REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-MOT-GEN-2019/00473

In the matter between:

P[redacted] L[redacted] **APPLICANT**

and

MINISTER OF HOME AFFAIRS AND IMMIGRATION **RESPONDENT**

Neutral Citation: *L[redacted] v Minister of Home Affairs and Immigration* (HC-MD-CIV-MOT-GEN-2019/00473 [2021] NAHCMD 481 (13 October 2021).

CORAM: **MASUKU J**

Heard: **04 August 2021**
Delivered: **13 October 2021**
Reasons: **19 October 2021**

Flynote: Constitutional Law – Citizenship by descent – Article 4(2) – Eligibility of a child born through surrogacy to be issued citizenship by descent – The parent of the child should be a Namibian citizen at the time of the child's birth — Purposive interpretation of

the Namibian Constitution to be made – Article 144 Namibian Constitution – Binding nature of international agreements to which Namibia is a State Party – inapplicability of the Child Care Protection Act, 2015 to issues of citizenship.

Summary: Before court for determination is the eligibility of a child born through surrogacy in South Africa to be accorded Namibian citizenship by descent. The applicant is a Namibian male involved in a same sex marriage solemnized in South Africa. Together with his partner, they obtained an order from the Western Cape High Court endorsing a surrogacy arrangement with a South African woman. After birth, the child was issued with a South African birth certificate, in which the applicant and his partner were endorsed as the child's parents.

The applicant brought the child to Namibia, and in due course applied for Namibian citizenship by descent, but the respondent required of him to first provide proof that he indeed is the biological father of the child. This was premised on the respondents' position that a possibility exists that the gamete that fertilised the egg of the surrogate mother, may be that of the applicant's spouse, who is not a Namibian citizen. This position is informed by the fact that the applicant is in a same sex marriage.

Dissatisfied by this position, the applicant approached this court for relief. He is of the view that the position taken by the Minister is discriminatory and is not in the best interests of the child. The Minister took it further by lodging a counter-application, seeking an order compelling the applicant and his child to undergo a DNA test to determine the paternity of the minor child. The court found as follows:

Held: The provisions of Article 4(2) of the Constitution mean that persons seeking to be granted citizenship by descent should be the children of the parent, either a farther or a mother who at the child's birth is a Namibian citizen. The minor child in question meets this requirement.

Held that: It is not disputed that the applicant is a Namibian citizen and is registered on the child's birth certificate as a parent to the minor child. The applicant thus meets the requirements of the legislative scheme in Namibia.

Held further that: There is no reference in the Constitution to biology or genetics in matters pertaining to citizenship by descent. If the respondent's stance is accepted, children adopted outside Namibia by Namibian citizens would not be entitled to citizenship by descent, which would be anomalous.

Held: that the Constitution requires the father or mother of the child to be a Namibian citizen, this does not exclude a parent in a generic sense.

Held that: The Court must give a purposive interpretation to the Constitution, one which will be elastic, flexible and adaptive to the changing norms and practices in society.

Held further that: Namibian courts recognise judgments and orders issued by foreign courts and more particularly South African, because of historical ties. The authenticity of the court order by the South African court has not been challenged, and in the circumstances, it should be given effect to as it does not appear to violate Namibia's public policy or Namibian laws.

Held: That it is in the best interests of the minor child to live with his parents and take up citizenship of the applicant by descent. It is improper for the respondent to create a dispute within the applicants' family regarding issues of paternity when such dispute does not exist.

Held that: The scheme of the Citizenship Act, read *in tandem* with the Constitution, does not require a biological link between the parent and the child. If that were the position, children adopted by Namibian citizens outside the country may be refused citizenship by descent.

Held further that: the Minister's reliance on the provisions of the Child Care Protection Act, 2015, are misplaced because they are not designed to deal with issues of acquisition of citizenship.

Held: that Namibia, by virtue of Article 144 of the Namibian Constitution, is required to give effect to international agreements to which she is a signatory or which she has ratified. The court, when dealing with such matters, cannot close its eyes to the international instruments to which Namibia is a State party. Thus, effect should be given to the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child in the current matter.

Held that: The had the child having been born pursuant to a surrogacy agreement to a hetero-sexual couple, the respondent would not have required the applicant to undergo DNA tests to prove the paternity of the child.

