KENI MUBAIWA
versus
ARTHUR MUBAIWA
and
REGISTRAR GENERAL OF BIRTHS AND DEATHS

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE 06 June, 2013

**Opposed application**

*Adv. T Magwaliba*, for applicant
*Adv. T. Mpofu*, for first respondent

**CHITAKUNYE J.** The Applicant seeks an order that:-

a) The second respondent be ordered to delete the entry in his register relating to first Respondent register number SMS/96/81 now HMS/96/81 and any other entry that was made on the basis of the entry aforementioned; and
b) Respondents be interdicted from registering such Birth registry with 'Mubaiwa' as the first respondent's surname.

The background of this matter is conveniently set out in the parties' documents filed of record which can be summarised as follows;

The Applicant in this matter Keni Mubaiwa seeks an order that second respondent delete in his register the birth entry of the first respondent under birth entry number SMS/96/81 now HMS /96/81. The basis upon which Applicant seeks the deletion of the "entry" is that his details were falsely entered in first respondent's birth entry as the father to first respondent yet he is not his father. He alleges that false information was given to second respondent leading to the registration of applicant as father of first respondent. In support of the fact that he is not father of first respondent, applicant produced a DNA test result which clearly shows that he is not the father.

In response first respondent said he is not aware of who provided the information contained in his birth entry that applicant is his father but he believed that the person who did that had a basis for believing that the applicant was his father. He now accepted that applicant is not his father.

Second respondent did not oppose the application serve to state that he will abide by the court's decision.

It is upon these facts that applicant seeks the deletion of the first respondent's birth entry from the second respondent's register. The fact that applicant is not first respondent's father is now common cause. It is accepted that in second respondent's registry applicant is cited as the first respondent's father and as the informant of such information. The question is thus whether or not false information was given to second respondent leading to the registration of applicant as father of first respondent. Before that can be determined counsel for first respondent raised the issue of the appropriateness of the procedure adopted. I will thus deal with that issue first.

**WHETHER THE APPLICANT ADOPTED THE WRONG PROCEDURE FOR SEEKING CANCELLATION OF A BIRTH ENTRY BY INVOKING SECTION 27(4) OF THE BIRTHS AND DEATHS REGISTRATION ACT, CHAPTER 5:02.**

Applicant is seeking a court order directing the second respondent to effect the cancellation of a birth entry made in relation to first respondent and any other entries made on the basis of the aforementioned birth entry in terms of s 27(4) of the Births and Deaths Registration Act, Chapter 5:02, herein after referred to as the Act.

Counsel for the first respondent raised a point *in limine* that, approaching a court that has not heard the matter in criminal proceedings seeking such cancellation is misplaced as that does not disclose a cause of action. He argued that, the power set out under that provision, that is s 27(4) of the Act, are to be exercised by a court at the conclusion of a criminal trial where the question of *mens rea* would have been determined. The powers set out under that section are to be invoked at the conclusion of a criminal trial which is not the case here. Where a party seeks the cancellation of a birth entry purely as a civil claim they can do so basing their application on a proper cause of action.

Applicant's counsel did not respond well to this point of argument save to contend in his supplementary heads of arguments that, in that legislative provision, it is clear that the court either in civil proceedings or in criminal proceedings may order the deletion, removal or correction of false information or entries made at the time of registering the birth of the first respondent herein. The point raised was not whether court has power in either civil or criminal proceedings to delete, remove or correct any false information or entry but whether applicant had adopted the correct procedure or not in founding his application on section 27(4) of the Act.

It is pertinent to note that *s* 27 is titled 'Offences and penalties.' Subsections (1) to (3) outline criminal offences that may be committed and penalties applicable in respect thereof. Section 27(4) of the Act then states that:

> "Without derogation from its powers in any civil proceedings, a court may, at the conclusion of any criminal proceedings, order the Registrar-General to-
>
> (a) Register any birth, still- birth or death of a person; or
>
> (b) Delete, remove or correct any false information or entry; or
>
> (c) Reproduce or replace any destroyed or damaged register or document.''

