HLOPHE v MAHLALELA AND ANOTHER 1998 (1) SA 449 (T)

Citation	1998 (1) SA 449 (T)
Case No	13084/95
Court	Transvaal Provincial Division
Judge	Van Den Heever AJ
Heard	April 21, 1997
Judgment	June 24, 1997
Counsel	RG Tolmay for the applicant JH Jordaan for the respondents
Annotations	None

Flynote : Sleutelwoorde

Customary law - Proof of - Judicial notice - Law of Evidence Amendment Act 45 of 1988 s 1(1) - Section, though providing that any court may take notice of law of foreign State and indigenous law insofar as it can be ascertained readily and with sufficient clarity, not precluding party where indigenous law not readily ascertainable from proving it by adducing expert evidence to establish it as fact.Customary law - What constitutes - Necessity of distinguishing between cultural practices and rules of indigenous law stressed - Not all cultural practices constituting indigenous law and vice versa.

Customary law - Minors - Custody of - Whatever position might have been in general in indigenous law regarding custody of children, basic principles thereof to certain extent excluded in favour of common law - Interests of child to take precedence above all else - Conclusion of civil marriage after customary marriage having general effect of imposing personal status on parents governed by common law - Hence parent-child relationship governed by common law - No custodial arrangement smacking of sale of or traffic in children to be enforced - Plain that not expedient to determine issues relating to custody of minor child by mere delivery or non-delivery of a number of cattle by husband to wife's parents (lobolo).

Headnote : Kopnota

The applicant claimed custody of his minor child, S, who had been living with her grandparents, the respondents, after the death of her mother, applicant's wife by Swazi customary and subsequently civil marriage. One of the main points of contention was what bearing the fact that applicant had not paid the lobolo in full at the time of his wife's death had on the issue of S's custody. The parties' experts on Swazi law and custom were in disagreement: applicant's expert stated that the father would always get the custody of the children, while according to respondents' expert the minor children went to the maternal grandmother if the lobolo had not been paid in full. As to the applicability of Swazi law and custom to the instant situation the Court referred to s 1(1) of the Law of Evidence Amendment Act 45 of 1988, which provides that '(a)ny court may take judicial notice of indigenous law insofar as such law can be ascertained readily and with sufficient clarity. . .' and pointed out that this did not preclude a party where indigenous law was not readily ascertainable with sufficient clarity to prove it by adducing expert evidence to establish it as a fact. (At 457E--F.) The Court further held that while it was mindful of the fact that in trying to establish what indigenous law was it should not adopt a too positivistic approach, it could not be accepted that all cultural practices constituted indigenous law and *vice versa*. The failure of respondents' expert witness to appreciate the distinction between customary law and practice put such a question mark over the reliability of her evidence as an expert in Swazi law as to result in the respondents having failed to prove Swazi law on a preponderance of probabilities. (At 457H--I and 458B/C--D.) The Court was itself unable to ascertain what Swazi law and custom provided in circumstances such as the present but pointed out that it was clear that the basic

principles of indigenous law relating to the custody of children had to a certain extent been excluded in favour of the common law. It was not clear whether common law had been incorporated into customary law or whether customary law had simply been excluded in favour of the common law. What was clear was (1) that in custody matters the interests of the child had to take precedence; (2) that where parties concluded a marriage by civil rights after a customary marriage it imposed on the spouses a new personal status governed by the common law, with the result that the parent-child relationship was governed by the common law; and (3) that any arrangement that smacked of sale of or the trafficking in children would not be enforced. (At 458E/F--459C.) Though counsel for applicant had during the course of the trial tendered the outstanding lobolo to respondent it was plain that issues relating to the custody of a minor child could not be determined by the mere delivery or non-delivery of a certain number of cattle. (At 459C/D--D/E.) Any doubt as to the applicable legal principles that might have existed in this regard were effectively removed by s 30(3) of the Constitution of the Republic of South Africa Act 200 of 1993 which provided that 'in all matters concerning (children) his or her best interest shall be paramount'. (At 459D/E--G.) The Court then examined the evidence and came to the conclusion that it was in the best interest of S for her to be reunited with the applicant. (At 462A/B--B.) So ordered.

