

**IN THE COURT OF APPEAL OF LESOTHO  
HELD AT MASERU**

**C of A (CIV) 03/2022  
CIV/T/313/2018**

In the matter between:

**MOLEFE  
APPELLANT**

**MAFAUFAU**

AND

**'MALERATO MAFAUFAU  
RESPONDENT**

**1<sup>ST</sup>**

**PRINCIPAL SECRETARY-MINISTRY  
OF SOCIAL DEVELOPMENT  
RESPONDENT**

**2<sup>ND</sup>**

**ATTORNEY GENERAL  
RESPONDENT**

**3<sup>RD</sup>**

**CORAM:**

K. E. MOSITO P

J. VAN DER WESTHUIZEN AJA

N. T. MTSHIYA AJA

**HEARD:** 10 OCTOBER 2022

**DELIVERED:** 11 NOVEMBER 2022

**SUMMARY**

*Family Law— Best interests of the child — right to basic education - Custody of a child awarded to his mother and later to the father - Principles applicable - Duty of Court to investigate and consider factors relevant to the best interests of the child if necessary mero motu - Matter remitted to court a quo for this purpose.*

*Application for condonation - Reasonable explanation found- Prospects of success on appeal found to exist -Where non-observance of Rules not flagrant and gross regard being had to the reasonable explanation for the delay given - condonation application granted.*

## **JUDGMENT**

**K. E. MOSITO P**

### **Introduction**

[1] This appeal orbits around the best interests of the child. We first comment on the condonation applications. This is followed by the factual background; the appellant's complaints; issue for determination; the law; consideration of the appeal; disposal and the order.

### **Condonation Applications**

[2] Before considering the merits of this appeal, it is necessary to decide whether we should condone the failure of the appellant to file the record and the heads of argument timeously. On 24 March 2022, the appellant filed a composite application for condonation for the late filing of the record and the heads of argument. The application was opposed through a notice of intention to oppose on behalf of the first respondent. At the hearing of the appeal, this court directed the matter to be heard holistically. Therefore, the explanation for the delay should be considered together with the prospects of success.

### **Factual background**

[3] This appeal arises out of an application for the variation of a custody order. The appellant and the first respondent were previously married to each other. Their marriage was dissolved on 26 September 2018 by order of the High Court, the appellant being the plaintiff in the divorce proceedings. In terms of a Deed of Settlement which was made an order of the court, the respondent was awarded the custody of the two children of the marriage, subject to the appellant's rights of access. The rights of the parties in this regard are defined as follows in the Deed of Settlement:

(a) The divorce should proceed uncontested on the grounds of malicious desertion.

(b) Custody of the two minor children of the parties be awarded to the defendant, with the plaintiff having reasonable access to the said minor children.

(c) Maintenance of the parties' minor children shall be in terms of the conditions mentioned hereunder:

(i) The plaintiff shall oversee the maintenance and school fees of the two minor children.

(ii) The said plaintiff shall further oversee payment of the minor children's transportation costs and all other costs ancillary to the children's education.

(iii) The defendant, on the other hand, shall maintain food and clothing.

(d) Property of the joint estate shall be divided as follows:

(i) The matrimonial home and household equipment of the parties herein shall be held in trust by the defendant on behalf of the minor children.

[4] On 8 September 2022, the principal of Unity English Medium School, where the child Realeboha Mafaufau was registered as a student, wrote a letter titled: "TO WHO IT MAY CONCERN". In the letter, the principal states that, although the fees for the learner (Realeboha Mafaufau) had been paid up in full up to the last term, the said learner had not turned up for classes since 2 August 2021.

[5] On 21 October 2021, the appellant approached the High Court *ex parte* seeking an order that the respondent release the child, Realeboha Mafaufau, to the appellant for purposes of attending school pending finalisation of the application, with visits by the first respondent on weekends and holidays. Khabo J granted the application *ex parte*. She also varied the aforementioned Deed of Settlement to enable the release of the child to the appellant.

[6] The respondent filed her answering affidavit. She deposed that the appellant had approached the court with dirty hands because he had not disclosed to the court that he had been defaulting on the terms of the divorce order from the day it was granted, thereby resulting in Realeboha Mafaufau's expulsion from school on account of non-payment of school fees by the appellant.

[7] The appellant replied to the answering affidavit. He specifically denied ever defaulting on the order. He averred that he had paid the school fees for the children at their respective schools. On 6 December 2021, Mahase J ordered the second and third respondents to have the child's plight to be attended to urgently. She ordered advocate Khubetsoana of the second respondent to consult before the end of business on 8 December 2021 to have the matter attended to appropriately. She further ordered that the second and third respondent's officers who had been allocated the matter should log in on 8 December 2021 at 9:30hrs to have the matter argued.

