

**IN THE COURT OF APPEAL OF LESOTHO**

**HELD AT MASERU**

**C of A (CIV) NO.53/13**

In the matter between

**TLHORISO MAKENETE**

**APPELLANT**

and

**MOOKHO MOTANYA**

**RESPONDENT**

**CORAM:** SCOTT AP  
THRING JA  
LOUW AJA

**HEARD:** 10 APRIL 2014

**DELIVERED:** 17 APRIL 2014

## **SUMMARY**

*Custody of young female child awarded to her grandmother – Principles applicable – Duty of Court to investigate and consider factors relevant to the best interests of the child, if necessary mero motu – Matter referred back to Court a quo for this purpose.*

## **JUDGMENT**

### **THRING, J.A.**

[1] This appeal is about the custody of a little girl, not yet three years of age, who is the respondent's granddaughter. The child's mother, who was the respondent's daughter, was unfortunately killed in a motor accident on 15 February, 2013. The appellant is the child's biological father. He was not married to the child's mother, but from 2011 and up to the time of her untimely death they were living together as man and wife, and the child was living with them. In March, 2013 the respondent launched an application against the appellant on motion in the Court a quo in which she claimed, *inter alia*, the following relief as a matter of urgency:

- “(b) Ordering the respondent [now the appellant] to release the minor child Relebohile Neo Motanya alias Makenete to applicant [now respondent].
- (c) That the applicant be granted sole custody of the child.
- (d) Further and/or alternative relief.
- (e) Costs of suit.”

The appellant opposed the application, but on 6 November, 2013 the Court a quo (per **Moletse J**), after hearing the viva voce evidence of both parties, granted the relief sought by the respondent as prayed, with costs. The appellant appeals to this Court against this order. On 21 November, 2013 the Court a quo granted a stay of execution of the order pending the outcome of the appeal, the status quo thus being preserved. However, on the return day of the rule nisi, we are told, the rule was not made final, and the order of 6 November, 2013 was put into effect.

[2] The appellant, whose age is not stated in the record, is employed as a Lecturer at the Lerotholi Polytechnic

(College). He gave no evidence as to his income. He resides on the campus in what is presumably staff accommodation. He was in the process of building a house of his own at Masowe when the child's mother died, but that operation has ceased. He is married and has one child born of his marriage, a boy who lives with him and attends the National University of Lesotho. The boy's age does not appear from the record, but he is presumably a teenager or a young man. Since 2007 divorce proceedings have been pending between the appellant and his wife. They have not yet been concluded. The appellant's mother is still alive. He met the respondent's late daughter in 2010, and they started to live together in 2011 without any objection from her family. There was talk of their getting married after the divorce had been finalised. The deceased was given the name 'Maneo by the appellant's family after she had been accepted into the family as a prospective daughter-in-law.

[3] The respondent has never been married, and is 51 years old. She has had two children, one of whom was the child's late mother. The other is a son who is now a major. She has been employed at a hotel in Maseru called the

Lesotho Sun for about 20 years. She brought up her children alone and both attended university. Her late daughter obtained a B.Sc. degree at Roma University and an M.Sc. in Zimbabwe. She lives in her own house at Matala. It has eight rooms. She earns M3,800.00 per month. She lives with her son, who is now about 33 years of age, her brother's son and a domestic servant who is able to "*babysit*" the child.

[4] As for the child, the appellant says that after the death of her mother she was taken care of for two months by the appellant, assisted by his family. Thereafter, custody and access appear to have been shared in some way between the parties: the respondent says that the child did not live with her; she collected the child on Fridays, presumably from the appellant, and returned her to him on Sundays. It is unfortunate that more detail did not emerge about this arrangement, and how satisfactory or otherwise it has been.

[5] Since the order of the Court *a quo* on 6 November, 2013, we are told, the child has been handed over to the respondent and has lived with her, subject to the appellant having access to the child once or twice a week.

