



**IN THE HIGH COURT OF ESWATINI**

**JUDGMENT**

**CIVIL CASE NO.: 1919/2018**

In the matter between:

**DARYL NICHOLAS DU PREEZ**

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

**ALLICE DU PREEZ**

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

And

**NERISSA QUEENIE DU PREEZ (born KEMP)**

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

**PHYLLIS NENWOOD**

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

**ANTONIE HENWOOD**

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

**SMALL HENWOOD**

**4<sup>TH</sup> RESPONDENT**

**THE PRINCIPAL SECRETARY OF**

**THE DEPUTY PRIME MINISTER'S OFFICE**

**5<sup>TH</sup> RESPONDENT**

**THE NATIONAL COMMISSIONER OF THE**

**ESWATINI ROYAL POLICE**

**6<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL**

**7<sup>TH</sup> RESPONDENT**

**Neutral Citation:**

*Daryl Nicholas Du Preez and Another vs. Nerrisa Queenie Du Preez (born Kemp) and 6 Others (1919/2018) [2019] SZHC 99 7<sup>th</sup> June 2019*

**Coram:**

**MLANGENI J.**

**Heard:**

**10/5/19, 14/5/19, 16/5/19**

**Order made:**

**21/5/19**

**Reasons handed down:**

**7/6/19**

*Summary: Family law – application for guardianship over minor children whose parents were in the process of divorce and living apart – minor children living with a third party who was not a blood relative.*

*Applicant a paternal grandmother of the children – socio-economic investigation conducted and recommended that grandmother be granted guardianship.*

*Respondents challenging some aspects of the socio-economic report, court undertaking an inspection of the place where the minor children were residing.*

*Importance and probative value of socio-economic report discussed – court of the view that the recommendation made in such report may be overlooked only if it is inconsistent with the facts established by the investigation.*

*Held: Guardianship awarded to the paternal grandmother.*

*No order for costs.*

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## **JUDGMENT**

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[1] This application is about custody/guardianship of three minor children, namely Chelsey Darissa Du Preez, Ethan Danny Du Preez and Emily Jasmine Du Preez. Chelsey, born on the 9<sup>th</sup> May 2011, is eight years old. The other two children are twins born on the 29<sup>th</sup> October 2015. They will turn four in October 2019. Although born within wedlock, the material circumstances into which the children arrived were far from stable. When Chelsey was born both parents were unemployed. Subsequently, at different times, both parents got jobs in Matsapha.

Their jobs can best be described as modest, with joint monthly earnings just below E8, 000.00.

- [2] For some time all three children lived with their parents. In these proceedings the father of the children is the First Applicant and he will be referred to as such. The mother is the First Respondent and she will be referred to as such.
- [3] The marriage relationship between the First Applicant and the First Respondent became turbulent. According to the First Applicant they quarreled a lot on finance and trust issues<sup>1</sup>. This is confirmed by the First Respondent<sup>2</sup> who further makes reference to “**communication breakdown**”<sup>3</sup> between them. It is at the height of this strained marital life that on or about April 2018 the First Applicant alleges that he asked his father-in-law to come to the marital home to take his daughter away as she was threatening to kill him. The First Respondent denies threatening to kill the First Applicant and avers that when her husband called her father-in-law to come to the marital home to take her away he said that he “**was done with me**”<sup>4</sup>. It is common cause that it is at this point in time that the First Respondent left the marital home. Since then they have not lived together and they are presently involved in divorce proceedings in the Magistrates’ Court, Manzini.
- [4] When the First Respondent got a job in 2016 the twins were taken to reside at Hluti in the Shiselweni Region. Having been born in October

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<sup>1</sup> Socio-economic report, page 4

<sup>2</sup> Socio-economic report , page 25

<sup>3</sup> Socio-economic report, page 28

<sup>4</sup> Para 11.3 of the First Respondent’s Affidavit, captioned “SUPPLEMENTARY AFFIDAVIT”.