Annotations

Reported cases

McCall v McCall 1994 (3) SA 201 (C) : not followed
Masenya v Seleka Tribal Authority and Another 1981 (1) SA 522 (T) : dictum at 524 applied
Thibela v Minister van Wet en Orde en Andere 1995 (3) SA 147 (T) : distinguished

Statutes Considered

Statutes

The Law of Evidence Amendment Act 45 of 1988, s 1(1): see *Juta's Statutes of South Africa 1996* vol 1 at 2-498.

Case Information

Application by a father for the custody of his minor child. The facts appear from the reasons for judgment.
R G Tolmay for the applicant.
J H Jordaan for the respondents.*Cur adv vult*.
Postea (June 24).

Judgment

Van den Heever AJ: During July 1995 the applicant moved an application in which he claimed that custody of his minor child, Sihle, be awarded to him. The first and second respondents in the application are Sihle's maternal grandparents. They opposed the application and moved a counter-application in which they claimed that custody of Sihle be awarded to them.
The matter was initially enrolled for hearing on 12 March 1996 on which date Le Roux J requested the family advocate to furnish the Court with its report on the issue of custody. Arrangements between the parties were also made at the time regarding the interim access to Sihle by the applicant. The matter was also referred for the hearing of oral evidence to determine the issue of custody.The matter was eventually enrolled for hearing on 17 February 1997 on which date it was postponed because the respondents indicated that they intended adducing the evidence of a psychiatrist of which they had not given proper prior notice to the applicant. The matter eventually came before me.The relevant background circumstances, which are undisputed, can conveniently be summarised as follows.
On 29 December 1984 the applicant and respondents' daughter, Ms Phumzile Patricia Mahlalela entered into a customary marriage in respect of which a written lobolo agreement was concluded in terms whereof fifteen head of cattle or an amount of R3 000 had to be transferred to the first respondent. Two head of cattle were delivered and an amount of R800, representing four head of cattle, was paid leaving a balance of nine head of cattle or R1 800 outstanding.
The applicant resided in Swaziland at the time and his wife in Eerstehoek, Mpumalanga. On 28 July 1985 the applicant and respondents', daughter entered into a civil rights marriage which

marriage was concluded in community of property.
During or about April or May 1986 the applicant and his wife moved into a home approximately 20 kilometres from where the respondents were residing in the Nelspruit area at which time he gained employment at a nearby college. On 6 June 1986 Sihle was born. They stayed together until approximately July or August 1987 when his wife left for Wales to further her studies. He and Sihle moved in with the respondents but after approximately one month he moved out and rented a room closer to the college where he was employed and left Sihle in the care and custody of the respondents.His wife returned approximately during September 1988 and they as well as Sihle moved into their own home where they lived together until he was appointed as a lecturer at the University of the North in July 1989. He left his family to attend to his career and his wife and Sihle stayed behind in the Nelspruit area.In April 1991 the applicant was appointed as a research lecturer at the University in Mmabatho where he presently still resides. His wife and child did not join him in Mmabatho but remained in the Nelspruit area.
On 21 June 1994 the applicant was advised by the respondents that his wife had died on 18 June 1994. She had fallen ill approximately a week earlier and she and Sihle moved in with the respondents.According to the applicant's testimony, he is presently employed as a lecturer in analytical chemistry at the University of the North-West. He occupies a three-bedroom house in Mmabatho and his present salary is in the vicinity of R9 000 per month. He is presently 44 years of age and intends marrying his present fiancée Ms Modzile Kepadize, at the end of June 1997. He said that he regards Sihle as his responsibility and that he wants to assume responsibility for her care and upbringing. He has become a reborn Christian and is desirous of raising Sihle according to Christian values and traditions. Although he still has regard to traditional Swazi values, insofar as it might conflict with his Christian values and beliefs the latter are to take precedence.He admitted that the marital relationship between himself and his wife had irretrievably broken down at the time of his wife's death. The problems started when he visited his wife when she was in Wales and found her with another man. These problems were compounded when his wife refused to join him when he moved from the Nelspruit area to the University of the North after he had been appointed as a lecturer at that university. These problems caused his relationship with the respondents to deteriorate and become strained. He did not attend his wife's funeral because he claimed that his life had been threatened should he attend.
A dispute also arose between the applicant and the first respondent regarding the burial place of the applicant's wife which resulted in the applicant moving an application in the magistrate's court for the district of Kabokweni and obtaining an interdict prohibiting the burial of his wife at the KaNyamazane graveyard on 25 June 1994. The interdict was served on the first respondent on 24 June 1994 but the burial nevertheless took place the following day.The applicant testified that since his wife died until approximately March 1995 he had been denied access to Sihle by the respondents. Since March 1995 he managed to obtain access which was, however, restricted to visiting her at school. She was at the time a student at the St Peter's School in Nelspruit which is a private school. Since the Court order had been issued by Le Roux J in March 1996, the applicant has had more regular access and Sihle has visited him on weekends and for holidays. The applicant testified that Sihle and his fiancée, whom he intends to marry, have got to know each other well and their relationship is very stable. His fiancée also has a 13-year-old daughter and she and Sihle have become friends.His working hours are from 08:00 to 16:30 and he has two long holidays during the academic year plus a further two recess periods of approximately one week each. He wants Sihle to attend the International School of South Africa, which is also a private institution situated in Mmabatho and provision will be made for her to attend the after school care centre until 16:30 when he completes his working day. It is common cause that he is paying the school fees of Sihle at the St Peter's School in Nelspruit and in addition to that he has also furnished her with an Autobank card in which he deposits an amount of R300 per month to take care of her personal financial needs. Apart from that he has not paid any maintenance to the respondents for the care and custody of Sihle. He maintains, however, that he has never been requested to make any such payments. The applicant also testified that even though his wife and Sihle did not join him when he had moved to the University of the North and subsequently to Mmabatho he maintained regular contact with Sihle by visiting her at the very least for a weekend once per month and also for short periods during the holiday seasons.He described his relationship with Sihle as excellent and stated that she had already made friends with other

