IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) NO.44/11

In the matter between:

NKARENG MAPETLA **APPELLANT**

AND

BOFIHLA LEBOELA **RESPONDENT**

CORAM:

RAMODIBEDI, P
HOWIE, JA
HURT, JA

Heard : 23 JANUARY 2012
Delivered: 10 FEBRUARY 2012

SUMMARY

Custody of minor child born out of wedlock – How best interests of child ascertained - Court's duty to conduct investigation beyond evidence placed before it, if necessary, to ensure order serves best interests of the child.

JUDGMENT

[1] The respondent brought an urgent application in the High Court for an order effectively declaring her to be the guardian and lawful custodian of her minor child Nts'eliseng Nelly Mapetla and directing the appellant, who is Nts'eliseng's father, and his wife to hand Nts'eliseng over to her. She also sought a declaratory order to the effect that the appellant and his wife had "no right and control over (Nts'eliseng)". The application was opposed by the appellant but Majara J found for the respondent and granted an order in the form proposed in the Notice of Motion. The appellant appeals against the grant of this order.

[2] There is no serious dispute about the background to this matter. The respondent was married to someone whom she left in about 1995. In 1999, whilst still so

married, she struck up a relationship with the appellant, himself a married man, and from this adulterous relationship Nts'eliseng was born on 16 January, 2002. For reasons which are not directly relevant to this appeal, the respondent agreed that Nts'eliseng should take the appellant's family name, Mapetla, and go to live at appellant's sister's home in Swaziland. This was done in 2003 when Nts'eliseng was less than two years old. There Nts'eliseng stayed until, late in 2010, the respondent sought the assistance of the Swazi and Lesotho Police Child Protection Units to have Nts'eliseng brought back to Lesotho. The basis on which the police were asked to perform this service is not at all clear, but it must be assumed that the respondent claimed, as she did in the urgent application, that she is the guardian of Nts'eliseng and is accordingly entitled to be her custodian. It appears that the Child Protection Unit received information to the effect that respondent's claim to be the rightful custodian of Nts'eliseng was disputed

because, on the day after the child was brought back to Lesotho, she was placed in the Mazenod Centre for Abandoned Children and the police informed the respondent that they believed she had forfeited any right to custody by "giving" Nts'eliseng to the appellant. On the following day, the Child Protection Unit apparently authorized the Mazenod Centre to release Nts'eliseng into the custody of the appellant and his wife. Shortly thereafter, the respondent lodged her application which was opposed by the appellant.

[3] As indicated earlier, the basis upon which the respondent sought the order was that Nts'eliseng was born out of wedlock and she is Nts'eliseng's mother. Her contention is that, under the Common Law, the appellant has no right to custody of, or even access to, the child. The appellant countered these contentions by alleging that Nts'eliseng was born as a product of a customary law arrangement known as *mala*. It is not necessary to

discuss the merits of this contention; it will suffice to say that it was justifiably rejected by the learned Judge in the High Court. But apart from his claim that Nts'eliseng should be placed in the custody of his wife and him by virtue of the *mala* custom, the appellant also contended (albeit in the tersest terms), that "any attempt to reverse this relationship (i.e between Nts'eliseng, the appellant and his wife) will most adversely affect the minor child and leave her traumatised for the rest of her life."

[4] It is apparent from the judgment that argument in the High Court revolved almost exclusively around legal points. In the end the Judge held that the respondent was the guardian of Nts'eliseng and (apparently on that basis) awarded the respondent custody of the child. In keeping with the prayers in the Notice of Motion, she also granted the declarator referred to in para 1 above. Regrettably, these proceedings reflect a misguided

approach by both counsel and the court as to what was in issue in the application.

[5] It has been stressed in countless cases that, where the custody (and even guardianship) of a minor child is in issue, the court must reach its conclusion by considering what will be in the child's best interests. ***Cronje v Cronje* 1907 TS 871; *Cook v Cook* 1937 AD 154** at **p 163; *Shawzin v Laufer* 1968 (4) SA 657 (A)** at p **662; *Jackson v Jackson* 2002 (2) SA 303 (SCA)** at p **307**are a few of the decisions in which this principle has been reiterated over more than a century. More recently the principle has been incorporated in specific terms in the International Convention on the Rights of the Child[1], adopted by the Kingdom of Lesotho in March 1992, and in similar language in the African Charter on the Rights and Welfare of the Child, which took effect on 29th

[1] Article 3: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child should be the primary consideration."

November, 1999. It seems that section 4 of the Children's Protection and Welfare Act, No. 7 of 2011, which reads:

> "(1) All actions concerning a child shall take full account of his best interests.
>
> (2) The best interests of a child shall be a primary consideration for all courts, persons, including parents, institutions or other bodies in any matter concerning a child."

