SPIWE CHITINDINGU
versus
TOBAIWA MUDEDE N.O
and
NATSAI SHOKO (in her capacity as mother and guardian of minor child Polite Shumba)
and
NYARARAI DHEGE (nee Shoko)
and
TAFADZWA DHEGE (as co-executor in the Estate late Keron Shumba)
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 17 November 2017 and 26 July 2018

OPPOSED APPLICATION

H. Mukonoweshuro for the applicant
T. Thondhlanga for 1st to 4th respondents

CHITAKUNYE J. This is an application for Review of the first respondent's decision handed down on 30 November 2015.

The second respondent is the mother of Polite Shumba

The third respondent is the late Keron Shumba's mother and is also the second respondent's paternal aunt.

The fourth respondent is a sister to the late Keron and is a co-executor with applicant in the estate of the late Keron Shumba.

The applicant was married to the late Keron Shumba in terms of an unregistered customary law union in about 2003. Their union was blessed with one child.

The union subsisted till the 29th April 2013, when the late Keron Shumba died at Harare. After the demise of Keron, applicant registered his estate as the surviving spouse.

On 6 August 2013 an edict meeting was held for the purposes of appointing an executor of the estate late Keron Shumba.

During the edict meeting the late Keron's relatives indicated that the deceased had another child besides the one with applicant. They were asked to provide proof of the existence of this other child.

The applicant and the fourth respondent were duly appointed co-executors of the estate late Keron Shumba.

On 15 August 2013 the second and third respondents approached the first respondent's Mberengwa District Offices and obtained a birth certificate for a child named Polite Shumba. The birth certificate indicated that the said Polite Shumba was sired by the late Keron Shumba and that she was born on 8 August 1998 to Natsai Shoko, the second respondent.

The applicant alleged that sometime in July 2013 Luckson Shumba, who is a half brother to the late Keron had advised her of an approach by the third respondent with a request that he allows his child Polite Shumba, born on 7th August 1998, to be registered as a beneficiary to the late Keron's estate, which request Luckson said he refused. Therefore when the second and third respondents now came up with a birth certificate obtained on 15 August 2013, applicant opined that the respondents were acting fraudulently as her late husband had never told her about having sired a child called Polite Shumba.

As a consequence the applicant through her legal practitioners complained to the first respondent about this birth certificate and the manner the birth certificate was obtained. Applicant asked the first respondent to investigate further the registration of Polite Shumba as her late husband's child.

The first respondent after conducting inquiries advised the applicant by letter dated 30 November 2015 that:

> "Following our meeting of 22 October 2015 my position is that I was satisfied that Polite Shumba's birth certificate is authentic and was properly registered in terms of the Births and Deaths Registration Act.
>
> This follows the examination of reports by the District Registrar for Mberengwa as well as interview proceedings that centred on submissions from you and from the grandmother and relatives."

The applicant was aggrieved by the above decision by the 1st respondent hence this application for review.

The grounds advanced for review were couched as follows:

1. The 1st respondent confirmed the recording in the birth register of the name of the deceased Keron Shumba as the father of Polite Shumba contrary to evidence from deceased's mother

that in his life time the deceased had refused to acknowledge the child as his and had, despite requests, refused to get a birth certificate for the child. This confirmation is *ultra vires* to the provisions of section 12(1) of the Birth and Deaths Registration Act [chapter 5:02]. It is an illegal decision.

2. The decision by the 1st respondent to confirm the deceased as the father of Polite Shumba is so outrageous in its defiance of logic that no person having applied his mind to the facts would arrive at the same decision.
   (a) The Registrar did not apply his mind to the evidence of Luckson Shumba whose affidavit states that 3rd respondent approached him after the deceased's death and requested him to allow his daughter also known as Polite Shumba to be registered as a beneficiary of the deceased's estate and further that Luckson Shumba did not know if his late brother had a child by the name of Polite Shumba.