2015, they were pretty young at this stage. The First Respondent actually states that when they were relocated to Hluti they were eight months old<sup>5</sup>. Whether this arrangement was by mutual agreement or not is in dispute. At this point in time the first born, Chelsey, was attending pre-school in Manzini, hence she remained behind with her parents. In December 2017 she was also moved to Hluti where she was subsequently enrolled in grade one at Our Lady of Sorrows Primary School. At Hluti she, together with the twins, were placed under the care of three elderly citizens, namely Phyllis Henwood (77), Antonie Henwood (81) and Small Henwood (86)<sup>6</sup>. Again there is a veritable dispute whether the arrangement to relocate Chelsey to Hluti to start schooling there was by mutual consent of the parents or not. This dispute, like the one I mentioned in paragraph four (4) above, does not have a significant bearing upon the outcome of this matter. I am prepared to accept that when the children were moved from their parents to Hluti there were reasons for that<sup>7</sup> and that it was with good intentions. In respect of the twins, for instance, the reason given by the First Respondent is that she had found a job in Matsapha and there was no one to take care of them. The children have continuously lived away from their parents since then.

- [5] Before Chelsey joined the twins at Hluti, it was alleged that the parents travelled to see them at Hluti once a month<sup>8</sup>. It appears that the pattern of visitation improved after Chelsey joined the twins at Hluti and the parents saw the children once every two weeks<sup>9</sup> through an arrangement that saw the children transported from Hluti to Siphofaneni at First Respondent's parental home, where she would be with them over the

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<sup>5</sup> Para 9 of First Respondent's paragraph

<sup>6</sup> These ages are documented in the socio-economic report at para 11

<sup>7</sup> At para 8.2 of her affidavit the First Respondent mentions three sound reasons

<sup>8</sup> Para 9.1 of First Respondent's Affidavit

<sup>9</sup> Para 9.1 of First Respondent's Affidavit

weekend. During this visit their father would also come to see them at Siphofaneni when he knocked off work on Saturday afternoons. On Sundays the children would be transported back to Hluti so that Chelsey would attend school.

- [6] I know that the tarr road from Hluti to Siphofaneni, via Lavumisa, is quite long. There is an alternative route which is a dirt road, via Maloma, which is much shorter but treacherously rough. According to the First Applicant on each of the trips of the children to visit at Siphofaneni there would be **“about six-eight children.....and three adults”**<sup>10</sup> in one car, a van. In the First Applicants words:-

**“They are drove (sic) in a van from Hluti up to Siphofaneni and back to Hluti. They are driven up on Friday and then I would go to Siphofaneni on Saturday after work..... so that I could spend some time with them. They.....are never allowed to come to my place in Matsapha .....<sup>11</sup>”.**

- [7] After the First Respondent’s departure from the marital home the relationship between the spouses appears to have deteriorated. The First Applicant alleges that he received a call from the First Respondent who told him that her father does not want him to set foot at Siphofaneni again, to see the children, otherwise he would shoot and kill him **“on sight.”**<sup>12</sup> Apparently, this was in reaction to the tiff that led to the First

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<sup>10</sup> First Applicant’s founding affidavit at para 24

<sup>11</sup> See Note 10 above

<sup>12</sup> Founding affidavit at para 26

Respondent's departure from the marital home<sup>13</sup>. The First Applicant has not had voluntary access to the children since then.