Held further that: Article 10 of the Constitution deals with the rights to equality and non-discrimination. In this instance the respondents' actions are discriminatory and cannot be allowed to prevail.

The court found that the respondent's counter application was actuated or informed by discrimination and should fail. The court held that the minor child was eligible to be granted Namibian citizenship by descent. The court accordingly ordered the Minister to grant citizenship by descent to the minor child.

ORDER

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1. The minor child YDL, born on [redacted] 2019, is hereby declared to be a Namibian citizen by descent, as envisaged by Article 4(2)(a) of the Constitution of the Republic of Namibia.

2. The Minister of Home Affairs and Immigration is within 30 days of issue of this order, directed to issue the said minor child YDL a certificate of Namibian citizenship by descent.
3. The counter-application launched by the Minister of Home Affairs and Immigration to compel the Applicant to submit to a DNA test, to prove the paternity of the minor child YDL, is hereby dismissed.
4. The Respondent is ordered to pay the costs of the application.
5. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Introduction

[1] Society has the penchant, as it changes, develops and grows, to throw up a vagary of unprecedented situations, which call upon the courts to extend the reaches of the law, where appropriate and in ground-breaking decisions in some cases, to chart a new legal course which culminates in the court fashioning an order that accords with the justice of the case. In this sense, the court, marries, the law with the notion of justice. This case is no different.

[2] It is my experience that it is not always the case that the law and justice coincide. They may live in the same yard but certainly in different houses. The main quest for the court must be to bring both the law and justice to live together under one roof, if not in the same room. It is in that convivial atmosphere that the full and effectual enjoyment of the rights and freedoms accorded to citizens and other people by the Supreme law of the Land thrives.

[3] At issue, and requiring determination is the eligibility of a child born through a medium that is known as surrogacy, in South Africa, to be accorded Namibian citizenship by descent, in terms of the Constitution and the laws of Namibia. The Minister, the respondent in this case, is vehemently opposed to the relief sought and has moved the court to throw out the main application with both hands as it were.

[4] The Minister did not end there. He filed a counter-application in terms of which he seeks an order that the applicant subjects himself, together with the minor child, (who shall, in order to protect his identity, be referred to as 'YDL' in this judgment), to DNA tests in order to determine the child's paternity. It would seem that the Minister's position is informed by the notorious fact that the applicant is in a same-sex marriage with Mr. C[redacted], who is of Mexican extraction.

[5] The Minister adopts the position that it would be improper for him and the court to grant the order sought by the applicant, who is Namibian, because a possibility exists that the gamete that fertilized the egg of the surrogate mother, may be that of the applicant's spouse, who at the moment, is not a Namibian citizen as his matter involving Namibian citizenship is awaiting judgment in the Supreme Court. The Minister's counter application is accordingly geared to eliminate the possibility of his office granting citizenship by descent when a possibility exists that the 'father' to the child, may not be a Namibian citizen.

[6] The applicant, for his part, has come out guns blazing in opposition to the Minister's counter-application. His position is that the approach to this matter by the Minister, is discriminatory and is adopted for no other reason than that he is in a same sex marriage. Had his spouse been female, the Minister's attitude and approach would have been different, contends the applicant.

[7] The task of the court, in view of the foregoing, is to determine who between the two protagonists, is on the correct side of the law. Both parties, from their submissions, which shall be adverted to briefly below, proclaim that the court should find for them. It is

unusual for the court to return what in footballing parlance is referred to as a 'draw', where the spoils are shared, as it were. As matters stand, one of the parties will have to sustain defeat in this court, reserving the right, if dissatisfied, to escalate the matter to the Supreme Court.

Background

[8] As intimated above, the applicant is a Namibian male who is in the employ of the Namibia University of Science and Technology. He resides in Windhoek. Whilst abroad on studies in the Netherlands, he met Mr. E[redacted] G[redacted] C[redacted]-D[redacted], to whom he was attracted. The relationship appears to have grown in leaps and bounds as the parties eventually contracted a civil rights marriage in Upington, South Africa, on [redacted] 2014.

[9] Desirous of starting a family, the spouses decided to go to South Africa, where they obtained an order from the Western Cape Division of the High Court of South Africa, which endorsed a surrogacy arrangement with a South African woman. I will return to the details of the said arrangement in due course.