The applicant thus sought the setting aside of the first respondent's decision and its substitution with an order that the first respondent deletes the late Keron Shumba's name from Polite Shumba's birth certificate.

The first respondent opposed the application. In his opposition he alluded to the initial investigations that were done by his Mberengwa District Office and the further investigations done by the Provincial Office and his office all confirming that the registration of the deceased as a father to Polite Shumba was authentic. He referred to written reports submitted and interviews with the late Keron Shumba's siblings and relatives which led to the acceptance of the registration as authentic.

The second and third respondents also opposed the application contending that Polite Shumba was sired by the late Keron. They disputed the applicant's assertion that the late Keron had refused to obtain birth certificate for the child in question.

It is apparent that the applicant's complaint is on the exercise of administrative discretion by the first respondent. The question that arises is whether there is a proper case for review. In answering this question it is pertinent to examine the different circumstances in applications for review.

In *Geddes Ltd* v *Tawonezvi* 2002 (1) ZLR 479 (S) court held that:

> "In deciding whether an application is for a declaration or review, the court has to look at the grounds of the application and the evidence produced in support of them. The fact that an application seeks a declaratory relief is not itself proof that the application is not for review. The court should look at **the grounds on which the application is based, rather than the order sought**…" (emphasis is mine)

In *Musara* v *Zinatha* 1992(1) ZLR 9 at p 14 ROBINSON J had this to say on the same subject:

> "At the outset I would observe that the bulk of the petitioner's petition raises matters, such as **malice, gross irrationality, the application of the *audi alteram partem* principle and bias, which relate to the subject of review** and which would only render the act in question voidable and not void. Consequently, those issues are not properly before this court in the present application which seeks a declaratory order specifically and exclusively on the ground that the petitioner's purported suspension is null and void. Fortunately for the petitioner, there is just sufficient information on the papers to enable the court to consider the petition as one seeking a declaratory order in regard to the petitioner's suspension- had there not been such information so that the petition amounted to a review *simpliciter,.....* then I would have dismissed the petition on the ground that it was out of time as a review matter and that no cause had been shown on the papers for the court, in terms Rule 259 of the Rules of court, to extend the prescribed eight week period within which a review is to be instituted." (emphasis is mine)

In Herbstein & Van Winsen *Civil Practice of the High Courts of South Africa* 5 ed p 1271 the author explains the distinction between appeal and review as follows:

> "The reason for bringing proceedings under review or appeal is usually the same, viz to have the judgment set aside. Where the reason for wanting this is that the court came to a wrong conclusion on the facts or the law, the appropriate procedure is by way of appeal. Where, however, the real grievance is against the method of the trial, it is proper to bring the case on review. The first distinction depends, therefore, on whether it is the result only or rather the method of trial which is to be attacked. Naturally, the method of trial will be attacked on review only when the result of the trial is regarded as unsatisfactory as well. The giving of a judgment not justified by the evidence would be a matter of appeal and not a review, upon this test. The essential question in review proceedings is not the correctness of the decision under review but its validity."

In *City of Harare* v *Zvobgo* 2009 (1)ZLR 218(S) court quoted the words of Prof. Geoff Feltoe in his book *A Guide to Zimbabwean Administrative Law* 3ed (1998) at p14 wherein the learned author stated that:

> "the main deference between the two remedies is that in an appeal what is in question is the substantive correctness of the original decision, whereas on review the High Court is not delving into substantive correctness of the decisions, but is only determining whether there were any reviewable procedural irregularities or any action which was reviewable because it was *ultra vires* the powers allocated to the tribunal."

