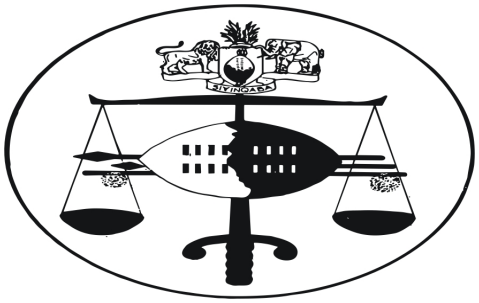

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE CIVIL CASE NO. 2240/07

In the matter between:

CHRIS STAPLEY **APPLICANT**

and

MARGARET DOBSON **RESPONDENT**

CORAM	:	Q.M. MABUZA –J
FOR THE APPLICANT	:	ADV. M. KOLBE INSTRUCTED BY MR. B. MAGAGULA OF ROBINSON BERTRAM
FOR THE RESPONDENT	:	ADV. D. SMITH INSTRUCTED BY MR. MAPHANGA OF MAPHANGA HOWE MASUKU NSIBANDE

JUDGMENT 1/2/08

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[1] This matter was brought under certificate of urgency because the Respondent was due to relocate to Sri Lanka on the 1st August 2007 and the Court had to make a decision within a short space of time. At the time I dismissed the application and indicated that the reasons therefore would follow. Herewith are the reasons.

[2] This is an application by the father of a minor child Ashley who is presently 6 years of age for inter alia an order declaring the Applicant the guardian of Ashley and interdicting the Respondent from taking Ashley to Colombo, Sri Lanka without the Applicant's permission. The Applicant also seeks an order that he be awarded custody of Ashley.

[3] It is common cause that:

3.1 The Applicant and the Respondent lived together from September 1996 to June 2003 and were not legally married.

3.2 That Ashley a boy was born out of wedlock on the 19th October 2000. The Applicant is the biological father and the Respondent the biological mother of Ashley.

3.3 The parties lived together until Ashley was 3 years of age when they separated.

[4] The Applicant relies on the provisions of section 31 of the Constitution Act, 2005 for the contention that he has full parental rights including the right to refuse that Ashley be removed from Swaziland.

[5] He also relies on an agreement between them that the Respondent is not entitled to remove Ashley from Swaziland without his permission.

Declaration of guardianship in terms of Constitution:
To fortify his submissions the applicant has cited the following constitutional provision section 29 (4).

> **"children whether born in or out of wedlock shall enjoy the same protection and rights."**

The matter in casu deals with simple illegitimacy.

[6] There are children who are born within wedlock who turn out not to be the children of the husband but of a paramour. Prima facie these children are legitimate until proved otherwise. What then is their status and what are

their rights vis-à-vis a married paramour? What of incestuous illegitimate children?

[7] There are fathers who are donors of test-tube babies to both unmarried mothers and married couples. What are their rights to these children and vice versa. It seems to me that if this Court opens this particular door there will be a plethora of issues that will emerge which only Parliament can deal with.

[8] What are the ***"protections and rights"*** referred to in section 29 (4). It seems to me that these ***"protections and rights"*** are found in various scattered pieces of legislation such as statutes and International conventions on the rights of the child that Swaziland is a signatory too. These are also found in the common law. It is these ***"pieces"*** of law that have to be brought together and enacted under section 29 (7) of the Constitution which specifically provides for the enactment of laws by Parliament to ensure children's' rights as well as the domestication of the Convention on the Rights of the Child.

[9] Miss Kolbe, Counsel for the Applicant has kindly referred me to the Children's Act 38/2005 of South Africa (Childrens Act). Because of the wide ranging complex

issues involved in its enactment only certain sections or portions of it have come into operation and it is not known when the rest of the Act will become operative. This to me fortifies the submission that such legislation is the domain of the Legislature and not the Courts.

