HH 50-03
HC 1043/03

RUMBUDZAI CLEO KATEDZA
versus
ADRIAN TULANI CHUNGA
and
REGISTRAR OF BIRTHS AND DEATHS

HIGH COURT OF ZIMBABWE
SMITH J.
HARARE, 19 and 02 April, 2003

Mr *Machingota* for applicant

SMITH J: The applicant filed this application for an order declaring that she is the guardian of her minor child and directing the second respondent (hereinafter referred to as "the Registrar") to issue a birth certificate for the child in its new name. I granted the order sought. My reasons for granting the order are as follows. The relevant facts are not in dispute. The applicant was born in this country on 17 January 1974. Shortly after her birth, her family migrated to the United States of America where they lived for seven years. They returned to this country in 1981, shortly after Independence, but soon after their return her father was appointed ambassador to Japan so she lived there for the next four years. She returned to this country after her father's tour of duty and attended a secondary school in Harare. Thereafter she went with her family to Italy for a year and then attended a university in Canada. After obtaining her degree she returned to this country and started working in the local film industry.

In May 1998 the first respondent and her family entered into an agreement which resulted in a customary union between the applicant and the first respondent. Lobola was paid to her family. Pursuant to the customary union, she lived with the first respondent for three years until they separated in April 2000 due to incompatibility. The customary union resulted in the birth of a baby boy on 3 February 2000. His name was Tulani Jai Chunga. On 26 May 2002 the applicant

appeared before a notary public and changed her son's name to Tulani Jai Katedza. The notarial deed that was drawn up was registered in the Deeds Office on 30 July. Thereafter the legal practitioners applied to the Registrar for the issue of a new birth certificate in the new name of her son. The Registrar refused the application on the basis that the consent of the first respondent was required. That resulted in the legal practitioners writing to the Registrar and pointing out that the question of the father's consent was not in issue as the child was born out of wedlock and therefore full guardianship vests in the mother. The Registrar replied, saying that the first respondent, being the father, had been interviewed and said he strongly objected to the change of surname from Chunga to Katedza and was prepared to fight his case in the courts. The Registrar concluded by saying that the applicant could approach the Court for redress.

The contention of the applicant is that the change of name is a *fait accompli*, having been effected before a notary public. Accordingly, the function of the Registrar is simply to record what has been legally effected. He has no right to refuse to issue the birth certificate requested. Since there was a customary union between the parties, the first respondent may have certain rights of guardianship in relation to the child, but that would only be for customary law purposes. The position under the general common law of this country is that she, being the mother, is the guardian of her child and, as such, she has the right to select a name for the child. The rights accorded to a father in terms of s 3(5) of the Customary Marriages Act [Chapter 5:07] are operative at customary law only and do not take away the mother's rights under the common law.

The first respondent did not oppose the application, neither did the Registrar. However, the Registrar did file an affidavit in which he said that he would no longer

insist on the consent of the first respondent and that it is up to the Court to decide what is in the best interests of the child. He did not oppose the change of name and the issuing of a new birth certificate. He concluded by saying that the issues raised are issues of law which have very little to do with the issue of change of name which is governed by s 18 of the Births and Deaths Registration Act [Chapter 5:02] (hereinafter referred to as "Chapter 5:02").

In *Docrat* v *Bhayat* 1932 TPD 125 at 127 DE WET J said -

> "Now our law does not recognise marriages by Mahommedan rites, and therefore the marriage between the applicant and his deceased wife is not considered valid according to our law. That might be an unfortunate position, but there is no moral stigma on the parties or their children. But on a legal question our courts have to consider such a marriage as non-existent, and any issue of the marriage must be regarded as illegitimate. That being the position here, I think it is clear that the applicant in this case has no *locus standi* at all as far as the custody of the child in question is concerned. The mother of the child was the natural guardian. If the mother were alive, and if an application were made in which both the mother and father claimed the custody of the child, the mother would undoubtedly have been entitled to succeed."

TINDALL JA, in *Dhanabakuim* v *Subramaniam & Anor* 1943 AD 160 at 166 echoed the above where he said -

> 'Now though the mother, and not the father, of an illegitimate child is generally speaking, the natural guardian of the child".

