CHENGETO SCOTT
(On her behalf and on behalf of her minor children JS born on 024 March 2012 and NS born on 4 June 2014)

Versus

NYASHADZASHE SHIRI

And

REGISTRAR GENERAL NO.

And

MINISTER OF HOME AFFAIRS & CULTURAL HERITAGE NO.

IN THE HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 29 FEBRUARY 2024

Opposed application

J. L. Mhlanga for the applicants
S. Jukwa for the respondents

MOYO J: This is an application for an order that:-

> "The 1st respondent be and is hereby ordered to register the births and issue birth certificates of the minor children namely Joane Shiri born on 24 March 2012 and Naima Shiri born on 4 June 2014."

At the hearing of the matter, I granted the order. The parties have requested for written reasons and here are they. The 1st applicant is the biological mother of the minor children as aforestated herein. The 2nd applicant is their biological father. The problem, however, is that the 1st applicant is still legally married to David Joseph Scott and the marriage was solemnized in 2004. It is alleged by applicant that sometime in 2004, Mr Scott left for the United Kingdom and never returned and that the parties have thus been estranged since 2004.

That, sometime in 2010, 1st applicant and 2nd applicant started a romantic relationship and sired the 2 minor children whose issue of birth certificates is the subject matter of this dispute.

Nature of the application

The applicant avers that it is an application for a mandatory order to compel the respondents to comply with section 35 (3) (c) read with section 36 (1) (a) and section 81 (1) (c) of the Constitution of Zimbabwe together with section 12 (2) (a) of the Births and Deaths Registration Act Chapter 5:02.

That, section 35 (3) (c) of the Constitution guarantees the right to a birth certificate to every citizen of Zimbabwe.

That section 36 (1) of the Constitution recognizes citizenship by birth. That section 81 (1) (c) (i) of the Constitution provides for the right to prompt provision of a birth certificate for every child born in Zimbabwe. That section 12 (2) (a) of the Births and Deaths Registration Act Chapter *supra* hereinafter referred to as the Act, requires that 1st respondent enters in the register of births the names of any person as the father of a child born out of wedlock upon the joint request of the mother and the person acknowledging himself to be the father of the child. 1st applicant has failed from the time the minor children were born to date, to enter them in the registry of births kept by the 1st respondent. She was informed to either produce a disclaimer affidavit from the estranged husband, or a decree of divorce or DNA test results confirming the paternity of the children. She then consulted her legal practitioners of record and they wrote to the 1st respondent demanding that the children be registered.

The 1st respondent responded through a letter authored by one B. Mpala which advised the applicant's lawyers that, "Please take not that the reason why the issuance of the birth certificates was withheld by our office is that Mrs Chengeto Scott is currently legally married to David Joseph Scott. Therefore, for the registration to be effected, a disclaimer affidavit from the husband is required disowning the children or a DNA test result with the biological father. "<u>This is to safeguard the department in case the husband challenges the registration stating that he is the father of the two children.</u>" (emphasis mine)

There is a supporting affidavit by the biological father of the 2 children confirming that the children are indeed his. There is an affidavit filed as respondent's opposing affidavit, it is neither attributed to 1st or 2nd respondent but a reading of the affidavit shows that the deponent is secretary to 2nd respondent.

The 2nd respondent avers that section 2 (a) of the Act defines children born out of wedlock as those whose parents were not married to each other at the time of conception on birth and that this does not apply in cases where the mother of the children is in a subsisting marriage. That 1st applicant is in a monogamous marriage, that still subsists and that therefore the parties siring these 2 children are in an adulterous relationship, that the additional requirements are therefore guided by the Act as a result of the special circumstances from their case. That the requirements by the Registrar General to have a disclaimer by the father or DNA test results are reasonable in the circumstances and that as the authorities must satisfy themselves that the children were sired by the purported father. The respondent further contends that the requirements made by the 1st respondent are neither onerous nor demanding as they will ensure that the estranged father is indeed not the father.

The relevant provisions

The Act cites itself as "An Act to provide for the registration of births and deaths in Zimbabwe and to provide for matters incidental thereto or connected therewith".

Starting right from its preamble the Act is meant to ensure that all births in Zimbabwe are registered by the appropriate authority. Section 3 of the Act creates the offices of the Registrar General and that of other registrars. This in essence means that the Registrar General is a creature of statute and therefore can only exercise powers as are given to such office by the statute from which the office derives its existence.

In terms of section 3, 4 and 5 of the Act the Registrar General and the registrars are mandated to register, keep and maintain all births, still births and deaths.

Section 24 of the Act provides that; "On receipt of any notice of birth, still birth or death, the registrar shall examine such notice and cause any defect or inaccuracy therein to be remedied or corrected and for such purpose, may direct in writing that the responsible person appear before the registrar on a date, being not less than seven days after receipt of the

written direction and give to the best of his knowledge and ability such information as may be in his possession as to the birth, still birth or death."

Section 10 of the Act provides for the compulsory registration of all births, still births and deaths which occurred as from 20th June 1986. Section 11 (1) of the Act provides that "Subject to section 12, 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."

