

IN THE HIGH COURT OF LESOTHO

In the Application of :

THERESIA MAKARA .

Applicant

v.

CAMILLUS PHOLENG MAKARA

Respondent

J U D G M E N T

Delivered by the Hon. Acting Chief Justice  
on the 12th day of June, 1986

The applicant is applying for an order:

- (a) Directing the respondent to allow the minor children Motheba and Ntsepase to attend applicant's graduation ceremony at the University of Hull in Great Britain in July, 1986;
- (b) Directing the respondent to sign the necessary papers for the issue of passport to enable the children to get to Britain;
- (c) Directing the respondent to pay the costs of this application.

It is common cause that the respondent and applicant are husband and wife married by christian rights on the 23rd August, 1974. There are two children born of the marriage, namely, Motheba and Ntsepase. There is a divorce case pending between the parties in CIV/T/98/78. By order of Court the custody of the two minor children

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of the marriage has been given to the applicant pendente lite.

In her founding affidavit the applicant deposes that she is presently Senior Extension Educator at the National University of Lesotho and she obtained a Doctorate in Philosophy in Education in October 1985 and she is to attend a graduation ceremony at Hull in England, <sup>in</sup> July, 1986. The children asked her to take them to the graduation ceremony in England and she promised to do so. She avers that she has saved enough money to pay the fares of her daughters to attend her graduation ceremony. However, the respondent refuses to allow them to go with her and will not make a letter authorising the Passport Office to issue them with passports or to enter them in her passport. She feels that respondent's conduct is unreasonable, as the four weeks trip in Britain would broaden the horizon of the children and be in itself an education quite apart from the inspiration they might get in witnessing a postgraduate ceremony. She has a permanent job at the National University of Lesotho and has no desire to leave Lesotho or to take the children permanently out of the jurisdiction of this court.

The applicant has annexed to her affidavit a letter from the Acting Registrar of the National University of Lesotho addressed to the Director of Immigration which confirms that the applicant is an employee of the University and that she is to attend a graduation ceremony at the University of Hull on the 11th July, 1986 and that she will return to her work at the National University of Lesotho after the graduation ceremony. He asked the Director to help her.

The respondent is strenuously opposing this application on the ground that the intention of the applicant is to take the children out of the jurisdiction of this court and so deprive him of his rights of guardianship as the father permanently. In his opposing

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affidavit he avers that during the period of four years that the applicant spent in Britain the children were in his custody and were living with him. During that period there developed an intimate association between himself and the children of which association the applicant is well aware. Since applicant's arrival in Lesotho applicant has denied him reasonable access to the children over weekends. He denies that the applicant told him of her wish to take the children to Britain for her graduation ceremony as there is little or no communication between him and the applicant. He avers that if the children were as keen to go as the applicant wants us to believe, they would have easily come to him to ask him to allow them to go.

He further avers that he has been reliably informed and reasonably believes that the applicant has decided to work outside Lesotho and she has attempted without his knowledge and consent to obtain passports for the children or to include them in her own passport but failed because the Immigration Office wanted her to obtain his approval as the father of the children. This conduct of the applicant confirmed the information he had received. The applicant knows that there are a number of mothers who after finishing their studies abroad have come to Lesotho to take children and never came back. He has reasonable fear that the applicant wanted to do the same with his children. He has no knowledge as to whether the applicant has made enough provision for his children's stay abroad as well as their safe return to Lesotho.

In her replying affidavit the applicant admits that she went to the passport office to get information about the procedure for including children in her passport. She avers that she did not have to get his permission in order to seek this information.

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As the upper guardian of minors this Court must always take into account the interests of the minors where the custodian parent and the non-custodian parent cannot agree. In the instant case the custodian parent is going to attend a graduation ceremony in England at which a degree of Doctor of Philosophy in Education is to be conferred upon her. The children have expressed their desire to go with her and she has promised to do so. It seems to me that attending a postgraduate graduation ceremony in England at which their own mother is going to receive a degree of Doctor of Philosophy in Education is going to broaden their outlook and is part of their education and it will make them aspire for very great things. I have no doubt that they will enjoy themselves and it will be a holiday they will never forget in their lives.

Not even the respondent has any doubt that the children are going to benefit by their journey to England but his fear is that the applicant's intention is not to bring them back to Lesotho. The issue which I have to decide is whether the fear is based on reasonable grounds. The fear is based on the fact that some mothers who studied abroad came back and took their children and returned abroad. I do not know whether or not such mothers had permanent jobs in this country. The applicant in this case is holding a very senior post at the National University of Lesotho. She has not given any notice to the University that she is resigning and remains on the permanent staff. She is going to attend a graduation ceremony. I do not think that the cases of those mothers referred to by the respondent were similar to the applicant's case. The circumstances surrounding her going to England show that she intends to come back.

/Our law....

Our law is that the mother, as the custodian parent, is entitled to have the children with her; to control their daily lives; to decide all questions relating to their education, training and religious upbringing; to determine what homes or houses the children may or may not enter and with whom they may or may not associate (The South African Law of Husband and Wife, 4th edition, by H.R. Hahlo, p. 463). As I have shown above attending the graduation ceremony in England is itself education to the children and as such is a matter within the powers of the custodian parent. The respondent can stop the custodian parent from exercising her right by showing on a balance of probabilities that the intention of the applicant is to deprive him of his access to the children by taking them out of the jurisdiction of this Court. The respondent has failed to do so; his fear is not based on reasonable grounds. The mere fact that the applicant made some inquiries at the Immigration Office about the procedure as to how to include her children in her passport or to get them their own passports does not mean or indicate that she intends to leave Lesotho permanently.

It was the duty of the respondent to disclose his source of information that the applicant intends to work outside Lesotho. The mere allegation that there is reliable information and which he verily believes, is not sufficient evidence in the face of applicant's denial and evidence that she has a permanent job at the University and that she is going to receive her degree. She has a genuine reason to go to England.

The application is granted as prayed in terms of prayers (a) and (b) of the Notice of Motion. With regard to costs I shall not penalise the respondent by making him pay costs because although his fear is not based on reasonable grounds it does appear to be genuine. Each party to bear its own costs.

J.L. KHEOLA  
ACTING CHIEF JUSTICE.

12th June, 1986.

For Applicant - Mr. Maqutu  
For Respondent - Mr. Pheko.