IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CASE NO: 2204/2022**

In the matter between:

ZINHLE MKHONTA (NEE LUKHELE) **APPLICANT**

And

MUZI DLAMINI **FIRST RESPONDENT**

MAGISTRATE M. DLAMINI N.O **SECOND RESPONDENT**

PRINCIPAL SECRETARY, DEPUTY

PRIME MINISTER'S OFFICE **THIRD RESPONDENT**

ATTORNEY GENERAL **FOURTH RESPONDENT**

Neutral citation : *Zinhle Mkhonta (nee Lukhele) v Muzi Dlamini & 3 Others (2204/2022)[2023] SZHC 351 (07/12/23)*

CORAM: **B.S DLAMINI J**

DATE HEARD: 14 November 2023

DATE DELIVERED 12 December 2023

Summary: *Review proceedings-Applicant contending that there are gross irregularities in the decision taken by Second Respondent in granting custody of a two year old child to the First Respondent. Applicant alleging that Second Respondent misapplied the provisions of the Children Protection and Welfare Act, 2012.*

Held; *Application for review has merit. Court accordingly refers matter back to the Court a quo for proper application of the provisions of the Children Protection and Welfare Act, 2012.*

JUDGMENT

INTRODUCTION

[1] Before Court is an application for review in which Applicant seeks an order reviewing, correcting and/or setting aside the decision taken by

the Second Respondent on the 14th November 2022. The parties before Court, namely Applicant and First Respondent, are each contesting the right to be awarded custody of a minor child born out of wedlock between them.

[2] The decision taken by Second Respondent on the 14th November 2022 is as follows;

"1. **The Applicant (now First Respondent) shall have custody of the minor child namely Ungangatsi Bhalashile Mkhonta.**

2. **The parties shall both have the rights and responsibilities to make important decisions regarding the minor child.**

3. **The 1st Respondent (now Applicant) shall be entitled to have reasonable access to the minor child at least two weekends in a month and on some school holidays.**

4. **The Applicant and the 1st Respondent is [are] ordered to cooperate and work together towards conducting a DNA test and thereafter causing the correct surname to be**

entered in the Register of Births in line with the outcome of the DNA results.

5. **The parties are further ordered to rename the minor child with acceptable names in the society."**

[3] The above highlighted orders are the subject of the present review application. Applicant has advanced a number of grounds to support the review application. In paragraph (24) of the Founding Affidavit, it is alleged by Applicant that;

"**24.1 The minor child involved herein is born between me and the 1st Respondent out of wedlock. The Respondent is married and I am widowed. Therefore, the best interests of the child rests with him (child) being in my custody that [than] living with the Respondent's family.**

24.2 The child legally belongs to my marital family, despite the fact that biologically he is fathered by the Respondent. The custody of the child vests with my in-laws. They were never involved even in the Application in the Court *a quo*.

24.3 The sole reason relied upon by the Respondent in the Court *a quo*, why he wanted custody of the child was that he had, both in terms of Swazi Law and Custom and courteous engagements, tried to obtain the custody of the minor child. The Court *a quo* automatically became constitutionally handicapped to entertain this matter as a customary and constitutional issue had arisen. This issue was raised, but was dismissed by the Court.

24.4 The child involved herein is still an infant (3 years) now and is not in a position to exercise his rights in terms of section 200 (4) of the Children's Protection and Welfare Act, 2012.

24.5 The 1st Respondent has shown no interest to the minor child involved herein, since conception till date. He has never seen nor requested to be shown the child. This is very contradictory with the application of doctrine of best interest of the child.

24.6 The Social Welfare Officer never conducted a socio-economic assessment but showed clearly from the first day that she was conflicted and bias against me."

[4] Applicant further contends that the child is of a tender age and that it would defeat the ends of justice if he were to be taken away from her.

FIRST RESPONDENT'S SUBMISSIONS

[5] In response to the application, First Respondent strenuously argued that there is no irregularity whatsoever in the decision taken by the Second Respondent. In answer to Applicant's grounds for review, First Respondent stated that;

"29.2 The Court *a quo* having regard to the arguments advanced, dismissed the point on jurisdiction and directed that the matter should heard on the merits. There was no reviewable irregularity committed by the court in this respect.