[10] On [redacted] 2019, the surrogate mother gave birth to YDL in a hospital in South Africa and he was issued with a South African birth certificate. The applicant was recorded on the said certificate as a 'parent' to YDL. The applicant contacted the Namibian High Commission in Pretoria, South Africa and that office facilitated the issue of a travel document to enable the applicant to come to Namibia with YDL.

[11] On 28 March 2019, the applicant made an application to the Ministry of Home Affairs and Immigration for the granting of Namibian citizenship by descent to YDL. The application was based on the fact that his father, the applicant, is a Namibian citizen by birth. The resolution of the matter delayed as the Minister considered it 'complex' and required legal advice from the Attorney-General.

[12] The Ministry, by letter dated 27 January 2020, wrote to the applicant, after this application had been launched and suggested that the matter be settled out of court 'on condition that the applicant provides proof that the child is the biological child of the Namibian', as opposed to the Mexican, it must be added.[1] Needless to say, the suggestion by the Minister was rejected out of hand and the applicant persisted in the present application.

[13] The Minister opposed the application and also filed a counter-application. In the notice of motion, the Minister applied for an order subjecting the applicant to a DNA test in order to establish the paternity of the minor child. This counter-application was opposed by the applicant. He filed opposing papers, mainly claiming that the Minister is discriminating against him because of his sexual orientation and that had he been in a hetero-sexual relationship, the Minister would have handled the matter differently and would not have applied for the outlandish order he sought.

The applicant's case

[14] It is fair to say that on a proper reading, the applicant's case is premised on the Constitution. In this regard, the applicant claims that the refusal to grant the minor child Namibian citizenship by descent, is not only unlawful, but also contrary to the provisions of the Namibian Constitution.

[15] The mainstay of the applicant's argument is to be found in the provisions of Art 4(2) of the Constitution, which regulate citizenship by descent. The applicant argues that YDL was born outside Namibia to a Namibian father and YDL therefor eminently qualifies to be granted citizenship by descent. The applicant further contends that there is no dispute regarding the validity of the duly authenticated birth certificate issued to the minor child by the South African authorities. It refers to the applicant as a 'parent' to the minor child.

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[1] Letter marked annexure FK 1, p. 41 of the record.

[16] The applicant further relies on the surrogacy arrangement that was concluded in terms of South African Law. In this regard, the Western Cape Division of the High Court confirmed the surrogacy arrangement by its order dated 28 November 2017.[2] The order, *inter alia* declared the children born from the said arrangement to be those of the applicant and his spouse and that the applicant and his spouse shall have full parental rights and responsibilities for the children born from the said arrangement.

[17] It is the applicant's contention that the attitude adopted by the Minister serves to violate the rights of the minor child in terms of equality before the law and the right not to be discriminated against. Furthermore, the applicant contended that the Minister's stance regarding the compulsory taking of a DNA test, violated the child's and the applicant's right to dignity.

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[2] The surrogate motherhood agreement entered into between the parties and annexed hereto as "A" is confirmed; 2. The child/children born of third applicant, in accordance with the surrogate motherhood agreement entered into between the parties, is/are for all intents and purposes the child/children of first and second applicants from the moment of the birth of the child/children concerned; 3. First and second applicants shall have full parental rights and responsibilities in respect of the child/children born of such surrogate motherhood agreement, whether in terms of the common law of the Children's Act, 38 of 2005 (the Children's Act) (and any amendments thereto) and/or any other statute which may be promulgated or has been promulgated dealing with parental rights and responsibilities; 4. No adoption procedures are required in respect of the child/children to be born of the surrogate motherhood agreement in terms of section 297(1)(a) of the Children's Act, together with the provisions of paragraphs 2 and 3; 5. The registration of birth of the child/children as required in chapter II of the Births and Deaths Registration Act, 51 of 1992, shall be effected such that the first and second applicants shall be registered as the parents of the child/children respectively, as from date of birth, given 9 annex FK 3 on record page 44-62 10 record page 63-65 8 that first and second applicants are the parents of such child/children; 6. Third and fourth applicants shall have no rights of parenthood or care in respect of the child/children born of the surrogate motherhood agreement, no rights of contact with such child/children and the child/children will have no claim for maintenance or of succession against the third and fourth applicants or any other relatives;"

[18] The applicant, in this regard, called upon the court to turn its face against the stance adopted by the Minister and grant the declarator sought and consequently issue the order compelling the Minister to grant citizenship to the minor child. Much store was laid, in the argument advanced above, on the Constitution of this Republic, together with various international instruments and treaties to which Namibia is a State party, such as the African Charter on the Rights and Welfare of the Child and the United Nations Convention on the Rights of the Child.