[6] The learned Judge *a quo* applied the following principle in deciding the application:

*“The matter was based, as it ought to be, on the welfare and best interests of the minor child. The authorities, both in Lesotho and South Africa, do agree that this should be the primary and major consideration.....”*

*As already mentioned, this [is] also in compliance with the Children’s Protection and Welfare Act, No.7 of 2011 and established principles of the common law.”*

With that principle there can be no quarrel. He then proceeded to conclude as follows:

*“At the end of the day the court was left in no doubt that the minor child’s welfare and best interests would only be served*

*by granting custody to her grandmother. The following factors were taken into consideration:*

- (a) The tender age of the child, which requires guidance and support that could best be given by the grandmother;*
- (b) The stable home and environment she is able to provide as opposed to the respondent;*
- (c) The fact that the child's mother in her wisdom had left everything to her own mother rather than the respondent. It can be assumed that she intended the funds to be used for the welfare of her child;*
- (d) The uncertainty of the outcome of the divorce proceedings which it is fair to conclude has been neglected for a very long time and will further add uncertainty to the future of the child."*

[6] Unfortunately, a large number of relevant and important questions arise, which do not appear to have been properly canvassed, investigated or answered in the Court a quo. Chief among these are the following:

- (1) From birth until the Court a quo made its order on 6 November, 2013 the child has lived with her father, the appellant, in his home; save for the week-ends which she has spent since about April,

2013 with her grandmother, the respondent, the child has known no other home. It can be assumed, in the absence of any evidence to the contrary, that she consequently has a close bond with her father. What will be the effect on the child of suddenly taking her away from her father and sending her to live with her grandmother in another home and a different environment? The apparent failure of the Court *a quo* to ask itself this question is, in my view, a fundamental misdirection which cannot be allowed to go uncorrected.

- (2) How suitable is the respondent to be a surrogate mother to the child? What arrangements can or will be made for the supervision and care of the child whilst the respondent is at work? Is the respondent's servant a reliable and adequate "*baby-sitter*"?



- (3) During the approximately nine months after the deceased mother's death that the child lived with her father, what arrangements were made for her supervision and care, particularly during the hours whilst the appellant was at work? If those arrangements were satisfactory, can they be continued in the future?
- (4) What is to be the position as regards access to the child by the non-custodian party (the order of the Court *a quo* makes no mention of this)? In the light of the apparent inability of the parties to reach amicable long-term arrangements, it seems to be essential that such access should be properly defined by the Court. See **Lesala v Morojele, C of A (CIV) No. 29/2011 (21 October, 2011)** at paragraph [6] (unreported), **T v M, 1997 (1) SA 54 (A) at 60** and **Makatse v. Makatse, C of A CIV No. 19/2010** at paragraph [10] (unreported).

(5) It emerged in the evidence that as a result of the death of the child's mother the respondent received large sums of money, totaling some M900,000, the bulk of which she still holds in certain bank accounts in her own name. It is referred to by **Molete, J** in para. (c) of the passage in his judgment quoted above. The learned Judge a quo seems to have accepted that the respondent acquired this money from her daughter's estate, but that the daughter "*intended the funds to be used for the welfare of the child.*" But the position with regard to this money is far from clear. As the upper guardian of minors, it seems to me that the Court a quo ought at least to have attempted to find answers to the following questions:

- (a) Did the child's late mother leave a will? (We are advised from the bar that she did not.)
- (b) If so, is the child a beneficiary under the will?

- (c) If not, was the child entitled to inherit some or all of this money ab intestato? (We are advised from the bar that the child is an intestate heir.)
- (d) Was the estate of the late mother reported to the Master in terms of the Administration of Estates Proclamation, No. 19 of 1935 and sec. 38 of the Children's Protection and Welfare Act, No. 7 of 2011?
- (e) Has an executor been appointed to the estate? If so, who is he or she? And how has he or she dealt with the money? (We are advised from the bar that no executor has been appointed.)
- (f) In particular, and if some or all of the money has become due from the deceased's estate to the child, has the executor (or the respondent) paid such money into the hands of the Master in terms of sec. 54 (2) (a) of the Administration of Estates Proclamation? If not, why not? And have these funds been deposited into the

Guardian's Fund in terms of sec. 91 (1) (b) of the Proclamation, as they ought to have been?

- (g) If some or all of the money is due to the child, has any of it been alienated or disposed of without the permission of the Master in contravention of the terms of sec. 39 (1) of the Children's Protection and Welfare Act?

