

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/65/2021

In the matter between:-

REFILOE RAPHOKA - HARMANS

APPLICANT

AND

MOTHUSI HARMANS

1ST RESPONDENT

**MAGISTRATE COURT – CHILDREN COURT
DIVISION**

2ND RESPONDENT

**OFFICER COMMANDING – THETSANE POLICE
STATION**

3RD RESPONDENT

COMMISSIONER OF POLICE

4TH RESPONDENT

THE ATTORNEY GENERAL

5TH RESPONDENT

**Neutral Citation: Refiloe Raphoka – Harmans v. Mothusi Harmans and 4
Others [2022] LSHC CIV 106 (5th May, 2022)**

JUDGMENT

Coram : Hon. Mahase J.

Date of hearing : 15TH March, 2nd September 2021

Date of delivery : 5th May, 2022

Summary

Husband and wife – custody of the child – Best interests of the child – What is? - Minor child attending school in a foreign country – Child moved on to Lesotho – By father’s unilateral actions – Best interest of the child – Mother still working in Mozambique – Parties having since divorced.

ANNOTATIONS

CITED CASES:

- **Matjelo v. Mapetla and Another CIV/APN/107/2011 LSHC 29.**
- **Plascon-Evans Paints LTD v. Van Riebeck Paints (PTY) LTD, 1984 (3) S.A 623 (A)**
- **Du Preez v. Pheko, CIV/APN/151/2018 LSHC 24**
- **Kalil v. Decotex (PTY) LTD and Another 1988 G S.A 943 (A)**
- **Vice Chancellor of N.U.L v. Putsoa 2000 – 2004 LAC**

STATUTES

BOOKS

- **None**

[1] **INTRODUCTION:-**

Parties are at logger heads over the custody of their minor child. Each of them claiming to be the best suited parent to be awarded full custody of the minor child. Child’s parents residing at two different countries – viz Lesotho and Mozambique. This child is a girl aged five or six years in the year 2021.

[2] **Factual Background**

The applicant and the first respondent have at all material times been staying together as husband and wife. They were married by customary rights in community of property. Their marriage has since

been a subject of divorce in the Matala Local Court. They are now divorced.

- [3] Prior to that divorce, by agreement, the applicant and the minor child were staying in Mozambique where the applicant is currently employed. The first respondent is residing in Lesotho. At first, the parties were living peacefully and were in constant communication with each other including the minor child
- [4] However, things turned and changed sometime in the year 2014. The facts of this case are spelt out by each counsel for each party.
- [5] In a nutshell parties did not live in harmony because they fought each other frequently. In the year 2019, the applicant secured a job in Mozambique. The first respondent had made attempts to secure a job in that country too, but his efforts to travel there to make proper consultations were hampered by the advent of the Covid 19 Pandemic which restricted people's movements globally.
- [6] Only the applicant was able to move from Lesotho to Mozambique where she had a job. By agreement then, the parties' minor child went to live with its biological mother in that foreign country.
- [7] Having failed to move to Mozambique, the first respondent started to accuse the applicant of having unlawfully kidnapped their minor child and having moved her to Mozambique. Of course, all these are baseless accusations. He could not support any of them. The relationship between the parties herein has become worst such that

they ultimately informally separated, prior to the divorce being finalized by the Matala Local Court.

[8] Prior to this, the parties were able to communicate with each other. The minor child used to visit its father and both parties complied with the children's court order in CIV/CPU/MSU/228/220.

[9] It is important to mention that when the parties first started to fight over the visitation rights of this child, the first respondent accused the applicant of having kidnapped their minor child. He made a report to the Maseru Central Police; but he failed to convince the police that, his wife had indeed kidnapped her own daughter.

[10] The first respondent has ultimately taken their minor child away from its biological mother. He has also taken away the child's passport and her birth certificate. This, the first respondent did despite the fact that the minor child was attending school in Mozambique. This child has now missed school, as of date she remains in Lesotho. She now stays with her father's aunt; the first respondent's sister at Masianokeng.

[11] The first respondent refused to allow the child to return to its mother. That child has been separated from its biological mother since December 2020. The biological mother (the applicant) has therefore been forced to live this minor child in Lesotho with its father (the first respondent). The applicant had to go back to work in Mozambique. The parties' minor child is now attending school at Maseru Academy.

[12] The applicant has since approached Children’s Court in Maseru asking that Court to grant her sole custody of their minor child with reasonable access by the first respondent to the said child. No final decision was made by that Court on the said issue. Instead it made an order that (I quote) “ *The matter is referred to the High Court since it has unlimited jurisdiction* “.