children at the Sunday school which she attends when she visits him and that she also on several occasions expressed the desire to come and stay with him.
Ms Modzile Kepadize testified that she is a human resource practitioner at the cultural centre of the University of the North-West and confirmed that she and the applicant intend getting married at the end of June 1997. She has a 13-year-old daughter and they will both move in with the applicant once they get married. She described the relationship between her and Sihle as good and also stated that Sihle and her own daughter have become good friends. She looks forward to Sihle coming to stay with them and is fully prepared to render whatever assistance is required from her towards Sihle's upbringing. She described herself as a Tswana who grew up as a Xhosa but said that she has no communication problems with Sihle. She stated that Sihle expressed certain reservations and fears regarding the role of a stepmother but she was adamant that she had put these fears to rest.The report of the family advocate, as requested by Le Roux J, was also before me and Ms Mayaba, who appeared in court on behalf of the family advocate, confirmed the contents thereof. She had requested Ms Z B Semenya, a registered social worker, to assist her in her investigations and her written report was annexed to her own report. Ms Semenya was called as a witness and she confirmed her report. She conducted interviews with the applicant and the first respondent as well as with Sihle and recommended that the custody of Sihle be awarded to the applicant subject to the respondents' reasonable access. She said that because there were no real conflicting allegations between the parties she did not regard it necessary to conduct further detailed investigations. This report was also confirmed by the family advocate.
It is necessary at this point in time, to refer to an aspect of the case, which was raised for the first time at a pre-trial conference which was held on 17 April 1997. In reply to a question by the applicant's counsel as to whether any expert evidence was to be adduced at the trial, counsel for the respondents indicated that they were considering calling a psychiatrist as well as an expert on Swazi law and custom. Counsel for the applicant objected because no proper notice had been given in respect of any such witnesses.
At the inception of the trial Mr *Jordaan*, who appeared for the respondents, applied for a postponement of the matter in order to enable them to comply with the necessary formalities by furnishing the applicant with the necessary notices and summary of evidence of the said expert witnesses. Ms *Tolmay*, who appeared for the applicant, opposed the application for postponement. The postponement was refused but I did indicate that the refusal of the application for postponement should not be seen as a ruling disallowing the evidence of the expert witnesses and that the matter may be addressed again if so advised. At a later stage during the trial and before the applicant's case was closed, Mr *Jordaan* requested my ruling regarding the admissibility of the evidence of the psychiatrist Dr Missinne. My ruling was that the evidence would be allowed.
No ruling was at that stage sought or made regarding the admissibility of any expert evidence in respect of Swazi law and custom. The applicant, probably in anticipation of the respondents reviving their application to call an expert witness on Swazi law and custom, proceeded to call a certain Mr Sibandzi to give expert evidence on Swazi law and custom. As is to be understood, no objection was taken to evidence. Mr Sibandzi testified that he is presently the first secretary of information at the office of the High Commissioner for the Kingdom of Swaziland in South Africa. He is the responsible person in the office for information pertaining to Swazi law and custom. He has personal knowledge thereof being the son of a chief himself and also having obtained a diploma in law in 1971.
He was requested to state the Swazi law regarding the custody of minor children in the event of the death of a wife where the lobolo had not been fully paid at the time of her death. His opinion was that according to Swazi law and custom, the fact that the lobolo had not been paid in full at the time of the wife's death would not have any bearing on who would get the custody of the minor children as Swazi law clearly provides that the father of a customary marriage always gets the custody of the children. He also said that the conclusion of a lobolo agreement is not essential to a valid customary marriage.It was put to the witness during cross-examination that according to Swazi law and custom, the custody of minor children would revert to the wife's family in the event of the wife's death if at the time thereof the lobolo had not been fully paid. This, of course, is the exact same position we have in the present instance. The witness, however, denied that this is a

