

TAONGA EDSON MASENDEKE
(On his own behalf and on behalf of minor child A)
and
FORTUNE MASENDEKE
(On her own behalf and on behalf of minor child A)
and
STEPHANO GUDUKEYA
(On his own behalf and on behalf of minor child B)
and
LOICE KERESIA GUDUKEYA
(On her own behalf and on behalf of minor child B)
versus
THE REGISTRAR-GENERAL
and
THE MINISTER OF HOME AFFAIRS AND
CULTURAL HERITAGE
and
MINISTER OF PUBLIC SERVICE LABOUR
AND SOCIAL WELFARE

HIGH COURT OF ZIMBABWE
DUBE JP
HARARE, 28 February & 30 August 2024

Opposed Application

P. Musimwa, for the applicants
A. Magunde, for the respondents

DUBE JP

Introduction

1. The first and second applicants are the adoptive parents of “A”, a minor child they adopted as a couple. The third and fourth applicants are the adoptive parents of child “B” another minor child whom they also adopted. The applicants brought this application as parents and legal guardians of their adopted minor children and on their own behalf. The first respondent is the Registrar General of Zimbabwe, an official responsible for registration of births and deaths, the second respondent the Minister responsible for the Births and Deaths Registration Act, [Chapter 5:02] and the third

respondent the Minister responsible for the administration of the Children's Act, [Chapter 5:06], all cited in their official capacities.

2. The application brought in terms of s 85(1) of the Constitution of Zimbabwe as read with s14 of the High Court Act [Chapter 7:06], is for a declaratory order to pronounce the conduct of the Registrar General of Zimbabwe [Registrar], in issuing abridged/short birth certificates to the applicants' adopted children which do not include their surnames as adoptive parents unlawful and unconstitutional. which include their surnames as their adoptive parents. In addition to the constitutional declarator, the applicants sought an order to compel the 1st and 2nd respondents to issue the children with long abridged birth certificates which include their details as adoptive parents under sections for the mother and father in terms of s 6(1) the Births and Deaths Registration Act.
3. For the reasons that follow, I dismissed the application finding that the applicants have approached the court with a constitutional challenge when they have available to them alternative remedies in terms of other existing laws which they ought to have invoked for the resolution of this dispute.

Factual Background

4. The facts of this matter are common cause. After applicants adopted the minor children, they went on to obtain adoption orders from the Children's Court at which point they took a further step to acquire birth certificates for them in terms of the Births and Deaths Registration Act. Central to the applicants' case is the endorsement of the words, "unknown" on their children's birth certificates. The applicants averred that they were shocked to discover that they had been issued with birth certificates which only had information about the children and stated their parents as "unknown". They elucidated how they discovered upon issuance of abridged birth certificates how glaringly different the documents are from the regular birth certificates issued to children who are not adopted. They stated that after consultation with the third respondent, they were informed that the birth certificates could not reflect their names as they are not the biological parents of the children. Dissatisfied with the respondents' position, they filed this application in which they allege violation of their constitutional rights. The applicants impugn the different treatment of adoptive parents and natural parents and their children in respect to the issuance of birth certificates.

Applicants' submissions

5. The applicants submitted that the effect of the adoption order is to render them the legal parents of the children and that they have an entitlement to have the children carry their surnames with an endorsement to that effect on their birth certificates. They challenged the use of different laws to issue birth certificates to children who are born to their natural parents and those who are adopted. Ms *Musimwa* who appeared on behalf of the applicants took issue with the fact that all other children's births are registered under the existing law and submitted that the issuance of short abridged birth certificates by the Registrar to the applicants' adopted children under the repealed Births and Deaths Registration Act 1986, is unlawful and unconstitutional for the reason that the certificates do not disclose the details of the adoptive parents.
6. She drew the court's attention to what she termed glaring differences, in the form and substance of the birth certificates issued to adopted children and those born to natural parents. She argued that the long birth certificates are materially different in that they contain the details of the parents of the children and because of this it is easy to form a nexus between the parent and the child. The short birth certificate, on the other hand, neglects to disclose such information. In this respect, she contended that adopted children are treated differently. The applicants contended that this exclusion is not in line with s64 of the Children's Act which outlines the rights and obligations that accrue to an adoptive parent in the case where a person obtains an adoption order.
7. The applicants maintained that the conduct of the Registrar of Births and Deaths, in refusing to display the adoptive parents' details on adopted children's birth certificates infringes upon their constitutional rights as enshrined in sections 51, 56 (1), 81(1)(a) of the Constitution. They submitted that the conduct of the first respondent violates the right to equality and is discriminatory to adoptive parents and their children when compared to how other parents and children are treated. The applicants contended that as some institutions do not accept the short birth certificate, this practice causes prejudice to the children as they might lose future opportunities due to use of short birth certificates which do not create or establish the relationship between the children and their parents thereby denying them a right to an identity. In addition, the applicants submitted that the refusal to register the children under their surnames is not in the best interests of the children and is contrary to the provisions s81 (2) of the Constitution which guarantees the best interests of the child. Further, that the conduct of the respondents impinges on their right to dignity.