#### COURT APPLICATION

[8] Issues of maintenance and access to the children came to the fore and despite escalation to the Social Welfare department there was no amicable solution. On the 10<sup>th</sup> December 2018 the First Applicant and his mother moved the present application, on grounds of urgency, seeking the following orders:-

- 8.1 That the Social Welfare Department immediately compile a social – economic report to determine the welfare of the minor children;
- 8.2 Pending the compilation of the socio-economic report, interim custody and guardianship of the minor children be awarded to the First and Second Applicants;
- 8.3 That the First to Forth Respondents be ordered and directed to release the minor children to the Applicants on or before the 14<sup>th</sup> day of December 2018 so that they can enjoy the festive holidays with them;
- 8.4 That 8.2 and 8.3 above operate with immediate and interim effect;
- 8.5 That members of the Royal Eswatini Police Service either at Hluti or at Siphofaneni station be directed to ensure the compliance with any order issued by the court and **“to arrest on sight anyone that defies”** the court order.
- 8.6 Costs of suit against any Respondent who opposes the application.
- 8.7 Further and/or alternative relieve

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<sup>13</sup> Founding affidavit at para 26

[9] The matter was placed before me on the 13<sup>th</sup> December 2018. All the parties including the Attorney-General, were represented except the First Respondent. The Court was informed that the First Respondent's attorney was Lucas B.K.S Dlamini and that it was believed that he was on his way to court. In the end he did not make an appearance and the matter was postponed to the following day, the 14<sup>th</sup> December 2018 at 9:30 a.m. I ordered that the postponement order was to be served upon the First Respondent's attorney. When the matter was called on the 14<sup>th</sup> December 2018 all the parties, except the First Respondent, were represented. Her name was called three times and there was no response. I then granted orders to the following effect:-

- 9.1 that a socio-economic report be compiled and filed in respect of the welfare of the children,
- 9.2 that the First to Fourth Respondents should forthwith release the minor children to visit the Applicants during the festive season;
- 9.3 that to the extent that may be necessary the Eswatini Royal Police service should assist to ensure compliance with the order.

The visitation to the Applicant during the festive season was an interim measure to address the fact that the First Applicant had not seen the children for many months.

[10] The socio-economic report was compiled and filed, and pursuant to that the Applicants' attorney set the matter down for hearing. In the notice of set down, dated 23<sup>rd</sup> May 2019, there was a significant change in the main prayer, in that it was then sought that guardianship and or sole

custody of the minor children should be awarded to the Second Applicant who is the First Applicant's biological mother. In other words, guardianship or sole custody was to be awarded to the children's paternal grandmother. This shift, which had the effect of removing the biological father of the children from the equation, was based on the recommendations in the socio-economic report where, among other things, the social worker recommends that **“the 2<sup>nd</sup> Applicant Alice Du Preez be granted guardianship to the children in question.....since she is their paternal grandmother who has been taking care of the children and she is financially stable”**<sup>14</sup>.

[11] Throughout the hearing of the matter, I was of the firm view that since the parents of the minor children were in the process of divorce, the issue of custody was best left in the hands of the divorce court. There are at least three reasons for this. In the present application there are multiple litigants many of whom are not biologically related to the minor children. Secondly, where the parents' positions are polarized, as in the present case, there is likely to be a need to hear oral evidence. Thirdly, it would be most undesirable to have a situation where the two courts come into different conclusions on the issue of custody.

#### THE PLEADINGS

[12] Out of all the Respondents, the First Respondent is the only one who filed an affidavit. For reasons known to her attorney, this affidavit is styled as a supplementary affidavit. As far as I am aware, there is no affidavit which she filled in answer to the Applicants' founding affidavits. Prior to that, attorney HENWOOD & CO. filled a notice to raise points of

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<sup>14</sup> Socio-economic report, at para 12, titled. "RECOMMENDATIONS"

law. The points of law were not pursued and at a certain point in time the said attorneys ceased appearing in the matter, without filing any formal notice of withdrawal. Mr. Mntungwa for the Applicants, informed me that in his interaction with them he understood that their clients were to abide whatever order the court made.

- [13] In her “**supplementary**” affidavit the First Respondent advances her version of the events in the marital life of the couple, up to the point when she left the marital home. Much of the factual issues upon which they disagree do not significantly influence the conclusions that I came to in the matter. Of importance is that the First Respondent does not agree with certain aspects of the socio-economic report and challenges the recommendations therein. But before I get to the relevant factual issues upon which she disagrees with the socio-economic report, I wish to briefly state the law applicable in matters of guardianship and custody of minor children.