true reflection of Swazi law and custom. This concluded the evidence on behalf of the applicant.The first respondent testified that he is presently 68 years old and married to the second respondent. He has had a long and illustrious career in education and retired as Director of Education of Kangwane. He presently conducts training courses from his home. According to his evidence Sihle is well adapted to her environment and she is happy in school and has a lot of friends and family in the area where she now resides and he maintained that it would be disruptive socially as well as scholastically if she would now have to go and live with the applicant. He also testified that according to the Swazi custom the custody of Sihle should go to her grandmother and he gave the following reasons. (1) the mother and the grandmother share the same blood;

(2) the grandmother resembles the picture of the child's mother; and

(3) the grandmother must console the child in her grieving over the death of her mother.

He gave as other reasons that the applicant's family did not properly pay their condolences when his daughter died and the lobolo had also not been paid in full. When asked to comment on the appropriateness of the applicant being awarded the custody he had several complaints. The applicant did not attend his son's funeral when he died and he also complained about the fact that the applicant did not seem to care when Sihle became ill. He also referred to an incident which took place on 12 July 1996 when Sihle was visiting the applicant in Mmabatho and had been left alone for most of the night by the applicant who had gone to Johannesburg after he had locked the security doors of the house. Apparently Sihle phoned them during the night and had been very upset about what had happened. He confirmed that the relationship between him and his wife and the applicant is presently a very strained one. He testified that the relationship started to deteriorate when applicant left to take up the teaching position at the University of the North and deteriorated even further when his daughter died and since the present application was moved in March 1996 they have not spoken to one another.The second respondent holds a higher diploma in adult education from the University of the Witwatersrand as well as a secondary teacher certificate from the University of Swaziland and has also attended a primary teacher's course at the University of Natal. She is presently the principal of the adult literacy training programme for the Government of Education in Mpumalanga and is 61 years old. Like her husband her working day starts at 08:00 and ends at 16:00.
When asked why she wanted to obtain custody of Sihle she advanced several reasons: Sihle has been staying with her for a long time and they are used to one another; when her daughter died she requested her to take care of Sihle and, according to the Swazi culture, if the mother of achild dies and the lobolo has not been paid in full the child must go to the mother's mother. She also said that it is very important that Sihle be taught the Swazi way of life and that the Swazi culture and traditions be imprinted upon her. She as Sihle's grandmother is the only person who can properly perform this function.
Other reasons advanced by the second respondent were that Sihle was still grieving and she could console her, that she and Sihle understand one another very well, that she can take care of her health and in summarising she said Sihle gets all the love she needs from them. Despite answering in the negative to a direct question as to whether they regard the applicant as a fit and proper person to be awarded the custody of Sihle both the second respondent as well as her husband seemed to be quite content that Sihle could go to the applicant as soon as 'she becomes a woman'. This, according to the second respondent, could happen within the next two years. As to exactly what Sihle had to be taught according to the Swazi culture and traditions the second respondent's testimony was rather unspecific, but she did mention the following examples: how she must behave in general, which people to respect, how to preserve her chastity, how to respect her husband once she is grown up and gets married, how to establish good relationships with members of the community and how to properly respect one's elders.
Ms Khelina Nkosi Magongo was called on behalf of the respondents as the respondents' expert on Swazi law and custom. Although she was not scholastically educated, she was the daugther of a Swazi chief and has personal knowledge and expertise regarding the Swazi culture. She was appointed by King Sobuza of Swaziland to assist in the revival of Swazi traditions and customs.