[10] The Applicant has further submitted that the concept of or common law status of an illegitimate child no longer exists. If no such status exists, a father's rights can only be determined in the context of him being the father of a legitimate child. The Applicant bases this submission on section 31 of the Constitution which states:

> ***"Abolition of the status of illegitimacy***
> ***31. For the avoidance of doubt, the (common law) status of illegitimacy of persons born out of wedlock is abolished."***

[11] The Respondents on the other hand contend that on a literal interpretation of the aforesaid section it is apparent that the status of illegitimacy of ***"children"*** born out of wedlock is abolished. The section is silent as to the ***status of the father*** of a child born out of wedlock and in the absence of any specific legislation to

the contrary, the common law pertains to the status of the Applicant.

[12] I agree with the above submission and until Parliament enacts the necessary laws in terms of section 29 (7) of the Constitution, the legal consequences flowing from the fact that Ashley was born out of wedlock continue to apply and this Court cannot declare the Applicant to be a guardian of Ashley in terms of the Constitution. If the Court did this it would be usurping the powers of the legislature under section 29 (7) of the Constitution. If the Court declared the Applicant to be guardian of Ashley the Court would then have to define the rights and obligation that flow there from which would be an onerous task rightly reserved to Parliament under section 29 (7) above.

[13] A further submission made by the Respondents is that on a purposive interpretation of section 31 of the Constitution, the mischief it intended to suppress is the bastardisation of the illegitimate child. By enacting section 31 of the Constitution, an illegitimate child now has the same status as legitimate children. At common law an illegitimate child is not related to the natural father and therefore he/she is ***inter alia***, not entitled to

intestate succession as regards the natural father. I agree with the above rendition of the law.

[14] It follows therefore that by enacting section 31 of the Constitution, Ashley is now entitled to intestate succession as regards the Applicant. The section does not change the common law status of either the Applicant or the Respondent until Parliament enacts the necessary laws in terms of section 29 (7) of the Constitution.

[15] The Applicants interpretation of section 31 of the Constitution and the inference drawn therefrom is incorrect in law. I agree with the Respondent's Counsel Mr. Smith that the application falls to be adjudicated in the light of the common law position of a father of a child born out of wedlock. The application to be declared a legal guardian in terms of the constitution therefore fails.

Custody:

[16] The Applicant has prayed to be awarded custody of the minor child Ashley.

In Roman-Dutch Law an illegitimate child fell under the parental authority and thus the guardianship and

custody of its mother. The father had no such authority save for the duty to provide maintenance. There was no legal relationship that was recognised between him and his child. See Van Leeuwen RHR 1.7.4, Van Bunkershoek Quaestiones 3.11 and Van Linden Koopmans Handboek 1.4.2. See **B v S 1995 (3) S.A. 57 (A) at 575 G.H.**

Both custody and guardianship vest solely in the mother of an extra-marital child.

See: **Dhanabakium v Subramanian and Another 1943 A.D 160 AT 166 Engar & Engar v Desai 1966 (1) S.A. 621 (T) at 625 H. Exparte Kedar 1993 (1) S.A. 242 (W)**

[17] In deciding whether or not to award custody to the Applicant one of the factors the Court looks at are the best interests of the child. In the case of Ashley the Applicant has deposed to the fact that the Respondent is a fit and proper mother. Nowhere has he alluded to the fact that she is a bad mother nor given reasons why Ashley should be taken away from the Respondent and given to him. He has not given the Court a clear picture of how he could be a better parent to Ashley than the Respondent. For example he states that he lives in a three bedroom house but does not state whether it

belongs to him and if not what are the terms of his occupation thereof. If it belongs to him he has not shown the court proof of ownership. If its rented, the amount of rent and the terms and conditions of lease. Children need a secure base.

[18] The Applicant has stated that he is financially stable. At paragraph 7.6 of his founding affidavit this is what he says: ***"I am financially stable, I have been self employed for the last nine years in Swaziland, and receive a steady monthly consultation fee from the Swimming Association. In addition I conduct swimming lessons throughout the country and the remuneration that I get from that exercise brings in additional finances.***
I also own a house in Ezulwini."