#### THE LAW

- [14] There is much common ground between guardianship and custody of minor children. It follows that in determining whether to award guardianship or custody the considerations are largely the same, the main objective being to advance the best interests of the children.
- [15] A guardian is defined as “**a person legally responsible for someone unable to manage their affairs, especially a child.....**”<sup>15</sup>. The author H.R. Hahlo defines it in the following manner:-

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<sup>15</sup> Concise Oxford English Dictionary, 10th Edition.

**“At common law, guardianship in its widest sense includes custody, and embraces the care and control of the minor’s person as well as the administration of his property and business affairs. Where custody and guardianship are separated, the custodian parent has the care and control of the minor’s person, while the guardian parent administers his property and business affairs.....”<sup>16</sup>.**

Another author of note in this region<sup>17</sup> says that **“custody is but one incident or sector of .....guardianship. During marriage it is shared by the spouses while they share a common home. When matrimonial breakdown leads to the judicial severance of custody from the remaining incidents of the parental power, what remains may be called ‘residual guardianship’. The custodian parent enjoys the physical presence and companionship of the child while she controls its day to day life, upbringing and education; the guardian parent continues to function as the child legal representative and the administrator of his property.<sup>18</sup>”**

- [16] On the basis of the definitions captured above, my understanding is that guardianship is much wider than custody and, as Hahlo puts it, it **“embraces the care and control of the minor”** on a daily basis, including health and educational needs. It is a responsibility that requires firm mental willingness as well as resources. In terms of prayer 2 of the notice of set down dated 23<sup>rd</sup> May 2019 the Second Applicant is seeking that the court grants her this responsibility. As stated above, she is the biological grandparent of the children on the paternal side.

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<sup>16</sup> The South African Law of Husband and Wife, 5<sup>th</sup> Edition at p389.

<sup>17</sup> P.Q.R. Boberg, the Law of Persons and the Family

<sup>18</sup> At p427

## THE RELEVANT FACTS

[17] My task is to determine whether or not the interests of the minor children would be best served under the care and control of the Second Applicant. This task requires a careful analysis and understanding of the children's present living circumstances, on the one hand, and a scrupulous and fastidious projection of the circumstances they are likely to be in under the Second Applicant's care. This enormous task is made a lot easier by the fact that the living circumstances of the biological parents are far from satisfactory, and their resources are quite tenuous. It is clearly in recognition of this reality that the father of the children, the First Applicant, threw in the towel and let his mother, the Second Applicant, pursue the application alone. It is also of remarkable significance that the First Respondent, who is the biological mother of the children, is not claiming that the children must come to live with her at Siphofaneni. And rightly so, because she does not have a place of her own. At Siphofaneni she resides at her parental home and from there she commutes daily to her place of work in Matsapha.

[18] It is a matter of necessity that the spotlight must first be upon the present living conditions of the children at Hluti. In this regard the report of the social worker is quite adverse. At paragraph 11 of the report the Welfare Officer has this to say:-

**“The children in question are taken care by their grandmother Phyllis Henwood 77 years old..... Antonie Henwood.....who is 81 years old (found sick with sugar diabetes).....and Small Constantine Henwood (partially deaf) who is 86 years old. The social worker observed that the caregivers are too old to cater for the children in question.....For example the grannies find**

**it normal for a child to travel long distances to school, the exposure to danger that might happen to the child is not considered.....”.**

[19] I pause to mention that the girl child that travels long distance to school is the first born, Chelsey, who turned eight in May 2019. In the report the social worker states that this child walks about 4 kilometres to school and back, a total of eight kilometres per day, and that the road from the Henwood farm is bushy. It is of particular importance that the observation of the social worker was that *de facto* it is the first born, Chelsy, who takes care of the of the twins – **“she feeds them and baths them.”**

