ZVIKOMBORERO PAUNGANWA
versus
REGISTRAR OF BIRTHS AND DEATHS
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 15 March 2016 and 7 July 2016

Opposed application

Ms *S. Nkomo*, for the applicant
C. Chopamba, for the respondents

MUNANGATI-MANONGWA J: In this opposed application, the applicant seeks to compel the first respondent, the Registrar of Births and Deaths, to issue a birth certificate to her minor child in the family name of that child's father. Secondly, she wants a passport to be issued to the child. The first respondent has set out requirements which the applicant has to meet in terms of the Act that the first respondent administers, in particular s 12 (2) (c) of the Birth and Deaths Registration Act [*Chapter 5:02*]. The applicant, believing the set requirements are an impediment to her enjoyment and her child's enjoyment of constitutional rights, seeks to have s 12 (2) (c) of the Births and Deaths Registration Act declared to be ultra vires the Constitution and therefore null and void.

The application is opposed by the civil division on behalf of the first respondent on the basis that there is nothing unconstitutional about the particular section of the Act.

Factual background

The applicant who was in an unregistered customary law union had the misfortune of losing her husband on 10 June 2010 before the parties procured a birth certificate for their minor child, Talent N. Jangara, born on 2 April 2010. Prior to his death, the applicant's husband had assaulted her causing injuries which led to health complications. The applicant then sought medical treatment in South Africa where certain procedures could not be done when pregnant. When she ultimately gave birth, she needed to travel to South Africa and to

take her baby with her. In seeking to procure a birth certificate for the minor child in order to then get a passport for her, she met with hurdles.

When approached to issue a birth certificate for the child in the child's father's family name, the first respondent, as the Registrar of Births and Deaths advised that in the absence of the husband's relatives as required by s 12 (2) (c) of the Births and Deaths Registration Act [*Chapter 5:02*], he would not issue the minor child with a birth certificate in the family name. He further advised the applicant that alternatively he would only issue the birth certificate on the strength of a court order "because doing so in the absence of a court order will be a breach of the statute enacted for purposes of governing issuance of vital identity documents."[1] However, applicant was faced with a situation where the late husband's relatives were not willing to assist. Aggrieved by the first respondent's stance, the applicant approached this court seeking an order compelling first respondent to issue the minor child with a birth certificate.

This application was filed as a chamber application in December 2010, opposition papers were filed on 26 November 2012, the answering affidavit thereof was filed on 19 June 2013. The application for set-down was only filed on 14 December 2015 and the matter ultimately heard on 15 March 2016. I hasten to say that this matter being of paramount importance, it is unfortunate that it took more than 5 years to be set down. It took the first respondent 2 years to file opposing papers, then the applicant did not file an answering affidavit for 7 months and only applied for set-down two and half years later. The matter was not treated with the urgency it deserved given that the interests of a minor child were at stake. To think that the minor child was at the time of hearing above 5 years and without a birth certificate is highly displeasing.

Applicant's case

The applicant is alleging that the child's constitutional rights to a birth certificate and to a family name has been violated by the first respondent by virtue of the invocation of the provisions of s 12 (2) (c) of the Births and Deaths Registration Act. Section 12 (2) provides as follows:

> "(2) A registrar shall not enter in the register the name of any person as the father of a child born out of wedlock, except—
> (*a*) upon the joint request of the mother and the person acknowledging himself to be the father of the child;

[1] See para 7 of the respondent's opposing affidavit

> or
> (*b*) if the mother of the child is dead or has abandoned or deserted the child, upon the request of the person acknowledging himself to be the father of the child; or
> (*c*) if the alleged father of the child is dead, upon the joint request of the child's mother and a parent or near relative of the alleged father." .