He does not know how much he earns. He does not attach a Bank statement for the Court to enable it to see that indeed he is financially stable. He does not set out his monthly expenditure. He does not disclose to the Court how much he receives from the monthly consultation nor from the swimming lessons he conducts throughout the country. He has not disclosed to the Court whether or not he has a retainer/contract with the Swimming Association nor has he annexed same for the

Court to peruse. The Court is not even told if he pays the Respondent monthly maintenance and the amount thereof. In such matters it is often advisable to seek the assistance of the Social Welfare Department to help prepare a report that would be acceptable to the Court. There is no title deed attached for the house he says he owns at Ezulwini nor its full description.

[19] The Respondent on the other hand has had full custody of Ashley since at least October 2005 with the Applicant enjoying rights of access. She has deposed to the fact that he loves his child and that he spends quality time with him. Does this make him a good father? I think not. The Respondent visited Colombo in Sri Lanka during the period 28 April to 4 May 2007 to familiarise herself with the place. She visited the school where she is to teach, she inspected a three bedroom house that she will be living in with Ashley, spoke to the teachers, tourists and expatriates and locals living there, visited resorts and obtained relevant information from the British High Commission, Colombo. At paragraph 24.4 of her answering affidavit she states:

> ***"By virtue of the aforegoing I can first-hand confirm to the Court that Colombo is a safe place, popular with tourists and most certainly***

my general impression has been that nobody lives in fear of their lives."

[20] This careful preparation shows that she is a concerned mother and would not wantingly take both herself and Ashley to a new environment totally alien to both of them and in the line of danger.

[21] The Applicant raised the issue of civil unrest in Sri Lanka. His reports are all hearsay and are inadmissible however the Court takes judicial notice of the apparent conflict with the Tamil in the north but this alone is not enough for the court to prevent the Respondent from relocating. It is the Court's view that the relocation will be good for both the Respondent and Ashley. Travel, hiring in a different environment can only enrich both the Respondent and Ashley. At paragraph 27 of her answering affidavit the Respondent has stated as follows:

"27.1 The teaching post that I have been offered in Colombo is far better than anything I could wish to obtain locally. My contract includes the following benefits:

27.1.1 Free tuition for Ashley at a school of international repute and which

standards are internationally accepted;

27.1.2 I receive free medical benefits for both myself and my son. This includes hospital, surgical insurance and emergency medical evacuation;

27.1.3 ***I receive free accommodation which consists of a three-bedroomed furnished house approximately 5 minutes from my place of work and Ashley's school;***

27.1.4 ***An annual remuneration of $37,000.00 which at present exchange rate equates to E259,000.00 which in turn equates to E21,583.00 per month, exclusive of the other benefits referred to herein;***

27.1.5 Pension benefits, i.e. a retirement plan;

27.1.6 ***Free transportation for Ashley and I, i.e. from O.R. Thambo International Airport Johannesburg to Colombo, a***

mid-term return flight, i.e. the two month period which I will be spending in Swaziland during June/July 2008 and free transportation to return to my base after the two year contract has been concluded".

She has made at a very good case and I agree with her that she should not be deprived of such an opportunity. It is healthy too for the Respondent to chart a new career path for herself. She has not excluded the Applicant from visiting Ashley. She has indicated when she will return to Swaziland and during this time the Applicant may see Ashley.

[22] My finding on the issue of custody is that the Applicant has not made out a case to enable the Court to grant him custody nor to interdict the Respondent from taking Ashley to Colombo, Sri Lanka.

The agreement

[23] The Applicant has also relied on an agreement entered into between the parties with regard to Ashley. The relevant portion of this agreement reads as follows:

"In the event of either party wishing to leave the Country with the intention of gaining temporary or permanent residence, access to Ashley (as set out in page 2 of this agreement) may need to be re-addressed, discussed. More suitable and reasonable access arrangements may then be agreed upon and reduced to writing."

The Respondent tried to engage the Applicant in order to discuss her relocation which would have an impact on the agreement but these efforts were not successful. She cannot therefore be tied down to the above agreement when both Ashley and herself have better prospects in relocating to Colombo. The best interest of Ashley are in my view best catered for by the Respondent.

[24] In the event the application is dismissed with costs. The Applicant is also ordered to pay the certified costs of Respondent's Counsel in terms of Rule 68 (2).

Q.M. MABUZA -J