Judgment No. HB 50/06
Case No. HC 332/06

THULANI NCUBE

Versus

SABELO SIZIBA

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 22 MARCH AND 1 JUNE 2006

Ms Vundhla, for the applicant
Ms A. Masawi, for the respondent

NDOU J: The applicant claims to be the biological father of the minor JMTL. The respondent is a maternal uncle of the said minor. It is common cause that the minor was brought to Zimbabwe from South Africa by one David Lebese (Lebese) who was married to the minor's late mother at the time of its birth. The applicant's case is that the minor was conceived from an extra marital relationship he had with its mother just before she got married to Lebese. In short he says he is the natural father of the minor. Because the minor was born during the subsistence of the marriage of Lebese and its mother, it carries the family name, Lebese. The minor has a birth certificate to that effect.

The applicant strongly believes that he is the natural father of the minor. The minor has always stayed with Lebese and its mother as its parents since birth in 1993. The applicant's explanation is that he has lost touch with the minor and its mother. When the mother passed on in 2005, Lebese brought the minor and left it in custody of the respondent to attend school in Zimbabwe. The

respondent enrolled it at Phezulu School in Shangani where its maternal aunt is teaching and it is doing grade 6. The

applicant never tried to assert his rights as natural father during the mother's lifetime. He only featured at the beginning of 2006 and launched this application seeking a *mandamus* directing the Deputy Sheriff to remove the minor from the respondent and place him in his custody. Once this is done, he intends to take the child back to South Africa as he is under the impression that education in Johannesburg is superior to that offered at Phezulu School (formerly a so-called group A school). Lebese, as the surviving parent, has parental authority over the minor. Lebese decided that the best interests of the child would be served by it being placed with respondent. He brought the minor to this jurisdiction. It has not been shown that Lebese was incompetent to make the decision as the surviving parent. This court is being called upon to substitute its own decision for that of a person in whom the parental authority of the minor concerned vests. First, if the applicant' story is accepted, still, he cannot succeed in with his claim because the minor will be one born out of wedlock. An illegitimate father has no inherent rights in the child born out of wedlock – *Cruth* v *Manuel* 1999(1) ZLR 7 (S); *Douglas* v *Meyers* 1991 (2) ZLR I (H); *S* v *S* 1993 (2) SA 200 WLD; *Tiwandire* v *Chipanda* HB 12-04 and *Jones* v *Raimondi* HB-9-05. On this ground alone, the application should fail.

Second, the best interests and welfare of the minor do not favour the granting of the order. To start with, the applicant wants me to take the 13 year old minor from a known maternal uncle and aunt and place it in the custody of a "new" father after the mother's death. The father it has known

all along is still alive. The "new" father intends to disrupt its schooling and take it to a new school in Johannesburg. He has not even bothered to

provide details of the intended school save to make a rather unhelpful assertion that education in Johannesburg is superior to that offered in Zimbabwe. His emphasis is that he needs to bond with minor and also for the minor to bond with its sister. It is common cause that the applicant has a daughter mothered by the minor's later mother. The said daughter has always stayed with the applicant. She was never part of the minor's life. I do not think it would be in the best interest of the minor to remove it from the father, uncle, aunt and other relatives it has always known to the unknown so soon after the passing on of its mother.

It is common cause that after taking the minor into his custody, the applicant intends to have DNA tests carried out to determine if he is indeed the natural father of the minor. Under oath I enquired from applicant what would happen to the minor if

the tests proved that he is not the biological father of the minor. His response defeats his application. He says he would return the minor to the respondent. This would no doubt be devastating to the minor. Why subject the minor to such a situation? The minor cannot be kicked around like football in the fashion suggested by the applicant. The ideal approach would be to determine the paternity issue first. Even in the application the applicant seems to emphasise his claims above those of the minor. In such matters, it is the claims of the minor that are overriding and not those of the parents – *W* v *W* 1981 243; *Short* v *Naisby* 1953 (3) SA 572

(D) and *Kuperman* v *Posen* 2001 (1) ZLR 208. The application is devoid of merit.

Accordingly, the application is dismissed with costs.

Dube & Partners, applicant's legal practitioners
Masawi & Associates, respondent's legal practitioners