IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) NO. 19/10

In the matter between:

STELLA KEKETSEHO MAKATSE **APPELLANT**

and

NKOPELE SAMUEL MAKATSE **DEFENDANT**

CORAM: RAMODIBEDI, P
MELUNSKY, JA
SCOTT, JA

HEARD: 6 APRIL 2011
DELIVERED: 20 APRIL 2011

SUMMARY

Custody of minor child – mother living in the U.K., father living in Lesotho – child aged 8 in custody of father for past 4 years – custody awarded to father.

JUDGMENT

SCOTT, JA

[1] The appellant appeals against an order made by Monapathi J awarding custody of her minor daughter, F, to the respondent.

[2] The parties were married on 21 December 1996. There

appears to have been friction between them from a relatively early stage in their marriage. The appellant claimed that the respondent used to drink to excess and then assault her. The respondent, in turn, complained that the appellant was "bossy and did not want to be reprimanded". He also complained that she spent too much time at her parents' home. The respondent was a self-employed electrician. His income was irregular and this, too, was a bone of contention. Nonetheless, despite their differences, there were happy times in their marriage. The respondent trained as a nurse and qualified in 1999. On 20 July 2002 F was born. Both parties are deeply attached to her.

[3] At some stage prior to July 2006 an opportunity arose for the appellant to take up a nursing post in the United Kingdom. She was enthusiastic about the prospect of emigrating. The respondent was less so. Nonetheless, an agreement was reached that the appellant would accept the

offer to nurse in Scotland and that the respondent and F would follow once the appellant had settled in. On 10 July 2006 the appellant left for Scotland. F was then just 10 days less than four years old. At first all seemed well. The appellant sent a text to the respondent saying that she missed him. But soon thereafter the respondent began to have second thoughts about emigrating. Their relationship soured and in October 2006 the appellant phoned the respondent to say that she had met someone else and wished to terminate their marriage. A year later in October 2007 she instituted divorce proceedings. The respondent counter-claimed. Both parties sought the custody of F. A decree of divorce was granted by Guni J on 20 August 2008. The prayers for custody were deferred. The sole issue considered by the Court *a quo* was who should have custody. By the time the trial commenced the appellant had remarried. She and her new husband, who is German, had since moved to England where the appellant had obtained another nursing

position.

[4] Before the appellant left for Scotland the parties had agreed that it would be best for F to attend a multi-racial school in Ficksburg. In that event she would have been able to live with the respondent who lived at St. Monica's in Leribe together with his mother. According to the respondent, even prior to the appellant leaving, they had been unable to get F into the school of their choice at Ficksburg and it had been agreed that F would stay with the respondent's sister, Mrs. Blandina Lisene, and attend a school in Ladybrand. The appellant's version, on the other hand, was that they had agreed that F would stay with Mrs. Lisene for no more than a week or two. But the dispute is of little consequence as it is clear that once it was established that F could not be accepted at the Ficksburg school the appellant had no objection to F living for the time being with Mrs. Lisene.

[5] F attended the Lilliput Pre-Primary School in Ladybrand

where she did well. Her teacher described her as one who “ oes through life with a smile and is an example of a happy c ild.” Subsequently she could not get into the Ladybrand Primary School and was put on the waiting list. In the meant me, she attended the Tholoana-ea-Bophelo Primary S hool. Mrs. Lisene used to take her to school in the morning a d collect her in the afternoon. She spent long weekends nd school holidays with the respondent.

[6] It appears that all went well at first. The appellant kept in touch with Mrs. Lisene who reported on F’s progress. F and the appellant also regularly spoke to each other on the phone. The appellant and Mrs. Lisene enjoyed a good relationship.

[7] The trouble started in March 2007 when the appellant returned to spend some two weeks in Lesotho. At this stage divorce proceedings had not yet been instituted. The appellant arrived at the Lisene household only to be told that

the respondent had taken F home for the school holidays. The appellant then went to the respondent's house where she found no one at home. It transpired that the respondent had gone with F to South Africa. The appellant insisted that she had left messages with the respondent (presumably on his cell phone) that she was coming to Lesotho, but received no response. This was hotly denied. In the result, the appellant sought as a matter of urgency an order in the High Court directing that F be released to the appellant "for a short period until the [appellant] returns to Scotland where she works'. The respondent as well as Mr. and Mrs. Lisene were cited as respondents.

[8] The appellant returned again in April 2008. This time she went straight to F's school to collect her there. The respondent and Mrs. Lisene were summoned and eventually after a heated exchange good sense prevailed and the parties signed a "Memorandum of Understanding" drafted by an

attorney in which provision was made for the appellant to have access to F whenever she visited Lesotho.

[9] In the course of a lengthy trial the appellant's visits in 2007 and 2008 became the subject of endless cross examination concerning numerous allegations and counter-allegations of what was done or said by whom and where. It was all fruitless and served merely to obscure the real issue before the Court which was what was in the best interest of F. The appellant on each occasion had not seen F for the best part of a year. One can understand her anxiety to see as much of F as possible in the short time she was here. On the other hand, the respondent and the Lisenes would have found her conduct high-handed and invasive. The verbal exchanges between the parties on these emotionally charged occasions can carry little weight in determining who should be awarded custody.