[20] In her affidavit the First Respondent states that the socio-economic report **“is wanting and is not the true reflection of the facts”**<sup>19</sup> At paragraph 14.2.6 she specifically denies that the distance from the Henwood farm to the school is about four kilometres. Because of the challenge to the report I found it necessary to travel to Hluti in order to make my own observations on the ground. The court undertook the inspection on the 14<sup>th</sup> May 2019 in the presence of the legal representatives from both sides. I measured the distance from Henwood farm to the school and found that it is actually much longer than four kilometres – it is six kilometres. So this girl child who is eight years old walks twelve kilometres every school day. I also observed that the distance from the farm to the tarr road is about four kilometres of dirt road. On both sides there is tall grass and bushes of natural trees which are sparse on certain areas. On this long stretch of road only two homes are close enough to the path. The third home is quite far and would be

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<sup>19</sup> At para 14.2.2

of no help in the event of an emergency. Granted that this child probably walks to school and back in the company of others, the fact of the matter is that the vulnerability of girl children in this country is well documented. One only needs to read the newspapers to have a good idea of this scary situation.

[21] The socio-economic report also observes that the twins are at an age where they should be attending pre-school education and because there are no such facilities at Mantambe they are just sitting at home. When they are six or seven years old they will join their older sister on the twelve kilometer walk per day. It is on the basis of the foregoing that the welfare officer concludes the report with the recommendation that **“the children in question should be quickly removed from Mantambe so that they could be closer to school. Ethan and Emily are 4 years now they should be at kindergarten but they are home because there are no day care centres around Mantambe. Chelsey is too young to take care of her siblings.”**<sup>20</sup>

[22] On the basis of the socio-economic report and my own observations at Mantambe, I had no doubt that the children deserve better and they need to be removed from there. To where? Well, the Second Applicant who is the children’s paternal grandmother has raised her hand. In this context I mention that none of the Henwood Respondents – the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondent – is a blood relative of the children. The only relationship that exists between them and the children is that the children’s mother, the First Respondent, was brought up by the Henwoods at Mantambe, Period. There is no doubt that the Henwoods did a noble thing, for which they must be commended, but their

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<sup>20</sup> At pages 39-40

obligations, whatever they were, cannot be extended to their adoptee's children, especially at the advanced stage of their long lives.

[23] Mr. Magagula for the First Respondent has passionately argued that the children should not be uprooted just like that, especially in the middle of the year, and that there is no evidence to suggest that the children are abused or otherwise not taken good care of at Mantambe and that they have not complained about the place. At these ages the children are not likely to complain openly about their environment. The truth of the matter is that there is no basis upon which to infer how the children about the living conditions there. It might have been possible and useful for the court to attempt to interview Chelsey – at the age of eight she might have said something. However, the extent of friction between the two parents made this course inadvisable. In the circumstances the court must objectively make a determination of the best interests of the children,<sup>21</sup> taking into account all relevant considerations.

[24] It is something of an anomaly that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents who presently reside with the children have not filed any affidavit to say that they are willing and able to continue looking after the children. It is the First Respondent who is saying that the children must be kept at Mantambe, a place where she does not reside. I would be surprised if these children are not being used to settle personal scores, something that would be most regrettable.

[25] In view of the inadequacies of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents, and the fact that none of the biological parents of the children is making out a

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case to take them, the Second Applicant presents an answer to the unfortunate circumstances of these children. According to the socio-economic report she is gainfully employed at Swaziland Impact Steel and Roofing and earns a salary of E15, 000-00. She has a home at Malindza which is said to be built with bricks and roofed with tiles. The home is described as clean and fully furnished.<sup>22</sup>In the course of the hearing the court was made aware that for purposes of getting to her work at Ezulwini the Second Applicant rents a flat at Mobeni Flats in Matsapha, and that she intends to house the children there for purposes of enrolment at Tubungu Private School which is within the vicinity of Matsapha Industrial Estate.