[8] A police officer (one Senior Inspector Mokotjomela) served the order of the court and caused the child to be released to the appellant. On 10 December 2021, a social worker named 'Mapaballo Thaha prepared a social enquiry report on the custodianship of the said child. The report revealed that the child's custody should be awarded to the appellant.

[9] On 15 December 2021, Mahase J discharged the *rule nisi* previously granted by Khabo J and awarded the child's custody to the first respondent, with the appellant having reasonable access.

[10] I must observe in passing that, it was inappropriate for Khabo J to have awarded the orders *ex parte* in this kind of case. As this Court pointed out in **Commander, Lesotho Defence Force another v Matela**<sup>1</sup> as a general rule, basic considerations of fairness and the need to prevent the administration of justice being brought into disrepute require

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<sup>1</sup> Commander, Lesotho Defence Force another v Matela LAC(1995-99) 799 at 804-805.

appropriate notice to be given. Orders should only be granted without notice where this is rigorously justified (where, for instance, there is extreme urgency or the need to prevent the order from being frustrated where any prior notice could well have that effect). When the appellant so rushed to court and proceeded *ex parte*, he must have been aware that he was asking for a relief that was going to affect the rights of custody of the first respondent in which case the application of the rules of natural justice must have come to his mind, but instead, he just lightly employed this procedure. Rule 8 (22) (b) of the High Court Rules specifically demands that circumstances rendering an application to be urgent must be set forth in detail. I say no more on this issue for it was not addressed before us.

### **Appellant's complaints**

[11] Dissatisfied with the aforementioned decision by Mahase J, the appellant has approached this court on several grounds of appeal. The first ground is that the learned Judge *a quo* erred in discharging the *rule nisi* before considering the merits of the matter and the social enquiry report. Second, the appellant complains that the court *a quo* erred in disregarding the role of the police by the Lesotho Mounted Police Service (LMPS) regarding the minor child's best interests. Third, the appellant further complains that the court *a quo* erred in awarding the custody of the minor child, Realeboha Mafaufau, to the first respondent without enquiring what is in the best interest of the minor child.

[12] It was argued before us that, the learned Judge's file remained with her as she was still preparing her reasons for judgment. Only 18 March 2022 did the appellant's Counsel have access to the file. The first respondent had not filed opposing affidavits, but there had, on the other hand, been an indication in her heads of argument that she would be opposing the application in court. I am of the opinion that, with regard being had to the reasonableness of the explanation given for the delay coupled with the importance of this case on the need to determine the child's best interests, the non-observance of the Rules has not been flagrant and gross. Regarding our decision on the merits of this appeal, I hold that there are prospects of success in this appeal. The application for condonation should be granted.

### **Issue for determination**

[13] Therefore, the issue for determination is whether the court *a quo* did determine the child's best interests before awarding the child's custody to the first respondent with concomitant access to the non-custodial parent.

### **Law**

[14] Before determining the issue identified for the decision above, it is, at this stage, apposite to turn first to the law applicable to the present kind of case. In our law, the child's best interests are the primary and major consideration in determining matters such as the present.<sup>2</sup> This is consistent

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<sup>2</sup> This complies with the Children's Protection and Welfare Act, No.7 of 2011 and established common law principles.

with the terms of the Children's Protection and Welfare Act.<sup>3</sup> The Act aims to promote and protect children's rights and welfare. In terms of section 11 of the Act, a child has a right to access education. In section 212(1) of the Act, a parent legally liable to maintain a child or contribute towards the child's maintenance must supply basic education or any other thing necessary for the child's well-being. Subsection (2) provides that, for purposes of this section, basic education means primary up to secondary education or its equivalent.

[15] The High Court may permissibly resort to its inherent jurisdiction as the upper guardian of minor children to fulfil its duty to protect children's rights. The court determined that the position regarding access to the child by the non-custodial party has to determine the apparent inability of the parties to reach amicable long-term arrangements. The court should properly define such access.<sup>4</sup>

### **Consideration of the appeal**

[16] It is trite that in matters of this kind, the interests of the children are the first and paramount consideration. Generally speaking, where, following a divorce, the custodian parent does things which are inimical to the child's best interests, a court will not lightly refuse an application to have the child's custody removed from such parent. The best interests of the child's determinations are generally made by considering a number of factors related to the child's circumstances and the parent or

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<sup>3</sup> Children's Protection and Welfare Act, No.7 of 2011.

<sup>4</sup> 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, *Makenete v Motanya* C of A (CIV) NO.53/13 at para 4 and *Makatse v. Makatse*, C of A CIV No. 19/2010 at paragraph [10] (unreported).



caregiver's circumstances and capacity to parent, with the child's ultimate safety and well-being as the paramount concern.