The Minister's case

[19] The Minister, for his part, took a stance diametrically opposed to that of the applicant. The Minister relied for his stance regarding the DNA test on the provisions of s 111(1) of the Child Care Protection Act, ('the CCPA').[3] It was his contention that there is no certainty regarding the male gamete involved in the fertilization resulting in the birth of the child. Because the applicant and his spouse were donors, it was necessary that there is scientific evidence to prove that it was the applicant's gamete that fertilised the surrogate mother's egg and citizenship by descent could then follow.

[20] It was the respondent's case that it was in the interests of the minor child to conduct the paternity test in this matter and that this court, as the upper guardian of all minors should remove the uncertainty engulfing the paternity of the minor child. This, the Minister submitted, this court was allowed to do by the provisions of s 10 of the Children's Status Act, No. 6 of 2006.

[21] The Minister flatly denied that there was any discrimination perpetrated against the applicant or the minor child by compelling them to undergo a DNA test. It is only once that test is done that the possibility of granting Namibian citizenship to a non-Namibian would be eliminated, it was further argued on the Minister's behalf. Lastly, the Minister poured scorn over the allegations that his stance infringed on the fundamental rights of the

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[3]Children Care Protection Act, Act No. 3 of 2015.

applicant and the minor child, especially the rights against discrimination, dignity and equality before the law.

Determination

[22] As will be seen above, the primary question to be determined is whether the applicant is entitled to the relief that he seeks, namely, that the minor child is, in terms of the law applicable, entitled to be granted Namibian citizenship by descent. The second question to be determined is whether the respondent is entitled to the order calling upon the applicant and the minor child to submit themselves to a DNA test, and whether the issuance of that order does not serve to violate the applicant and the minor child's fundamental rights to dignity, equality before the law and against discrimination.

[23] I intend to deal with the first question first. This will also entail dealing with a sub-question, namely, whether the applicant must be biologically related to the minor child in order for him at law, to be able to confer, as it were, citizenship by descent to the minor child. I turn to deal with the first question.

Citizenship by descent

[24] The relevant provision that deals with the issue of citizenship by descent, is to be found in Art 4(2) of the Constitution. The said provision reads as follows:

> 'The following persons shall be citizens of Namibia by descent:
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> (a) those who are not Namibian citizens under Sub-Article (1) hereof and whose fathers or mothers at the time of birth of such persons are citizens of Namibia or whose fathers or mothers would have qualified for Namibian citizenship by birth under Sub-Article (1) hereof, if this Constitution had been in force at the time; and
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> (b) who comply with such requirements as to registration of citizenship as may be required by Act of Parliament: provided that nothing in this Constitution shall preclude Parliament from enacting legislation which requires the birth of such persons born after the date of Independence to be registered within a specific time either in Namibia or at an embassy, consulate or office of a trade representative of the Government of Namibia.'

[25] It is clear that the Constitution, in Art 4(2)(b), above, specifically recognised the right of Parliament to promulgate legislation to deal with requirements for registration of persons born after the date of Independence as citizens of Namibia. Parliament indeed did so when it promulgated the Citizenship Act.[4] The said Act deals with the concept of citizenship by descent in the following manner at s 4(1):

'Subject to the provisions of subsection (2), a person who complies with the requirements and conditions for the acquisition of citizenship by descent upon registration of his or her citizenship as such in the prescribed manner and the Minister may upon application made at any time in the prescribed form by that person, cause a certificate to be issued to that person.'

[26] In s 4(2), the Citizenship Act provides the following:

'A person born outside Namibia on or after the date of Independence shall be deemed to have complied with the requirements of registration under subsection (1), if –

(i) such person's birth is registered at any Namibian diplomatic mission, if there is one, or in default thereof, any Namibian consular mission . . . in accordance with the provisions of any law in force in Namibia regulating the registration of births; or

(ii) such person has entered Namibia and his or her birth is, within one year after having entered Namibia or such longer period as the Minister may in the special circumstances approve, registered in Namibia in the prescribed manner.'