The wording of the section specifically refers to steps court may take at the conclusion of a criminal matter. It is a rule of statutory interpretation that court should apply the literal rule which is giving the words of a statute their natural or ordinary meaning before seeking to make sense of the statute.

See *Fisher* v *Bell (1961) 1 QB 394*
See *Whitely* v *Chappel (1868) LR 4 QB 147*

The court can only depart from the ordinary or natural meaning of a statute if the meaning happens to be still dubious or ambiguous. *Cross – Statutory Interpretation 2nd Edition Dr John Bell at p 48 wrote;*

> "If the words of the Statute are in themselves precise and unambiguous, then no more can be necessary than to expand those words in that natural and ordinary sense------But if any doubt arises, from the terms employed by the legislatives it has always been held a safe means of collection that the intention to call in aid the ground and cause of the making of the statute".

From the reading of *s* 27(4) (b), there is no ambiguity in the wording of that section nor can it be said, that, it is not precise. The section specifically deals with a court that would have heard the same matter in criminal proceedings. Even reading the entire section, it is very clear that the section is referring to a criminal court and not civil. The use of the term 'Without derogation' merely mean without taking away from its powers in civil proceedings that are brought in terms of a properly laid out civil claim, it does not in my view mean one can merely cite the section as a basis for a civil claim. It was thus wrong for applicant to seek to base its application on this section.

As a consequence of the failure to appreciate the above applicant failed to disclose a clear cause of action for the nature and extent of the relief sought.

A cause of action according to *Black's Law Dictionary*, *2nd edition*, is a ground on which an action maybe legally sustained. A cause of action signifies the matter of the complaint or claim on which a given action is in fact grounded whether or not legally maintainable.

I thus conclude that this application, based as it is on section 27(4) (b) of the Act, is fatally defective. Despite the fact that this finding results in the dismissal of the application I will proceed to deal with the other issues.

**WHETHER SECOND RESPONDENT CANNOT CANCEL A BIRTH ENTRY WITHOUT A COURT ORDER**

An issue that may be considered is whether the second respondent cannot cancel a birth entry made in his register without an order of the court. In the case of *Timbe* v *Registrar* General 2008 (2) ZLR 250 (S) at p.254B-C MALABA JA made the following remarks;

"Regrettably I am unable to agree with the learned Judge in holding that the respondent was exercising the powers vested in him under Section 8 (1) of the Act when he cancelled the children's birth certificates. 'Entry' in relation to any register kept in terms of the Act is defined in Section 2(1) to include any information contained in a birth certificate which forms part of that register. Section 8(1) is the only Section which gives the Respondent the power to correct an entry in a register without erasing the whole entry altogether. Cancellation of a birth certificate has the effect of erasing the entry in the register. There is no section in the Act which gives the Respondent power to cancel an entry in a register without an order of a court."

From what was said in the *Timbe* v *Registrar General* (*supra*), it is very clear that second respondent cannot purport to cancel an entry without a court order. What he can only do without a court order is correction of an error in terms of s 8(1) of the Act. Since applicant wanted the entire birth entry to be erased or cancelled, he was correct in seeking a court order.

The applicant's task as alluded to above is to bring an application based on a proper cause of action and to satisfy court that false information was deliberately given to second respondent for the purposes of registering a birth if court is to grant such an order.

**WHETHER FALSE INFORMATION WAS GIVEN TO SECOND RESPONDENT LEADING TO THE REGISTRATION OF APPLICANT AS FATHER OF FIRST RESPONDENT?**

The issue of whether false information was given to second respondent leading to the registration of applicant as first respondent's father and the probable provider of such information can only be ascertained from the circumstances surrounding the case. In his founding affidavit applicant did not disclose the circumstances under which he came to be cited as first respondent's father. He gave the impression that he was not aware who did it and why. It was as if he had just stumbled upon an entry in second respondent's registry where he is cited as first respondent's father and as the informant of that information.

