

**IN THE HIGH COURT OF LESOTHO**

In the matter between:

**MOOKHO MOTANYA**

**APPLICANT**

**AND**

**TLHORISO MAKENETE**

**RESPONDENT**

**JUDGMENT**

**Coram** : **L.A. Molete J**  
**Date of Hearing** : **20<sup>th</sup> September, 2013**  
**Date of Judgment:** **06<sup>th</sup> November 2013**

**SUMMARY**

*Custody of minor child – Courts to establish best interest of the child in awarding*

*custody – Best interests principle supported by the Common Law and Statute in Children’s Welfare and Protection Act No.7, 2011 - Court finding best interests of the child would be served by granting custody to grandmother.*

## **ANNOTATIONS**

### **CITED CASES**

**Matlanyane Vs Matlanyane (unreported) C of A (CIV) 18/2010**

**Nkareng Mapetla Vs Bofihla Leboela C of A (CIV) 44/2011**

**Shawzin Vs Lauter 1968 (4) SA 657 (A)**

**Jackson Vs Jackson 2002 (2) SA 303 (SCA)**

### **STATUTES**

**Children's Protection and Welfare Act No.7, 2011**

### **BOOKS**

**P.Q.R. Boberg – Law of persons and Family (2<sup>nd</sup> Edition) Page 323 & 404**

**[1]**

This matter is an application brought by Mookho Motanya, who is the grandmother of a minor child Relebohile Neo Motanya for her custody. The mother of Relebohile, who was applicant's daughter died in an accident on or about 15<sup>th</sup> February 2013. The child was born on 10<sup>th</sup> May, 2011, which means the mother died before she reached the age of two.

**[2]** The Respondent is the biological father of the child. He had been living in adultery with the daughter of the plaintiff Limpho Veronica Motanya. This is so because the Respondent at the time of the birth of the girl, and indeed, up to the time of the hearing of the matter was still legally married to his wife Mascasa Makenete.

[3] Applicants claim, or relief sought against Respondent was that Respondent be ordered to release the minor child to her and that she be granted sole custody of the child.

[4] It is significant to point out that the court, before hearing argument in the matter, attempted to persuade the parties and counsel to resolve the matter, bearing in mind the principle or main consideration being the interests of the minor child.

[5] At some point, in an effort to persuade the parties themselves, the court even held conference with them without their counsel in an attempt to make them reach an amicable settlement. This was done with a view to maintaining cordial and responsible attitudes between the parties. The Court was concerned and sought to avoid the need for a judgment or ruling which may deprive one of the parties of custody because it held the strong view that the interests of the minor child would best be served by cooperation between the two contestants.

[6] In the meantime the parties shared custody; which was the best interim arrangement. The matter came before me in the months of June, July and August, and despite what I considered to be the best effort, no agreement was reached. It had to be heard and argued in September, 2013.

[7] The brief and common cause history of this matter is that Respondent a married man who had separated with his wife, and was going through a contested divorce, met the Applicant's daughter, and they started a relationship out of which the minor child was born. The matter of his divorce is still pending in the High Court.

- [8] The child was born in May, 2011 and less than two years later her mother died in a car accident. The deceased and respondent had virtually lived as man and wife, albeit in adultery. They had shared and used the properties each had, including motor vehicles and furniture as if they were a married couple. They apparently even deceived the officials in registering the child's birth to reflect that they were married and the child was given the fathers surname. The officials at the department naturally acted in good faith, unaware of the true situation.
- [9] After the death of her daughter, Applicant demanded all the items that belonged to her daughter. The Respondent agreed to release all the items in his possession consisting of two motor vehicles; furniture items including computers, tv set, tables and items of cutlery, cooking pots; dishes, curtains and some blankets. There was some dispute about a site and some few items but these were inconsequential apparently because the present dispute excluded them. The Respondent refused to release the child, hence the dispute before me.
- [10] In his opposing papers, the Respondent raised some preliminary points relating to urgency and disputes of fact; but the court recognised that the application was in anyway brought on notice and that a lot of time had expired while attempts were made to resolve the matter. In so far as the disputes of fact were concerned, it would in any event be necessary to call viva voce evidence to determine the best interests of the child.
- [11] The main and probably only basis for the Respondent's refusal to release the child to Applicant was that he is the biological father of the minor child.

He relied on the provisions of the **Children's Protection and Welfare**<sup>1</sup> which provides that all actions concerning a child should take full account of the child's best interests, and concluded that it would serve her interests best if she were left in his custody as her biological father. He postulated that it would be damaging to the child's upbringing and development if she were removed from his custody.