In **Spiro's Law of Parent and Child** 4 ed at p 452 the learned author states that the mother of a child born out of wedlock has all the rights and duties *vis-à-vis* her illegitimate child which a sole parent has. He then deals with the question of the registration of its birth, saying -

> "In the first instance, the illegitimate child takes its name from its mother. The registrar shall not enter in the birth register the name of any person as the father of the illegitimate child except at the joint request of the mother and of the person who in the presence of the registrar or assistant registrar acknowledges himself in writing to be the father of the child, any such acknowledgement being only of evidential value in respect of the question who the natural father is. It is also for the mother to assign a Christian name to her minor illegitimate child".

It is clear from the above that the mere fact that the father's name appears on the birth certificate does not mean that he has any rights of guardianship or custody.

Section 18 of Chapter 5:02 provides for the change of a name in any register. Subsection (3) thereof provides that where the birth of a person has been registered in any register and the surname of the person is changed, if that person has not attained the age of 18 years his responsible parent or legal guardian may apply to the Registrar-General for the registration of the surname and the Registrar-General shall , on payment of the fee and on being satisfied that a notarial deed has been registered in the Deeds Register and that the change has been advertised in the Gazette, register the change of surname. The term "responsible parent" is defined in subs (1) of s 18. It means, if the father is dead or the mother has been given custody or the child is born out of wedlock, the mother of the child. In all other cases it is the father. The provisions of subs (3) of s 18 are mandatory.

In this case, the applicant's child was born out of wedlock. That means that she is the responsible parent as defined in subs (1) of s 18 of Chapter 5:02. When she made the application for the change of surname to be registered and provided the necessary details, the Registrar was obliged to register the change of surname. He has no discretion in the matter. The surname of the child was changed in the manner required by subs (3) of s 18 of Chapter 5:02. The Registrar exceeded his responsibilities when he interviewed the father of the child. It as not his function to make any such inquiry. It was because the Registrar failed to do what s 18(3) of Chapter 5:02 required him to do that the applicant was obliged to come to Court to get an order requiring the Registrar to carry out his functions, which are so clearly spelt out in the Act. Had the Registrar acted reasonably and responsibly, this court application would not have been necessary. There is no ambiguity in s 18(3) of

Chapter 5:02 which requires clarification. Accordingly, I considered that it was appropriate to order that the Registrar pay the applicant's costs on the legal practitioner and client scale.

This application was dealt with whilst I was doing the Motion Roll Case No HC 10172/02, *Nenya* v *Gambakomba* also appeared on the roll as an unopposed application. That was an application by Nenya in terms of s 4(1) of the Guardianship of Minors Act [Chapter 5:08]. The facts of that case are as follows. Nenya entered into a customary union with Nyasha Gambakomba in January 1996. A child was born of that union in May 1996. The birth certificate of the child shows Nenya to be the mother and Gambakomba to be the father. The parties lived together until 1997, when they separated. The child stayed with the mother and Gambakomba emigrated to the United States of America. Nenya has enrolled the child at primary school but says that she is unable to apply for a passport for him because there is an insistence on the part of the Registrar-General of Citizenship that the consent of the father be obtained. She therefore applied for an order granting her sole guardianship of her son. Since her son was born out of wedlock, he is regarded under the common law of this country as being illegitimate. Accordingly, Nenya is the sole guardian by operation of law. It is not necessary for that to be declared by order of Court. However, because it might assist her in her dealings with officials who do not know the law, or who are directed to apply the law as some would like it to be rather than what it is, I granted the order sought.

Subsection (5) of s 3 of the Customary Marriages Act [Chapter 5:07] provides as follows -

> "A marriage contracted according to customary law which is not a valid marriage in terms of this section shall, for the purposes of customary law and

> custom relating to the status, guardianship, custody and rights of succession of the children of such marriage, be regarded as a valid marriage".

The acquisition of a birth certificate, a passport or a visa cannot be regarded as part of customary law or custom relating to the status, guardianship and custody of children. Birth certificates are issued in terms of Chapter 5:02 and passports are issued to citizens to enable them to exercise their rights of freedom of movement under the Constitution. Neither of these concepts are governed or affected by customary law. Therefore, s 3(5) of the Customary Marriages Act [Chapter 5:07] - cannot affect the right of the mother of a child born out of wedlock to claim a birth certificate or a passport or visa for her child in her capacity of sole legal guardian of the child. The father has no say in the matter. The mother does not need to obtain his consent. If the mother of a child born out of wedlock wishes to visit another country and take her child with her, she is the one who must apply for a passport or a visa on behalf of her child as she is the sole guardian, unless of course the father has been made guardian by an order of Court.

Honey & Blanckenberg, legal practitioners for applicant
Civil Division of the Attorney-General's Office, legal practitioners for 2nd respondent