Section 12 (a) provides that "A registrar shall not enter into 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 (emphasis mine)

The applicants argue that 1st respondent being a creature of the statute cannot exercise powers other than those given to the office by the statute.

I tend to agree with this contention in that, in the letter dated 11 May 2023, from the Registrar General to the parties, the Registrar General is advising the parties that issuance of the birth certificates was withheld by their office (a power that the Registrar General does not have), nowhere in the Births and Deaths Registration Act is the registrar empowered to withhold issuance of births certificates in fact section 10 stipulates that such issuance is compulsory subject to section 12 which stipulates that the parents of children born out of wedlock should attend to the registration of their birth.

The letter further requires a disclaimer affidavit from 1st applicant's husband disowning the children or a DNA test result to prove their biological father. The letter further states that this is to safeguard the department in case the husband challenges the registration stating that he is the father. In my view, whilst the requirements were being made in good faith, nowhere in the Act is the Registrar empowered to disregard the evidence of 2 people in their department vouching for the parentage of children allegedly sired by them. Whilst the 1st applicant as stated is the estranged spouse of David Joseph Scott, it is herself in my view as the mother of the children who can tell anybody including the Registrar General who is the father of the children that she bore. In this case, it is even cemented by the alleged father,

who confirms his paternity and is present and willing to be part of the registration process. Whilst I agree with the respondents on the moral values and issues pertaining to the respect and norms accorded to the institution of marriage, I am not persuaded that children born of illicit unions must be without identity and their births must not be registered so that they suffer the consequences of behaviour that is not attributed to them. These innocent souls must live their lives with all the rights and dignity accorded to any other human being, despite the existence of illicit unions by those who bore them. One of these children was born in 2012, the other was born in 2014, a mathematical calculation will show that in 2024, one will turn 12 years old and the other 10 years old. The children's lives must continue in my view, they must have entitlements like medical aid, school certificates, and they are also entitled to inherit from either of their biological parents if it so happens that death comes. Without birth certificates, they are just as good as stillborn. If the estranged husband cannot be found and if the DNA tests cannot be done as the parties state that they have no funds what it means is that innocent souls will suffer the consequences of being brought into this world by parents in a precarious and somewhat difficult to understand relationship and yet those who sired them are here and vouching for their identity. Are these children not born out of wedlock? Since their parents are not married despite the fact that one of them is in a union that she claims did not produce these children?

A question comes to mind, where if it was the 2nd applicant who was legally married to another woman, whether the Registrar General would decline to register a birth where he has sired a child with a woman other than his wife? It is a critical question because, this court takes judicial notice of such many children, duly registered and living despite being sired by men still in legal unions but sired with other women other than their wives. What does this then mean to women in 1st applicant's position? That because she is a woman, the Registrar General wants a different yardstick for the registration of a child born to another man other than her estranged husband and yet one should believe the mother more in issues of paternity and nobody else. It is trite that even in child maintenance matters, the father pointed to by the mother of the child is the father until proven otherwise. She sired the children and she knows who their father is. For the Registrar General to then decline to register a birth where she does not only claim the paternity of the 2nd applicant, but the 2nd applicant is also present to confirm and attest to that is outside the purview of the Act in my view.

The case of *Zvikomborero Paunganwa* v *Registrar of Births and Deaths and Anor* HH-406-16 in my view is distinguishable from the case at hand in that, in that case, the woman wanted to register a birth in the absence of a marriage certificate and in the absence of the man who allegedly sired the child since he was already deceased. Surely, it would not be appropriate for a woman to just name any man as the father of a child born out of wedlock in the absence of that father and then the Registrar just accepts that. It would be unlawful as it would fly in the face of section 12 of the Act, which requires that both such parents be present and acknowledge the parentage. Which in my view is the case by applicants, both applicants attest to the parentage of these children.

The Constitution of Zimbabwe

Section 35 (3) (c) provides that all Zimbabwean citizens are entitled to birth certificates and other identity documents issued by the State. Section 36 (2) (a) provides that children born of Zimbabwean citizens are entitled to all the rights of citizens. Section 81 (1) (b) provides that every child in Zimbabwe, that is to say, every boy or girl under the age of eighteen years has the right to be given a name and family name. Section 82 (2) of the Constitution provides that; "A child's best interests are paramount in every matter concerning the child."

Section 82 (3) provides that children are entitled to adequate protection by the courts, in particular the High Court as their upper guardian.

So if the Constitution provides for the paramountcy of children's rights on every matter concerning the child, a question that immediately arises is, the tussle between the Registrar General and the applicants is not really about the parties before me, it is about the rights of minor children that have found themselves at the centre of an illicit union. They are here now, and their existence cannot be undone. They are entitled to all the constitutional, social and emotional benefits like every other child. At the centre of this dispute are the lives of innocent children, which are hanging precariously, they may be affected by this tiff in their educational circumstances, they may be affected by this tiff on health matters, regarding their qualifications to medical aid cover, they may be affected in their rights to inheritance if any of their parents dies before they are registered. A whole future of these children may be lost

forever and yet their parents are here and they are telling everyone, the registrar, the courts, that these children belong to them and they must be so registered.

