HIGH COURT

(BISHO)

CASE NO.: 89/2000

In the matter between:

BUSISWA NOBAZA

and

MPUMELELO MFIKILI

J U D G M E N T

EBRAHIM J: This matter stood down to enable me to consider the representations which have been made and I now proceed to deliver judgment.

This is an application by the applicant, BUSISWA NOBAZA, for an order that the respondent, MPUMELELO MFIKILI, be ordered to return to the applicant custody of the child SIZLEN NTSIKA MGIGIMA. This matter arose as one of urgency, but for various reasons it was only argued today.

The basis of the application as set out in the founding affidavit is that the applicant claims that she acquired guardianship over an individual NANDIPA MGIGIMA, who is the mother of the minor child who is the subject of this application. NANDIPA MGIGIMA is the natural mother of the minor child. The applicant avers that she acquired guardianship over her after the death of her own mother and she exercised rights of guardianship over NANDIPA until the

latter/ ...

latter herself pertained the age of majority. She sets out in the papers the particular history of NANDIPA. That she qualified as a teacher and then avers that on 25 August 1997 NANDIPA gave birth to a boy named SIZLEN NTSIKA MGIGIMA and that the respondent is the father of this child which is born out of wedlock. The reason for the application is that the natural mother died on 23 January 2000 and until that date she had not only had physical custody of the minor child but in fact was the child's guardian insofar as the law recognised her rights of guardianship.

On the particular day NANDIPA took ill and she apparently assisted that she be taken to her paternal family, but before they set out on the journey the respondent arrived. The applicant says that he then suggested that he take the minor child for a while as the child was crying because the child wanted to go with him. She avers in her founding affidavit that there was an understanding that the respondent would return the child later that same day. En route to the paternal family NANDIPA died. The minor child has since 21 January 2000 been in the custody of his natural father, the respondent.

It appears that on 5 February 2000 at the request of the respondent's father a meeting was held between the MGIGIMA family and the MFIKILI family. At that meeting there was a request that the surname of the minor child to be changed to

MFIKILI. It appears that the applicant's family then indicated that they could not give any reply in this respect and that they were still mourning and that according to custom the child still had to be with them. It appears further that the respondent's father had given some sort of undertaking that the request for the return of the child would be answered by the following Wednesday, 9 February 2000. Thereafter since they did not hear from him, the applicant saw the need to bring this application.

The respondent's answer in brief is that he is the natural father of the child, that on the particular day when the child was handed to him there was no question of any understanding that the child would be returned. In view of the death of the child's mother the minor child remain with him and he has since then cared for the child, and obviously the child is being cared for not only by himself but he also has an individual who assists as well his sister. He says that he now resides at Thornton, Wilson's Place, King William's Town.

There are various disputes of fact in these papers. Before I turn to them the question of the jurisdiction of this Court was raised by the respondent in that both he and the child are domiciled in King William's Town which is obviously not within the jurisdiction of this Court. The applicant on the other hand has argued that since the child

was removed from the area of jurisdiction of this Court and furthermore because the applicant owns properties in Zwelitsha that he falls within the jurisdiction of this Court. The respondent has also in his opposing affidavit set out the circumstances under which the child is being cared for at present and it appears from that that although he says he has a house in Bisho and a property in Zwelitsha, that he disputes the Court's jurisdiction as I have said.

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In view of the peculiar circumstances of this matter I do not intend expressing a firm opinion in regard to the jurisdiction of this Court. For the simple reason that I think it is more important to deal with the issues and not to nonsuit the applicant and thereby causing the applicant to feel that the merits of the matter have not been addressed and that it is because of some legal technicality that her matter has not been able to be dealt with by this Court.