The same court in *Affretair (Pvt) Ltd & Another* v *MK Airline (Pvt) Ltd* 1996(2) ZLR 15(S) had held that:

> "the role of the court in reviewing administrative decisions is to act as an umpire to ensure fairness and transparency, the latter being a word which could usefully be used to connote openness, frankness, honesty and absence of bias, collusion, favouritism, bribery, corruption or underhand dealings and considerations of any sort. The duty of the court is not to dismiss the administrative authority and take over its functions, but to ensure, as far as humanly and legally possible, that it carries out its functions fairly and transparently. Provided that the court was satisfied that the authority had done that, it could not interfere merely because it did not approve of the authority's decision; though if the decision was hopelessly wrong, the court might say

> that the decision could only have been arrived at by reference to improper considerations or by failure to refer to proper ones."

It is apparent from the above cases that a review does not and ordinarily should not address the merits or correctness of a decision but the decision- making process. In short, the grounds for review must relate to issues of a procedural nature such as irregularities in the process, lack of jurisdiction, *audi alteram partem* principle, bias, and failure to conduct proceedings in a fair and transparent manner. Where the decision making process is not being challenged such a matter may not be for review.

Due to the confinement alluded to above, grounds for review are limited.

The limitation is also evident from the High Court Act, [*Chapter 7:06*]. Section 26 thereof provides that, subject to the provisions of the Act and any other law, the High Court has review powers over all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities. Section 27 (1) thereafter provides that: -

> "(1) Subject to this Act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court shall be-
>
> (a) Absence of jurisdiction on the part of the court, tribunal or authority concerned;
>
> (b) Interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case maybe;
>
> (c) Gross irregularity in the proceedings or the decision."

Section 27 (2) provides that nothing in that particular section shall affect the provisions of any other law relating to review of inferior courts, tribunals or authorities

In this application the applicant's complaints were not in terms of grounds (a) or (b) of s 27(1) of the High Court Act. The applicant did not raise issues of procedural irregularities. The grounds of review seemed to attack the correctness of the decision rather than the decision making process and the allegation that the 1st respondent did not apply his mind to the evidence presented and the law applicable.

The grounds may be considered as follows.

1. The first respondent confirmed the recording in the birth register of the name of the deceased Keron Shumba as the father of Polite Shumba contrary to evidence from deceased's mother that in his lifetime the deceased had refused to acknowledge the child as his and had despite requests refused to get a birth certificate for the child. This confirmation is *ultra vires* to the provision of section 12(1) of the Births and Deaths Registration Act [chapter 5:02]. It is illegal decision.

It is clear that the applicant is not raising any procedural irregularities in the manner in which the decision to register the deceased as father to Polite Shumba was arrived at. What the applicant refers to as *ultra vires* s 12(1) is difficult to comprehend as that subsection simply states that:

> "Notwithstanding section eleven, no person shall be required to give information acknowledging himself to be the father of a child born out of wedlock."

I did not hear applicant to allege that the first respondent had required the deceased to acknowledge himself as the father of the child in question.

In his submissions counsel for applicant argued that since the deceased had during his lifetime not registered the child's birth, the first respondent should not have acceded to the request for registration by the second and second respondent. He did not challenge the fact that the first respondent, firstly through his district office proceeded in terms of s 12(2) (c) of the Births and Deaths Registration Act.

In any case, it was not true that the third respondent gave evidence to the effect that the deceased had in his lifetime refused to acknowledge the child as his or that he had refused, despite requests, to get a birth certificate for the child. The third respondent refuted such assertions in her affidavit filed of record and submitted to the first respondent. If anything she disclosed that the deceased accepted the responsibility for impregnating his cousin the second respondent leading to the birth of the child in question. She in fact gave her explanation for the delay in the registration of the birth of the child which pertained to family tension caused by the incident as the deceased and the second respondent were blood relations.

The second ground was that:

2. The decision by the 1st respondent to confirm the deceased as the father of Polite Shumba is so outrageous in its defiance of logic that no person having applied his mind to the facts would arrive at the same decision

   (a) the Registrar did not apply his mind to the evidence of Luckson Shumba whose affidavit states that 3rd respondent approached him after the deceased's death and requested him to allow his daughter also known as Polite Shumba to be registered as a beneficiary of the deceased's estate and further that he, Luckson Shumba, did not know if his brother had a child by the same name of Polite Shumba.