Ms *Nkomo* for the applicant, submitted that the requirement of the participation of a relative as provided for by Section (12) (2) (c) of the Births and Deaths Registration Act (hereinafter referred to as "the Act") runs contrary to the right of a child to prompt provision of a birth certificate and to a family name as provided for in the constitution, to the extent that it has no position in our law and should be declared invalid. Such rights pertain in s 81 (1) (c) of the Constitution of Zimbabwe which provides as follows,

> "Every child, that is to say every boy and girl under the age of eighteen years has the right-
> (a)……
> (b)……..
> (c) in the case of a child who is-
> i. born in Zimbabwe, or
> ii. born outside Zimbabwe and is a Zimbabwean citizen by descent,
>
> to the prompt provision of a birth certificate."
>
> and

Section 81(1) (b) of the Constitution of Zimbabwe which provides as follows,

> "Every child, that is to say every boy and girl under the age of eighteen years has the right-
> (a)……
> (b) to be given a name and family name,"

Ms *Nkomo* submitted that the provisions of these sections of the Act subjected the child's interests to the actions of third parties, especially in the instance where its father's relatives were not cooperating as is the present case. Given such a scenario, it becomes impossible for the child to enjoy its constitutional right to issuance of a birth certificate promptly or to assume a family name. She further argued that the requirement that there be confirmation by a relative as required by s 12 of the Act does not impute paternity to the child as such confirmation is not scientific and cannot be taken to mean paternity is genuine or otherwise. She further highlighted that the position so stated by s (12) (2) (c) does not obtain in South Africa.

She submitted that applicant had complied with the law in notifying the registrar of the birth of her child as provided in s 11(1) which provides as follows,

> "Subject to Section twelve it shall be the duty of the father or mother of a child,-

> to give notice of the birth or still birth in the prescribed form to the Registrar of the district in which the birth or still birth, as the case may be, occurred."

Having played her part, it remained for the first respondent to issue a birth certificate to applicant's child. She further submitted that the right to a birth certificate is a fundamental right which is engraved in the Constitution which is the supreme law, hence such right should be treated with utmost consideration for the realization and protection of the child's rights. Such right could not be wished away by any administrative acts or by any law that is inconsistent with the Constitution, as it is the minor child's fundamental right to be issued a birth certificate with immediate effect.

Ms *Nkomo* submitted that the child in question has a right to the family name by virtue of the recognition of customary law unions *vis* issues pertaining to children as provided for in s 3(5) of the Customary Marriages Act [*Chapter 5:07*] which provides that;

> "A marriage contracted according to customary law which is not valid marriage in terms of this Section shall for the purposes of customary law and customs relating to status, guardianship, customary and rights of succession of the children of such marriage, be regarded as a valid marriage."

She argued that it is trite law that children born of parents married under customary law are legitimate by virtue of the above provision and as such it is respectfully submitted that they assume their family name.

Apart from alleging the violation of her child's rights, applicant also made averments that her own rights had been violated in the following regard:

a) That the provision discriminates against women in that it accords a father of a minor child the right to get a birth certificate without assistance from anyone yet a woman has to be assisted contrary to the equality provision in the constitution specifically s 56.
b) That the provision discriminates against women on the basis of gender as it carries the notion that women can lie about the paternity of a child yet the man cannot lie about the maternity of a child.
c) That the section discriminates against children born out of wedlock as against those born in wedlock in that for the latter there is no need for the mothers to seek assistance yet same is required for children born out of wedlock.

The applicant argued that as the child's guardian, she had the right conferred upon her to procure the birth certificate without hindrance or assistance from any one drawing from s

80 (2) of the Constitution which provides that women have same rights as men regarding the custody and guardianship of the children. Under common law all the rights in respect of a child born out of wedlock are vested in the mother and she has the same rights.

By virtue of the foregoing, the applicant wants s 12 (2) (c) declared invalid to the extent that the provisions thereof are in contravention of the constitution and that the first respondent be compelled to register the minor child in the family name.