[7] As the upper guardian of minors within its jurisdiction the Court *a quo* was under a duty to enquire into and, as far as possible, find answers to these questions, and also, perhaps, to others which might flow from their investigation. It ought, in my view, to have appointed one or more social workers from the Ministry of Social Welfare, or similar officials, to assist it by furnishing a report on these matters and by giving evidence, if necessary. A report should also have been obtained from the Master and placed before the Court. If the parties were unable or unwilling to furnish the Court with the necessary information themselves, the Court should have acted *mero motu*. In such an enquiry the question of onus does not

arise, and the Court follows a more or less inquisitorial procedure in its endeavour to ascertain what will be in the best interests of the minor concerned. The litigation then becomes less of a simple adversarial contest between the parties, and acquires rather the nature of an enquiry into the child's best interests. If a conflict should arise between those interests and those of a parent of the child, the Court may even appoint a curator ad litem to the child, although I am not suggesting that such a step would be necessary in this case. But I am satisfied that the Court a quo committed a serious misdirection when it decided this matter without causing any of the above questions to be properly investigated or canvassed before it.

[8] A further aspect on which, in my opinion, the Court a quo misdirected itself was in relation to the money. The learned Judge a quo appears, in sub-paragraph (c) of the passage from his judgment which I have quoted above, to have reasoned that custody of the child should be awarded to the respondent because, inter alia, the latter was in possession of the funds left by the late mother “*for the welfare of the child.*” This reasoning is false. In the first

place, money can easily be moved about. The fact that it is presently in the respondent's bank accounts does not preclude some of it being made available to the appellant from time to time to help to pay for the maintenance of the child, if he were to be awarded custody. Secondly, it would appear that the money does not belong to the respondent: it is probably the child's intestate inheritance. Consequently there is no good reason why it should remain in the possession of the respondent: on the contrary, it probably ought to be paid into the Guardian's Fund to be administered for the child's benefit under the direction and control of the Master. The question who has or is to have possession of the funds can have no relevance to the question who is to have custody of the child.

[9] Moreover, the wording of prayer (b) of the notice of motion, which was granted by the learned Judge a quo in unamended form, is unfortunate. It calls upon the appellant to "*release the minor child*" to the respondent, as if the child were a chattel. It reveals what appears to me to be a somewhat "*regimented (and archaic)*" approach to the topic of custody in the Court below, which has failed to

keep pace with recent developments in this field of the law (see **Lesala v. Morojele**, supra at paragraph [5]).

[10] For these reasons the order of the Court *a quo* cannot be allowed to stand, and the matter must, in my view, be referred back to it so that it can conduct the enquiries and investigations necessary to deal properly with the aspects which I have mentioned above, as well as any others which may arise therefrom.

[11] We raised with counsel the desirability of an interim regime to govern the situation until the matter of custody is finally resolved. Fortunately the parties are agreeable to such an order being made on the basis of equally-shared custody in the interim, and I propose to make such an order which will, I hope, be acceptable to the parties as a temporary measure without destroying or unduly harming the existing bond between the appellant and his young daughter.

[12] The following order will therefore be made:

- (1) The appeal is upheld. The order of the Court a quo is set aside.
- (2) The matter is referred back to the Court a quo so that it may investigate, consider and deal with the matters referred to in paragraph [6] of this judgment, and any other questions which may arise therefrom relating to the best interests of the minor child.
- (3) In the interim, and pending the final resolution of the matter, the following order is made:
  - (a) Custody of the minor child shall be shared equally by the parties as follows.
  - (b) Every Friday afternoon the party who has not had the child with him or her during that week shall collect the child from the home of the other party.
  - (c) The party who has collected the child as aforesaid shall have the child with him or her



until the following Friday afternoon, when the other party shall collect the child from his or her home, and so on every week.

(d) The above arrangement shall commence on Friday, 18 April, 2014.

(4) No order is made as to the costs of this appeal.

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**W.G. THRING**  
**JUSTICE OF APPEAL**

I agree

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**D.G. SCOTT**  
**ACTING PRESIDENT**

I agree

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**W.J. LOUW**  
**ACTING JUSTICE OF APPEAL**

**For the Appellant:** K. Thabane  
**For the Respondent:** T. Matoane