This ground as couched lends itself to the assertion that the decision was unreasonable. In *African Tribune Newspapers (Pvt) & Ors* v *Media & Information Commission & Anor* 2004(2) ZLR 7(H***)*** this court held that:

> "Unreasonableness has an extremely limited, even an insignificant, role as a ground of review in our law. Judicial review is concerned not with the correctness of the decision but with the decision- making process. A review court can only set aside a decision if it is satisfied that the decision was so grossly unreasonable that no reasonable person applying his mind to the facts before him would have come to that conclusion."

See also *Nyoni* v *Secretary for Public Service, Labour and Social Welfare & Anor* 1997(2) ZLR 516(H) at 525F.

In order to succeed on this ground the applicant must show, not that the determination was wrong, but that it was 'irrational', in the sense of being 'so outrageous in its defiance of logic or any accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it.

I am of the view that given the facts of this case most of which are common cause, the applicant has lamentably failed to discharge the onus.

It is clear that the first respondent's decision was informed by the evidence gathered during the investigation by his officers at both the District level the Provincial level and at Head Office level. The applicant conceded that the first respondent undertook such investigations or inquiries before confirming the registration.

The procedure first respondent adopted was in terms of s 12 (2) (c) of the Births and Deaths Registration Act. That subsection provides that:

> "(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—
>
> (*c*) if the alleged father of the child is dead, upon the joint request of the child's mother and a parent or near relative of the alleged father.
>
> (3) A request in terms of subsection (2) shall be made in the form and manner prescribed."

In *casu*, as the child's father is deceased, the deceased's mother Nyararai Dhege (nee Shoko), the deceased's sister Tendai Shumba and the child's mother duly approached the first respondent's offices for the registration of the late Keron Shumba as the father of the child.

Besides presenting themselves they also tendered affidavits to the effect that the late Keron Shumba was the father of the child in question. The first respondent upon receipt of the request took steps to verify. Those steps included reports from the schools the two children going by the same name of Polite Shumba attended. The applicant made her own submissions. It was after considering all the evidence tendered including the affidavit by Luckson Shumba, that the first respondent confirmed the registration of the late Keron Shumba as the father of the child in question.

The applicant's counsel argued that by failing to register the birth of the child within 42 days after birth as required by s 11 of the Act, the second respondent was guilty of contravening s 27(1) of the Act which penalises any person whose duty is to give notice of the birth of a child but fails to do so. He argued that in those circumstances the first respondent should not have registered that birth.

Counsel opined that the issue which this court is asked to determine is whether or not the first respondent was correct in posthumously registering the birth of the out of wedlock child in question in terms of s 12(2) (c) of the Act in circumstances where both the mother and the father of the out of wedlock child had been alive, available and able to register the birth of their child within the period prescribed by the Act if the father wished.

As already alluded to above the question of the correctness of the decision is an issue for appeal as it delves on the substantive aspect of the decision and not the decision making process. Clearly therefore counsel's argument that the second respondent erred at law by registering the birth of the second respondent's out of wedlock child in terms of s 12(2)(c) of the Act is misplaced. In any case there is no provision barring late registration of a birth beyond the 42 days as long as one gives a satisfactory explanation to 1st respondent. In *casu*, the first respondent said that he was satisfied with the explanation given for the delay and authorised the registration.

The applicant's Counsel also argued that upon realising that the second respondent had not given notice of the birth of the child within 42 days, the first respondent should have reported the matter to the police and such failure shows that the first respondent did not apply his mind to the facts. This was another argument on irrelevant issues that are not subject of review. In any case in terms of s 25(1) of the Act late registration is allowed with the authority of the first respondent. Section 25(1) provides that:

> "No birth, still-birth or death which occurs after the 20th June, 1986 shall be registered after the expiry of twelve months from the date of such birth, still-birth or death except with the written authority of the Registrar-General."