First respondent's submissions

Mr *Chopamba* for the first respondent submitted that there was nothing unconstitutional about the section. He submitted that applicant had not made up her case in her founding affidavit in that there is no evidence that substantiated that there was a customary law union between her and the deceased husband. In as much as applicant sought protection of the law, even the deceased's estate was also entitled to protection. He argued that the provisions of the section in issue were a safeguard to fraudulent claims by mothers where the purported father was no longer available. He therefore maintained that up until the courts have ruled same to be unconstitutional, the provision remains so.

He further argued that s 56 (5) of the constitution allows discrimination where it is fair, reasonable and justifiable, and in that regard the provisions under attack are covered. Further, nothing much should be read into the endorsement on the birth record where it says "customary marriage."

Suffice to say that I found the submissions by the Civil Division very disappointing and deficient for such an important matter, moreso where the applicant had gone all out to touch on the provisions of the constitution, which required a meaningful and substantive response. Surely, the lawyers who come to court representing government departments must move away from an attitude where they just put an appearance and do not put full effort in presenting well researched and comprehensive arguments. The court relies on persuasion grounded on the law to reach an informed decision. In that regard, representation of a litigant should be done wholeheartedly, diligently and brilliantly.

THE LAW

Where there are allegations of infringement of rights a careful consideration has to be made whether indeed there is such infringement and if so in what regard and to what extent. In considering the enjoyment of the fundamental rights bestowed by the constitution it must

be noted that not all rights are absolute. In that, regard must be made to section 86 which provides as follows:

> **"86 Limitation of rights and freedoms**
> (1) The fundamental rights and freedoms set out in this Chapter must be exercised reasonably and with due regard for the rights and freedoms of other persons.
> (2) *The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom,* taking into account all relevant factors, including—
> (*a*) the nature of the right or freedom concerned;
> (*b*) the purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest;
> (*c*) the nature and extent of the limitation;
> (*d*) the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others;
> (*e*) the relationship between the limitation and its purpose, in particular whether it imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose; and
> (*f*) whether there are any less restrictive means of achieving the purpose of the limitation"

In essence there is room for limitation of fundamental rights, provided as set out above the limitation is fair, reasonable and justifiable in a democratic society due regard being made to the listed considerations. Equally s 56 of the constitution provides for a margin which can be termed as limiting broad enjoyment of the right to equality and non-discrimination.

It provides thus:

> **"56 Equality and non-discrimination**
> (1) All persons are equal before the law and have the right to equal protection and benefit of the law.
> (2) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
> (3) Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, ethnic or social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, *gender, marital status,* age, pregnancy, disability or economic or social status, *or whether they were born in or out of wedlock.*
> (4) A person is treated in a discriminatory manner for the purpose of subsection (3) if—
> (*a*) they are subjected directly or indirectly to a condition, restriction or disability to which other people are not subjected; or
> (*b*) other people are accorded directly or indirectly a privilege or advantage which they are not accorded.
> (5) *Discrimination on any of the grounds listed in subsection (3) is unfair unless it is established that the discrimination .is fair, reasonable and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.* (my emphasis)"

Thus the law requires that where there is a restriction to a fundamental right there be reasons which are fair, reasonable and justifiable and thus acceptable to an open and

democratic society based on human dignity, equality and freedom. This therefore entails a balancing test. Iain Currie & Johan de Waal in their book *The Bill of Rights Handbook* state as follows:

> "To satisfy the limitation test then, it must be shown that the law in question serves a constitutionally acceptable purpose and that there is sufficient proportionality between the harm done by the law and (the infringement of fundamental rights) and the benefits it is designed to achieve (the purpose of the law.)"[2]

To that end one has to consider the relevant factors listed in s 86 (2) (a) to (f) which range from the nature of the right or freedom concerned to whether there are any less restrictive means of achieving the purpose of the limitation.

It is important to state from the onset that with regards to Section 81 which deals with the rights of children, notice should be taken of s 46 of the Constitution which provides that when interpreting Chapter 4 which is the Declaration of Rights, courts should give full effect to the rights and freedoms enshrined in the Chapter and account should also be taken of international law and all treaties and conventions to which Zimbabwe is party.