29.3 The second ground of review pertains to an order of court that had not been prayed for in the notice of motion. The applicant has not disclosed the order complained of and

accordingly this ground of review must be rejected. In any event, the court has a discretion to issue orders in respect of issues that were raised in argument, where the dictates of justice and prudency so require.

29.4 The third ground of review is that the court relied on a flawed socio economic report. A reading of the judgment of the court negates this conclusion. The court, as required, made reference to the socio economic report but in the main relied upon the arguments made by counsel at the hearing of the matter.

29.5 The next ground or [of] review relates to what is described as ignoring the provisions of the Children's Protection and Welfare Act. Not only is this not a valid ground for review or appeal, but it lacks substance in that the court did consider the provisions of the Act as well as the applicable constitutional principles.

29.6 On the next supposed ground [of] review, it is being suggested that the court ignored principles pertaining to the best interest of the child. Once again, this ground is meritless, the court dealt with the principles of the best interest of the child in the course of its judgement. At the hearing of this matter, the court will be referred to the specific paragraphs in the judgment.

29.7 The last ground of review pertaining to the order of the court has already been addressed in the preliminary paragraphs. I need not say anything further."

ANALYSIS AND CONCLUSION

[6] Our Courts have sought to draw a distinction between two categories of errors which may result to different legal outcomes in review proceedings. In **VMB Investments (Pty) Ltd v. Nyembe And Another (22/2014) [2016] SZSC 60 (30 June 2016)**, the Supreme Court held that;

"[20] In my view, the Swaziland Revenue Authority case clearly draws a distinction between a misdirection (error) of law

which is not reviewable, and a misdirection (error) of law which is capable of review. As regards the latter, the Supreme Court's determination of the merits of a dispute for the first time on appeal (where the trial court had not done so) constituted a serious procedural defect or irregularity. The authorities referred to by Dlamini AJA in the President Street Properties case (supra) also emphasize that a distinction must be drawn. I will not go on to discuss the other decisions of this Court as the two cases referred to above clearly set out the view or approach that it has authoritatively taken on reviews in terms of section 148.

[21] Further, in my view the decisions in the Swaziland Revenue Authority and President Street Properties cases are consistent with the common law position on review. This court in the case of *Takhona Dlamini v President of the Industrial Court And Another, Civil Appeal Case No.23/1997,* approved as persuasive and adopted as the position in this jurisdiction the principles laid down in *Hira and Another v Booysen and Another 1992 (4) SA 69*; *Local Road*

Transportation Board and Another v Durban City Council and Another 1965 (1) SA 586 (AD) **and** *Goldfields Investments Ltd and Another v City Council of Johannesburg and Another 1938 TPD 551* **namely;**

> **"As would appear from a number of the cases to which I have referred, the courts have often relied upon a distinction between;**
>
> **(a) an error of law on the 'merits' and;**
>
> **(b) one which causes the decision-maker to fail to appreciate the nature of the discretion or power conferred upon him and as a result not to exercise the discretion or power or to refuse to do so. A category (a) error ...has been held not to be reviewable, whereas a category (b) error ...has been held to be a good ground for review at common law (per Corbett CJ in Hira and Another)"**

[7] In **Ngwenya Glass (Pty) Ltd v Presiding Judge of the Industrial Court of Swaziland and Others (3206/2008) [2013] SZHC 348 (28 February 2013,** the Court (per M. Dlamini J), held that;

> **"[14] Ota J.A in** *James Ncongwane v Swaziland Water Services Corporation (52/2012) [2013] SZSC 65* **expounding on the common law grounds for review tabulated as follows;**

"It is overwhelmingly evident from the afore-going that the common law ground for review permitted by section 19 (5) of the Act, falls within the purview of decisions arrived at in the following circumstances;