She became well known throughout Swaziland as an expert on Swazi culture and is also the presenter of a radio programme on SABC Radio Gwala Gwala on Sundays informing the Swazi people on their traditional culture. She was also employed by the Mpumalanga provincial government as an expert on Swazi customs and traditions. According to her, in an instance like the present, where the wife in a Swazi customary marriage dies, the minor children go to the maternal grandmother if the lobolo has not been paid in full.

Dr Missinne, the qualified psychiatrist referred to earlier, testified that he conducted interviews with the first respondent and Sihle and he confirmed his report where he made the recommendation that custody be awarded to the respondents to prevent serious disruption in Sihle's life. In his opinion, the disadvantages overwhelmed the advantages of awarding custody to the applicant from a psychiatric perspective. He did not conduct any interviews with the applicant or the applicant's fiancée and neither did he revert to the family advocate or the social worker, having been satisfied with their respective reports. He said that he conducted no psychiatric evaluations but according to his observations Sihle presented herself as a normal intelligent 10-year-old child. It would appear from the discussion in his report that he relied almost entirely on what he had been told by Sihle herself in coming to the conclusion that he did. In his evidence in Court he conceded that Sihle was a rather talkative child and that it was to be expected that she exaggerated in many respects and this is borne out by the fact that he did not take the threat that Sihle would commit suicide seriously at all. He was also of the view that Sihle was at the time definitely being influenced negatively by the respondents against her father.

I will deal with the aspect of the applicability of Swazi law and custom to the present situation first. Mr *Jordaan* invited me to apply Swazi law and custom in the event that I should find that the scales are more or less equally balanced. Lobolo not having been paid in full at the time of Sihle's mother's death, the custody of Sihle should be awarded to the respondents. He relied *inter alia* on *Thibela v Minister van Wet en Orde en Andere* 1995 (3) SA 147 (T) in which case Van Dyk J applied customary law by virtue of the provisions of s 1(1) of the Law of Evidence Amendment Act 45 of 1988 which reads as follows: 'Any court may take judicial notice of the law of a foreign state and of indigenous law insofar as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy or natural justice: Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or similar custom is repugnant to such principles.'The facts in the *Thibela* case are distinguishable from the facts in the present case but the said section of the Law of Evidence Amendment Act nevertheless applies.

This section now empowers any court to take judicial notice of indigenous law insofar as such law can be ascertained readily and with sufficient certainty which jurisdiction, before their abolishment, vested in the special courts created in terms of the Black Administration Act 22 of 1927. This, in my view, will not preclude a party where indigenous law is not readily ascertainable with sufficient certainty from proving indigenous law by adducing expert evidence to establish it as a fact. See *Masenya v Seleka Tribal Authority and Another* 1981 (1) SA 522 (T) at 524.

Both counsel informed me during argument that very little has thus far been documented as far as Swazi law and custom are concerned. Mr *Jordaan* referred me to certain publications by Ms *Hilda Cooper*, which were apparently written from a cultural rather than a legal perspective and her views are therefore not necessarily authoritative on Swazi law and custom. I have this same problem with the evidence of Ms Magongo. The impression I gained from her evidence is that she does not or cannot differentiate between cultural practices and Swazi law. To her it would seem to be one and the same thing.While being mindful of the fact that in trying to establish what indigenous law is one should not adopt a too positivistic approach, it cannot be accepted that all cultural practices are indigenous law and *vice versa*.

