

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 761/2007

In the case between:

SEANE MARIA MPHATSOE

Applicant

and

ABEL MAREME MOHLALA

Respondent

JUDGEMENT:

MOCUMIE, J

HEARD ON:

24 APRIL 2008

DELIVERED ON:

15 MAY 2008

[1] The applicant approached this Court on 22 March 2007 for an order in the following terms:

“2. That a Rule Nisi is hereby issued, calling upon the Respondent to show reasons, if any, on or before **22 MARCH 2007** why the following order should not be made final:

2.1 That the Respondent be ordered to return the minor child **Mologadi Esther Mphatsoe** to the Applicant with immediate effect, alternatively, and in the event of the child not being with the Respondent that the Respondent be ordered to indicate to the Sheriff where the child may be found;

2.2 That the Sheriff of the above Honourable Court be ordered and authorized, in the event of the Respondent failing to comply with the order in paragraph 2.1 above, to remove **Mologadi Esther Mphatsoe** from the Respondent's place of residence and/or any other place where she may be found, and to return said child to the Applicant with immediate effect;

2.3 That the Respondent be interdicted from removing **Mologadi Esther Mphatsoe** from the Applicant's custody, whether it be done personally or with the assistance of any other person;

2.4 That the Respondent be ordered to pay the costs of this application;

3. That the orders in paragraph 2.1, 2.2 and 2.3 serve as an interim interdict with immediate effect;..."

[2] On 22 February 2007 an order was granted which reads:

"2. A Rule nisi is hereby issued, calling upon the respondent to show reasons, if any, no or before 22 March 2007 why the following orders should not be made final:

2.1 that the respondent be ordered to return the minor child **Mologadi Esther Mphatsoe** to the applicant with

immediate effect, alternatively, and in the event of the child not being with the respondent that the respondent to be ordered to indicate to the Sheriff where the child may be found.

2.2 that the Sheriff of the above Honourable Court be ordered and authorized, in the event of the respondent failing to comply with the order in paragraph 2.1 above, to remove Mologadi Esther Mphatsoe from the respondent's place of residence and/or any other place where she may be found and to return said child to the applicant with immediate effect.

2.3 that the respondent be interdicted from removing Mologadi Esther Mphatsoe from the applicant's custody whether it be done personally or with the assistance of any other person.

2.4 that the respondent be ordered to pay the costs of this application.

3. that the orders in paragraph 2.1, 2.2 and 2.3 serve as an interim interdict with immediate effect.

4. A copy of this order must be served on the respondent."

[3] On 24 April 2008 when this matter came before me, I had to

consider whether to confirm the *rule nisi* or discharge it.

[4] The application has a long and chequered history. The applicant and respondent were in a love relationship since 1994. Two children were born out of the relationship Olebogeng Mphatsoe ("*Olebogeng*") and Mologadi Esther Mphatsoe ("*Esther*"). Olebogeng is the first born of the couple and was born on 21 April 1995. Whilst Esther was born on 6 April 1996. The couple was never married. They terminated their relationship in 1997.

[5] When the relationship was terminated the children were approximately 2 years (Olebogeng) and 1 year (Esther) respectively. Whether by agreement or not the respondent stayed with Olebogeng and applicant with Esther up and including the date of the urgent application in February 2007.

[6] Around January 2007, the respondent took Esther away without the consent of the applicant either on request of

Esther or at his instance. This forced the applicant to approach this Court on an urgent basis to seek the order referred to above which order granted her rights to have Esther in her care with the respondent's normal rights of contact as the applicant as the natural mother was Esther's only guardian. By then the respondent had no parental rights over either of the children even in terms of the Natural Fathers of Children Born out of Wedlock Act 86 of 1997. If he had any such rights, the rights would have been granted by an order of the High Court which order he did not have.

[7] The two parties have since 2007 been fighting each other over who should have *inter alia* residential rights and full parental rights and responsibility of the children in each parent's care.

[8] The respondent opposed this matter and filed an answering affidavit and a counter-application. In his counter-application he averred that the applicant was staying in an abusive relationship with another man and exposing Esther to such

abuse. He alleged that Esther also intimated that she wanted to stay with him. He therefore wished to have residential rights and full parental responsibility in respect of both children.

[9] The Family Advocate's intervention was sought by the order of this Court. The Family Advocate sought assistance of a Family Counselor to investigate the matter especially with regard to Esther.

[10] The Family Advocate's report combined with the Family Counselor reflects the two children's opinion with regard to their rights to residential rights. In the report and during the interview conducted Olebogeng indicated that he did not want to stay with the applicant for different reasons. *Inter alia* is the fact that he regarded the applicant's home as poor. This in my view is based on the materialistic way and manner in which he perceived his situation as the respondent gave him everything he wanted. It is clear that he assumed that he will not get the same from the applicant. Esther and the applicant's parental-

child relationship is described as good. The Counselor has indicated that the two have a strong bond. There is clearly no confusion with regard to where she wanted to reside and with whom. The only overrider was the condition she attached in staying with the applicant.