[13] No reasons have been provided explaining or in justification of this order. The Children’s Court is empowered by section 200 to deal with issues pertaining to custody and access. Subsection (1) of this Act provides that:-

“(1) A parent, family member or any other person may apply to a Children’s Court for custody of a child”.

[14] The learned Magistrate should have made a final pronouncement on the issue at hand particularly because he/she had heard evidence adduced before Court by parents of this minor child. Be that as it may, before this Court, both parents claim to be suited to be awarded sole custody of their minor child with reasonable access to the child by the parent who would not have been awarded custody.

[15] Well, it is not understandable how any of the parents could be awarded sole custody; whatever that means in the light of the fact that section 10 of the Children’s Protection and Welfare Act No. 7 of 2011 clearly stipulates that “*a child has a right to live with his parents and grow up in a caring and peaceful environment unless it is proved in Court that living with his parents shall -----:*

- a) Lead to significant harm to the child;
- b) Subject the child to abuse and neglect; or
- c) Not be in the best interest of the child.

[16] In this application when at first both parents made the decision that the applicant should take the minor child to Mozambique that was made by mutual agreement between them. Things changed after the respondent was unable to move to Mozambique due to Covid 19 pandemic, to join his family.

[17] The first respondent has raised two points in limine which are:-

- Dispute of fact
- Disguised interim relief with final effect.

[18] Dispute of fact: According to the first respondent, this is in relation to the issue whether or not the first respondent is a fit and proper parent to be awarded the sole custody of their minor child.

[19] It is trite law that whenever a point of law that a dispute of fact exists and an application cannot properly be decided on affidavit, it is not enough for a respondent to merely allege that a dispute of fact exists. The test laid down is whether the alleged dispute of fact is material to the determination of the issues as a result of which the matter cannot be properly decided on papers.

[20] Issues for determination centre around the following:

- Whether or not the points of law raised in limine are genuine and or real?

- Whether or not such point as herein raised, necessarily entails the dismissal of this application; particularly bearing in mind the provisions of Rule 8 (14) of the Rules of this Court?

[21] Each parent argues that he or she is a fit and a proper parent entitled to be granted an order of sole custody of the child with reasonable access of the other parent to the child.

[22] While it is not denied that the parties herein have not had a harmonious marital relationship for many years; there is nothing alleged by either party that any of them had failed to carry out his or her responsibilities in terms of section 20 (2) (a) and (b) of the Children's Protection Welfare Act No. 7 of 2011.

[23] In the circumstances, the point of law raised in limine by the applicant and against the first respondent that he is not a fit and proper parent to be awarded custody (not sole custody) of the minor child herein and that there is in existence a dispute of act is not tenable.

[24] There is nothing on the papers indicating that the first respondent has failed to do his duties in terms of the relevant and current legislation referred to above. This point of law raised in limine is therefore dismissed.

[25] Disguised interim relief with final effect:- It is argued on behalf of the first respondent that all the orders sought to be obtained by the applicant are couched as interim but in essence they are final in nature or in effect. That, if they were to be granted they would have an

effect of having determined the whole application to finality, without him having been heard by Court.

[26] Indeed, the above is a correct interpretation of the net effect of what will ensure should these orders sought be granted. They are in effect final in nature although they are couched as being interim.

[27] That the above is as the first respondent alleges is confirmed by the contents at paragraph 2 (2.2) page 3 of the written submissions of the applicant to the effect that “a determination of the second issue will have the effect of addressing prayer 2 (F) as outlined in the notice of motion...”

[28] In the said prayer 2 (F), the applicant has asked this Court to grant her an interim prayer allowing her to travel with their minor child to Mozambique where she is currently enrolled for study thereat”.

[29] The actual net effect of this prayer if granted, is to effectively remove this child out of the jurisdiction of this Court such that on the return date, there will be nothing to argue as the child will have permanently been moved to Mozambique.

[30] The applicant, has in moving this application as she did subjected herself to the risk of having the application dismissed on the points of law raised in limini. If this Court were to dismiss the points of law raised in limine herein, it would indeed have granted an order whose final effect would finally dispose of the matter whilst the first

respondent would not have been heard. This would be grossly unjust and prejudicial to the first respondent.

[31] It is therefore the considered view of this Court that if granted as has been pleaded, then there will be nothing to be argued on the return date and that the applicant will no longer be interested in whatever outcome of the application as she will be having the child with her, in a foreign land out of the jurisdiction of this Court.

[32] In the premises, the two points of law raised in limine herein are upheld. The application is therefore dismissed. No order as to costs is made.

M. Mahase

Judge of the High Court

For Applicant: Adv. M. Makau

For first Respondent: Adv. L.O. Maphatsoe

For second up to fifth Respondents: No appearance