney was aware of this Act, recognised its validity and acceptance to be bound by its provisions. In the same breath, the Appellant became aware of the provisions of this Act.

[5] At the Court *a quo*, in one of the pleadings in that Court, in a Founding Affidavit signed by the Appellant's counsel at paragraph 5, it was submitted as follows:

***"5. The above Honourable Court has jurisdiction to hear and dispose of the matter in that the dispute between the parties hereto is founded on a cause of action within the jurisdiction of the Court"***

[6] The Respondent in its Answering Affidavit submitted as follows at paragraph 9:

***"9. I submit that this Honourable Court has jurisdiction to hear and determine this matter because it made the Court order whose interpretation is sought".***

The Court *a quo* having assumed jurisdiction as submitted by the parties, heard and determined the matter.

[7] The final orders of the Court *a quo* in the litany of applications and counter applications filed before that Court, was that the:

**custody of the children was awarded to the Respondent herein;**

(b) **amount of maintenance was raised from the sum of E3, 500.00 to ES, 000.00; and**

(c) **Commencement of the awarded maintenance of ES, 000.00 would be the 1<sup>st</sup> of March, 2019 and the actual payment would be payable before the end of March or beginning of April, 2019** (though the Respondent holds that the award is payable on the pt March, 2019).

### **THE LAW**

[8] When the Appeal and Cross-Appeal commenced in this Court on the 24<sup>th</sup> March, 2021, the Court asked the parties to address or make submissions on the jurisdiction of the Court and by extension the jurisdiction of the High Court on matters of custody and maintenance of children. During submissions, the Appellant submitted that, whatever the determination on the question of jurisdiction would be, the Appellant was agreeable to continue paying the sum of E8,000.00 per month as maintenance for the children.

[9] To allow the Counsel sufficient time to submit on the question of jurisdiction, the Court Ordered a postponement. The Order specified that the matter was postponed to 14<sup>th</sup> April, 2021 at 9.00 A.M for that purpose. While both parties filed documents in support of their suppositions, neither appeared at the allocated time on the date in question.

(10) Rule 33 of the Court of Appeal Rules regulate the power of this Court in such matters as the present and I quote it in full:-

**"Power of Court of Appeal to amend, admit further evidence, or draw inference of fact- Civ. Form 5.**

***33. (1) No party to an appeal shall have the right to adduce new evidence in support of his original case; but for the furtherance of justice, the Court of Appeal may where it thinks fit allow or require new evidence to be adduced.***

***(2) A party may, by leave of the Court of Appeal, allege any facts essential to the issue that have come to his knowledge after the decision from which the appeal is brought and adduce evidence in support of such allegations.***

***(3) Even where the notice of appeal seeks to have part only of the judgment re-versed or varied, the Court of Appeal may draw any inference of fact, give any judgment, and make any order which***

ought to have been made and may make such further or other order as the case may require, and such powers may be exercised in favour of all or any of the respondents or parties whether or not they have appealed from or complained of the decision under appeal.

(4) *The Court of Appeal may make such order as to the whole or any part of the costs of the appeal as may be just."*

*(my underlining).*

The powers conferred on the Court is that it can make any order as the case may require in furtherance of justice whether or not the parties have raised the issue.

[11] I now turn to address the question of jurisdiction as it is the issue that should be resolved first before any other issues can be considered.

[12] First, the question of jurisdiction of a Court to hear and determine a matter may be raised by a Court *mero moto* in the interests of justice. It's trite that all determinations, final or interlocutory decisions or orders should be made by a tribunal or Court with the necessary jurisdiction or jurisdictional power. The Court has a right to question itself whether or not it has the legal right to hear the matter, that is, jurisdictional power to hear the matter placed before it.