[12] One thing that the counsel for the parties at least agreed on was that the main consideration in deciding the matter must be the welfare and best interests of the minor child. Mr Matooane for the Applicant submitted that;

“where the child is extramarital, the parental power vests in the mother alone”<sup>2</sup>

And further that;

“It has been said that an extra-marital child has a mother but no father”<sup>3</sup>

[13] In this case, fortunately the court did not have to decide on that. 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 primary and major consideration.

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<sup>1</sup> Act of 2011

<sup>2</sup> Boberg – Law of Persons and Family (2nd edition) P. 323

<sup>3</sup> Borerg – Page 404

**Matlanyane vs Matlanyane (unreported)<sup>4</sup>**

**Nkareng Mapetla vs Bofihla Leboela (unreported)<sup>5</sup>**

A number of South African authorities also confirm this basic principle and are quoted in the Mapetla case above. They are **Shawzin vs Lauter<sup>6</sup>** and **Jackson vs Jackson<sup>7</sup>**.

As already mentioned this also in compliance with the Children's Protection and Welfare Act, No.7 of 2011 and established principles of the Common Law.

[14] In order to determine the best interests of the minor child, the court heard the evidence of both the Applicant and Respondent.

[15] The Applicant gave evidence that she was 51 years old, and employed for a period of about 20 years by the Lesotho Sun Hotel. She had never been married and lived with her son, her brother's son and a domestic worker. She testified that she lives in her own house, which has eight rooms and is situated at Matala Phase II within the Maseru district. She earns a salary of M3800-00.

[16] She said her daughter, the deceased, was an educated and independent young lady who had a BSC degree from the National University of Lesotho and MSC from University of Zimbabwe. She had lived with the Respondent, but on the day she met her untimely death, she had asked for

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<sup>4</sup> C of A (CIV) 18/2010 – Page 6

<sup>5</sup> C of A (CIV) 44/2011

<sup>6</sup> 1968 (4) SA 657 (A)

<sup>7</sup> 2002 (2) SA 303 (SCA)

a meeting with her. She arrived at around 1;00pm and told her that the Makenete family, (i.e. Respondent's family) were intending to bring to her bohali (or lobola) cattle on a specified date, but that she should not accept them because she was not prepared to be a junior wife to a polygamous marriage.

[17] The Applicant then said her daughter went ahead on her trip, and sadly had the accident on her way.

[18] Upon her death, Applicant received substantial amounts from her daughter's estate. An amount of M170,000-00 from her bank account, 677,000-00 from the Lesotho Revenue Authority being tax refund; 24,000- 00 from Alliance Insurance and M20,000-00 from Metropolitan Insurance. She testified that she reported it to the Master of the High Court and made the minor child the beneficiary of the funds.

[19] She indicated that she was due to still receive further funds; but such could not be released because certain documents required are still in the possession of the respondent who refuses to release them. She also has not yet received from respondent some of the furniture and household items that belong to her daughter.

[20] The Respondent on the other hand gave evidence that was not really relevant to what was required. He was mainly led on issues relating to the fact that Applicant was aware; and it was suggested; approved of the relationship between himself and her daughter. He suggested that his family wanted to help and be involved in the burial, but significantly failed to address the issues relating to the welfare and best interests of the child.

[21] It was the court which tried to establish some of the relevant issues. Surprisingly, counsel for the Respondent raised objections at every turn even to the court on what it considered a relevant inquiry.

[22] The sum total of his evidence revealed that he resides within the school premises in a house that belongs to the school. He had no house of his own. His divorce is still pending after about 7 years and had not even commenced to the hearing stage. When asked by the court why he would want to remove the child from Applicant and separate her from the very estate and benefits that her mother had put in place for the minor child, he said that he could still sue the Applicant for those on behalf of the child.

[23] When he was asked about what he could offer the minor child, it was his counsel who responded to object and submit that he could by way of a will leave anything he wished to the minor child. What counsel overlooked was that as matters stood, he was only entitled to an undivided half share in the joint estate of his wife and himself.

[24] 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 her grandmother.

(b) The stable home and environment she is able provide as opposed to the Respondent.



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- (c) The fact that the child's mother in her wisdom had left everything 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 this child.

**[25]** In the result I came to the conclusion and I make the following order;

- 1. The application is granted as prayed and the Respondent is ordered to release the minor child Relebohile Neo Motanya, Alias Makenete to Applicant.
- 2. Costs of suit are awarded to the Applicant.

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**L.A. MOLETE**

**JUDGE**

**For the Applicant : Adv T. Matooane K.C.**

**For Respondents : Attorney Mrs K.M. Thabane**

