IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CASE NO. 315/2024**

In the matter between:

LUNGISILE NXUMALO	**APPLICANT**
And	
ZULA NHLEKO	**1ST RESPONDENT**
MAGISTRATE S. DLUDLU N.O	**2ND RESPONDENT**
THE ATTORNEY GENERAL	**3RD RESPONDENT**

NEUTRAL CITATION:	**LUNGISILE NXUMALO VS ZULA NHLEKO & 2 OTHERS (315/2024) SZHC – 24 [04/03/2024]**
CORAM:	**BW MAGAGULA J**
HEARD:	**28/02/2024**
DELIVERED:	**04/03/2024**

SUMMARY: *Civil Law – Review application in respect of an interim order granted by the 2nd Respondent – Point in limine taken with regard to the jurisdiction of the court – matter argued thereafter holistically – Point in limine incompetent in the circumstances of the matter at hand – Dismissed – On the merits, the Applicant has been able to establish a case for review.*

HELD: *Review application succeeds with costs.*

JUDGMENT

BW MAGAGULA

[1] The Applicant is before court on a certificate of urgency seeking ostensibly the following orders;

1.1 Dispensing with normal rules relating to time limits, forms manner of service and procedures in application proceedings and enrolling the hearing of this application as one of urgency in terms of the Rules of the High Court.

1.2 Reviewing, correcting and or setting aside the decision taken by the 2nd Respondent on the 1st of February 2024.

1.3 Directing the 1st Respondent to return the minor child namely Unathi Nhleko to the custody of the Applicant.

[2] In as much as the Applicant's Counsel had initially insisted on an interim order, the court deemed it fit to hear both parties first before any form of order could be granted. It is in that respect, that the 1st Respondent was allowed to file an answering affidavit. The 3rd Respondent also field the reasons of the decision of the 2nd Respondent that sought to be impugned.

[3] When the matter was heard on the 28th of February 2024 Counsel ND Jele for the 1st Respondent commenced the arguments in support of the points of law raised.

[4] The ***points in limine is couched as follows;***

4.1 The Court will note that impugned Order by the Children's Court is that I should have interim custody of the minor child for 6 months whilst awaiting the socio-economic report and the matter is to return thereafter for a final determination of the custody issue.

4.2 I am advised that such an order is interlocutory and not subject to reversal by the Children's Court later on in 6 months. It follows that this Court has no jurisdiction to entertain this matter until it has run its course.

4.3 On that basis, this Court lacks jurisdiction to entertain this matter until the proceedings at the Children's Court has been finalized.

4.4 I am advised that, to the extent necessary, further legal argument in this regard will be advanced at the hearing of this application in due course.

[5] The 1st Respondents contend that the manner in which the present application is framed by the Applicant is such that it can be easily deduced that the Applicant is seeking to appeal the interim decision of the 2nd Respondent. The decision of MJ Dlamini JA, in the matter of **Director of Public Prosecutions vs Sipho Shongwe (12/2018) SZSC 23 (22nd August 2018)** was used where the court stated that an interlocutory order is an order by court at an intermediate stage in the course of litigation, settling or giving directions on regard to some preliminary or procedural question which has a reason in dispute between the parties. Such an order may be either purely interlocutory or it may an interlocutory order having final or definitive effect.

[6] The learned Judge proceeded to clarify further by making reference to ***Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd 1948 (1) SA 839 (A) 870*** that;

> ***"It is settled that a decision or order "is purely interlocutory" if it does not "dispose of any issue or any portion of the issue in the main action or suit" or does not irreparably anticipate or preclude some of the relief which would or might have been given at the hearing".***

[7] It is common cause that the interim measure directed by the 2nd Respondent will be in effect for only six months. After which, the parties are to return to him and deliberate on the way forward. The point advanced on behalf of Applicant that it is definitive of its rights stands to be dismissed.[1]

[8] From the above excerpt of the judgment by M.J. Dlamini JA as read with **The Child Welfare and Protection Act**, the right to appeal a judgment of this Court on a pure interlocutory order is permissible by leave of Court (Appeal Court). This has not been sought by the Applicant.

[9] In terms of common law it is only final orders and/or decisions that are appealable as of right. Interlocutory orders or decisions are as of right not appealed without leave. However where the interlocutory order or decision is final in nature leave to appeal is not necessary. In the case of ***Small Enterprise Development CO vs Phyllis Ntshalintshali Industrial Court of Appeal Case No. 8/2007*** the Court usefully stated as follows;

> ***"[9] Interlocutory orders are generally classified under two categories, namely; (a) simple interlocutory orders and (b) other interlocutory orders that have a definitive and final effect in their application.***
>
> ***[10] Pure or simple interlocutory orders are not appealable whilst those listed under (b) above are appealable, some with leave of the court, A refusal for a stay of execution falls under those (orders) under (b);***

[1] See also, Sipho Shongwe v The Director of Public Prosecutions (134/2019) [2019] SZHC 74 (23rd April 2019)

[11] In terms of Section 19 (1) of The Industrial Relations Act No.1 of 2000 (as amended) (hereinafter referred to as the IRA) "there shall be a right of appeal against the decision of the Court or of the arbitrator on a question of law to the Industrial Court of Appeal."

