CIV/APN/14/90

IN THE HIGH COURT OF LESOTHO

In the matter between:-

NTSANE MOSUHLI — Applicant

and

TSELISO SELEMATSELA — Respondent

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 30th day of April, 1990

This is the return day of a rule nisi calling upon the respondent to show cause, if any, why:

1. (a) He should not be ordered to deliver to Applicant a minor child Motlohi Jacob Mosuhli;

   (b) He should not be ordered to pay costs hereof in the event of his opposition.

2. That prayer 1(a) operate as an interim interdict with immediate effect.

It is common cause that the respondent is the father of the late Rebone Mosuhli who was the lawful wife of the applicant. Motlohi Jacob Mosuhli is their son and is now ten (10) years old. The applicant married the late Rebone Mosuhli by civil rites on the 2nd April, 1980. At the time of the marriage Motlohi Jacob was already born and was apparently legitimated by the marriage.

The applicant alleges that he has always had access to Motlohi and has been maintaining him from 1982 when he was taken to the respondent by his mother, the late Rebone Mosuhli.

On the 21st March, 1989 a final decree of divorce was granted on the grounds of Rebone Mosuhli's malicious desertion and the custody of the minor child was granted to the late Rebone Mosuhli per the deed of settlement signed by the parties.

On the 8th July, 1989 Rebone Mosuhli died and the applicant is the sole surviving parent of Motichi Mosuhli. The child had lived with the respondent pursuant to the wishes of the custodian parent, the late Rebone Mosuhli.

The applicant deposes that the respondent refuses to allow him to take Motlohi for shopping or even to visit him in Maseru or to go to his parental home at ha Makhakhe. On the 24th December, 1989 he quarrelled bitterly with the respondent who refused to allow Motlohi to spend Christmas with him. This has made it impossible to allow Motlohi to continue to live with the respondent.

In reply to this allegation the respondent deposes that on the 24th December, 1989 the applicant asked to be allowed to take Motlohi to ha Makhakhe and promised to bring him back on the same day. This he did and, on his return, then asked to bring the child to Maseru to spend Christmas with him. The respondent alleges that he protested because applicant had not given him notice of this and that he and his wife had already made arrangements to spend Christmas day with Motlohi. There was no quarrel bitter or otherwise. He says that he was not moved by a belief that he had a better right than the applicant to have the child with him. His reaction was an instinctive parental response which applicant, as his son, ought to have understood better than anyone else. Applicant's reaction was to threaten to remove the child from respondent's custody.

The respondent alleges that as will be apparent from the divorce order Annexure "A" applicant has never shown any willingness to maintain the child. The respondent says that he does not want to make issue of this fact and he merely mentions it to set the record straight.

In his replying affidavit the applicant deposes that the fact that there was no order of maintenance in the final order of divorce, does not mean that he was not willing to maintain the child. It was agreed between the parties that since he was maintaining the child, there should be no order of maintenance.

It is not possible to resolve this dispute of fact on papers before me, however, I do not think that it is absolutely necessary for me to make a finding because the respondent says that he does not want to make issue of this fact. In any case the applicant alleges that he used to give money for maintenance of Motlohi to his mother while she was alive. Now that she is late no one can deny this allegation.

It is common cause that Motlohi was going to school at Morija Primary School where the wife of the respondent is a teacher. At the moment he has been admitted at St. James Primary School here in Maseru. It is also common cause that the applicant has remarried and his second wife has two young children. Applicant alleges that Motlohi relates very well with his step-mother and step-sisters.

The question which this Court has to decide is whether or not it is in the best interests of the child to disturb the status quo in the circumstances of this case. Motlohi started living with the respondent and his wife at the age of two years. I agree that the child knows no other home other than that of the respondent. If the order is confirmed he will have to start living in a completely new home and with a step-mother who has her own children to look after. Of course, this does not mean that the applicant will not be there. As a policeman he will be away from home for a greater part of the day; but during the day the child will be at school.

The law regarding custody of minor children following an order of divorce or judicial separation has been stated in numerous cases in the Republic of South Africa and such cases are very persuasive authorities in this country.

In Calitz v. Calitz, 1939 A.D. 56 at pp. 63 and 64 Tindall, J.A. said:-

> "In my judgment the Court has no jurisdiction, where no divorce or separation authorising the separate home has been granted, to deprive the father of his custody except under the Court's powers as upper guardian of all minors to interfere with the father's custody on special grounds, such for example as danger to the child's life, health or morals."

> "That being the position, it is clear that the Court was not entitled to deprive the husband of the custody. The learned Judge held that he was a fit and proper person to have the custody. The father had done nothing which entitled the Court in the exercise of its powers as upper guardian to hold that he had forfeited his right to the custody of the child. The fact that the child, being of tender years, would be better looked after by the mother did not, under the circumstances, justify the order made."