It was only upon perusal of case number HC 2625/10 referred to in applicant's heads of argument that some light was shed as to the probabilities.

In his founding affidavit in Case No. HC 2625/10, applicant admitted that there was an intimacy relationship between him and the first respondent's mother in the late 1970s. He went on to admit that sexual intercourse took place between him and first respondent's mother in January 1976. From the evidence presented, it is clear that first respondent was born in December of the same year. In terms of paternity laws there is a rebuttable presumption that, Applicant is the father of first respondent.

In the same affidavit in Case No. HC2625/10 applicant admitted that he met first respondent's mother who was claiming that he was the father of first respondent. Although he initially said he met her in 1983 when respondent was about to get into grade one, in reply to first respondent's contention that it was earlier as he got into grade one in 1982, applicant conceded when he said that there is not much of a difference whether he came in 1981 or 1982 or 1983. If it was a time before respondent got into grade one it could only have been in 1981 before first respondent enrolled into grade one and before schools opened in 1982. This is the very same time first respondent's birth entry was registered with applicant cited as the father of first respondent and as the informant. I am of the view that the probability is that applicant was not being candid with court when he pleaded total ignorance of how and who provided the information in question.

Applicant's counsel argued in his supplementary heads of arguments, that if he had participated in the registration of first respondent's birth entry as indicated in the entry, he could not have misrepresented himself as Kennedy Mubaiwa as is the information in the first respondent's birth entry. I am of the view that not much should be read into that. That is

clearly a question of how one spells the name or calls oneself at a given time. In any case he acknowledged that all the other identity details related to him.

The first respondent's counsel in his submissions counter argued that, the act of registration of births is carried out by the parents of a child unless there are circumstances requiring the contrary. He went on to argue that, the name of the father of a child born out of wedlock will not be entered in the register except at the joint request of both parents and after the father himself acknowledges in writing in the presence of the registrar that he indeed is the father. In this regard he cited *ss* 11 and 12 of the Act.

After a careful analysis of the documents filed of record and hearing counsel. I a m of the view that, since applicant had a relationship of a sexual nature with first respondent's mother and that the first respondent's mother claimed that he was the father of first respondent, applicant may have believed at that time, that he was the father of first respondent thereby causing that information to be entered in the second respondent's birth register in 1981 when he met with first respondent's mother. The sexual intercourse in January 1976, the birth of first respondent in December 1976, the paternity claim in 1981, the meeting of applicant and first respondent's mother around 1981 and later the registration of first respondent's birth entry in 1981 all this cannot be a coincidence.

In *Ibrahim* v *Pitman N.O.*1995 (1) ZLR 176 at 177C-D court held that:-

> "…in a civil case, where the court seeks to draw inference from the facts, it may, by balancing probabilities, select a conclusion which seems to be the more natural or plausible (in the sense of credible) conclusion from among several conceivable ones, even though that conclusion is not the only reasonable one."

In the circumstances of this case a conclusion that applicant was involved in the registration of first respondent's birth is most appropriate.

I also agree with Counsel for the first respondent that, the act of registration of births is primarily carried out by the parents of a child unless there are circumstances requiring the contrary. To that effect s 11(1) of the Act states as follows:-

> "Subject to section *twelve*, it shall be the duty of the father or the mother of a child and, in the case of the death or inability of the father and the mother, the duty of-
>
> (a) the occupier of the house in which the birth or still- birth occurred, where he had knowledge of such birth or still-birth; or
>
> (b) the person in charge of any hospital or other institution in which the birth or still-birth occurred; or

(c)……

(d)……

(e)……. or

(f) such other person as may be prescribed;

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''

In this jurisdiction the name of the father of a child born out of wedlock will not be entered in the register except at the joint request of both parents and after the father himself acknowledges in writing in the presence of the registrar that he indeed is the father. In this regard *s* 12 of the Act states that:-

"(1) Notwithstanding section *eleven*, no person shall be required to give information acknowledging to be the father of a child born out of wedlock.

