IN THE SUPREME COURT OF APPEAL OF SWAZILAND

CIVIL APPEAL NO. 17/2006

In the matter between

WILLIAM MABUZA **APPELLANT**

Vs

MUSA SHONGWE **RESPONDENT**

Coram: Steyn JA

Tebbutt JA

Banda JA

For the Appellant: Mr. L. Maziya

For the Respondent: Mr. M. Mabila

JUDGMENT

BANDA JA

[1] The appellant has appealed to this court against the judgment of Maphalala J which was delivered on 10th February 2006. The learned judge ordered that the children, who were the subject of the application before him, should be in the custody of the natural and biological father of the children. The application before the trial judge was seeking an urgent order of the court for the return of the two

children to the custody of the applicant now the appellant in this appeal.

[2] It is important to recapitulate the relevant facts in this appeal and these appear to be as follows: The respondent had lived together with appellant's daughter and two children were born out of that union namely S and T S. Their custody was the subject-matter of the application before the lower court. Unfortunately their mother died. It would appear that their father, the respondent in this appeal, had gone to the Republic of South Africa for further studies. On the death of his wife, the mother of the children, it was arranged, with his agreement, that the children, while he was in South Africa, should stay with his sister-in-law who was also staying in Mbabane so that the children could continue with their education there. It would further appear that after school term in December 2003, the children went to live with the appellant who is their maternal grandfather. It is clear to us that when the respondent returned from South Africa he expressed his wish to the appellant, to have the children go and stay with him. The evidence is that the appellant was not in favour and rejected the request. The respondent went again, apparently in the absence of the appellant, to the latter's house where he called the children to go with him. The respondent's case is that the children willingly agreed to go with him.

[3] It is clear in our judgment that the children were already in the custody of the respondent and his wife before he went to South Africa for his studies; and the respondent believed on his return from South Africa that it was within his rights, when he discovered that his children were no longer staying with his sister-in-law, to redeem their custody. And if we had to make an order to restore the *status quo ante,* it would be that the children should be returned to the respondent, in whose custody they were before he went to South Africa.

[4] It was the appellant's contention, at the trial, that the respondent did not have the right to have the custody of the children because, in his view, the marriage between the respondent and his deceased daughter, which was a customary one, was not complete because certain marriage formalities were not followed and that the effect of such failure was to render the marriage invalid with the result that the children of such an invalid marriage are under Swazi law and custom, illegitimate. Only the family of the woman can then have the right of custody of such children.

[5] It is important to bear in mind that one of the important findings of the learned judge in the court below was that there was a valid marriage under Swazi law and custom between the respondent and the appellant's deceased daughter.

[6] Mr. Maziya appeared for the appellant in this court as he did in the lower court. He has attacked the finding of the learned trial judge by contending that he erred in law and in fact in determining a matter which depended entirely on Swazi law and custom without the assistance of assessors and that the judge should have referred the matter to trial to enable expert witnesses on custom to testify. Mr. Maziya also attacked the learned trial judge's reference to the cases which he relied upon, arguing that the cases did not deal with the crucial question as to the validity of a customary marriage where the essential formalities were being challenged. Mr. Maziya condemned the respondent for collecting the children from the appellant's homestead without the latter's consent and has urged this court to disapprove of the respondent's behaviour which he characterized as self-help which, if not checked, could lead to a breakdown of law and order in the Kingdom.

[7] We understand Mr. Maziya's line of argument because to him, if it is proved that the marriage between appellant's daughter and the respondent was invalid

under Swazi law and custom, the children of such a marriage would be illegitimate and only the female side would have the right of custody of such children. He, therefore, urged this court not to disregard the principles of Swazi law and custom when considering the custody of the children. It was however, interesting to observe that when we asked Mr. Maziya to refer us to the principles which, under Swazi law and custom govern issues of custody he was unable to do so. Even if we were to find that Mr. Maziya was correct in his contention we would find it difficult to say that such children have no rights to protection. The new Constitution of the Kingdom provides that there shall be no distinction between legitimate and illegitimate children. All the children must be treated equally under the law. Section 29 (4) the Constitution provides in the following terms:-

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

Clearly therefore even if Mr. Maziya had succeeded in his contention that the children were illegitimate, it would not have changed the fundamental consideration which must guide courts in determining applications for custody of children, which is the best interests of the children.

