

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 2022-007052

(1) REPORTABLE: Yes / No
(2) OF INTEREST TO OTHER JUDGES: Yes / No
(3) REVISED: Yes / No

Date: 06 April 2023 WJ du
Plessis

In the matter between:

KHODANI HARRIET MUNYAI FIRST APPLICANT

R M K SECOND APPLICANT

and

THE DIRECTOR GENERAL OF HOME AFFAIRS 1ST RESPONDENT

THE MINISTER OF HOME AFFAIRS 2ND RESPONDENT

JUDGMENT

DU PLESSIS AJ

[1] This is an application to order the First Respondent, or alternatively, the Second Respondent, to take all steps necessary in terms of s 9 of the Births and Deaths

Registration Act¹ ("the Act"), to register the birth of the minor T M C K ("the minor"), born on [...] September [...]. The matter is unopposed.

- [2] The applicants have been in a permanent relationship since August 2009 and moved in together at the end of 2016. In February 2019, the First Applicant discovered that she was pregnant. During the pregnancy and to date, the applicants are residing together (with the minor). While discussing marriage, they elected to wait until after birth to start the lobola negotiations.
- [3] When the child was born on [...] September [...], the applicants agreed that the child would have the Second Applicant's surname. On 17 October 2019, within thirty days of the birth, the applicants completed the birth form, accompanied by the First Applicant's identity document and Second Applicant's passport. Their Kafkaesque bureaucratic journey started when they were informed by the Department of Home Affairs ("the Department") that they needed a paternity test, as the child was born out of wedlock and the Second Applicant is a Zimbabwean citizen.
- [4] The test was done on 29 October 2019, and the necessary costs were paid on 21 October 2019. They were advised by the National Health Laboratory Services ("NHLS") that the test would be available in four to six weeks. After six weeks, the First Applicant followed up and was advised that the results go directly to the Department.
- [5] From December 2019 to March 2020, the Applicant visited the Department weekly to follow up on the results, with no luck. On 20 March 2020, the Second Applicant was advised to contact the NHLS directly for the results. He sent them an email on the same day. He was asked to contact them telephonically on 23 March 2020, which he tried for a week with no luck. The NHLS then advised him to go back to the Department.
- [6] Thereafter, due to the Covid lockdown restrictions, he was precluded from going to the Department. He did so as soon as he could and was told by the Department

¹ 51 of 1992.

that they were still waiting for the DNA results from the NHLS. In May 2021, the applicants were advised that there was no information on the system and that the Department could not assist the Applicants. This was when the Applicants approached their attorney to assist them.

[7] The attorney then took over the correspondence with the Department between 4 May 2021 and 3 June 2021, when the Acting Provisional Manager of the Department requested internal assistance in finalising the matter. On 14 June 2021, this Manager informed them that the matter would be placed on a list of interviews in July 2021. Nothing happened, prompting a follow-up email on 5 August 2021, 14 September 2021, 30 September 2021 and 27 October 2021, with no feedback. On 2 November 2021, the Civic Supervisor requested proof of the application to prioritise the matter. An email was sent on the same date with the required documents. After that, there was no response from the Department.

[8] This inertia of the Department resulted in the child being. Absent the certificate, the child has no officially recorded name, cannot get legally vaccinated, cannot be registered on medical aid, cannot attend a crèche or play school, and cannot travel to meet his family in Zimbabwe. He is thus excluded from the education system and from accessing social assistance and healthcare or exercising his civil rights in obtaining a passport and travelling to meet his Zimbabwean family.

[1] **The law**

[9] Section 9(1)² of the Act prescribes that a parent of a child must, within 30 days of the birth, give notice of such a birth in the prescribed manner. The now unconstitutional³ s 10 prescribed a specific procedure for children born out of wedlock, namely that a child out of wedlock shall be given the surname of the mother or, at the joint request of the mother and in the presence of the person to

² Notice of birth:

9 (1) In the case of any child born alive, any one of his or her parents, or if the parents are deceased, any of the prescribed persons, shall, within 30 days after the birth of such child, give notice thereof in the prescribed manner, and in compliance with the prescribed requirements, to any person contemplated in section 4.

³ Centre for Child Law v Director General: Department of Home Affairs [2021] ZACC 31.

whom the notice of the birth was given, acknowledges himself in writing to be the father, under the surname of the father.⁴ In this case, if the Second Respondent was a South African citizen, s 10(1)(b) would have applied at the time of registration, and the minor would have received the birth certificate.