All that is required is for the first respondent to give his authority for late registration to be effected. In the exercise of this power the first respondent is permitted to delegate such exercise to district Registrars. In this regard s 25(3) states that:

> "(3) The Registrar-General may delegate the functions conferred on him by this section to a registrar in respect of births, still-births and deaths occurring in the district of that registrar."

In *casu*, the first respondent through his district office authorised the registration and there has not been any grievance relating to procedural irregularities.

As regards the argument that the 1st respondent should not have registered the birth as the second respondent had contravened s 27(1) of the Act by not giving Notice of the birth within 42 days, I am of the view that such argument is misplaced. The section does not prohibit late registration. Whilst indeed s 27 creates an offence and penalty for failing to give notice of birth within the stipulated period, one can only be guilty of the offence where there is no reasonable cause for such failure. In this regard s 27 (1) states that:

> "Any person whose duty it is to give notice of the birth or still-birth of a child or the death of a person and who, without reasonable cause, fails to do so within the appropriate period provided in this Act shall be guilty of an offence and liable to a fine not exceeding level six or to imprisonment for a period not exceeding one year or to both such fine or such imprisonment."

In *casu*, the second respondent gave an explanation for the failure to give notice of the birth within the appropriate period which the first respondent found reasonable hence the late registration of the birth.

In a bid to bring the arguments in the purview for review applicant's counsel also made submissions to the effect that the first respondent erred in law in that he did not correctly apply the provisions of the Act given the failure to register the child within 42 days and whilst the late Keron was still alive. As a consequence of such error, the first respondent's decision was wrong and irrational because the wrong criterion was applied. Unfortunately this argument was misplaced as the first respondent, in my view, complied with what the Act required in cases of late registration. There was evidence from deceased's mother, Sister, father and the child's mother all pointing to the deceased as the father of the child. In addition the two children bearing the same names were availed to the first respondent's officers who carried out investigations on the ground. Out of the evidence gathered it was only the affidavit by Luckson Shumba which alluded to an approach by the third respondent to have his child with the same name benefit from deceased' estate. It is my view that even in that affidavit Luckson was not categorical that the late Keron had no child with the name Polite. In the last sentence of his affidavit he stated as follows:

> "whether my brother had another child by the name Polite that much I do not know."

Considering the unchallenged assertion by respondents that Luckson, being born of a second wife, was not staying with the third respondent but with his mother, such a statement cannot

be taken to mean that deceased had no child by the name Polite. The affidavits also show that Luckson was not staying at the same address as the second and third respondents.
It was in the face of all this information that the first respondent believed the version given by deceased's relatives that the child in question was sired by the deceased.

The fact of the second respondent and the late Keron being cousins did not make it impossible for the two to have sexual relationship even though such a relationship was undesirable.

It is pertinent to note that most of applicant's arguments were premised on her dissatisfaction with the substantive reasons for the registration of the late Keron as father to Polite Shumba and not to any irregularities committed in the process of such registration.
Counsel for the respondent alluded to the fact that in as far as the applicant's assertions on the attitude of the late Keron to the paternity of the child conflicted with the evidence of the second and third respondent, this was a matter applicant should have sought paternity tests as such issues cannot be resolved on the affidavits. The parties can go for DNA tests or such other scientific test as they wish to conclusively resolve their dispute.

It is indeed advisable that parties attend paternity tests, but that is not a subject of review proceedings. In as far as this application for review in concerned I am of the view that the applicant has lamentably failed to make a case for the setting aside of the first respondent's decision to confirm the registration of the Late Keron Shumba as the father to Polite Shumba born on 8th August 1998.

The application is hereby dismissed with costs.

H Mukonoweshuro & Partners, applicant's legal practitioners
Thondhlanga & Associates, 1st -4th respondents' legal practitioners