> 'A further stipulation found in modern systems of law is that custom must be observed as of right. This requirement is different in kind from the other rules, and is in principle fully applicable to customary law, indeed it is crucial to any analysis. Besides the misunderstandings to which the technical lawyer is liable, . . . there is a further danger of an opposite kind, namely that custom may be interpreted to mean no more than practice. If law is to be looked for not in those who expound it as professionals but in those who live it and use it, it could be supposed that it can be found simply by looking at what people do - law becomes simply a function of practice. No misunderstanding could be more complete. To

make practice the formal source of law in the customary field is to be untrue to the facts, where people recognise in normative law a moral authority, a legitimacy, that they do not accord to practice or usage as a whole. No approach to customary law that fails to take this indigenous recognition into account can ever be satisfactory.'

Bennett *A Source-book of African Customary Law for South Africa* (1991) at 6. See further in this regard *Bill of Rights Compendium* (1996) para 6A--1.
Her failure to recognise and appreciate this distinction in my view puts such a question-mark on the reliability of her evidence as an expert in Swazi law as to inevitably result in the respondents having failed to prove the Swazi law on a preponderance of probabilities. (Mr Sibandzi's expertise was in my view also effectively negated by Mr *Jordaan* in cross-examination.)
If my interpretation of s 1(1) of the Law of Evidence Amendment Act (*supra*) is correct, I will still have to take cognisance of Swazi law if I can ascertain it readily and with sufficient certainty. I have consulted the following text-books on indigenous law, assuming that they may properly be used for this purpose: Olivier *et al Die Privaatreg van die Suid-Afrikaanse Bantoesprekendes* (1989); Bennett *Application of Customary Law in South Africa*, (1985); *A Source-book of African Customary Law for South Africa* (*supra*); Bekker *Seymour's Customary Law in Southern Africa* 5th ed and Bennett *Human Rights and African Customary Law* (1995).
I was unable to ascertain what Swazi law and custom provide in respect of the custody of minor children when their mother dies at a stage when lobolo had not been paid in full by her partner in the customary marriage.
It did, however, become apparent to me, that whatever the position might have been in general in indigenous law regarding the custody of children, the basic principles thereof have to a certain extent been excluded in favour of the common law. It appears to be uncertain whether the common law has been incorporated into customary law or whether customary law has simply been excluded in favour of the common law.

1. In a long line of cases throughout the Republic, decided by the special courts for blacks under the Black Administration Act, it was decided that in custody matters the interests of the child should take precedence. See *Human Rights and African Customary Law* (*supra* at 106) and *A Source-book of African Customary Law for South Africa* (*supra* at 291) where Bennett says the following:

   'While the courts have not discounted the significance of bridewealth in determining rights to children, they none the less give overriding effect to principles of the common law. In the first place, they have assumed protective jurisdiction as upper guardian of all minor children, which they exercise at any time when: a child is without a guardian, the guardian has neglected his or her duty, or the natural guardians cannot agree on what is best for the child. In the second place the welfare of the child is deemed to be of paramount importance. . . . ' 2. If the parties, like in the present case, conclude a marriage by civil rights subsequent to a customary marriage it has the general effect of imposing a new personal status on the spouses, one governed by the common law. Bennett *A Source-book of African Customary Law for South Africa* says the following in this regard at 440: 'The same legal regime has been extended to other members of the immediate family, which is now conceived to be a nuclear unit. Hence the parent-child relationship is governed by the common law.'
3. Any arrangement that smacks of the sale of or the trafficking in children will not be enforced. *Bill of Rights Compendium* para 6A--39 and *Seymour's Customary Law in South Africa* (*supra* at 201 footnote 182 and 183); J M T Labuschagne *Regspluralisme en Huweliksduplikasie in Suid-Afrika* (1993) at 26 *De Jure* vol I at 171.

Applicant's counsel in fact, during the course of this trial, tendered the outstanding lobolo to the respondents apparently with the view to unsettle the respondents' claim to custody. Admittedly though, this tender was apparently made in desperation.It is, in my view, clear that issues relating to the custody of a minor child cannot be determined in this fashion, ie by the mere delivery or non-delivery of a certain number of cattle.
Any doubt as to the applicable legal principles that might have existed in this regard was, in my

view, effectively removed by the promulgation of the Interim Constitution of South Africa Act 200 of 1993 inasmuch as s 30(3) thereof provides as follows:

> 'For the purpose of this section a child shall mean a person under the age of 18 years and in all matters concerning such child his or her best interest shall be paramount.'