[26] On the 14<sup>th</sup> May 2019 the court conducted an inspection of the Second Applicant's rented flat at Mobeni and observed a two bedroom flat with a living room, kitchen area and a bathroom, with reasonably good furniture and appliances. Mr. Mntungwa for the Applicants was emphatic that the Second Applicant's wish was to welcome the children and enroll them at the institutions that are in the area. Two points deserve emphasis. At Matsapha the children would be more accessible to both parents who work at Matsapha. It was repeatedly stated on behalf of the Second Applicant that the parents would have unlimited access to them. Secondly, the Second Applicant has a demonstrable track record of love, care and attention towards the children, demonstrated through material support whenever there was need. This support includes sending food parcels to the children at Mantambe where they presently reside. It is common cause that when Chelsey was born both parents were unemployed. During this difficult time the Second Applicant was on hand to maintain the young couple and their child. Upon reading the papers I got the clear impression that she would stop

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<sup>22</sup> Socio-economic report at p17

at nothing in giving her grandchildren an opportunity for a better future, and certainly that she loves them.

[27] The recommendation(s) of a socio-economic report may not be taken lightly. Such reports are compiled by officers who are trained for that purpose. I would be ready to overlook a recommendation only if it is inconsistent with the facts as established in the investigation. In the case before me the recommendations are consistent with the facts established in the investigation. Commenting on the importance and usefulness of the socio-economic report His Lordship M.S. Simelane J.<sup>23</sup>, quoting with approval from the judgment of Ota J. in the appeal case of WILLIAMS v WILLIAMS<sup>24</sup>, had this to say:-

**“The power to order welfare reports lies at the discretion of the court. A very pertinent weapon in the hands of the court indeed, as welfare reports are very useful in resolving custody cases, whether contested or not.....This is because even though both parties testify and call witnesses; the welfare report provides the court with an independent assessment of the facts requisite for a judicial and judicious resolution of the matter”.**

#### ORDERS

[28] It is on the basis of the foregoing that on the 21<sup>st</sup> May 2019 I made the following orders:-

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<sup>23</sup> In Mashumi Nkentjane v Ncobile Gama and Others (1821/12) [2014] SZHC 37 (14 March 2014)

<sup>24</sup> The Gambia Court of Appeal No.34/2007 at page 30.

- i) The issue of custody of the minor children Chelsey Darissa, Ethan Danny and Emily Jasmine Du Preez is to be dealt with by the court hearing the divorce matter between the biological parents of the minor children in Manzini Civil Case No. 5185/2018.
- ii) The Second Applicant Alice Du Preez is hereby granted unlimited guardianship over the three minor Children Chelsey Darissa, Ethan Danny and Emily Jasmine Du Preez.
- iii) For purposes of exercising guardianship over the said minor children the Second Applicant is hereby authorized to remove the said children, with immediate effect, from their present residence at Hluti and relocate them to Matsapha where they will be enrolled in institutions of learning without undue delay and as appropriate to their respective ages.
- iv) The First, Second, Third and Fourth Respondents are hereby ordered to hand over the minor children to the Second Applicant upon request.
- v) The court notes that the Second Applicant has a home at Malindza area in the Lubombo Region. Nothing in this order should be construed to forbid the Second Applicant from taking the minor children to Malindza during school holidays and at any other time, subject to the visitation rights and access of the biological parents of the children.

- vi) The biological parents of the minor children remain obliged in law to contribute towards the maintenance and upkeep of the minor children in accordance with their means and may do so in cash or in kind.
  
- vii) The biological parents of the minor children, namely Daryl Nicholas Du Preez and Merissa Quenie Du Preez (born Kemp) shall have unlimited access to the children and shall have visitation rights at reasonable times and upon reasonable notice to the guardian.
  
- viii) No order as to costs.



**T.M. MLANGENI**

**JUDGE OF THE HIGH COURT**

**For The Applicant: Mr. M. Mntungwa**

**For The Respondent: Mr. Z. Magagula**