[27] What is the upshot of these requirements above? It is to confer Namibian citizenship to persons who are not Namibian citizens by birth but whose parents, namely either their fathers or mothers are, at the time of the said person's birth (i.e., the child), citizens of Namibia. It means that the persons seeking to be granted Namibian citizenship should, although born outside Namibia, be the children of a parent, either a father or mother, who is, at the time of the child's birth, a Namibian citizen.

[28] In addition to the above requirement, the person seeking citizenship by descent should comply with requirements promulgated in an Act of Parliament regarding

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[4] Citizenship Act, Act No. 14 of 1990.

registration of citizens. In this regard, the Act of Parliament may prescribe, that persons, born after the independence of Namibia may be registered within a prescribed period of time.

[29] In terms of s 4(1) of the Citizenship Act, a person who complies with the requirements and conditions for acquiring citizenship by descent, meaning, one who falls within the rubric of Art 4(2) of the Constitution, shall become a Namibian citizen by registration in a manner prescribed by the Minister. Once the requirements have been met, the Minister may then issue a certificate of registration to that person.

[30] I am of the considered view that the minor child YDL in this matter meets the requirements of Art 4(2) of the Constitution. I say so for the reason that he was born outside Namibia, in South Africa. His birth certificate, which was duly authenticated, shows this fact indubitably. It has not been impeached in any manner, meaningful or otherwise, by the Minister.

[31] Secondly, it does not appear to be the subject of any disputation that the applicant in this matter is a Namibian citizen. He is registered in the birth certificate as a parent to the child. He states that he is the father of the minor child, which qualifies him to be regarded as a parent to the said minor child in line with Article 4(2) of the Constitution. It is in that connection that he applied for the registration of the minor child for citizenship by descent to the Ministry. In terms of the law, a person who is either a father or mother qualifies to make the application.

[32] In normal parlance, such a person, whether male or female, qualifies to be regarded as a parent. It is that appellation that has been employed by the South African authorities in describing the status of the applicant and his partner in relation to the child. It cannot make sense nor be in line with logic, to insist that the person who applies must be either a mother or father, as parent includes both. In any event, the applicant describes himself in the papers as father to the minor child, which in my view, meets the requirements of the legislative scheme in Namibia.

[33] It is true that there is no reference in the Constitution to biology or genetics in matters pertaining to citizenship by descent. The position adopted by the respondent in this matter, if taken to its logical conclusions, may have dire and possibly unintended consequences for many a Namibian born parent and a child applicant for Namibian citizenship by descent.

[34] I say so because if the Minister's apparent insistence on a biological connection were accepted, children adopted outside Namibia by Namibian citizens would not be entitled to citizenship by descent. This anomalous result would equally attend to children conceived and born outside Namibia, to a single Namibian parent via vitro fertilisation, employing a double donation. Similar results would obtain in respect of children conceived and born outside Namibia to a heterosexual couple via vitro fertilization, employing a double donation.

[35] I am of the considered opinion that the Constitution requires the father or mother to be a Namibian citizen. That does not exclude a parent in the generic sense. In this connection, the refrain to constitutional interpretation must not be lost to us, namely, that the court must give a purposive interpretation to the Constitution and one that will be elastic, flexible and adaptive to changing norms, beliefs and practices in society. It would accordingly be a travesty to give the words in the Constitution a narrow and pedantic interpretation.

[36] In this connection, it would be apposite to borrow from the words expressed in *Swart v Minister of Home Affairs*[5] namely that, 'One should be careful not to interpret the Constitution like any regulatory statute – and certainly not like a last will and testament. Lest indeed they become one . . . Constitutions are, for one thing, more important than most other laws. They form the foundation of all laws. They are intended to be much longer-lived than ordinary legislation, continuing to operate in social, economic and political conditions unimagined when they were first formulated. One source of its

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[5] *Swart v Minister of Home Affairs* 1997 NR 368 at 273 C-F.

longevity is the difficulty involved in amending Constitutions . . . Finally, Constitutions tend to employ less precise language, requiring greater judicial elaboration than other legislation . . . The Constitution is an intentionally incomplete, often deliberately indeterminate structure for the participatory evolution of political ideas and governmental practices.'