The right to prompt provision of a birth certificate and a family name are some of the most fundamental rights of children which are entrenched in the Constitution of Zimbabwe as provided in s 81 (1) (b) and (c). As correctly submitted by the applicant's counsel, the same right to prompt provision of a birth certificate is also entrenched in the United Nations Convention for the Rights of the Child which came into effect in 1990 and also the African Charter on the Rights and Welfare of Children which international treaties were ratified and signed by Zimbabwe.

As for guardianship, where the father of a child is deceased, the mother remains the legal guardian of the minor child and as such has the power to obtain a birth-certificate and passport for her minor child. Even in the instance where there is an unregistered customary law union the position under the common law of this country is that the mother is the guardian of her child, although the father may have had certain rights of guardianship in relation to the child, but that would only be for customary law purposes. The rights accorded to a father in terms of s 3 (5) of Customary Law Marriages Act, are operative at customary law only and do not take away the mother's rights under common law.[3]

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[2] 5th Edition p 176

[3] Katedza v Chunga and Another 2003 (1) ZLR 470

No doubt the Constitution is the Supreme law of Zimbabwe as provided for in s 2 and any law that is in inconsistent with it, is null and void to the extent of its inconsistency. That being the case, if the section of the Act that is complained of is adjudged to be contravening the provisions of the Constitution it cannot survive. It has to be declared null and void and hence of no force and effect.

THE LAW AND THE FACTS/ ANALYSIS

The applicant seeks that the first respondent be compelled to issue her child with a birth certificate in the name of her father. In my view, after being given a name, the first official document for a child creating its identity becomes a birth certificate. This is how important a birth certificate is. It confers official identity to a child, further entrenching that child's right as a citizen who is entitled to enjoyment of certain privileges. In Zimbabwe the birth certificate is required in procuring a national identity document and even a passport which documents are in themselves important, hence the entrenchment of the right in our constitution. The importance of this document is internationally recognised hence the provision of the right to prompt provision of a birth certificate and to a family name is restated or provided for in international treaties and conventions.

It is common cause that when children are born they are given a name as individuals then follows a family name which has commonly come to be regarded as a "surname" distinguishable from the first name which is individualistic. *In casu* the applicant's child neither has an official name nor a birth certificate.

The issue before the court is whether or not the provisions of the Act complained of are such as to offend what the supreme law of the land has provided in s 81 (1) (b) and 81 (1) (c) (i).

It is clear that the applicant has taken her constitutional challenges on two levels.

a) Being that she as the guardian of her child and being a woman is being discriminated upon in her quest to procure a birth certificate for her child. This is apparent from the submission made on her behalf and
b) That her child's right to a family name and to a prompt provision of a birth certificate has been contravened.

It is important to deal with each complaint separately.

Whether or not the applicant has been discriminated upon in her capacity as guardian and being a woman and not legally married.

It is not in issue that the applicant is the child's guardian. She is the only surviving parent and as such the natural guardian. I note that the first respondent has not raised issue regarding the capacity to procure a birth certificate. What the first respondent requires is that if the applicant wants the father's name entered into the register as the father of the child, deceased's parent or near relative of the alleged father has to confirm. In essence, the applicant's capacity to procure the birth certificate remains but for the fact that the child was born out of wedlock, assumption of a family name without confirmation from relatives is prohibited by that section. In that regard, it is not correct that the applicant is being discriminated upon as a guardian. In fact if she so wishes she is able to procure a birth certificate for the child in her own name without the assistance of anyone. It is the fact that she wants the endorsement of someone else's name in the register as being the father of her child which person is no longer there which brings about her predicament.