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Counsel for both the applicant and the respondent have submitted various arguments, but appears that there are certain issues in terms of which they are not ad idem. One of these if for example the contention by Mr Goosen that the child's domicile is determined by virtue of his mother's domicile and that this continues after the death of the mother by virtue of the child having been domiciled there. In other words he says the child has now acquired his own

domicile in that respect and for this reason as I have indicated he indicates also that there is in addition the fact that whilst the father might be the natural father of the child, it is an illegitimate child and the child cannot follow his domicile. Mr Chemaly's, who appears for the respondent, contentions in this regard are obviously different. He says that the domicile of the child cannot continue after the mother's death when there is a natural parent and that it would be an anomaly that the child continues to retain the domicile of his mother, even although she has died, without cognizance being taken of the fact that there is the natural father. In my view the submissions by Mr Goosen are somewhat misdirected in this regard. It would be an unacceptable anomaly that an illegitimate child would, particularly a child of the tender age of SIZLEN who I understand is about 2 and a half years old, that such a child would require a domicile independent of his natural father. Whatever their relationship may be between the natural mother of the child and the natural father, in my view it follows that the child cannot exercise an independent question of domicile since that would depend upon who is entitled to exercise rights of custody over the child.

There is some dispute also in regard to the rights of the natural father. In this respect Mr Goosen's contention is that the natural father of an illegitimate child acquires no

greater rights than anyone else, and is placed in the same position in fact as having no biological relationship with the child. As I understand his argument it means that any member of a family is able to approach the Court and to obtain custody of the child irrespective of the rights of the natural father. Mr Chemaly's contentions are of course different. In this regard it is pertinent to refer to the decision of the Constitutional Court in the matter of **FRASER v CHILDREN'S COURT, PRETORIA NORTH AND OTHERS** 1997(2) BCLR 153 (CC). Where the issue that the Court has to determine related to whether a natural father of an illegitimate child had any rights to intervene in regard and to be heard in that respect with an application for custody of this child. In that case the Constitutional Court found that to hold that the natural father of the child had no say in respect of the adoption of an illegitimate child offended against the rights of equality set out in the Constitution. Let me quote from paragraph 26 on page 164 of the report:

> "It was also contended before us on behalf of the applicant that section 18(4)(d) of the Act impermissibly discriminates between married fathers and unmarried fathers. There is also some substance in that objection. The effect of section 18(4)(d) of the Act is that the consent of the father would, subject to section 19, be necessary in every case where he is or has been

married to the mother of the child and never necessary in the case of fathers who have not been so married. In the context of certain laws there would often be some historical and logical justification for discriminating between married and unmarried persons and the protection of the institution of married is a legitimate area for the law to concern itself with. But in the context of an adoption statute where the real concern of the law is whether an order for the adoption of the child is justified, a right to veto the adoption based on the marital status of the parent could lead to very unfair anomalies. The consent of a father, who after his formal marriage to the mother of the child concerned, has shown not the slightest interest in the development and support of the child would, subject to section 19, always be necessary. Conversely a father who has not concluded a formal ceremony of marriage with the mother of the child but who has been involved in a stable relationship with the mother over a decade and had showed a real interest in the nurturing and development of the child, would not be entitled to insist that his consent to the adoption of the child is necessary."

It is clear from what had been said there that to treat the natural father of a child who has had a relationship with the mother by virtue of a recognised union differently from that of the natural father of a child who has not had such an union, would in my view similarly offend against the right of equality.

It appears to me that the proper approach is to hold that the father of an illegitimate child has the silently rights in respect of the question of custody of that child and more specifically when the natural mother has died. It appears to me that irrespective of the lack of a formal marriage between the parties that it cannot impact unfavourably on the father in relation to the custody of the child. To hold otherwise would in my view, as I have indicated, offend against the right of equality as set out in the Constitution. I am, from what I have said, clearly not in support of the contention as put forward by Mr Goosen.

But more importantly what arises out of this matter is that the applicant has approached the Court on the basis that she has acquired some custodial right over the child and that that custodial right should in fact take preference over that of the natural father. I have grave difficulties with this contention, as I have indicated, apart from it offending against the Constitution it offends also against the natural inclination for one to recognise that both

parents have certain rights in respect of the child and have certain bonds, not only biological, but sociological and otherwise.