[17] What must be stressed is that each case must be decided on its particular facts. No two cases are precisely the same, and while past decisions based on other facts may provide useful guidelines, they do no more than that. Care should be taken not to elevate to rules of law the dicta of Judges made in the context of the peculiar facts and circumstances with which they were concerned.<sup>5</sup>

[18] The Judge *a quo* does not appear to have considered many relevant and important questions. Chief among these are the following: the principal's letter, the issue of the child's best interest, the social enquiry report and the report by Senior Inspector Mokotjomela. Regard being had to the two reports, how suitable is the first respondent to be a custodian parent to the child? What arrangements were to be made to ensure that the child's best interests could or would be made for the supervision and care of the child whilst in the <sup>first</sup> respondent's regarding the child's schooling?

[19] If those arrangements were satisfactory, could they be continued in the future? Had the learned Judge considered the letter by the principal, she would have probably not concluded that no fees had been paid for Realeboha Mafaufau by his father. The social worker's social report was clear that it was in the child's best interests to be in the custody of its father. It is

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<sup>5</sup>Jackson v Jackson 2002 (2) SA 303 (SCA) p.318 per Scott JA in para 2.

nowhere alleged on the papers that the child is unhappy or in any distress while with the appellant.

[20] In his grounds of appeal, the appellant complains that the learned Judge a quo erred in discharging the *rule nisi* before considering the merits of the matter and the social enquiry report. In his argument before us, advocate Makhera for the appellant submitted that the court's failure to consider this issue was a fundamental misdirection that cannot be allowed to go uncorrected. For this submission, the learned Counsel relied on the judgment of the court in **Makenete v Motanya**<sup>6</sup>, where this Court held that:

[7] As the upper guardian of minors within its jurisdiction, the Court a quo was obliged to enquire into and, as far as possible, find answers to these questions and, perhaps, to others who 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 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, 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 to ascertain what will be in the best interests of the minor concerned. The litigation becomes less of a simple adversarial contest between the parties and acquires the nature of an enquiry instead of the child's best interests. If a conflict should arise between those interests and those of a child's parent, 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. However, I am satisfied that the court a quo committed a serious

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<sup>6</sup> Makenete v Motanya C of A (CIV) N0.53/13 at para 4.

misdirection when it decided on this matter without causing any of the above questions to be properly investigated or canvassed.

[21] Without disputing the correctness of the legal position articulated in the preceding paragraph, Adv Khutlang contended that, as a fact, the learned Judge had considered the social enquiry report. There was no paragraph in the judgment upon which the submission was based. I have read through the judgment and could not find a paragraph where the learned Judge considered the reports or the principal's letter. Indeed, no such paragraph exists in the court a quo's judgment. Therefore, I find that the court did not consider the social enquiry report.

[22] The learned Counsel further pursued the appellant's ground of appeal that the court a quo erred in disregarding the role of the police by the Lesotho Mounted Police Service (LMPS) regarding the best interests of the minor child. Third, the appellant further complains that the court a quo erred in awarding the custody of the minor child, Realeboha Mafaufau, to the first respondent without enquiring what is in the best interest of the minor child. Regarding the decision to which we have come on the main issue, it is unnecessary, in my view, to consider the other grounds of appeal raised above.

### **Disposal**

[23] This appeal should, therefore, succeed and the judgment of the court a quo be set aside. For the foregoing reasons, and as this court held in the past, the order of the court a quo cannot be allowed to stand. The matter must be remitted to it so that it can conduct the enquiries and investigations

necessary to deal properly with the aspects I have mentioned above and any others that may arise from there.<sup>7</sup>

[24] It is also important to mention that we raised with Counsel the desirability of an interim regime to govern the situation until the custody matter is finally resolved. Although Counsel agreed that it would not be in the child's best interests to keep removing from one parent to another pending finalisation of the legal battles between its parents, they made no suggestions regarding interim custody and access.

### **The order**

[24] The following order will therefore be made:

- (1) Condonation is granted for the late filing of the record and heads of argument.
- (2) The appeal is upheld. The order of the court a quo is set aside.
- (3) The matter is remitted to the court a quo so that it may investigate, consider and deal with the matters referred to in the social worker's report and any other questions which may arise therefrom relating to the best interests of the minor child.
- (4) No order is made as to the costs of this appeal.



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**K. E. MOSITO**

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<sup>7</sup> *Makenete v Motany* (supra), at para 4.

**PRESIDENT OF THE COURT OF APPEAL**

I agree:



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**NM MTSHIYA  
ACTING JUSTICE OF APPEAL**

I agree:



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**J VAN DER WESTHUIZEN  
ACTING JUSTICE OF APPEAL**

**FOR APPELLANT:** ADV. N.E. MAKHERA  
**FOR FIRST RESPONDENT:** ADV. B.NTOKO