Section 35(3) of the same Act further provides: 'In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this chapter.'

This matter should and will therefore be decided only on the basis of what would be in the best interests of Sihle.In the motion proceedings the respondents relied mainly on three factors to resist applicant's claim for custody of Sihle: that he had an unstable employment record, that he abuses alcohol and that he did not maintain regular contact with Sihle and her mother during the periods when they were living apart.During this trial, the emphasis shifted somewhat in that reliance was placed on Swazi law and custom and also on the fact that three years have now lapsed since the applicant's wife died during which period Sihle was in the *de facto* custody of the respondents. It should immediately be noted that the fact that Sihle has been in the *de facto* custody of the respondents for the past three years is not of the applicant's making. At the time his wife died, the applicant obviously experienced serious problems in gaining access to Sihle and he had started the present motion proceedings to obtain custody towards the end of that very year. The fact that the final determination of the matter has been prolonged for such a long period was due to circumstances beyond his control. He has, however, since at the latest March 1995 maintained regular contact with Sihle. The applicant, as well as both the respondents, are clearly well educated and refined people. They also care for Sihle very deeply. Although a certain degree of bitterness could be detected between the parties during the trial all of them seemed to have dealt with this problem in a very civilised manner. This is also clear from the evidence as a whole, as in my view, neither of the parties seriously contested the other's suitability to properly care for Sihle. It was not the applicant's case that Sihle is not properly cared for at the moment and, in my view, it was not the respondents' case that the applicant is not a fit and proper person to be awarded custody of Sihle at all. At the most, the respondents merely were of the view that the applicant should wait a year or two longer after which they would seem to have no problem if the applicant is to be awarded custody.

The allegations made against the applicant in the opposing affidavits, referred to above, came to nothing after the evidence had been adduced. These allegations were never substantiated.I was very impressed by the applicant's fiancée. She is obviously a very fine woman and there is no reason whatsoever to doubt the sincerity of her expressed intentions and desire to assist the applicant in the raising of Sihle to the best of her ability. I have no doubt in my mind that she has the ability to create as homely an environment for Sihle with her father as can reasonably be expected.Sihle is presently happy and content at being with the respondents and in her present environment. She is also happy at school and there is no need for any concern regarding her performance at school. She obviously enjoys the loving care and attention of two wonderful grandparents. Uprooting her from her environment by awarding custody to the applicant might well cause adjustment problems for Sihle in her new home and new school and this is a factor that I consider to be very important. Dr Missinne regarded this as apparently one of the most important factors but in cross-examination conceded that with children serious adjustment problems normally are only experienced once they have to adjust to a new environment for the second or third time.Another important factor, in my view, to which I have given long and serious consideration is the incident that occurred on 12 July 1996 when Sihle, while visiting the applicant, was left alone at the applicant's house. This initially caused me a lot of concern. When the applicant was cross-examined on this aspect he immediately conceded that he had made a terrible mistake. He did not try to justify his actions but openly admitted that it amounted to a serious error of judgment on his part, that it should never have happened, and that he would see to it that a similar incident never recurs.

Mr *Jordaan* in argument relied strongly on this indiscretion on the part of the applicant in developing his argument that this was clear proof of the fact that applicant was not a fit and proper person to be awarded custody of Sihle.