The Respondents submissions

8. Ms *Magunde* for the respondent submitted that the rights of children to an identity was not violated as the children have duly registered birth certificates. She argued that the issuance of the short birth certificates is a protective measure which should not be construed as discriminating the children as this was done in the best interests of the children and that the practice is in compliance with the law. She argued that adopted children may desire to know more and explore their origins and background, hence providing them with long-form certificates could prevent them from discovering their biological ancestry, potentially hindering their development.
9. In addition, she submitted that even if the rights of the applicants were infringed as suggested, this is not fatal as these rights are subject to limitations provided for in terms of s86(2) of the Constitution and s69 of the Children's Act, which prohibits publication of any information likely to reveal the identity of the adoptive parent or adopter of a child .

Relevant constitutional provisions and established principles of law

10. Applicants' pleadings call upon the court to interpret, enforce and protect a number of constitutional provisions. A number of constitutional rights or principles are at stake. The right to equality before the law as enshrined in s56 (1) of the Constitution states that all persons are equal before the law and have the right to equal protection and benefit of the law. Section 56(3) of the Constitution the applicants rely on is an anti - discrimination clause and stipulates as follows:

“Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race.... economic or social status, whether they were born in or out of wedlock.”

The best interests of the child are provided for in s81(2) of the Constitution and are paramount in every matter concerning the child. Children are entitled to adequate protection by the courts, in particular by the High Court as their upper guardian in terms of s81(3). Section 51 provides for the right to dignity and to have that right respected and protected.

11. A party who claims that his constitutional rights have been or are being violated has an entitlement to approach the court for redress in terms of s 85 (1) of the Constitution. Nonetheless, he only has an entitlement to invoke the provisions of the Constitution for

redress where he is able to overcome the hurdle of constitutional avoidance and subsidiarity. Mere reliance and reference to constitutional provisions in pleadings by a litigant does not necessarily call for the exercise of the court's constitutional jurisdiction. The resolution of the dispute must call for interpretation, protection and enforcement of constitutional provisions.

12. The doctrine of constitutional avoidance demands that courts interpret the law in such a way that they avoid deciding constitutional questions unless it is incumbent upon the court to do so. The doctrine of subsidiarity demands that remedies for resolving disputes where possible be found in primary legislation or other existing laws before one has resort to constitutional remedies thereby avoiding determination of constitutional challenges raised. This approach was succinctly elucidated by MALABA DCJ (as he then was), in *Zinyemba vs The Minister of Lands and Rural Resettlement CCZ 3/20* where the court defined the principles of constitutional avoidance and subsidiarity as follows:

“Two principles discourage reliance on the constitutional rights to administrative justice. The first is the principle of avoidance which dictates that remedies should be found in legislation before resorting to constitutional remedies. The second principle is one of subsidiarity which holds that norms of greater specificity should be relied on before resorting to norms of greater abstraction.”

13. In *Magurure v Cargo Carriers Internantional Hauliers (Pvt) Ltd T/A Sabot CCZ15/2016*, the court defined a constitutional matter in the following manner,

“A constitutional matter arises when there is an alleged infringement of a constitutional provision. It does not arise where the conduct the legality of which is challenged is covered by a law of general application the validity of which is not impugned. The question of whether an alleged conduct constitutes the conduct proscribed by a statute requires not only proof that the alleged conduct was committed, it also entails that the statutory provision against which the legality of the conduct is tested be interpreted to establish the content and scope of the conduct proscribed before it is applied to the conduct found proved.”

14. In *Majome vs ZBC CCZ14/16 @ 10*, the Honourable MALABA DCJ (as he then was) stated as follows:

“Where a law of general application prohibits conduct, the commission of such conduct does not give rise to a constitutional question. The question of the legality of the conduct is determined on the basis of the interpretation and application of the statutory of the provision prohibiting the conduct unless the constitutionality of the statutory provision itself is challenged.”

15. A court dealing with a constitutional challenge must approach the matter with caution. It must not adjudicate upon a constitutional question unless there is no other ground

upon which the subject matter of the dispute can be resolved. The court must be satisfied that the matter before it is a constitutional matter which can only be resolved by interpreting the constitutional provisions relied on. Consequently, a litigant bringing a constitutional challenge must show that all domestic remedies available to him have been exhausted before he elects to bring a constitutional challenge.