Was enacted with an eye to compliance with the Convention and the Charter as well as a codification of the Common Law as reflected in the body of decisions referred to above. The respondent has contended that the provisions of section 4 are not applicable to this matter because the Act only took effect on the date of its publication in the Gazette, namely 31st March 2011. The contention is that the incidents which have given rise to this litigation occurred prior to the commencement date of the Act and that the presumption against retrospectivity of legislation operates to preclude the

application of the provisions of the Act to the situation in this case. The submission is a curious one, to say the least. The short answer to it is that the "best interests" principle was, as I have tried to show, enshrined in the Common Law for decades before Act No. 7 of 2011 took effect [2] . There is accordingly no substance in this submission.

[6] It has also been stressed that a judge, seized of a matter in which custody is in issue, sits as the upper guardian of the minor child or children involved. In this capacity, the judge is under a duty, insofar as he or she thinks it necessary, to conduct an investigation wider in scope than the information placed before the court by the parties, in order to be satisfied that the order which is made is, indeed, in the best interests of the minor child. (***Shawzin*** **(supra) loc.cit;** ***Stock v Stock*** **1981 (3) 1280**

[2] In any event, where a statute merely restates or codifies the existing law, the question whether it is retrospective in effect simply does not arise. **L C Steyn "Uitleg van Wette" (5th Ed) p 90** and the authorities there referred to.

(A) at p 1290 to 1291; ***T v* M 1997 (1) SA 54 (A)** at pp57 to 58; **Jackson (supra) loc.cit; *Makatse v Makatse* (unreported) C of A (CIV) No. 19/10** at para 10; ***Matlanyane v Matlanyane* (unreported) C of A (CIV) 19/10** at para 6.)

[7] In this case, the circumstances in which the application for the custody order and other relief came to be made were unusual indeed. Nts'eliseng had been living with her aunt in Swaziland for about 9 years. Although the respondent stated in her founding affidavit that she had visited her daughter "periodically", there is no evidence to establish the frequency or duration of these visits. Likewise, the appellant made no effort to inform the court of the nature and extent of his contact with Nts'eliseng. Nor did either party give any evidence as to the arrangements which she or he was in a position to make for matters such as Nts'eliseng's accommodation, schooling, social and recreational activities and other

important aspects of life for a child of her age. There was therefore no evidence to enable the Judge to assess how Nts'eliseng related to her mother and her father and which of them was in a better position to assist her through the transition of her life from Swaziland to Lesotho. These matters were all overlooked by the parties and their legal representatives as a result of their apparent misconception as to the law. But they should not have been disregarded by the Judge. She was duty-bound, but failed, to conduct the type of investigation contemplated in the cases referred to in para 6, above, and her decision on the matter of custody and the declarator relating to the appellant and his wife were the result of a misdirection. Her judgment must accordingly be set aside.

[8] It is obviously important that certainty prevails in regard to the question of the custody, and perhaps guardianship, of Nts'eliseng. In the ordinary course, the

appropriate order on appeal may have been to remit the matter to the High Court with a directive to hear further evidence. But the affidavits, as they stand, contain virtually no evidence which would be helpful in arriving at an acceptable decision. Furthermore, we are told that Nts'eliseng has been staying with the respondent since the order of the court *a quo* was made on 15th May 2011.In the circumstances a remittal would effectively involve starting the whole matter *de novo* in the High Court. Counsel has informed us that the appellant intends applying to the High Court for custody, or at very least defined access, and it seems that the most appropriate way of dealing with the situation is simply to replace the order of the lower court with an order dismissing the application. The issue of custody (and guardianship) will then not be *res judicata* and it will be open to the appellant (or, if she so desires, the respondent) to bring an application or institute an action for relief as advised by his legal representative. It is

hoped, of course, that having spent money on this futile litigation, the parties will realize that it is in the best interests of everyone concerned that they meet as mature people and sort out an arrangement with regard to Nts'eliseng that does, in fact, serve her best interests.

[9] As to the question of costs, the parties themselves can hardly be blamed for the fact that their efforts were completely misdirected. Counsel were inclined to agree that there should be no order as to costs, either in the High Court or in this one.

[10] The following order is accordingly made:

(a) The appeal is upheld.

(b) The order of the court *a quo* is set aside and the following order substituted therefor:

"The application is dismissed with no order as to costs."

(c) There will be no order as to the costs of this appeal.

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N.V. HURT
JUSTICE OF APPEAL

I agree:

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M.M. RAMODIBEDI
PRESIDENT OF THE COURT OF APPEAL

I agree:

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C.T. HOWIE
JUSTICE OF APPEAL

For the Appellants : Adv P.R. Lebotsa

For the Respondent : Adv. L.T. Makholela