1. **arbitrary or capriciously; or**
2. **mala fide; or**
3. **as a result of unwarranted adherence to a fixed principle; or**
4. **the court misconceived its functions; or**
5. **the court took into account irrelevant considerations or ignored relevant ones; or**
6. **the decision was so grossly unreasonable as to warrant the inference that the court had failed to apply its mind to the matter; or**
7. **an error of law may give rise to a good ground for review."**

[8] The grounds for review mentioned in 1 to 6 of the *James Ncongwane judgment* can take place when the functionary or decision-maker is determining the 'merits' of a matter. The distinction sought to be

drawn between errors of law on the merits and errors of law on failure to exercise discretion properly can, practically and realistically become blurred. It is for this reason that many legal authorities have unequivocally stated that the distinction between an appeal and a review has become blurred and may only exist in theory.

[9] In the context of Eswatini, the powers of review have been expressly expanded by the supreme law of the land. The High Court has not only been granted powers confined to ordinary or common law review, but within the context of exercising these powers of review, the Court has been given additional 'supervisory powers'. The only practical method for the High Court to exercise 'supervisory powers' would be within the 'review' context. In this regard, it is provided in Section 152 of the Constitution of Eswatini, 2005 that;

Review and Supervisory Powers of the High Court

"The High Court shall have and exercise review and supervisory jurisdiction over all subordinate courts and tribunals or any lower adjudicating authority, and may, in exercise of that jurisdiction, issue orders and directions for the purpose of

enforcing or securing the enforcement of its review or supervisory powers."

ANALYSIS AND FINDINGS

[10] An enquiry in the determination of custody and the factors to be considered when making such determination is specifically regulated by legislation. Any decision or award of custody of a minor child must clearly be informed or grounded within the scope of the legislation.

[11] In section 200 (1) of the **Children Protection and Welfare Act, 2012,** it is provided that;

"A parent, family member or any other person may apply to a Children's Court for custody of a child."

[12] Section 200 (3) provides that;

"The Children's Court shall consider the best interests of the child and the importance of the child being with his mother when making an order for custody or access."

[13] The Act further requires in Section 200 (4) that;

"Subject to subsection (3), a Children's Court shall also consider-

(a) the age of the child;

(b) that it is preferable for a child to be with his parents except if his rights are persistently being abused by his parents;

(c) the views of the child;

(d) that it is desirable to keep siblings together;

(e) the need for the continuity in the care and control of the child; and

(f) any other matter that the Children's Court may consider relevant."

[14] All of these considerations as outlined in the Act must appear *ex facie* in the judgment or ruling made by a Children's Court. A Children's Court is defined in Section 132 of the Act as follows;

"(1) Every magistrates' 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 the Act."

[15] The Court *a quo* correctly cited all the relevant provisions of the Act applicable in custody matters. The only enquiry would be for this Court to assess how the functionary applied the provisions of the Act to the peculiar circumstances of the case.

[16] In paragraph (12) of his ruling, the learned Magistrate expressed himself as follows;

"**[12] Section 200 (3) of the Act does not only call upon the court to consider the best interest of the child, it also makes reference to the importance of the child being with his mother when making an order for custody or access.**

The latter statement of the provision seems to be consistent and in the spirit of the historical position that the mothers enjoy judicial preference for awarding custody of young children.

[13] However, modern judicial pronouncements have said this is no longer the case. With the advent of the Constitution there is now equality before the law. To put it differently, this means that the law look at men and women in the same

prism. Whatever it is that can be given to a man can also be given to the women."

[17] What comes out from the Court *a quo's* statement of law is that whereas there is an express legislative provision requiring that a Children's Court must consider '*the importance of the child being with his mother*', the Court, in its ruling, overlooked this and stated to the contrary that '*however, modern judicial pronouncements have said that this is no longer the case.*' This is a misdirection which unfortunately influenced the learned Magistrate, amongst other factors, to arrive at the wrong conclusion that he arrived at.