[37] It must be pertinently recalled that the surrogacy arrangement in this matter received the judicial imprimatur of the Western Cape Division of the High Court. In terms of that order, the child in question is 'for all intents and purposes the child/children of the first and second applicant from the moment of the birth of the child/children concerned'. Furthermore, the court also ordered that the applicant and his spouse would have full parental rights and responsibilities over the child.

[38] I am of the view that in the circumstances, that it would be contrary to the principle of comity of states for this court to indulge the Minister by mounting a challenge to the birth certificate issued to the child or the surrogacy arrangement, which obtained judicial endorsement. Namibian courts do recognise judgments and orders issued by foreign courts and South Africa is one of those states. The authenticity of the court order by the South African court has not been challenged and I am of the view that it should, in the circumstances, be given effect to as it does not appear to violate Namibia's public policy or laws in any manner whatsoever. That was, to my understanding, not the Minister's argument or contention in his papers.

[39] It would be a travesty of justice if the law, in this day and age, fails, because of the advancement of medicine and other technology, to take into account and to provide solace and justice to those who yearn for them. The process of birth via surrogacy, is an old phenomenon. As far as I am aware, it is not unlawful in Namibia and it would be a sad day for people, who employ the advancement of technology and methods of development, to be told that they cannot enjoy their rights and freedoms because the law has not kept pace with the level of development. The courts must step in and perform their sacred and constitutionally imposed duty to render justice to whom justice is due.

[40] It would, perhaps not be out of order, for the court, to refer to the timeless words that fell from the lips of the legendary Gubbay CJ, in *Zimnat Insurance Co. Ltd v Chawanda*[6], where the learned CJ spoke resoundingly about the need for the courts to chart new courses and in that trajectory, deliver justice to litigants. In that case, a woman, who had been living with the deceased in terms of an unregistered customary union, was declared entitled to sue for damages for loss of support. The law at the time, had been such that a customary law union was regarded as invalid and the court sought to bring the disparity in the treatment of similarly circumstanced women, to an abrupt end.

[41] The learned CJ expressed himself as follows:

'Law in a developing country cannot afford to remain static. It must undoubtedly be stable, for otherwise reliance upon it would be rendered impossible. But at the same time if the law is to be a living force it must be dynamic and accommodating to change. It must adapt itself to fluid economic and social norms and values and altering views of justice. If it fails to respond to those needs and is not based on human necessities and experience of the actual affairs of men rather than on philosophical notions, it will be cast off by the people because it will cease to serve any useful purpose. Therefore, the law must be constantly on the move, vigilant and flexible to current economic and social conditions. As that celebrated American jurist, Oliver Wendell Holmes, wrote on the opening page of his famous work, The Common Law:

"The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudice which Judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics".

Today the expectations amongst the people all over the world, and particularly in developing countries, are rising, and the judicial process has a vital role to play in moulding and developing

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[6] *Zimnat Insurance Co. Ltd v Chawanda* 1991 (2) SA 825 (ZS) at 832 C- 833 A.

the process of social change. The Judiciary can and must operate the law so as to fulfill the necessary role of effecting such development.

It sometimes happens that the goal of social and economic change is reached more quickly through legal development by the Judiciary than by the Legislature. This is because Judges have a certain amount of freedom or latitude in the process of interpretation and application of the law. They take part in the process of creation. Law-making is an inherent and inevitable part of the judicial process.

The opportunity to play a meaningful and constructive role in developing and moulding the law to make it accord with the interests of the country may present itself where a Judge is concerned with the application of the common law, even though there is a spate of judicial precedents which obstructs the taking of such a course. If Judges hold to their precedents too closely, they may well sacrifice fundamental principles of justice and fairness for which they stand. In a famous passage Lord Atkin, referring to judicial precedents said: "When these ghosts of the past stand in the path of justice clanking their medieval chains, the proper course is for the Judge to pass through undeterred."

[42] I endorse these remarks as pertinent and applicable in the instant case. The law must continue to be relevant to the people even in fast and eternally changing situations. Where people are compelled to seek redress outside the confines of the law, anarchy may well be the invited but unwelcome guest. The law must not lose its lustre. If it does, it will, like salt that has lost its saltiness, be thrown on the ground, to be trodden by women and men. That is a spectacle we can ill-afford in this great Nation.