On the papers as they are before me the applicant has not sought to make out a case that the father is an unsuitable person or totally incapable of acting in the best interest of the child. Mr Goosen has asked that since the application has not been brought on the basis of the best interest of the child, that this Court nevertheless act in that regard and even on that basis he contends that it is not in the best interest of the child to remain with the natural father. However, Mr Chemaly, quite correctly, has pointed out that the applicant has not made out a case in its founding affidavit to substantiate that it is not in the best interest of the child that he remain with the father. There is no indication either that it would be in the best interest of the child to return to the applicant as no attempt has been made to set out the circumstances in regard to the upbringing of the child, what the conditions are, to what extent it would benefit the child to be there and to put it broadly to provide a complete picture of the familiar circumstances in which the child would grow up. It appears to me that the respondent on the other hand has set this out sufficiently for the Court to be able to hold that there is no basis for saying that it would not be in the best interest of the child. During the course of his argument Mr

Goosen obviously asked the Court to look at the question of custody on a de facto basis instead of interpreting it on its legal basis. However, even in that regard the application of the applicant flounders. For she says that she was the one who handed the child to the respondent on the day that they were taking NANDIPA to the family, she says that there is an understanding, or there was an understanding that he would return the child. However, it is clear from the applicant's affidavit that he denies this, and I have no basis for holding that his denial in this regard is not genuine or does not create a real dispute of facts.

It is obvious from what I have said that I have adopted the approach as outlined in **PLASCON-EVANS PAINTS v VAN RIEBEECK PAINTS** 1984(3) SA 620 (OPD) and let me quote at page 634E-I:

> "...the affidavits reveal certain disputes of fact. The appellant nevertheless sought a final interdict, together with ancillary relief, on the papers and without resort to oral evidence. In such a case the general rule was stated by VAN WYK J (with whom DE VILLIERS JP and ROSENOW J concurred) in **STELLENBOSCH FARMERS' WINERY LTD v STELLENVALE WINERY (PTY) LTD** 1957(4) SA 234 (C) at 235E-G, to be:
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> '...where there is a dispute as to the facts

> a final interdict should only be granted in a notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justifies such an order...Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted.'"

There are a number of instances in the founding affidavit of the applicant and even in the replying affidavit that indicates that the applicant is not in a position to contest the circumstances under which the child now lives with the respondent, nor in terms of the arrangements that are made for the well-being of the child on a day to day basis. It seems to me that it would be quite improper of this Court to interfere in terms of the custody of the child at present, unless it is faced with a clear situation that the circumstances under which the child is being cared for are such that it is clearly not in the best interest of the child that he remain there. This is decided in not the case on the admitted facts, nor on those facts which cannot be placed in dispute. This Court is mindful of the fact that the interest of the child should always be upper most in the mind of the Court. However, the mere fact that the applicant may have tremendous concern and a deep love for the child does not in any way entitle this Court to disturb

the relationship between the natural father and the child, he too avers that he has such a deep love for the child and cares ultimately for the well-being of the child. There is no allegation any where that gainsays that.

Even if I may be wrong in this aspect there is the further aspect that the deceased made out a will 3 months prior to her death, the validity of this will is not placed in dispute at all, on the contrary the applicant accepts that there is such a will, but avers simply that she was never informed of that. It is a rather strange averment to make because I find no reason why the deceased should have confined in her in terms of what she was disclosing in the will. It may very well be that there was a deliberate reason for not doing so, but I am not prepared to speculate in this regard. Whatever the situation is in terms of the will the testator who is the deceased has specifically stated that custody of the child should be given to the respondent. Neither counsel have indicated to me that there is any basis that is apparent at the moment as to why that decision in the will of the deceased should be disturbed. On the contrary it seems to me that it is her wish and it must be honoured. In my view on whatever approach I adopt to the application the applicant has not succeeded in making out a case of a nature that entitles me to grant the relief that is being sought.

In the circumstances the application seeking the particular relief is dismissed.

The question of costs arises. It is a difficult aspect to determine in the sense that I accept that the applicant is motivated by deep love and concern for the child and that she has acted, although not expressly stated so, in the best interest of the child. However, it does appear to me on the other hand that attempts to resolve the situation between the respondent and the applicant was rather limited, if any. This matter was also brought as one of urgency when in my view the urgency is not apparent from the papers and such urgency as may exist has probably been created by the applicant. As difficult as it is for me I cannot see any other proper order than one which orders that the applicant pay the costs of the respondent and I so order.

In the circumstances the application is dismissed with costs.

Y EBRAHIM

JUDGE : BISHO HIGH COURT 11 MAY 2000