[13] I believe the following case from Lesotho equally represents our law in Eswatini in this regard. The Land Court of Lesotho in, **Motibele Tseliso v Matekase Mampho, LC/APN/152/2014**, an objection of lack of jurisdiction was not raised at the first Court appearance as may have been required by the Rules. The Court had to answer the question whether an objection can be waived in order to prevent the Court from entering a valid judgement. The Court held that the objection or the issue of jurisdiction cannot be waived and can be raised by the Court *mero motu*. At page 6 paragraph 10, the Court stated as follows -

**"[10] A Court has power to raise *mero motu* the special pleas of jurisdiction, non-joinder and mis-joinder, and if proven valid, must decline jurisdiction, whether or not the plea of lack of jurisdiction has been raised by the Respondent/defendant or *proprio motu* stay the proceedings until an interested party has been joined or intervened or has waived the right to be joined or intervene, or has consented to be bound by the outcome of the case."**

[14] And at paragraph [11] (*supra*) the Court further stated as follows -

**"[11] Since the special plea of jurisdiction is not confined to the *initio lites* stage of the proceedings but remains alive up to**



**the stage of appeal proceedings, there is no merit in the contention that it cannot be raised after the first appearance. In Attorney General v Kao LAC {2000-2004} 656 at paragraph !131 - (18) the Court of Appeal held that the defence of lack of jurisdiction may be raised at any time, even on appeal. Failure by a litigant to raise this defence does not have the effect of conferring jurisdiction where none exists".**

[15] This Court agrees with the view and decision in the Motibele Tseliso case, *supra*, that the question of jurisdiction of the Court is alive through all the levels of the proceedings inclusive of the appeal level, that is, from subordinate Courts, including tribunals, to the Supreme Court.

[16] The Court will now examine the statutory provisions to ascertain where and on whom it places jurisdiction on children's protection and welfare matters.

### **THE PROTECTION OF CHILDREN AND WELFARE ACT, 2012**

[17] This Act was promulgated as recently as 2012 and its objective being to extend the provisions of Section 29 of the Constitution (Rights of the child) and other international instruments, standards and rules on the protection, care, welfare and maintenance of children. This means it's an Act based on and implementing the Constitution of Eswatini and related international

instruments such as conventions and protocols and therefore no Court in this country should take it lightly or disregard it. The Act is born from and is a direct descendant of the supreme law, the Constitution of Eswatini.

[18] I draw attention to a few but pertinent provisions of the Act in support of my decision in this case which, if Counsel for the parties had paid attention to, would have saved the warring parties a lot of money and incidental expenses and time. This aspect of failure to pay attention to detail or to these provisions of the Act has a direct effect on the awarding of costs.

[19] Section 213 of this Act stipulates as follows

**"App lication for maintenance order**

213. (1) **The following persons may apply to the Children's Court for maintenance order of a child-**

- (a) **a child;**
- (b) **a pa rent of a child;**
- (c) **a guardian of a child;**
- (d) **relative of the child;**
- (e) **a chief;**
- (f) **a social worker; and**
- (g) **any other person.**

*(my underlining).*

[20] Section 132 provides as follows -

**"Jurisdiction of the Children's Court.**

*132 (1) Every Magistrate's Court shall be a Children's Court within its area of jurisdiction and shall have jurisdiction to hear and determine matters in accordance with the provisions of this Act".*

*(underling is mine/or emphasis on the question of jurisdiction and the High Court is excluded.)*

[21] Section 214 gives guidance of what the Children's Courts should consider when faced with an application for maintenance -

**"Consideration for maintenance orders**

214. *The Children's Court shall consider the following when making maintenance orders-*

- (a) the source of income and wealth of both parents of the child or of the person legally liable to maintain the child;*

- (b) *any impairment of the earning capacity of the person with a duty to maintain the child;*
- (c) *the financial responsibility of the person with respect to the maintenance of other children;*
- (d) *the cost of living in the area where the child resides;*
- (e) *the rights of the child under this Act; and*
- (I)** *and any other matter which the Children's Court consider relevant." (underling for emphasis).*

[22] From the foregoing it is crystal clear that the High Court has no jurisdiction to hear and determine the matter between the parties as a court of first instance. The High Court can only hear and determine custody and maintenance issues on review or appeal from the Children's Court. The common law principle that the High Court is the upper guardian of Children is overtaken by this Act. I must hasten to point out that this *moot* question was not put forward to Counsel for argument and proper digestion. It could, possibly, be argued though that the upper guardianship of the High Court could be invoked in special circumstances where the Children's Court has failed to exercise its jurisdictional powers. But it can never be emphasised more that it is universally accepted that statute law, legislation or Acts of Parliament prevails over common law. If there is a conflict between statute

law and the common law, statute law overrides the common law. Statute law can change common law but the reverse is not true and statutes law trumps Rules of other statutes.