16. Where a court finds that there are no alternative remedies available to resolve the dispute or that such have been exhausted, the constitutional issue is properly before it. Where the issues raised are capable of resolution through interpretation of other existing laws, that is the course to take. Decisions must where possible, be made without resort to constitutional intervention thereby preserving constitutional integrity.

17. In their interpretation of statutes, courts exercise judicial restraint and shy away from resolving constitutional questions or issues where such are capable of resolution on the basis of other existing laws and will only intervene and deal with constitutional questions when it is necessary to do so. This approach was stated in *S v Mhangu 1995* (3) SA 867 (CC) as follows:

“I would lay down the 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”

18. This constitutional challenge is directed at the respondents' conduct in refusing to issue birth certificates to adopted children using their parents' surnames rather than an attack on the law or policy. The applicants approached the matter from the premise that s64 of the Children's Act allows adopted children to carry their adopted parents' surnames. They do not impugn the provisions of s64. The applicants wrote to the Registrar requesting that their surnames appear on the birth certificates of their adopted children. When they did not find joy, they sought an explanation from the third respondent subsequently approaching the High Court in terms of s 85 (1) of the Constitution for redress without invoking existing primary legislation for redress. The applicants did not employ the domestic remedies available to them. The applicants' complaint being administrative in nature is capable of resolution through interpretation of the existing legal framework providing for adoption of children without the need to interpret the Constitution.

19. Section 64 of the Children's Act [Chapter 5:06], governs registration of adopted children and stipulates as follows:

“64. Effect of an adoption order

An adoption order shall, unless otherwise thereby provided, confer the surname of the adopter on the adopted child.

(1)

(2)

(4) Upon an adoption order being made, all rights, duties, obligations and liabilities of the parents or guardians of the person to whom the order relates shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as if that person were a child born to the adopter in lawful wedlock, and in respect of those matters that person shall stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock.”

20. The intention of the legislature in enacting s64 was to establish a clear legal framework for adoption and registration of adopted children. Section 64 outlines the rights and obligations that accrue to an adoptive parent in a case where he or she obtains an adoption order. The question begging an answer is whether upon an interpretation of this section, it can be concluded that an adopted child has the right to assume the surname of adoptive parents and have his or her birth certificate in the surname of the adoptive parent. The law of general application being available and covering the impugned conduct, the commission of the conduct complained of does not give rise to a constitutional question.

21. The dispute between the parties could have been effectively addressed by relying on an interpretation of s64 and other legislative pieces allowing for review of the decision of the Registrar. The Registrar is an administrative authority for purposes of the Administrative Justice Act [Chapter 10:28] and is required to act in accordance with the requirements of s3 (1) (a) as read with s4 of the Act. A party aggrieved by the conduct or decision of an administrative body is entitled to approach the court for review in terms of s4 of the Act. In terms of s26 and 27 of the High Court Act [Chapter 7:06], the Court has inherent jurisdiction to review administrative decisions challenged on the basis of legality, reasonableness or procedural fairness of the refusal to issue birth certificates of the adopted children under the adopted parents’ names. The applicants failed to seek judicial review of the administrative action complained of in line with the Administrative Justice Act.

Conclusion

22. From the foregoing, it follows that the dispute between the parties is resolvable on a non- constitutional basis and could have been effectively addressed at a lower level.

The mere raising of a constitutional argument in a party's pleadings does not automatically activate the constitutional jurisdiction of the court. Where the issues raised are capable of resolution through other existing laws, the need to resolve any constitutional issues raised is dispensed with. An adoptive parent who is aggrieved by any decision of the Registrar taken in terms of the Births and Deaths Registration Act is required to exhaust all domestic remedies available to him before he can bring a constitutional application. The conduct the legality of which is impugned being covered by the s64 of the Children's Act which provision the applicants do not challenge, no constitutional question arises. The question regarding the legality of the conduct complained of ought to be determined on the basis of an interpretation and application of s64 thereby avoiding constitutional concerns. The applicants failed to pursue the options available to them and consequently the constitutional issues were not properly raised and pleaded. The applicants have prematurely approached the court for constitutional relief. Consequently, the application is improperly before the court.

23. As regards the costs of this application, it having raised constitutional issues, I see no basis for making an order for costs. Accordingly,

- 1) The application be and is hereby dismissed.
- 2) There shall be no order as to costs.

Justice for Children, applicants' legal practitioners
Civil Division of the Attorney General's Office, respondents' legal practitioners