In Short v. Naisby, 1955 (3) S.A. 572 (D) at p. 575 Henochsberg, A.J. said:

> "It seems to me, however, that the Court has no jurisdiction to deprive a surviving parent of her custody at the instance of third parties, except under its power as upper guardian of all minors to interfere with their custody, but then only on special grounds. Such special grounds include danger to a child's life, health or morals, but those are not the only grounds on which a Court will interfere. Good cause must be shown before a Court will interfere, but good cause is not capable of precise definition. Each case must, therefore, be considered on its merits."

In Ex parte Sakota, 1964 (3) S.A. 8 (W) the Court awarded guardianship and custody of two children to an uncle because the father had been convicted of murdering their mother and sentenced to twenty years' imprisonment. A Yugoslavian court had deprived the father of guardianship.

In Blume v. Van Zyl and Farrell 1945 C.P.D. the dispute was between a mother and grandmother for an order varying an order of court under which the custody of a child had by agreement in a divorce action between the child's parents been awarded to the grandmother, the facts must be very strong against the mother or in favour of the grandmother before the court will give the grandmother the custody in preference to the mother.

In September v. Karriem, 1959 (3) S.A. 687 the headnote reads as follows:-

> "If, in an application for the custody of children, the Court is of the opinion that it should interfere with the rights of the parents, because the interests of the child demand such interference, it should be at large to act in the manner best fitted to further such interests. This may mean that the child should be taken from the custody and control of one or other or both parents and be given to a stranger. When the Court is asked to interfere as upper guardian it should be given as complete a picture of the child and its needs as possible."

In the case of Horsford v. De Jager and another, 1959 (2) S.A. 152 (N.P.D.) the applicant had obtained a divorce from her former husband on the ground of his adultery with a native woman, and had been awarded the custody of her children. At the time of the break up of their marriage and subsequent divorce these children were living with the brother and sister-in-law of her former husband, where they had now continuously resided for five and a

half years. Applicant had remarried some six months after the divorce, on 14th June, 1958, and now applied for the custody of her two girls, now aged ten-and-a-half and eight years respectively. The evidence of the elder girl was that she had no mother and that she loved and was happy with her aunt, but the Court found that the applicant had been prevented from seeing her children, and that an attempt had been made to expunge from their minds the memory of their mother and that a feeling against her had been built up in the children. The Court therefore found that if the children were removed now into applicant's custody they would be likely to suffer a temporary emotional upset which would not be permanent; on the other hand, if they were with the uncle and aunt, that emotional upset would be avoided but the girls would be brought up firstly in circumstances to some extent influenced by an unworthy father, secondly under the care of a woman who was not their mother and thirdly in the belief that their real mother was an unworthy person who had abandoned them without just cause. The Court therefore concluded that the latter course was likely to do more lasting harm to them than if a change was now made while they were still comparatively young and while there was still time for them to settle down with their mother, with whom they ought, in the nature of things, to live.

Therefore, that the interests of these children demanded that they now be returned to their mother.

According to the cases quoted above it is very clear that before the Court can award custody of a minor child to a third party, special circumstances or good cause must be shown. It must be shown that the parent is not a fit and proper person to be

awarded the custody of his or her own child. The special grounds may be such, for example, as danger to the child's life, health or morals. It seems to me that it is not enough that the child may suffer temporary emotional upset which would not be permanent.

In the present case the respondent has failed to prove that the applicant is not a fit and proper person to whom custody of Motlohi Mosuhli should be awarded. The mere fact that the child was living happily with the respondent and his wife and that he was well looked after and attended a good school, cannot be regarded as good or special ground on which the applicant can be deprived of the custody of his child..

The respondent has failed to prove that after the death of Rebone Mosuhli the applicant failed to maintain the child. He admits that the applicant provided the child, from time to time, with some items of clothing and a bit of pocket money. I have already stated above that what the applicant said he did before the death of Rebone, i.e. that he gave the money to her for the child's maintenance, is not something that can be rejected outright without hearing viva voce evidence.

The applicant is a policeman and lives in a Government house at Europa. Nothing has been shown that the applicant is not a fit and proper person to be awarded the custody of the child and this Court is not entitled to exercise its powers as upper guardian to hold that he has forfeited his right to the custody of the child.

In other words the Court can have jurisdiction only in a case where special grounds or good cause have been shown. It cannot be said that the best interests of the child will be served by not disturbing the status quo because the respondent has failed to prove that the applicant is not a fit and proper person to be awarded custody of his child.

In the result the rule nisi is confirmed with costs.

J.L. KHEOLA
JUDGE

30th April, 1990.

For Applicant - Mr. Maqutu
For Respondent - Mr. Sello.