IN THE HIGH COURT OF LESOTHO

CIV/APN/95/2011

In the matter between:

MASUPHA LESALA APPLELLANT

vs

HLAPASE LINEO MOROJELE RESPONDENT

JUDGMENT

Delivered by Honourable Justice T. Nomngcongo

On the 20th April, 2011

It is not often that one comes across of an application such as the present one. The applicant prays for order in the following terms:-

1. Applicant to be granted access to the minor child Karabelo Morojele, as follows:

(a) Karabelo Morojele the minor child to visit applicant herein, every two (2) weekends of every month from Fridays after school to Sunday evening;

(b) Karabelo Morojele, the minor child to visit applicant herein, for a period of two weeks during Christmas holidays and winter holidays;

(c) Applicant be permitted to pick up the child, Karabelo Morojele from school during school times and to take the child to the Respondent's residence.

(d) Karabelo Morojele's birthday's (sic) celebrations to alternate between applicant and the Respondent.

(e) Respondent be ordered and directed to consult with the applicant about the choice of school, Karabelo Morojele is to attend and the parties herein to make a joint decision about the choice of school for the child.

(f) Applicant herein be permitted to pay for the minor child's school fees, clothing, medical expenses, nanny's salary and food and the respondent be ordered to accept on behalf of the child, maintenance that applicant provides.

(g) Respondent be ordered and directed to inform applicant whenever the child falls sick.

(h) Respondent be ordered and directed to consult the applicant before the respondent can take the child out of the country for visits to other foreign countries.

He asks for costs in the event of opposition and further and/or alternative relief.

The applicant and the respondent were lovers and out of that relationship a child, Karabelo Morojele was born. After the birth of the child he sat up house for the mother and child and he paid a sum of M3,400 monthly towards their up keep, the services of a nanny and rental. He apparently lived apart from them but access to mother and child was unconditional and he would visit and sometime sleep over at the residence of the respondent. The child would also be sent for visits with the applicant.

This idyllic arrangement was not to last, thanks to the arrival of a Frenchman who stole the respondent's heart. Things soured. The respondent started putting restrictions on the access to herself and the

child. Recriminations started flying and applicant was told to stop sleeping over at respondent's residence. Relations deteriorated to the point where respondent refused to accept the maintenance money that applicant proffered saying it was user as a use to gain untrammeled access to the child and to disturbed her right of privacy with her fiancé who she plans to marry in May this year. Attempts at reconciliation were obviously doomed to fail under these circumstances and fail they did. In the acrimony that followed communication and effectively access to the child were cut off.

It is against this background that applicant seeks the extensive rights of access and other orders that he prays for in the notice of motion.

It is trite law that custody of a child born out of wedlock vests in the mother. The father of such a child does not have any *prima facie* right of access to it. He may have such a right, like any third party, only if there are compelling reasons which render it to be in the interests of

the child, to grant such access or even custody to an applicant should claim access merely because he is the natural father of the child, he wishes to bond with the child and he pays maintenance for it. The latter is after all his duty to provide.

It was put this way by **Muchechetere J.** in **Douglas V Mayers 1987 (1) 910**.

> **"The point therefore to take note of in this case is that the Court will only intervene with the custodial rights which include access, in the interests of the child.**
>
> **From the above, my conclusion is that there is no inherent right of access or custody for a father of a minor illegitimate child but the father, in the same way as other third parties, has a right to claim and will be granted these if he can satisfy the court that it is in the best interests of the child. The onus is on the applicant, in this case the father, to satisfy the court on the matter and**

usually the court will not intervene unless there is some very strong ground compelling it to be so".

In that case the applicant 's ground for seeking access was that it was obviously in the interests of the child that he should know who his father is, and become acquainted with his father. In rejecting this as a ground for granting the right to access the learned judge went on to say:

"**This and the fact that the applicant has paid and is willing to pay some maintenance for the child are the only matters placed before the court for consideration in support of the application. Mr Besset could neither elaborate nor, indeed add to these during his submissions. There are no allegations suggesting or implying that the respondent is not capable of or has not looked after the child properly, necessitating a periodical check by applicant. There is no allegation or suggestion that the**

maintenance the applicant has paid so far had been, or in future will be misused. There is no allegation that the child, who has been seen by the applicant on three separate occasions since birth, was other than happy and well in the respondent's care and custody. Nothing untoward has been said about the respondent's character and the environment under which the child is being brought up. It is, more importantly not explained in which way it is in interest of the child that it should know and be acquainted with its natural father …… In my view the application has not gone beyond saying that the applicant wants access because he is a natural father and because he pays maintenance. This is my view, is the same as applying for access as of right on the ground of an inherent right of access, which , as I have stated above, is non-existent in the case of a natural father.

The cases could not be more similar. In the present case the applicant says he wants access because he wants to **"strengthen the child's ties with his father"** As in the above case, there is no allegation or suggestion that the custodian mother does not properly case for the child or is guilty of any untoward conduct that could merit interference with her custodial rights.

The case of **Douglas V Meyers** (supra) was not referred to by both counsel. The case and many others before and after it **(S v S 1993 (2) 200; B v S 1993 (2) 211,)** have consistently maintained the principles enunciated in it. Then there was the case of **Van. Eck v. Holmer 1992 (2) SA 636 (W)** which is the case I presume – I say presume because Counsel for the applicant, did not give its citation in his heads of argument - Mr Mokoko referred to. That case parted from the views that now appeared to be settled. This is **what Spoelstra J. in B V S** had to say about THE Van Eck **case "….the view was expressed that the**

natural father of an illegitimate child should be accorded the same rights of access to his illegitimate child as are recognized in respect of a legitimate child….. I shall not deal with this unusual judgment at length. It was criticized by Flemming DJP in this Division in the matter of S V S case N0. 92/15007 … It was not followed by Flemming DJP who refers in his judgment, to number of other unreported case in this Division who refused to follow it. Flemming DJP demonstrates that Van Zyl J's judgment is founded on fallacious and illogical argument and is clearly wrong. I am in fact unaware of a single case in which the Van Eck judgment has been followed in this or any other Division"

If Cullinan C.J. (as he then was) in **Paseka Souls and Another v Tuman Lebitsa CIV/APN/399/92 relied on the Van Eck case** (supra) then he was with respect in extremely unpopular company. The father of an illegitimate child has no right of access to its child access to its child

unless there are strong and compelling reasons for granting access. If it is felt that the law should change in this regard, it is for the legislature to decide that and not for the courts. In my view, in any case I see no need to depart from the common law. I regard it as undesirable and therefore, not inn the best interests of the child that it should periodically shuttle between parents who not live together and will therefore have different influences on a child, especially one of tender age. I believe that it is inevitable that each of the parents will view for the ascendency of their own stamp of parenthood on the child leaving it emotionally confused. The present case with its recriminations has all the ingredients of just such a situation.

I consider that the applicant has not out of a case for the extensive access rights that he claims which include a twice daily contact with the child during school days and the sharing of holidays and birth days equally. This would amount to sharing the custodial rights of the

mother with the father (see The LAW OF PERSONS AND THE FAMILY by BOBERG 1977 Ed. P.463 where it is observed: “It is in the nature of custody that it cannot be shared between parents who are living apart and an agreement that both parents are to have custody will not be made an order of court)

The application is dismissed with costs.

T.Nomngcongo
Judge

For Applicant: Mr Mokoko
For Respondent: Ms Thabane