[8] There was another point on which Mr. Maziya attacked the learned judge's finding on the validity of the marriage. He submitted that the judge erred in determining the validity of the marriage without the assistance of assessors. It is trite law that superior courts are not obliged to hear cases with the assistance of assessors. If there was any doubt before, the new Constitution has clarified the position by giving the Superior courts a discretion in the matter. Section 144 of the Constitution provides in the following terms :-

> **"144 (1) A superior court may hear a case wholly or in part with the assistance of assessors. (2) A superior court may, in any case in which it appears to the court to be expedient call in aid one or more assessors with such qualification as the court may deem appropriate".**

The absence of assessors does not, therefore, vitiate the finding of the court.

[9] Mr. Mabila who appeared for the respondent in this court has submitted that the determination of the appeal will depend on whether or not there was a valid marriage under Swazi law and custom between the respondent and the appellant's daughter. It is Mr. Mabila's contention that given the fact that both parties concede that the appellant's deceased daughter was smeared with red ochre it is clear, in his view, that a valid marriage existed between the respondent and the appellant's daughter. In support of his submission Mr. Mabila referred to the decided cases to which the learned trial judge also referred in his judgment such as the case of *R v Timothy Mabuza and another 1979 - 81 S.L.R 8, R v Fakudze and another 1970 - 76 S.L.R 422.* In all these cases the court sat with assessors. Mr. Mabila further submitted that the appellant did not challenge the fitness of the respondent to have the custody of the two children and that it was incumbent on the appellant to produce evidence which would deprive the respondent, as natural and biological father of the children, of his right to their custody.

[10] We regret that a lot of time and energy was wasted on the issue of the validity of the marriage of the respondent and his wife. The crucial issue which was before the learned judge in the lower court and the issue, which is before us in this court, is the custody of the children and what is in their best interests. Although the

learned trial judge quite properly directed his mind to the essentials of a valid marriage under Swazi law and custom as it was raised before him, the main relief which the appellant sought from the court was the custody of the children. He sought an order which would have directed the respondent to return the children to the custody of the appellant. The issue of the validity of the marriage was also raised in argument by Mr. Maziya in this court. In view of what has been discussed earlier in this judgment, we do not feel it is necessary for us to make a definitive finding on the validity of the marriage in this case.

[11] In the application for custody of children the paramount consideration is the welfare, interests and happiness of the children which is the central point of investigation. The learned trial judge properly directed his mind to this fundamental consideration. The respondent is the natural and biological father of the children and *prima facie* he has the right to custody of his children unless it can be shown that he is not a fit and proper person to have custody of the children. Because the central consideration in custody cases is the welfare and interests of the children, it was held by this court in the case of *Lindiwe Flynn, Dick Flynn vs Thulani Nxumalo - CivilAppeal No. 17/2002* that the father of an illigitimate child could be granted custody.

[12] The appellant's evidence in the court below was that he was a businessman engaged in the passenger business venture and that he is engaged in some farming. There is no evidence to state the kind of passenger business it is that he is engaged in and how much income he derives from it; and whether it is taxi or bus passenger business, and there is no evidence to show whether it is his own business or merely a driver or conductor. On the other hand we have evidence that the respondent is gainfully employed with a house which is in Mbabane. The children have also been enrolled in a nearby school. This is the school in which Sibusile has been

since 2003 and although Tiyandza only started there this year, it would clearly not be in the children's interests to separate them or to disrupt their schooling by removing them from a school to which at least Sibusile has become accustomed, to one which will be strange to them both. No evidence was adduced, in our judgment, which would lead this court to find that the respondent is not a fit and proper person to have the custody of his own children. There was some allegation that his wife mistreats the children but no evidence was called to substantiate it and we dismiss it as having no basis. We would, therefore, order that the children will continue to be in the custody of the respondent.

[13] In the result the order of this court is that this appeal is dismissed with costs.

R. A. BANDA
JUDGE OF APPEAL

I agree

J.H. STEYN
JUDGE OF APPEAL

I agree

P. H. TEBBUTT
JUDGE OF APPEAL

Delivered in open court on this day of November 2006