- [11] It is clear that the Children's Act, No. 38 of 2005 ("the Act") has ushered in a whole new era and approach to children's rights as opposed to parents rights. The Act came into operation on 29 June 2007. It puts both natural parents on an equal footing with regard to the care, contact and parental responsibilities of their children. It puts more emphasis on the principle of the "Best *interests of the child*". Quite interestingly, this resonates with section 28(2) of the Constitution. In terms of the Act the opinion of the child concerned must be taken into consideration when a decision is made as to where and with whom (s)he should stay. This means that in this era, one parent cannot claim full responsibility of a child to the exclusion of the other. Even if the child resides with one parent, the other parent must

be consulted on decisions made about the child. So too must the child.

[12] The facts of this case are in my view not complicated. In deciding what is in the best interest of these children, I have to take in account all the relevant factors including the child's age, maturity, development and the background I have sketched above. I am thankful that the Family Advocate investigated the matter to the extent that it did and furnished me with very valuable information and background. The shortcoming of the report is obvious to the extent that it does not address Olebogeng's situation completely. It does not begin to address the relationship between Olebogeng and the applicant or even make recommendations as to how this situation can be addressed in the future. What is clear from the report is this: The children are comfortable where they are currently. They say so themselves except the allegations of violence at the applicant's home and the fact that they wish to be together.

[13] Esther has repeated the allegations of abuse consistently ever since she was interviewed in 2007 by the Family Counselor. I cannot begin to minimize the seriousness thereof. In the same vein, I cannot base my view on one aspect of a whole conglomeration of factors which I ought to take into account in matters of this nature.

[14] I have given consideration to what Esther has expressed (to stay with the applicant on condition that she does not stay with her current boyfriend) in the context of :

[14.1] the accusations leveled by each party against the other;

[14.2] what the children said to the Family Counselor about where they want to live and or reside and why;

[14.3] their age;

[14.4] their level of maturity;

[14.5] the years each child has spent with each party;

[14.6] the level at which the children have been put up and influenced to behave in respect of each party, and

[14.7] the perception of the children of what is their best interest.

[15] The notion of "Best interests of the child" can never be interpreted and equated to *"what the child demands (s)he gets"*.

Even in this era of children's rights it is common knowledge that children lack the maturity to make decisions which affect their status, their future and or best interests. They are easily manipulated and influenced by a whole host of extraneous factors including what one parent offers and the other does not. To a large extent this is influenced by the difference in standard of living each parent affords. The notion can best be described as *"what parents and Courts consider to be in the child's best interests taking into account the child's basic needs, well being ,protection, guidance , care love and security."*

- [16] In my view it will not be in these two children's best interests to deprive them and in the process both parents of a relationship they all need. The unsettled and uncertain situation which exists is not healthy for the children i.e. excluding allegations of violence which I strongly believe can be dealt with as a separate matter by the Department of Social Development in consultation with the applicant and her live-in-partner together with the child(ren) concerned. It will be most appropriate and in

the children's best interests if the respondent participated voluntarily in the process.

[17] Having given due consideration to all the factors placed before me, I am of the view that the following order will be the most appropriate:

ORDER

Main application:

17.1 **That the *rule nisi* dated 22 February 2007 is confirmed;**

17.2 **That the applicant retains permanent residency of the minor child Mologadi Esther Mphatsoe;**

17.3 **That the respondent is awarded contact rights in respect of the said minor child which are defined as follows:**

17.3.1 **Contact on alternative weekends, commencing at 17:00 on Friday until 17:00 on Sunday, after which the respondent has**

to return the said child to the applicant's residence;

17.3.2 Public holidays to alternate between applicant and the respondent;

17.3.3 Short school holidays to alternate between the applicant and respondent and long school holidays to be shared equally;

17.3.4 Contact on Father's Day from 09:00 to 17:00;and

17.3.5 Reasonable telephonic contact.

Counter Claim

17.4 The adjudication of the counter-claim is postponed *sine die*;

17.5 Matter is referred to the Family Advocate for a thorough investigation and detailed report on the respondent's right to permanent residency and applicant's contact rights, of the minor child Olebogeng Mphatsoe;

17.6 Intervention of specialists in the field of psychology

and parent-and-child relationship to be sought by the Family Advocate during the investigation referred to in para 15.5 *supra*.

[18] Costs of both applications are reserved.

B. C. MOCUMIE, J

On behalf of the applicant: Adv. J. G. Gilliland
Instructed by:
Naudes
BLOEMFONTEIN

On behalf of the respondent: Adv. P J J Zietsmann
Instructed by:
Claude Reid
BLOEMFONTEIN

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