[10] In *Centre for Child Law v Director General: Department of Home Affairs*,⁵ the Constitutional Court set an important interpretative framework for understanding ss 9 and 10 of the Act. In this case, Victor AJ makes it clear that

"Children are vulnerable members of society, even more so when they are without valid birth certificates. The latter are at greater risk of exclusion from accessing social assistance and healthcare, and crucially access to their nationality. As children have a fundamental right to be registered immediately after their birth to acquire a nationality, it is not in the best interest of the child to be rendered stateless."

[11] Much of the interpretation and understanding focussed on the child's constitutional right not to be discriminated against based on social origin and birth as set out in the Constitution. Not only their right to dignity but their right to have their best interests advanced, protected and respected by everyone in the society, including the respondents.

[12] In this case, the applicants', but moreover, the minor's situation is further exacerbated by the fact that the Second Respondent is not a South African citizen, requiring him to jump over more bureaucratic hurdles to register the minor under his surname. This is presumably due to Departmental Circular 5 of 2014, which requires a father of a child born out of wedlock who is also a non-South African to go for a paternity test if he wants his particulars registered in the birth register of

⁴ Notice of birth of child born out of wedlock

10 (1) Notice of birth of a child born out of wedlock shall be given—

(a) under the surname of the mother; or

(b) at the joint request of the mother and of the person who in the presence of the person to whom the notice of birth was given acknowledges himself in writing to be the father of the child and enters the prescribed particulars regarding himself upon the notice of birth, under the surname of the person who has so acknowledged.

(2) Notwithstanding the provisions of subsection (1), the notice of birth may be given under the surname of the mother if the person mentioned in subsection (1)(b), with the consent of the mother, acknowledges himself in writing to be the father of the child and enters particulars regarding himself upon the notice of birth.

⁵ [2021] ZACC 31.

the child. However, if the applicants were married, they would not be required to provide a paternity test.

[13] The applicants did not ask for the directive to be set aside, and no argument was made on that point. However, to ensure that the order made by this court is effective, it is helpful to set out the legal nature of the Departmental Circular.

[14] These circulars are "administrative quasi-legislation" that are of great practical importance as they guide the exercise of discretionary administrative powers.⁶ Whether they are legally binding or to what extent they are binding, depends on whether the Act has anticipated the creation of such circulars. If the Act does anticipate the making of such circulars, a court will be more willing to find that it has legal authority. Furthermore, if the rules and guidelines interfere with the exercise of discretionary powers, they will be regarded with circumspection.⁷ In terms of the circular, an official registering the details of a non-South African unmarried father of a child *must* have the paternity test results. It is not apparent from the Act that these circulars are anticipated with specific reference to the registration of births. Considering all this, it cannot be said that a paternity test is not a *sine qua non* for the Respondents to register the particulars of the Second Applicant.

[15] Such an understanding of the circular is further bolstered by the fact that the paternity requirement set out in the circular, in this case, unduly infringes the rights of a minor, which include what is in the child's best interest. All the facts in this case, as set out in the affidavits and the annexures, indicate that it is in the child's best interest to have his birth registered, to make him visible in the South African law, and to enable him to exercise and enjoy his citizen rights fully.

[16] I am further satisfied that the affidavits deposed by the applicants as to the paternity of the minor are sufficient within the framework of the Act, to register the Second Applicant as the minor's father, and for the minor to carry his father's surname, as per the applicants' wishes.

⁶ Baxter *Administrative Law* 3ed (Juta & Co Ltd, Cape Town 1991) at 200.

⁷ Baxter *Administrative Law* 3ed (Juta & Co Ltd, Cape Town 1991) at 201

[2] Order

[17] I, therefore, make the following order:

1. The First Respondent, alternatively the Second Respondent, is directed within 20 days to take all steps necessary in Section 9 of the Births and Deaths Registry Act 51 of 1992, to register the birth of the minor child T M C K, born on [...] September [...].

WJ DU PLESSIS

Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be sent to the parties/their legal representatives by email.

Counsel for the Applicant:

Adv S F Fisher-Klein

Instructed by:

Daly Morris Fuller Inc

Date of the hearing:

13 February 2023

Date of judgment:

06 April 2023