The applicant indicates that the requirement that she be assisted by a parent or near relative is discriminatory and contravenes the equality clause as a father of a minor child can procure a birth certificate without assistance from anyone. This statement by applicant that a father can procure a birth certificate without the assistance of anyone is not entirely legally correct. Except in instances where the parties are legally married, a man has to take the mother of a child to the first respondent's offices for confirmation. This is so because with children born out of wedlock, a man still has to satisfy the requirements of s 12 (2) (a) of the act which provides that where the name of a person is to be entered in a register as the father of a child born out of wedlock this can only be done;

(a) "Upon the joint request of the mother and the person acknowledging himself to be the father of the child."

Thus, the father where he is alive has to acknowledge himself to be the father as provided for.

The applicant's position is different from a situation where a child is born in wedlock as there is a legal presumption that children born of parties legally married are sired by the husband. *In casu* the applicant was not in a valid marriage. Note must be taken that had the applicant's customary law husband not died before the procurement of the minor child's birth certificate, this issue would not have arisen. This is so because provisions of s 3 (5) of the

Customary Marriages Act [*Chapter 5:07*] would have ensured the recognition of this minor child.

The applicant has alleged that she is being discriminated upon on the basis of gender as the requirement for confirmation by the father of the child's relatives comes with the notion that women can lie about paternity yet the man cannot lie about the maternity of a child. I find this argument not to be persuasive but rather irrational and without merit.

Maternity is given, it is a fact as it involves the carrying of pregnancy to term resulting in the birth of a child. Paternity, except in instances where it is scientifically proven, remains a presumption. If anything s 12 (2) (c) is not onerous in terms of proving paternity. It allows confirmation of paternity by a parent or near relative of the deceased father through a "request" that the alleged dead father's name be entered into the register. Nothing could be more flexible given that the issue of paternity is an important factor.

I do not find that the applicant's rights were contravened at all. Given the facts and the aforegoing legal analysis, there is no discrimination which applicant herself could have suffered either on the grounds of gender, equality or that she was in an unregistered customary law union.

Whether the child's right to a family name and prompt provision of a birth certificate was contravened.

The *Shorter Oxford English Dictionary* Vol 1 describes "family" as "all those who are nearly connected by blood or marriage or those descending or claiming descendency from a common ancestor." *The Concise Oxford English Dictionary 2011* version defines a family as a " group of people related by blood or marriage" and a family name as "a surname". A surname is then defined as "a hereditary name common to all members of a family." Family name has also been defined as, "the last name that gives you a sense of identity and helps you discover who you are and where you came from." Given the definitions of a family name, I am of the view that there is more to a family name as it ties one to a common ancestor with the rest of the members you share the name with. It gives one a sense of identity and helps you discover yourself and your roots. Outside blood ties or marriage (with the exclusion of adoption) one cannot be family. It is this sense of identity and origin that applicant seeks for her minor child. In my view, a family name carries a unique identity which is bestowed upon a child, which identity goes beyond a first name randomly picked which does not necessarily link one to descendants or blood or a cluster of members sharing a common origin.

In the light of what constitutes a family name, can it be said that the provisions of s 12 (2) (c) of the Act are unreasonable and erode the rights of a child to a family name bestowed by s 81 (1) (b) of the Constitution?

In my view, the requirements are sensible and within the purview of the law. The child at issue was born out of wedlock, the person who allegedly sired her is no more. The authorities have to satisfy themselves that the child was indeed fathered by the deceased or that in the very least the family (whose identity the child seeks to assume) accepts that the child was or could have been fathered by one of their own. I find that the assumption of a family name, apart from through marriage, has immense intrinsic immeasurable value as it links one to ancestry, is sealed by blood and points to origin. I am of the view that the legislature's intention in putting such a requirement was to safeguard the family entity. There would be chaos if on mere say so, the first respondent would be obliged to enter a man's name in the register as the father to any child. The carrying of a family name comes with privileges and responsibility culturally, economically and socially, hence it is to be jealously guarded. Family is central to the issue of inheritance where it is important that in the absence of a will, whoever gets to inherit has to be a member of the deceased's family. As such, it is not desirable that family assets end up in the wrong hands.