(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; 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) ……

(3) A request in terms of subsection (2) shall be made in the form and manner prescribed."

It is clear from the above that where a child is born out of wedlock the registrar will not require the father of such a child to give information concerning the birth of the child. Further the name of the father of such a child will not be entered in the register except at the joint request of both parents, and after the father himself acknowledges in writing that he is the father. The effect of this provision is that as applicant's name appears as the informant and the father, court must first of all be satisfied of the circumstances leading to that information appearing on the certificate before it can become aware of the extent of its powers.

In *Timbe* v *Registrar-General* (supra) at 255 D-E MALABA J A reasoned that:-

"It is also important to note that a finding of the existence of an error in a register attracts correction of the error whilst a finding that false information was given to a

> Registrar for the purposes of obtaining registration of a birth leads to the cancellation of the entry itself."

It is thus upon applicant to satisfy court that false information was given before court can order the cancellation of the entry itself. Unfortunately the Applicant did not assist the court as to how his name and information was registered on the first respondent's birth entry serve to argue that the information was falsely given. Applicant did not plead or place evidence before court that the parties deliberately gave the registrar false information; that is, that at the time the information was given the informant knew that it was false or did not believe it to be true.

*Omnia presemuntur rite esse acta*, it is presumed that when the certificate was issued and in the absence of a marriage certificate both parents appeared before the Registrar and the father identified himself as such. They could have been mistaken as to the real position but the truth is that, despite applicant's desultory attempts, they appeared.

Such a situation calls for a correction of the error in terms of s 8 of the Act. In *Timbe* v *Registrar General (supra*) p 254D-F the learned judge stated that:-

> "Section 8(1) vests the respondent with a discretionary power exercisable only when he has satisfied himself that what he is called upon to correct is an error in the register. An error of fact or substance implies the existence of a state of mind in regard to the fact or state of facts but one which does not accord with the facts or state of facts in question. For purposes of exercising the powers of correction under s 8(1) of the Act, it would have had to be shown that Mr Timbe had genuinely believed that he was the father of the children and had caused that belief to be entered in the register when in fact another man was the father of the children. That would have been an error of fact found to have been entered in the register. It would not have been enough, as the learned judge thought, for the respondent to find that Mr. Timbe was not the father of the children without relating that fact to his state of mind for the existence of an error of fact to be established."

In *casu*, I have come to the conclusion that, the entry of applicant as the father of the first respondent cannot be said to be a result of false information being deliberately given to second respondent. Applicant caused the information to be registered as indicated by the first respondent's birth entry that applicant was the informant. When he gave the information he believed that he was the father of the first respondent. Therefore, the giving of the information was not a deliberate effort to give false information but was a clear error of fact or substance.

**CONCLUSION ON APPLICANT'S CLAIM FOR CANCELLATION**

I am of the view that applicant lamentably failed to show that false information, as against error in the information, was given to second respondent.

The probability is that the giving of the information was a genuine error of fact based on what the parties believed at the time. The fact that that belief has now been found to be wrong does not mean at the time of giving the information the informant deliberately told a falsehood knowing it to be false.

Accordingly the application for cancellation of the birth entry cannot be granted as there was no false information given to the second respondent leading to the registration by applicant of the first respondent as his son. What occurred was an error of fact which can be remedied by the second respondent in terms of s 8(1) of the Act without the need for a court order.

**WHETHER A CASE HAS BEEN MADE FOR A FINAL INTERDICT PROHIBITING SECOND RESPONDENT FROM REGISTERING FIRST RESPONDENT UNDER THE SURNAME ''MUBAIWA''.**

Applicant's second claim in this application is for an interdict to prohibit the second respondent from registering an entry pertaining to first respondent with the name ''Mubaiwa'' as his surname. The main relief sought by the applicant is couched in the form of a final interdict. In *Mtshali* v *Mtambo and anor* 1962 (3) SA 469 (GWLD) at p 473H court alluded to the fact that:-

> "The interdict procedure is an extra ordinary remedy for matters which do not admit of delay-*periculum in mora*- and in which the power of the court should be summarily interposed to prevent and, if necessary, to discontinue, the perpetration of unlawful acts forthwith and for good or pending action."

