

IN THE SUPREME COURT OF ESWATINI

Case No. 43/2024

In the matter between:

FAITH MTHANDAZO NKALA (*NEE* LUNGU)

Appellant

and

**PERFECT NKALA
THE DEPUTY PRIME MINISTER'S OFFICE
THE ATTORNEY GENERAL N.O.**

**1st Respondent
2nd Respondent
3rd Respondent**

NEUTRAL CITATION: *Faith Mthandazo Nkala (nee Lungu) v Perfect Nkala and Others (43/2024) [2025] SZSC 139 (6th February 2025)*

CORAM: J P ANNANDALE JA, M D MAMBA JA *et* J M VAN DER WALT JA

HEARD: 6 February 2025

DELIVERED: 6 February 2025 (*Ex Tempore*)

Summary

Jurisdiction of the High Court – Children – restated that the Children’s Protection and Welfare Act, 2012 does not oust the jurisdiction of the High Court

*Appeals – Appealability of orders or judgments in terms of **Rule 43** of the Rules of the High Court – restated that same are appealable without leave*

Civil Procedure – Contested socio-economic reports – held that challenges to report in casu such that report should have been ventilated, tested and assessed through the medium of oral evidence – appeal upheld and ordered that matter be heard de novo

EX TEMPORE JUDGMENT

VAN DER WALT, JA

- [1] This is an urgent appeal, rendered urgent by the fact that the interests of minor children are involved and in particular, in this case the children are not in school because the parents, who are adults, appear to be unable reasonably to settle their differences.
- [2] The parties are, and I would refer to them as, Mr and Mrs Nkala. Mrs Nkala is the appellant and Mr Nkala is the 1st Respondent. The 2nd and 3rd Respondents are represented by the Attorney General who appears to me is holding no more than a watching brief than anything else.
- [3] In this matter matrimonial proceedings were initiated in July 2023 by Mr Nkala who issued out summons in the High Court wherein the main relief sought was a decree of divorce and reasonable access to the

parties' minor children. Subsequently, we have been advised from the Bar, Mrs Nkala filed a special plea pertaining to jurisdiction and the Court's major concern is that nothing further appears to have happened in this matter.

[4] Mrs Nkala filed an application in terms of **Rule 43** of the **Rules of the High Court** seeking diverse payments and *interim custody pendente lite*. The order granted by the High Court was to award *interim* custody to Mr Nkala and to refer the issue of contribution to oral evidence. This culminated in an appeal noted by Mrs Nkala. There are multiple grounds of appeal primarily concerning custody and a socio-economic report filed by the office of Deputy Prime Minister in respect thereof.

[5] Mrs Nkala filed an application for urgent enrolment of the appeal which I heard sitting as a single Judge and which culminated in urgent enrolment being granted as well as related condonation and leave orders to ensure that the papers are in order for the hearing of the appeal. It needs to be emphasized that the accommodating approach adopted by the Court therein was occasioned by the paramount consideration of the best interests of the minor children and this should

not be seen as a precedent for laxity as far as adherence to the Rules of this Court is concerned.

[6] Before Court, on hearing the main appeal, the first preliminary issue arising concerns the jurisdiction of the High Court, more so since the Court has been made aware of contemporaneous custody and maintenance proceedings in the Magistrate Courts, evidently sitting as Children's Courts in terms of the **Children's Protection and Welfare Act, 2012**. It was held by this court sitting in its review jurisdiction under **section 148(2)** of the **Constitution of the Kingdom of Eswatini, 2005** that the case of *Sikhumbuzo Dlamini vs Samukelisiwe Dlamini (6) 2019 [2021] SZSC 50 (4 June 2021)* which was to the effect that the said Act ousts the jurisdiction of the High Court, had been decided erroneously and that the High Court's jurisdiction is not ousted. The reference of the review judgement, which regrettably does not appear on *eswatilii*, is *Samukelisiwe Dlamini vs Sikhumbuzo Dlamini (70/19) [2022] SZSC 03 (14 February 2023)*. It is trusted that this judgment of this Court herein would be duly reported on *eswatilii*.

[7] A second preliminary issue arising pertains to **Rule 43** and whether these judgments are appealable without leave. This question was answered in the affirmative by this Court in *Mvuselelo Fakudze vs Millicent Fakudze (55/11) [2012] SZSC (31 May 2012)* and I see no reason to deviate from that judgment or the authorities cited therein.

[8] Moving onto the merits of the appeal, it was strikingly conspicuous from the outset that the hotly contested and challenged socio-economic report was not ventilated, tested and assessed through the medium of oral evidence. This single factor is decisive of the appeal and accordingly the following order is made:

1. The appeal is upheld.
2. The judgment of the Court *a quo* is vacated and it is ordered that the matter be heard *de novo* in the High Court before another Bench including oral evidence on all contentious issues.
3. Costs are to be costs in the cause in the divorce action.

4. The Registrar of the High Court is directed to enroll the special plea filed in the divorce action for hearing at the soonest reasonable opportunity.



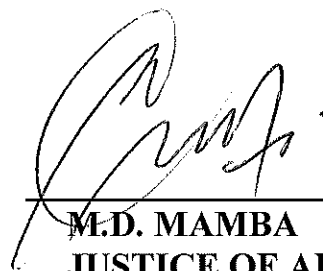
J.M. VAN DER WALT
JUSTICE OF APPEAL

I agree



J.P. ANNANDALE
JUSTICE OF APPEAL

I agree



M.D. MAMBA
JUSTICE OF APPEAL

For the Appellant: Mr M Donga of S.V. Mdladla & Associates
For the First Respondent: Mr M Mabila instructed by Mngomezulu
Attorneys
For the Second and Third Respondents: Mr B Dube of the Chambers of
the Attorney General