The operative word in the afore-quoted Section is "decision". This word does not seen (sic) to me to bear the same technical meaning or import attached to terms like "judgment. Order or decree", used under the Common Law or in the rules of the civil courts."

[10] In responding to the points in *limine* raised, Mr T. Hlanze made the following submissions;

10.1 The legal principle has not been captured correctly by the 2nd Respondent's Counsel. Especially when the entire proceedings are being challenged.

10.2 The non-interference only applies if there are no allegations of injustice or irregularity.

10.3 In the matter before court, there is both injustice and irregularity.

[11] I will commence my analysis with determining the points of law raised first. I agree fully with the principle enunciated in the matter of **Director of Public Prosecutions vs Sipho Shongwe**[2] which is that an interlocutory order is an order by court at an intermediate stage in the course of litigation, settling or

[2] See also, Sipho Shongwe v The Director of Public Prosecutions (134/2019) [2019] SZHC 74 (23rd April 2019)

giving directions in regard to some preliminary or procedural question which has a reason dispute between the parties.

[12] There are two (2) reasons why I am of the view that the principle is not applicable in the matter before me. First, the matter where this principle was enunciated, pertained an appeal. The matter before court is a review. Second, the essence of the application before this court is a wrong procedure attributed to the 2nd Respondent of an adoption of converting Section 341[3] proceedings into a children's court. The interim order which is being impugned, is a result of those converted proceedings. Therefore, there is merit in the argument that the court proceedings which resulted in the interim order which is the subject of the review appears to be flawed. It is the constitution of those court proceedings that is being challenged. Hence, to then confine the argument on the end product being the Rule *nisi* without looking at the propriety of the constitution of the court that produced it, would be myopic. Therefore, it is the finding of this court that in as much as the legal principle that an interlocutory order should normally be not interfered with by higher court, the facts in circumstances of the present matter are quite different as the manner in which the 2nd Respondent constituted himself into a children's court is being challenged.

[13] The other issue which warrants determination is whether the act of converting the Section 341 proceedings by the learned Magistrate, into a children's court

[3] Of the Criminal Procedure and Evidence Act 67/1938

is an irregularity? If it is, did the outcome of such a conversion occasion an injustice to the Applicant?

[14] It is common cause and in fact it is the correct position of the law that a Magistrate court generally is clothed with jurisdiction to entertain and adjudicate on questions of custody in respect of minor children.[4]

[15] The pertinent issue though, is whether the proceedings before the 2nd Respondent commenced in line with the provisions of **The Children's Protection Welfare Act of 2012** so as to have enabled the learned Magistrate to sit as a children's court as envisaged by the legislation. During the submissions by the Applicant's representative before court Mr Jele, it came out that the Magistrate did this conversion unilaterally after discovering that the real issues between the parties was the child. In as much as there are no facts before me that the Magistrate acted *malafide* in doing so, and he must have thought since he is also a Magistrate and a Magistrate Court is empowered in terms of the Children's Act to determine issues of custody, then he should do so there and then. In as much as the intention of the learned Magistrate was noble, but I find that it was irregular in the circumstances. The Applicant had been summoned to appear before court pursuant to proceedings initiated in terms of 4 Section 341 of the CP&E Act. The reading of the summons is that the purpose were peace binding proceedings. It is not remote to conclude that when she proceeded to the Magistrate Court, she was of the view that the issue that was going to be heard was the peace binding issue

[4] See Section 200 (1) of the Children's Protection and Welfare Act of 2012

between her and 1st Respondent. Surely, the summons did not advise her, at least on its reading *ex facie* that the issue of custody of her child would at any point be subject of the court proceedings. Either on that very same day or any other day.

[16] I am in full cognizance of the fact that the proceedings were not concluded the same day. It appears they were postponed and dealt with on another day. However, that cannot derogate from the fact that the proceedings before the 2nd Respondent were Section 341 proceedings. It definitely occasioned injustice to the Applicant that the end result of those proceedings is an interim order which determined the custody of her child, albeit on an interim basis. She had not been called to answer to the court on custody in the first place, nor was she prepared for it. Even on that basis alone, it is my considered view that such a procedure constitutes an irregularity that an injustice to the Applicant. The existence of the *rule nisi* and the effect thereof in my view warrants that this court entertains and hears the application for review, despite that it pertains to interim order.