I cannot agree with Mr *Jordaan* in this regard. Although it was an indiscretion on the part of the applicant and a serious indiscretion at that, I do not believe that a single incident such as this disqualifies the applicant from being a fit and proper person to be awarded Sihle's custody.
I perceived the applicant to have expressed an honest and heartfelt desire to assume the responsibility of raising Sihle according to his Christian beliefs and traditions and to afford to her the best possible education that she may be able to cope with. He furthermore without hesitation conceded that it would be in the best interests of Sihle, even if custody is awarded to him, that regular contact be maintained between Sihle and the respondents.Although hesitantly, the second respondent eventually conceded that whatever Sihle still has to be taught in respect of Swazi traditions and culture by herself could be done if they had regular access to Sihle. I am also mindful of the fact that Sihle has certain negative feelings towards the applicant at the moment. This much is clear from the discussion on p 2 of Dr Missinne's report. I also bear in mind that according to Dr Missinne's evidence these feelings of negativity are being fuelled by the respondents. This, of necessity, must to a certain extent upset Sihle emotionally as will the present conflict between her grandparents and her father. She attended the trial and the respondents were apparently intent upon her listening to the evidence. When I noticed the child in court before the trial started I informed Mr *Jordaan* that I would not allow Sihle to attend court and to listen to the evidence. Mr *Jordaan* also invited me to talk to Sihle in chambers in order to establish her choice of preference. I declined this request and eventually by agreement between the parties Sihle was called to the witness stand by Mr *Jordaan* and was only asked one question: 'where would you prefer to stay?' to which she replied 'with my grandparents'. Ms *Tolmay* informed me that she had received instructions from the applicant not to cross-examine Sihle on any aspect because in his view the experience would be too traumatic for Sihle and would not be in her best interests. It is also a matter of record that Mr *Jordaan* consulted with Sihle before the trial to establish her preference with a view to call her as a witness.
In his argument Mr *Jordaan* requested me to take account of the preference expressed by Sihle in Court and reliance was placed on the *dictum* of King J in *McCall v McCall* 1994 (3) SA 201 (C).For reasons which ought to be apparent from my judgment, I will not take any cognisance of Sihle's expressed preference.
In conclusion I would like to add that I did not find the evidence of Dr Missine very helpful. Various of the 'facts' on which he based his recommendation as furnished to him by Sihle have been proved to be incorrect. He also could not assist the Court at all with regard to the fitness or otherwise of the applicant to be awarded custody as he consulted only with the first respondent and Sihle and did not even liaise with the family advocate or the social worker. I therefore do not regard his conclusion as having been reached after a proper and thorough investigation of all the relevant circumstances.In arriving at my decision I have tried to make 'some kind of imaginative leap and guess what the child (Sihle) might retrospectively have wanted once (she) it reaches a position of maturity'. Eekelaar in Baxter and Eberts *The Child and the Court*, as quoted in *A Source-book of African Customary Law for South Africa* (*supra* at 296 footnote 324). It is my sincere belief that she would have wanted to have been raised by her father without having been alienated from her grandparents.
Taking all the relevant facts into consideration, I am of the view that it would be in the best interests of Sihle if she is re-united with her father and if custody is awarded to the applicant. Sihle should not be removed from the St Peter's School in Nelspruit before the end of the present school term. Because this arrangement is new and uncharted I intend requesting the family advocate to monitor the situation and to report to this court on the exercise of custody by the applicant. I have been in contact with Mr I van Zyl who heads the Pretoria office of the Family Advocate. He advised me that an office has been established in Mmabatho and that they will be able to perform the requisite monitoring function. Ms Mayaba, the family advocate who furnished a report on Sihle, will in fact be assisting in the training of the staff in Mmabatho. I am also of the view that it would be in the best interests of Sihle if the respondents be granted reasonable access. In view of the animosity that presently exists between the applicant and the respondents it might well be undesirable not to define specifically respondents' access to Sihle. The precise nature of the access, should custody be awarded to the applicant, was, however, not debated at the trial and should the legal representatives of the parties agree that it would be advisable to define respondents' access they can advise me of this.

Mr *Jordaan* submitted that as the parties concerned have, in contesting this case, acted in what they believed to be the best interests of Sihle, there would be no winner and no loser whatever the result might be and that consequently no order as to costs ought to be made. I agree with Mr *Jordaan* that in the present circumstances this would be the proper costs order.
I therefore make the following order: 1. Custody of Sihle is awarded to the applicant.

2. The respondents shall have reasonable access to Sihle (or as later determined).

3. The family advocate is requested to monitor the applicant's exercise of custody aforesaid for so long as such monitoring is in the opinion of the family advocate necessary.

4. The family advocate is requested to report to this Court on the aforesaid exercise of custody on 1 December 1997 or before that date if deemed necessary by the family advocate. Copies of this report to be furnished to the applicant as well as the respondents.

5. No order is made as to the costs of these proceedings.

Applicant's Attorneys: *Romanos*. Respondents' Attorneys: *Couzyn, Hertzog & Horak Inc.*