

MARBLE TIMBE v REGISTRAR GENERAL OF BIRTHS AND
DEATHS

SUPREME COURT OF ZIMBABWE
MALABA JA, ZIYAMBI JA & GARWE JA
HARARE, JANUARY 14 & OCTOBER 21, 2008

N P Munangati, for the appellant

M Chimombe, for the respondent

MALABA JA: This is an appeal against the judgment of the High Court given on 30 July 2007 dismissing with costs an application by the appellant for an order declaring that the decision by the respondent to cancel registrations of the births of two children of the appellant was void.

The facts of the case are these. The appellant is the mother of two children, KUDZAI LOUISA TIMBE born on 6 June 1995 and KUDAKWASHE LISA TIMBE born on 5 August 1997. The respondent is the officer-in-charge of the Central Registering Office for all notices of births. He has the power under s 8(1) of the Births and Deaths Registration Act [*Cap 5:02*] (“the Act”) to direct the correction of any error in any register, whether it is a clerical error or an error of fact or substance if he discovers the error himself or upon an application by any person.

In 1985 the appellant solemnized a customary marriage with one Stanlake Gahadzikwa Timbe in terms of the Customary Law Marriages Act [*Cap 5:07*]. She did not know at the time that Mr Timbe had on 21 January 1963 solemnized a civil marriage with one GRACE MARARA in terms of the Marriages Act [*Cap 5:11*]. The appellant *bona fide* believed that Mr Timbe was a bachelor. It was not suggested that she had knowledge of the existence of the other marriage during the time she lived with Mr Timbe as husband and wife. Theirs was therefore a putative marriage.

After the birth of each child, the appellant and Mr Timbe gave notice of the birth and its particulars to the Registrar for purposes of registration. As a result of the information they supplied, the name of Mr Timbe was entered in the register as the father of each child. He loved and cared for the children as their father.

In 2001 Mr Timbe had an altercation with the appellant's sister which resulted in him shooting her dead. At the trial, on a charge of murder, he raised the defence of provocation, the substance of which was that the dead woman had humiliated him by mocking him in front of the children as being barren. On 30 October 2002, the court ordered that he be examined by a doctor to ascertain the truthfulness of the allegation that he had no sexual organs. The examination which was conducted on 9 January 2003 revealed scars below both nipples suggesting that breasts had been removed. It also revealed that he had a small penis which was 4cm long. Testicles were absent from both scrotal sacs. The doctor did not express an opinion as to whether or not

Mr Timbe was capable of having intercourse and bearing children. On the basis of the results of the medical examination, Mr Timbe was found guilty of culpable homicide.

Mr Timbe died in a car accident on 18 February 2004 on his way home from collecting one of the children from school. Up to the time of his death Mr Timbe had acknowledged himself as being the father of the two children.

After the death of the deceased and in a bid to prevent the children from sharing in the inheritance of his estate, the deceased's relatives approached the respondent and asked him to direct that the birth certificates of the two children be cancelled. They alleged that the deceased could not bear children and produced a copy of the medical report on the examination conducted on the deceased by the doctor on 9 January 2003. They had also obtained an opinion on 1 March 2005 from a doctor who after studying the contents of the medical report said that it was not possible that the deceased could have been capable of child bearing. At a meeting of relatives of the deceased called by the respondent on 9 March 2005, the appellant denied the allegations that the deceased was not capable of bearing children. She pleaded with the respondent not to cancel the registrations of the children's births without having first obtained an order from a court.

On 17 March 2005, the respondent had the registration of the births of the children cancelled on the ground that false information had been given that the deceased was their father.

In the application before the High Court for a declaratory order, the respondent defended the decision to cancel the children's birth certificates on the ground that he was authorized to do so under s 8 of the Act. The section provides as follows:

“8. Correction of error in register

- (1) The Registrar-General may, subject to any regulations made in terms of section twenty-six, direct the correction of any error in any register, whether it is a clerical error or an error of fact or substance.
- (2) Any person may, upon payment of the prescribed fee, apply to the Registrar-General for a correction to be made under subsection (1).
- (3) Corrections shall be made without erasing the original entry, and shall be authenticated by the signature of the Registrar-General or a registrar.
- (4) The fee payable in terms of subsection (2) shall not be refunded unless the application is made in regard to an error which was made by the Registrar-General, a registrar or a member of their staff.”