[17] It is therefore my considered view that the points in *limine* in respect of the jurisdiction of this court must fail. It is accordingly dismissed. I will now proceed to determine the merits of the applications.

[18] It is common cause that the Applicant was summoned in terms of the Criminal Procedure and Evidence Act to make appearance before the Court *a quo* for a peace binding enquiry.

[19] A peace binding enquiry is regulated or governed by Section 341 of **The Criminal Procedure and Evidence Act 67 of 1938** (as amended). In **fana Balate Dlamini v Dumisa R. Mazibuko N.O and Another (1140/20160 [2016] SZHC 121 (13th July 2016)**. Mamba J making reference to **Zwelakhe Nhleko v Magistrate Sebenzile Ndlela N.O (448/12) [2012] SZHC 197 (23rd March 2012)** he had occasion to state as follows;

> ***"Section 341 of The Criminal Procedure and Evidence Act provides as follows;***
>
> ***"(1) If a complainant on oath is made to a Magistrate that any person is conducting himself violently towards or is threatening injury to the person or property of another or that he has used language or behaved in a manner towards another likely to provoke a breach of the peace or assault, then, whether such conduct occurred or such language was used or such threat was made in a public or private place, such Magistrate may order such person to appear before him, and if necessary may cause him to be arrested and brought before him.***
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> ***(2) The Magistrate shall thereupon enquire into and determine upon such complaint and may place the parties or any witnesses thereat on oath, and may order the person against whom the complaint is made to give recognizances with or without sureties in an amount not exceeding fifty rand for a period not exceeding six months to keep the peace towards the complainant and refrain from doing or threatening injury to his person or property.***

(3) The Magistrate may, upon the enquiry, order the person against whom the complaint is made or the complainant to pay the costs of and incidental to such enquiry.

[20] In performing his duties or functions under the above section, a Magistrate does not sit as, either a civil or criminal court. It is more of an administrative function whose aim or objective is to keep or maintain peace in general. The proceedings are not a trial but an inquiry based on the complaint by the person who has initiated such inquiry. Although the complaint may reveal a crime which has been committed, the Magistrate may not return a verdict of guilt. The crown is not a party to the proceedings either. Dealing with a similarly worded section the Court in **R v Limbada, 1953 (2) SA 368 (N) at 370C – D**, where the Magistrate had stated that an inquiry of this nature was purely an administrative matter or a quasi-judicial one and therefore no criminal appeal could be filed against his decision, **Broome JP** held that ...*"The machinery created by Section 387 of Act 31/1917 is designed primarily to prevent the commission of an offence rather than to deal with an offence already committed. A similar jurisdiction has been exercised by Magistrates in England from very early times. Its origin is not clear. One view is that it depends upon a statute of Edward III, passed some 600 years ago. Another view is that it is a Common Law jurisdiction which was in existence from an even earlier date. But however that may be, the jurisdiction rests, in South Africa, upon the clear statutory basis of Section 387.*

In dismissing the Appellant's argument, the learned JP stated that "...I feel it incumbent upon me to say that it did not leave me with any impression that the Magistrate was wrong in his finding.

It is also noted that the person against whom a complaint is made, is summoned to appear before a Magistrate once such complaint is made on oath. The summons is preceded by the sworn statement and not the other way round. In the present matter this was not the case. Rather, an unsworn statement was made to a police officer and this was the basis upon which the Applicant was called upon to attend court. I am mindful of course that the submitted record indicates that both parties made their presentations under oath when both appeared before the 1st Respondent on 13th February 2012. This, however, does not detract from the letter and spirit of the relevant provisions of the Act".

[21] From the foregoing caption, it is abundantly clear that what the learned Magistrate did on the 29th January, 2024 and 1st February was to catapult an administrative function in terms of S341 of the CP&E to civil proceedings and went on and determine a custody issue. There was no sworn statement before him having been made by the Applicant's estranged boyfriend. There was further, no enquiry at all in as much as the Applicant was not heard on the issue or complaint against him. Even if the Applicant had admitted having done what she was accused of having done or committed, she was still at liberty and indeed had a right to respond to the allegations levelled against her in a full blown custody hearing upon a substantive application by the 1st Respondent. The 2nd Respondent had no right to summarily issue a custody order without following the provisions of Section 200 of the Children's Court. This was no custody enquiry at all and the resultant order was equally no order at all. It was null and void *ab origine*.