[10] It is trite that in custody matters the interest of the child

is the first and paramount consideration. It necessarily follows that when the question of custody is judicially determined for the first time there would ordinarily be no onus in the sense of an evidentiary burden or so-called risk of persuasion on either party. The litigation in reality involves a judicial investigation. It is distinguishable from ordinary adversarial litigation. A court, for example, would be free to call evidence *mero motu* if it felt such evidence necessary to arrive at a proper result. See **Jackson v Jackson** 2002 (2) SA 303 (SCA) at 307 G-H; **T. v M** 1997 (1) SA 54 (A) at 57J – 58B. On the other hand, as pointed out by the Court *a quo*, where a minor child has lived with one of its parents for any length of time a court will not lightly award custody to the other parent in the absence of compelling reasons to do so.

[11] The appellant is undoubtedly an enterprising person. It was she who took the initiative to move to the United Kingdom in pursuit of what she considered would be a better

life to the couple and their young daughter. I have no doubt that she has the interests of F at heart and firmly believes that those interests would best be served if F were to live with her in the United Kingdom. The appellant was criticized by the Court *a quo* for failing to pay maintenance for F and it was said that this was indicative of a lack of concern for the child. I do not think this criticism is justified. Shortly after arriving in the United Kingdom the appellant paid the equivalent of M1000-00 into the account of Mrs. Lisene. She was not asked to do so. When she came to Lesotho she paid M1500-00 to F's school for school fees. Once again she was not asked to do so. She says she also sent money on an occasion to Mrs. Lisene's housekeeper. It is common cause that when she came to Lesotho she brought clothes and shoes for F. She also gave her a bicycle and a cell phone. Because of the strained relationship between herself and the respondent she sent clothes for F via her brother in Lesotho. When these were passed on to the respondent he refused to

accept them under the pretext that he did not know where they came from. Throughout the period the appellant was away she remained (save for a few interruptions) in telephonic communication with F. She knew where F was staying; she knew that F was being properly looked after and was doing well at school. Had the appellant been asked to pay maintenance and had she refused the position may have been otherwise. But she was not asked. What she did do was take out a policy for F and pay the monthly premiums which she continues to do. In my view there was no lack of concern.

[12] The fact remains that the appellant left F with the respondent when she was all but four years of age. By the time judgment was given in the Court *a quo* she had been away for almost four years. During that period F had seen her mother only for a short period each year. Almost a year has gone by since judgment was given. In July of this year F will be nine. She has lived happily with Mr. and Mrs. Lisene

and their children for the best part of five years. The appellant did not criticize the manner in which Mrs. Lisene cares for F, and rightly so. From all accounts she is a happy little girl doing well at school. The respondent has been paying her school fees and other expenses. He sees her over weekends and school holidays.

[13] What the appellant seeks is an order that would remove F from this happy environment and place her in a foreign country and for her a foreign world. What the consequences would be of the disruption that such a move would entail are difficult to assess. In my judgment the risks are too high. I think that on balance it is in the interests of F that she remains where she is. There is, in my view, accordingly no basis for interfering with the decision of the Court *a quo*.

[14] In awarding custody to the respondent Monapathi J emphasized that the order was subject to variation should the respondent deny the appellant access. I would repeat the

warning implicit in the learned judge's dictum. It is of paramount importance that F remains in contact with her mother and that every effort be made by both parents to foster the bond between mother and child. Perhaps when F is older she will have the opportunity of visiting her mother in the United Kingdom. Ultimately in years to come the decision where to live will be up to her.

[15] Although the issue of maintenance was an issue that was deferred for later determination at the time of the divorce, the Court *a quo* made no order with regard to maintenance. The respondent filed a cross appeal against the Court's failure to order appellant to pay maintenance for F in the sum of M1 000 per month. However, the issue of maintenance was hardly touched upon in evidence. There was no proper investigation into the means of the respective parties to pay maintenance and the needs of F. In the circumstances, the Court *a quo* was not in a position to

determine the issue and this Court is similarly unable to do so. It will accordingly have to stand over. Hopefully, good sense will prevail and the parties will use their best endeavors to reach agreement. Among the factors that will have to be taken into consideration will be the expenses necessarily incurred by the appellant for her to see F at regular intervals. As I have said, it is of paramount importance that the bond between mother and daughter be retained.

[16] The appeal and cross-appeal are dismissed with costs.

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D.G. SCOTT
JUSTICE OF APPEAL

I agree:

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M.M. RAMODIBEDi
PRESIDENT OF THE COURT OF APPEAL

I agree:

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L.S. MELUNSKY

JUSTICE OF APPEAL

For the Appellant : Adv M.S. Rasekoai

For the Respondent: Adv T.M. Kholoane