[18] **The Children's Protection and Welfare Act** also specifically requires that the age of the child must be a key factor in determining custody matters. In the decided case of **R.M.D v K.D (16995/22P) [2023] ZAKZPHC 2 (13 January 2023),** the High Court of South Africa (Kwazulu-Natal Province), stated as follows as regards the age of the child;

"[37] In coming to a decision, it is impossible to not attach any weight to the age of the minor child. She has just turned five

years old. She is entirely dependent on her care giver for her survival and will continue to be so for some considerable time. She is also at an impressionable age. In my view, it would be in her best interest to traverse this period of her life whilst being cared for by the respondent (mother). As Maya AJA stated in F v F [2006 (3) SA 42 (SCA); [2006] 1 All SA 571 (SCA) para 12);

"Despite the constitutional commitment to equality, the division of parenting roles in South Africa remains largely gender-based. It is still predominantly women who care for children and that reality appears to be reflected in many custody arrangements upon divorce."

[19] There appears to be nothing in the ruling made by the Court *a quo* in which the age of the child was given serious thought. At the time of hearing the matter by the second Respondent, the minor was two years old. At the time of hearing the review application the child is said to be about three years old. In as much as the First Respondent's representative argued that the child has already been weaned, there are in reality, many other factors to be considered in relation to the age of the child.

[20] A child who is two years old is incapable of doing anything by himself or herself and, as such, needs a higher degree of attention day and night. At this age, the child is vulnerable and needs a lot of patience and direct parental love. At night the child may need even greater care, requiring the parents or care- giver to wake up and attend to his or her needs, including but not limited to change of disposables, feeding and generally consoling. It can hardly be true that at this stage, there can be any substitute for such direct contact between child and biological parent.

[21] All of these things needed to come out clearly in the Second Respondent's ruling and how, in his assessment of the facts and being guided by the social welfare report, he came to the decision which is the subject of the review application.

[22] The other factors to be considered by a Children's Court in determining custody disputes as specifically mentioned in the Act are;

(i) that it is desirable to keep siblings together.

(ii) the need for the continuity in the care and control of the child

[23] This Court could not find anything on the items listed above from the ruling of the Second Respondent and how he came to the conclusion that these factors favour the granting of custody to First Respondent. This constitutes a gross irregularity and shows that Second Respondent failed to properly apply his mind on what was required of him.

SOCIAL WELFARE REPORT RECOMMENDATIONS

[24] The Second Respondent relied heavily on the social welfare report prepared by the Department of Social Welfare Services in making his judgment. The social welfare report contains recommendations as regards who, between the feuding parties, should be awarded custody of the minor child. The Court notes that Second Respondent extracted large portions of the report and made same part of his judgment.

[25] At the end of the day, it ought to be clear from the judgment that the Court duly exercised its own independent mind and that it discharged its functions in accordance with the law by properly applying its mind to all issues arising in the matter. The latter component seems to be somewhat lacking from the ruling of the Second Respondent.

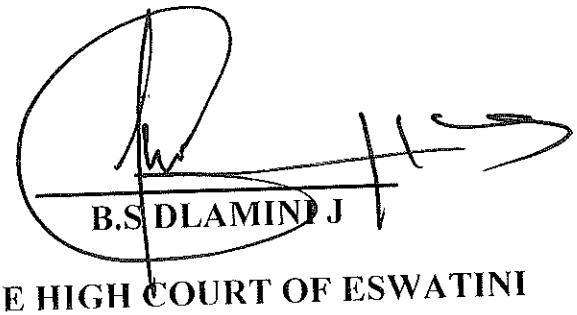
ORDER

[26] In conclusion, the Court hereby issues orders as follows;

(a) **The Second Respondent's ruling delivered on the 14th November 2022 is set aside.**

(b) **The matter is to commence *de novo* before a different Judicial Officer as provided for in the relevant legislation.**

(c) **There is no order as to costs.**



B.S DLAMINI J

THE HIGH COURT OF ESWATINI

For Applicant: *Attorney Miss L. Simelane*

(Khumalo Ngcamphalala Attorneys)

For 1st Respondent: *Attorney Mr. Z.D Jele*

(Robinson Bertram Attorneys)