[22] The distinction between an appeal and a review is notoriously trite now in our jurisdiction. I need not belabor this judgment by delving deeper into the distinction between the two. Having made the remarks above, I have come to the conclusion that the act of converting Section 341 proceedings of the CP& E into a family court by the 2nd Respondent was irregular. The Applicant was therefore perfectly entitled to approach the court on review. The real grievance is against the method adopted by the 2nd Respondent when conducting the proceedings, not necessarily the wrong conclusion on the facts or the law.[5] To the extent that the learned Magistrate did not constitute the court properly as children's court, irrespective of the noble intentions and irrespective of the fact that he heard both parties, he committed an act of irregularity. The Applicant was summoned for proceedings under Section 341 and whilst she had submitted to the court for that purpose the proceedings were unilaterally converted by the learned Magistrate into a children's court. There was definitely no application to initiate custody proceedings as envisaged by **The Children's Act of 2012**[6] before him at the time of the summons. Whatever result that came out of those defective proceedings can never be correct.

[23] It was also argued during the hearing by the 1st Respondent's Attorney that the Applicant has a remedy in the same court. She can anticipate the return day, as the order that is sought to be impugned is a *rule nisi* not a final order.

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[5] See Herbsteen and Wan Vinson Civil Practice of the Supreme Court of South Africa page 932 also See; Ellis vs Morgan; Ellis vs Desai 1909 TS 576 at 581

[6]

The argument was further augmented by reference to **Section 37 (13) of the Children's Welfare Act,** which provides that a Children's Court may at any point amend or vary and rescind its decision. This argument actually underpins an earlier argument that was made on behalf of the 1st Respondent to the effect that in as much as it is conceded that the proceedings were commenced under **Section 34 of the CP&E**, but the Magistrate was perfectly entitled to reconstitute the very same proceedings into a Children's Court once the issue of the welfare of a child had been raised. Further the Magistrate actually give an opportunity for all the parties to be prepared for this as the matter was postponed to another date. I disagree. This argument flies in the fact of the dicta espoused by Mamba J as he then was in the matter of **Zwelakhe Nhleko** (*supra*). In performing his duties under the provisions of Section 341 of the CP&E, a Magistrate does not sit as either a civil or criminal court.

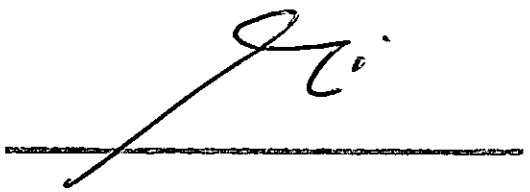
[24] In as much as the argument presupposes that the Magistrate adopted a fair procedure. Where it becomes unfair is that the Children's Welfare Act in Section 200 states categorically that a parent or family member may apply (my emphasis) to a Children's Court for a custody of a child. This court has not been told that prior to the issuance of the summons calling upon the Applicant to appear for a peace binding order, the 1st Respondent had filed any application for the custody of the child. The procedure as set out in the Criminal Procedure and Evidence Act, entails that a complainant may make a statement where peace or violence is an issue. The statement recorded at the police station is by no means an application as envisaged in **Section 200 of The Chidren's Welfare Act.**

[25] The 1st Respondent argues that once the proceedings had already commenced as Section 341 proceedings under the CP&E, at that forum he applied for custody. I will outrightly reject this narrative. It could not constitute an application as envisaged in Section 200. The other party, who in this case is the current Applicant, on the face of the summons had been called to answer on Section 341 of the CP&E proceedings. It was then unfair that all of a sudden, she would have been expected to engage a process of preparedness to anticipate that an adverse order of custody pertaining to her child could be made against her. Even on an interim basis.

[26] I find it imperative to interpolate and observe at this juncture that it is not for this court to determine the custody of the child, whether provisional or permanently. Hence, the court will not pronounce on that issue. What is before this court is the manner in which the 2nd Respondent conducted the proceedings on the day in question. The high water mark of the complaint by the Applicant is that the Applicant was only served with a summons in the prescribed form calling upon her to attend court, for a peace binding between her and the 1st Respondent. It is the conversion of this peace binding proceedings into a Children's Court hearing that the Applicant seeks to challenge as irregular. Once there is an application for custody, then the appropriate court will adjudicate on the matter as it deems fit.

[27] It is against the back drop of the aforegoing that the Applicant's application must succeed. The court grants the following orders;

1) **The normal Rules relating to time limits, forms, manner of service and procedures in application proceedings are hereby dispensed with and this matter is enrolled as one of urgency in terms of the Rules of this court.**
2) **The decision of the 2nd Respondent dated the 1st February 2024, is reviewed and set aside.**
3) **Costs to follow the event.**



BW MAGAGULA

JUDGE OF THE HIGH COURT OF ESWATINI

For The Applicant:	T. Hlanze – (Gigi A. Reid Attorneys)
For The 1st Respondents:	DN Jele and J. Dlamini - (Robinson Bertram)
For The 2nd and 3rd Respondents:	N. Ngcwane – (The Attorney General's Chambers)