In order to succeed in respect of the main relief, applicant must show firstly that he has a clear right secondly that such right has been infringed and thirdly he has no other suitable legal remedy other than the interdict sought.

See *Masuku* v *Minister of Justice 1990 (1) SA 832 (A) at p 840-841*.

Before delving into the issue, it is important to give a brief explanation of the law relating to interdicts. An interdict is part of the adjective law, the law of procedure.
*Prest, The Law and Practice of Interdicts pp 12-33.*

Historically, as Prest (*supra*) remarks at p 9, the foundations of the modern South African Law of Interdict are to be found principally in the Roman –Dutch law, although the contribution made by the English law cannot be disregarded. The requirement for the interdicts or *mandament* under the Roman-Dutch law was in a long line of cases over more than 150 years refined and developed which ultimately culminated in *Setlogelo* v *Setlogelo 1914 AD 221*,which is to this day the leading case. The courts in Zimbabwe have over the succeeding years further elaborated on the requirements for the grant of a final interdict and this resulted in the decision of the case of *Flame Lilly Investments Co.* v *Zimbabwe Salvage (Pvt) Ltd 1980 ZLR 378.* At p 382 B-D WADDINGTON J confirmed that: -

"It is now settled law that the three essential requirements for the issue of an absolute interdict are-

1. a clear right on the part of the applicant;

2. actual or apprehended injury; and

3. no other ordinary remedy by which the applicant can be protected with the same result."

The onus is upon the applicant to satisfy court on the admitted or undisputable facts on a balance of probabilities as is required in every civil suit if his case is to succeed.

See *Philips Electrical* v *Gwanzura* 1988(2) ZLR117 at 122F-G

**WHETHER THE APPLICANT HAS A CLEAR RIGHT DESERVING A FINAL INTERDICT**

In his supplementary heads of argument, applicant contended that the surname ''Mubaiwa'' originates from the wrong perception that the first respondent is a son of the applicant which perception has since been dispelled by the paternity tests carried out. He further contended that, first respondent cannot insist on continuing to use the surname as doing so will be in violation of the right of the applicant. Applicant did not however state the right that he claims will be violated.

In response, first respondent argued that, applicant sets out no ownership to the name "Mubaiwa" as he has no registered trademark over it. That is the name he has built his goodwill on and so he cannot be ordered to discard it for no good cause. The fact of continued use of the name by him and his children does not in any way mean he is portraying

himself as applicant's child. In any case there are many people by that name who are not related to applicant.

**FINDINGS**

After a careful analysis of the submissions made I am of the view that applicant has failed to establish that he has a clear right against the first respondent over the use of the surname "Mubaiwa". What he has only proved to court is that the surname was registered on the wrong perception that he was the father of the first respondent. However he did not state or mention his right to the exclusive use of that surname neither did he satisfactorily explain how his right to the name 'Mubaiwa' will be violated if an interdict is not granted? It is my view that the fact that the surname was registered under the perception that he was first respondent's father does not entitle him to its control or exclusivity. What he can only seek successfully is an interdict to stop or prohibit the second respondent from registering applicant as father of first respondent and not the use of a name.

In view of the above findings it is unnecessary to deal with the other requirements of a final interdict as the failure to establish a clear right is fatal to the application.

I have thus come to the conclusion that, applicant has failed for reasons stated above to satisfy court that he has a clear right over the use of the surname ''Mubaiwa'' and a right to prohibit first respondent from using the said surname.

Accordingly the applicant's application is hereby dismissed with costs.

*Bvekwa Legal Practice*, applicant's legal practitioners
*Gwaunza and Mapota*, first respondent's legal practitioners.