### **INCIDENTAL ISSUES TO JURISDICTION IN THE PRESENT CASE**

[23] One of the disputes in this matter concerns the commencement of a maintenance order as issued by the Court *a quo* which said it was effective from pt March, 2019. The Appellant argued in the Court *a quo* that such order meant that the first payment should be made at the end of March or at least on the 1<sup>st</sup> of April. This meant the award starts accruing from the 1<sup>st</sup> of March and becomes due at the end of March. The Respondent on the other hand held that the Appellant had committed the offence of contempt of Court as the Appellant failed to pay on the 1<sup>st</sup> of March but at the end of March or the beginning of April.

[24] Had the matter been instituted at the Children's Court, this dispute would not have arisen because Section 221 of the Act provides -

**"Enforcement of maintenance orders**

**221 (1) Maintenance orders shall be enforced thirty days after the order has been made".**

[25] The second dispute in this regard relates to a report made by a social welfare officer which was filed before this Court (socio- economic report) but not at the High Court. Counsel for the Appellant seemed lost as to what this Court should do with the report as it had not been introduced at the High Court and talked to, and even suggested that this Court should disregard it. The Act addresses itself to this issue where in Section 215 it states as follows -

**"Request for social enquiry report.**

215. *The Children's Court may request that a social worker prepares a social enquiry report on the issue of maintenance and submit it to the Children's Court for consideration be fore the children's Court makes a maintenance order".(My underlining)*

[26] The other issue that does not come out clearly from the judgment of the Court *a quo* is whether Section 228 was considered before the maintenance order was issued and the Section reads in part -

**"Joint maintenance of child.**

228. *Unless the Children's Court otherwise directs, and subject to any financial contribution ordered to be made to any other person, the following presumptions shall apply with regard to the maintenance of a child-*

- (a) where the parents of a child were married to each other at the time of the birth of the child and are both living, the duty to maintain a child shall be their joint responsibility;**
- (b) .....,**

[27] Finally, important and applicable to this matter is Section 229, as the parties sought to make it an issue that divorce proceedings were pending at the Magistrate's Court, which states as follows -

**"Maintenance during matrimonial proceedings.**

**229. The Children's Court shall have powers to make a maintenance order, whether or not proceedings for nullity, judicial separation, divorce or any after matrimonial proceedings have been filed by the parent of a child or during such proceedings or after a final decree is made in such proceedings".**

## CONCLUSION

[28] This Court is satisfied that -

- (a) this matter should have been instituted under the Children's Protection and Welfare Act, 2012 and commenced under the Children's Court which is defined as every Magistrates Court;
- (b) it has the power *mero motu* to raise the issue of jurisdiction of the Court in any matter before it and that the issue of the Court's jurisdiction remains alive during the proceedings and can be raised even at the Court of Appeal proceedings;
- (c) the High Court (court *a quo*) had no jurisdiction to hear and determine the disputes in this matter as a court of first instance in the face of the Children's Protection and Welfare Act, 2012; and
- (d) it is just to endorse the Appellant's undertaking made by Counsel, Mr Z. Jele to the effect that in accordance with the principle of "***best interests of the child***", the Appellant undertakes to continue contributing towards the maintenance of the three children in the sum of eight thousand Emalangeni (E8,000.00) per month.

[29] Accordingly the Court issues the following order:




- (a) The High Court, as a court of first instance has no jurisdiction to hear and determine custody and maintenance matters respecting children.
- (b) All the orders and judgments issued by the High Court respecting custody and maintenance of the children are set aside.
- (c) The Respondent in terms of an undertaking given from the Bar shall continue to contribute a sum of eight thousand Emalangeni (E8,000.00) per month towards the maintenance of the children subject to any subsequent order issued by the Children's Court.
- (d) The proceedings in this case shall, should any of the parties wish to pursue it again, be commenced *de novo* at the Children's Court.
- (e) No orders to costs, each party pays it's own costs.


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**JUSTICE OF APPEAL**

I agree

  
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**I.J. DLAMINI**  
**JUSTICE OF APPEAL**

I agree



R.J. CLO <sup>1</sup>  
JUSTICE Q ,APPEAL  
<sub>Y</sub>

**For the Applicants:** Z. JELE FROM ROBISON BERTRAM ATTORNEYS

**For the Respondent:** SABELO DLAMINI FROM MAGAGULA AND  
HLOPHE ATTORNEYS.