If provisions of s 12 (2) (c) were to be removed, it will be a free for all scenario where any woman who has a child out of wedlock and in the absence of the alleged father can impute paternity to anyone. Further, without safeguards, flood gates can be opened where if entering of a man's name in the register is done on mere say so, there can be targeting of the rich, the powerful and or the secure, where they can be purported to be the fathers, more so when deceased. Our Constitution promotes the preservation of cultural values and practices. The family entity is central to our values as a people it being based on common blood ancestry and of course marriage. Certain rights, benefits and practices can only be enjoyed by, accrue to, or partaken by those belonging to a family. This is how important a family is. Further it is important that the identity of the citizens be protected from abuse and that the information on the State's citizens is as accurate as possible.

In casu the legislature has put a provision which in my view is not cumbersome nor does it place a heavy burden on the person seeking to procure a birth certificate for a child born out of wedlock. The provision requires that the alleged father's relative and the child's mother jointly request the entering of the deceased man's name as the father. This cannot be said to be a hindrance to the enjoyment of the rights bestowed upon a child by the

Constitution. This, if anything, is neither expensive nor involving as a DNA test to prove paternity would be. In fact it is in the best interests of such a child that the process be as simple as prescribed given the nature of our society and that a sizeable number of people are in unregistered customary law unions and resources to go through DNA tests are not readily available. Even if it were to be held that the provision in issue limits the enjoyment of the child's right to a family name (which I do not subscribe to) the limitation is fair reasonable and justifiable in an open democratic society regard being made to human dignity, equality and freedom. What is limited here would be the indiscriminate right to register a child in the family name of the purported father in his absence, and without any confirmation of paternity. This would not be acceptable in our society being an open and democratic society given our values, the importance of and the repercussions thereof as enunciated above. The extent of the limitation is in my view not to prevent the total enjoyment of the child's right to a family name. It requires the mother to comply with a minimum, less cumbersome process of bringing relatives to first respondent's offices to confirm paternity without even requiring scientific tests. What the section requires is the very lower end of the proof bar such that I cannot think of any other simpler and cheaper way of achieving that means. In my view, there is nothing unconstitutional about this whole matter and the applicant simply had to comply with the requirements.

Given the applicant's averment that there was no co-operation from her deceased husband's relatives, can it be said that the applicant had no remedy. To me the applicant could have applied for a court order to compel them to co-operate laying down sufficient facts of her customary marriage, her relationship with the deceased and perhaps interaction with the deceased's family. Alternatively, a DNA test can still prove paternity. Not only that, the applicant can take the child's birth certificate in her own name so as not to prejudice the child and upon conclusive tests being made regarding the child's paternity, the father's name can be endorsed. In essence there are alternative remedies available to the applicant.

In *S* v *Mhlungu* 1995 (3) SA 867 (CC) at p 895 D-E the judge stated as follows:

> "I would lay it down as a general principle that where it is possible to decide any case, civil or criminal without reaching a constitutional issue, that is the course which should be followed."

These sentiments were echoed in *S* v *Dhlamini* 1999 (4) SA 623 (CC) at p 648 A, where the court made it clear that "as a matter of judicial policy constitutional issues are generally to be considered only if and when it is necessary to do so."[4]

It cannot therefore be said that this issue could not have been dealt with outside the constitutional purview. There are remedies under civil law which could be pursued without the escalation of the issue to a constitutional platform.

Due to the foregoing, I find that there is nothing unconstitutional about s 12 (2) (c) of the Births and Deaths Registration Act [*Chapter 5:02*]. The provision is not *ultra vires* the Constitution. As the applicant brought the application in a bid to protect her child's interests, such an attempt cannot be said to be vexatious. In that regard, there shall be no order as to costs.

On that basis, the application is dismissed with no order as to costs.

Sinyoro & Partners, applicant's legal practitioners
Civil Division of the Attorney General's Office, respondents' legal practitioners

[4] *See also Zanomzi P. Zantsi* v *Council of State Ciskei* & 2 Others 1995 (4) SA 615 (CC)