Illicit unions aside, what persuaded me to issue a directive to the respondents to register these children is that, that they were born of an illicit union does not deprive them of their rights and entitlements as children. They are innocent, their lives must start and continue like every other child. I am also persuaded in this view that children born to married men, in such illicit unions do not suffer the same fate. So why should these 2 children in particular suffer for the sins of their parents? I am also persuaded in my view by the judgment of the Constitutional Court of South Africa in the case of *Centre for Child Law* vs *Director General Department of Home Affairs* CCT-101-20 wherein VICTOR AJ stated thus; "Children are the soul of our society. If we fail them, then we have failed as a society."

He further went on to state that at paragraph 72 of the cyclostyled judgment:

> "Whilst society may express its condemnation of irresponsible liaisons outside the bonds of marriage, visiting this condemnation on an infant, through the application of the law, is illogical and unjust. This court has warned against punishing children for the sins of their parents, rather children must be regarded as autonomous right bearers and not mere extensions of their parents. Moreover, imposing undue burdens on the child born out of wedlock" is contrary to the basic concept of our system that legal burdens should be imposed on relationships between individuals. Obviously no child is responsible for her birth and penalizing the child is ineffectual as well as an unjust way of forcing parents to comply with stereotypical norms of the supremacy of the marital family."

> "In the case of *AB* v *Pridwin Preparatory School* 2020 (S) SALR 327 KHAMPEPE CJ stated thus; " Point of departure, it must be emphasized that children <u>are individual right bearers and not mere extensions of their parents, umbilically destined to sink or swim with them</u>." (emphasis mine)

I could not have put it any better. So a situation comes to mind, that, if the applicants threw in the towel, they can neither find 1st applicant's estranged husband to produce the disclaimer affidavit, they can neither proceed with DNA tests which are obviously a cost, the 1st applicant does not seek a divorce, what then will become of these innocent children? Is this court going to be part of the process that puts a stop at the lives of innocent children simply because their parents sired them in an illicit relationship? Yet both applicants have

knocked on the door of this court and stated that we are the parents and we want these children registered as such so that they can benefit from all the rights that flow from that registration and identity. So that these children can live a normal life. It exercises my mind that without any justification whatsoever other than the common law presumption that children born in wedlock belong to the father, and with both applicants claiming to be parents on oath, one does not want unregistered children, roaming the streets yet their parents did go as far as the High Court, the upper guardian of minors, to vouch for and attest to their parentage and that the court then denied innocent children their being, their identity, their future, in essence a right to exist without any fetter in society.

The presumption

It is correct that there is a common law presumption that children born in wedlock belong to the husband of the woman being the mother of these children. This is a common law presumption which is rebuttable. The online legal dictionary defines a presumption as a legal inference that is made from certain facts. The mere fact that it is called a presumption means that it can be rebutted by evidence to the contrary. It is my considered view that this common law presumption was crafted to protect the interests of the child. It was never crafted to advance the interests of the husband as the Registrar General seeks to state in the letter dated 2 May 2023. In the case of *Centre for Child Law* vs *DG Dept of Home Affairs (supra)* MOGOENG CJ had this to say; "When a child is born of a married woman, barring evidence to the contrary, the husband is legally presumed to be the biological father and his surname, ancestry, clan and nationality will without more adhere to the child. This presumption exists for the advancement of the best interests of this child." (emphasis mine) It therefore follows that this presumption has absolutely nothing to do with the husband. Again the aforestated statement by MOGOENG CJ say; "barring evidence to the contrary" so this presumption only applies where there is no evidence to the contrary. Where 2 adults visit the Registrar General's office and swear to affidavits that they sired those children despite one party being married elsewhere, that in my view, is evidence to the contrary, meaning that, without any further evidence, rebutting such evidence, the Registrar General must register the births as claimed. It is only where one party is insisting that he is the father and the other is also insisting that he is the father that the Registrar General, should direct the parties to approach the courts because even then, I do not hold the view that the Registrar General has

power and authority to order that parties should go for DNA tests. The registry in my view will then be exercising powers that it does not have. It is my considered view that a presumption is not a fact, it remains, a presumption, and it cannot prevail over and above other evidence like affidavits by the 2 parents vouching for and confirming their parenthood.

This is juxtaposed with the fact that at the centre of it all, are the lives of innocent children whose registration and identity are paramount to their being and their very existence.

It is for these reasons that I granted the order as sought by the applicants as I was persuaded that the plight of these innocent children far outweighs the interests of the absent husband and that laws are there to protect their registration, also that the Registrar General's office is taking matters further than the powers it is given by the statute creating it, and that this court is the upper guardian of minors, has with the facts seemingly not pointing to any prejudice against anyone, it has to ensure that these children's interests are protected and championed and the registration of their births is in my view at the very core of their existence.

Zimbabwe Lawyers for Human Rights, applicants' legal practitioners
Civil Division Attorney General's Office, respondents' legal practitioners