Although Mrs *Munangati* argued strongly that the power given to the Registrar-General under s 8(1) of the Act did not cover a situation where the action taken would lead to a change of the status of the person whose birth was registered, the learned Judge held that the cancellation of the registrations of the children's births by the respondent was *intra vires* s 8(1) of the Act.

The learned Judge said:

“Considering the facts before me, it is my view that the Registrar-General could act as he did in terms of s 8(1) of the Births and Deaths Registration Act [*Cap 5:02*]. It allows the Registrar to correct any errors be they clerical or errors

of fact or of substance in his registers. The Registrar-General after examining the medical reports presented to him and carrying out an enquiry as is confirmed by his papers, he determined that the late Stanlake Timbe could not have fathered the two minor children and proceeded to cancel the birth certificates.

In other words he made a declaration that those two minor children could not have been the late Stanlake Timbe's children and he was saying there was therefore an error of fact and substance in his register as the late Stanlake Timbe was indicated as the father of those children. In doing so, the Registrar-General was making an administrative decision in the exercise of his administrative functions as provided for in s 8(1)."

Regrettably, I am unable to agree with the learned Judge in holding that the respondent was exercising the powers vested in him under s 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 s 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.

Section 8(1) vests the respondent with a discretionary power exercisable only when he has satisfied himself that what he is being 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.

As a result of a failure to comprehend the essence of an error of fact, the learned Judge did not appreciate the fact that the respondent did not find that there was an error of fact in the register relating to the entry of the name of Mr Timbe as the father of the two children. The respondent found that there was a false entry in the register of the fact that Mr Timbe was the father of the children. He said that the entry in the register was as a result of Mr Timbe, with the consent of the appellant having given the Registrar false information on the fact of paternity of the children. It was for that reason that the respondent said he cancelled the children's birth certificates. The letter of cancellation dated 17 March 2005 clearly states that the birth certificates were cancelled "as false information was given at the time of registration". In paragraph 14 of the opposing affidavit the respondent reveals that the decision to cancel was arrived at on the basis of information received after the registration of the births of the children. He said:

"Ad Paragraph 16

- 14.1 Evidence from experts in the medical field and affidavits from the deceased relatives confirming that the late Mr Timbe could not have children resulted in the cancellation of the birth registration".

So the ground on which the birth certificates were cancelled was that when he had full knowledge of the fact that he was infertile or impotent and could not have intercourse and bear children, Mr Timbe, with the consent of the appellant, fraudulently misrepresented to the Registrar through notices of births of the children that he was the father and got his name entered in the register as the father of the children for the purpose of obtaining the registrations of births of the children. There could not be an error of fact if Mr Timbe and the appellant were found to have acted in concert and deliberately gave false information on the fact of the paternity of the children to the Registrar.

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. Section 8(3) of the Act specifically prohibits the erasure of the original entry by the respondent in the exercise of his powers under s 8(1). A careful examination of the various provisions of the Act shows that the power to order cancellation of an entry in a register vests in a court. The respondent can only cancel an entry in the Register upon an order of a court. Section 27(2)(a) of the Act makes it an offence to wilfully give any false information for the purposes of the registration of a birth of a child. Section 27(4)(b) provides that without derogation from its powers in any civil proceedings, a court may, at the conclusion of any criminal proceedings, order the Registrar to delete or remove any false information or entry in the register. It was for a court to make a finding that the entry made in the register to the effect that Mr Timbe was the father of the

children was false. As the respondent purported to cancel the birth certificates of the children without having been ordered by a Court to do so his action was unlawful.

The appeal succeeds with costs. The order of the court *a quo* is set aside and substituted with the following -

- “(1) The decision of the respondent to cancel the birth certificates of the minor children Kudzai Louisa Timbe (born 6 June 1995) and Kudakwashe Lisa Timbe (born 5 August 1997) is null and void.

- (2) The respondent shall within 7 days of this order cause to be issued to the children, birth certificates containing the same particulars as were in the register at the time the cancellation was effected.

- (3) The respondent is to pay the costs of the application.”

ZIYAMBI JA: I agree

GARWE JA: I agree

Munangati & Associates, appellant's legal practitioners

Civil Division of the Attorney-General's Office, respondent's legal practitioners