IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) 18/10

In the matter between:

MOJABENG MATLANYANE **APPELLANT**

and

TEBOHO MATLANYANE **RESPONDENT**

CORAM: SMALBERGER, JA
FARLAM, JA
TEELE, AJA

HEARD : 8 APRIL 2011
DELIVERED : 20 APRIL 2011

SUMMARY

Custody of minor daughter aged 6 years awarded to father upon divorce – appeal against order made – mother living in Cape Town – father living in Lesotho – relevant considerations and circumstances considered – in the best interests of the child at present for custody to be awarded to her father – appeal dismissed.

JUDGMENT

SMALBERGER, JA

[1] During the subsistence of the marriage between the appellant and the respondent a daughter, R, was born to them on 30 August 2004. The present appeal concerns the

question of who should be awarded her custody, following upon the divorce of the parties on 31 March 2010 at the instigation of the appellant. At the time of the divorce the matter of the minor child's custody was left over for later decision by Nomngcongo, J. Subsequently, after hearing the evidence of both the appellant and the respondent, the learned judge awarded the custody of R to her father, the respondent; the appellant to "have access to her at all reasonable times". The present appeal lies against such award.

[2] It appears from the evidence that R was born in Cape Town where her mother, the appellant, was studying at the time. When she was six days old she was taken to Lesotho by her maternal grandmother with the consent of both parents. She has remained in Lesotho ever since. She was initially cared for by her maternal grandparents. During that time the respondent, who lived nearby, had regular contact with her.

The appellant continued her studies in Cape Town and only saw her during university vacations.

[3] Towards the end of 2009 problems arose with regard to the respondent's access to his daughter. By then the divorce action was already pending. This led to the respondent applying to the High Court for her interim custody. The order was granted in December 2009 and R has been in his custody and under his care ever since. The respondent is employed as an hydrologist by the Ministry of Water Affairs. He earns a reasonable salary and is well capable of providing financially for his daughter. He has apparently made adequate provision for her daily care and schooling and, on occasions when his work takes him away from home, R is cared for by her paternal grandparents. There is nothing to suggest that he is not a suitable custodian parent.

[4] The appellant lives permanently in Cape Town. She has completed her studies, having obtained a masters degree in

engineering, and is employed by a large firm of engineers. She is financially independent. In the nature of things she has only limited opportunities of visiting R and exercising her rights of access. If she were granted custody of R she would remove her to Cape Town and bring her up there.

[5] One of the sad consequences of divorce is that a choice may have to be made between competing claims for custody of minor children between parents of relatively equal worth who both love their children and have their interests at heart. Deciding who should ultimately be awarded custody involves an enquiry in the nature of a judicial investigation by the trial judge as the upper guardian of minor children. It is trite that the paramount consideration is the overall interest of the child or children concerned. The interests of a child include considerations such as preserving the child's sense of security, emotional needs, ties of affection and material well being, the suitability of the prospective custodian parent and,

in the case of older children, the wishes of the child (the list is not intended to be exhaustive).

[6] While it is a general principle that the custody of young children should normally be awarded to the mother, it is not a fixed rule of law, and the final decision in each case as to what is in the best interests of the child or children concerned depends upon the particular facts and circumstances of that case. In making its decision the court, bereft of the wisdom of Solomon, must do the best it can on the material ultimately before it. In this regard the trial judge would be free to call evidence *mero motu* if it felt such evidence was necessary to arrive at a correct conclusion (Jackson v Jackson 2002(2) SA 303 (SCA) at 307 G-H).

[7] The trial judge was of the view that the appellant was a career orientated woman who appeared to have been prepared to put her career before the interests of R having regard, *inter alia,* to the fact that she was prepared to be

separated from her when she was a mere six days old. One must beware of being too critical of the appellant in that regard. Her desire to further her education and to provide a career and future for herself is laudable, and may ultimately inure for the benefit of R when she is older and the appellant is able to offer her opportunities in life which may otherwise not have been open to her. Her love for R is not in doubt. But her lack of regular contact with R since her birth must inevitably have caused the bond between them to be less strong than it might have been.

[8] What the trial court was concerned with was the best interests of R at the present time. She has been in the care of the respondent and, in his absence, her paternal grandparents, for the past 15 months. There is no reason to believe that her emotional and material needs are not being properly catered for. The nearby presence of her maternal grandparents is a further source of reassurance and comfort.

She attends school and has no doubt made friends. She is in an environment with which she is familiar, surrounded and supported by family. Her stability, for the present at least, is assured.

[9] If custody of R were now to be awarded to the appellant, she would be removed from her familiar and seemingly happy and secure environment to new and strange surroundings where she would have no friends or family apart from her mother. That is likely to be, at this stage of her life, a very traumatic experience, given also the fact that her ties with the appellant are still somewhat tenuous. The trial court was not told what accommodation and other arrangements, such as after school care, the appellant would be able to make for R in Cape Town, particularly while she is at work. Nor is there any family in Cape Town to provide back up care in time of illness or need.

[10] In my view, all things considered, it cannot be said that

the trial judge erred in holding that at present the interests of R are best served by being in the custody of the respondent, with the appellant having access to her at all reasonable times. With the passage of time the situation may change. It is to be hoped that when dealing with possible altered circumstances in future affecting R the appellant and the respondent will put her interests before their own and allow their decisions to be guided accordingly. It is also to be hoped that the parties will at all times act in a manner that will help to foster the bond between R and the appellant.

[11] It follows that the appeal falls to be dismissed. The learned judge in the court *a quo* made no order as to costs. Mr. Molati, for the appellant, did not ask for costs in the event of the appellant being successful; Miss Mokebisa for the respondent did. Bearing in mind that the appeal arises from the parties' concern for the welfare of their daughter it seems to be fair to make no order as to the costs of appeal save to order the appellant, who initiated the appeal and is

the unsuccessful litigant, to bear the costs of preparing the appeal record.

[12] In the result the following order is made:

> "**The appeal is dismissed. There will be no order as to costs save that the appellant is to bear the costs of preparing the appeal record".**

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J.W. SMALBERGER
JUSTICE OF APPEAL

I agree:

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I.G. FARLAM
JUSTICE OF APPEAL

I agree:

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M.E. TEELE
ACTING JUSTICE OF APPEAL

For the Appellant : Adv L.A. Molati

For the Respondent: Adv M. Mokebisa