The Minister's counter-application

[43] I find it opportune, at this moment, to deal with the Minister's stance regarding the counter-application. It would seem that the mainstay of the Minister's argument is to be found in s 111(1) of the Child Care Protection Act.[7] It is important that I point out that any

[7] Child Care Protection Act, Act No.3 of 2015.

reference and consideration of the CCPA is subject to the finding I make in paragraph [71] below, regarding the propriety of the Minister's reliance on the provisions of this Act.

[44] The said provision reads as follows:

'For the purpose of this section, - "artificial insemination" in relation to a woman means the introduction, other than by natural means of a female gamete or gametes into the internal reproductive organs of a woman for the purpose of reproduction, otherwise than in accordance with a surrogacy agreement.'

[45] It was Mr. Ncube's argument that in the instant case, there are two possible gametes that were at play in the conception of the minor child, namely that of the applicant or of his spouse. It was accordingly submitted that scientifically, only one male gamete is capable of causing conception and it is critical in this case to know whose gamete is the one that caused the conception of the child YDL.

[46] The court was referred by Mr. Ncube to a case of *LB v YD*[8]. In that case, the applicant and the respondent, who were unmarried, were involved in a relationship between February 2006 and April 2007. The respondent moved out of the common home in March 2007 and later discovered that she was with child. The child was subsequently born in November 2007, seven months after the relationship with the applicant had ended. In April 2007, the respondent became romantically involved with another man, a previous boyfriend. She married him after her relationship with the applicant had ended.

[47] The respondent was certain in her mind that the applicant was the father of the child. The applicant was at the beginning not sure and doubted that he could be the father of the child. He later changed his mind and became certain that he was the father of the child. He wrote a letter to the respondent's attorneys and intimated that he had decided to subject himself and the respondent to a paternity test to put the matter of paternity to

[8] *LB v YD* 2009 (5) SA 479 (GNP).

rest. The respondent refused to subject herself to the test and stated that it was not in the best interests of the child to do so.

[48] In the face of the refusal by the respondent, the applicant launched an application to compel the applicant to undergo the test. The learned judge (Murphy J), who dealt with the matter concluded that the High Court, as the upper guardian of all minors, should allow the discovery of the truth to prevail over the idea that bodily integrity should be respected. He held that it would be in the interests of the minor child to remove any doubts and uncertainties that existed over the paternity in that particular case by employing the best evidence available.

[49] I am of the considered view that the facts of that case are clearly distinguishable from those in the instant case. In that case, there was clearly a question and a nagging one at that, regarding the paternity of the child and the circumstances which led to the application and the decision, are quite understandable. It would, in those circumstances, also benefit the minor child if paternity is put beyond dispute as opposed to a situation where the minor child grows in darkness regarding the identity of the father. Therefore, parentage is not in issue in this matter and the best interests of the minor child are well catered for.

[50] In the instant case, there is no dispute between the applicant and his partner as to whose gamete could have caused the conception. This is an issue that is raised by the Minister and it is not clear as to why it should be regarded as in the best interests of the minor child for the Minister to do so. In point of fact, it is in the minor child's best interests to live with his parents and as desired in this case, take up citizenship of the applicant by descent.

[51] The reference to *LNL v LTL*[9] while no doubt correct on the facts, cannot be extended to apply in this case. It was held therein that s 9 of the Children Status Act[10]

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[9] *LNL v LTL* (Case No. I 2406/2013) [2014] NAHCMD 309 (17 October 2014).

[10] Children Status Act, Act No. 6 of 2006.

casts a presumption of paternity on a father and that the father has a duty to lay a foundation in the pleadings in order to reverse the presumption. The facts in this case are different. There is no dispute *inter partes* regarding the paternity of the child. The South African court is clear on the question of parentage of the children born from the surrogacy arrangement.

[52] It accordingly appears to me improper that the Minister should create a dispute and friction within the applicant's family regarding issues of paternity, when such disputes do not exist. In respect of the children involved in the other cases discussed above, it may well have been necessary and in their best interests to know who the father was but this case is on a different footing as there is no contestation regarding the issue of paternity. The court order, which was issued by the South African court and with the agreement of all the parties involved, puts paid to any question of paternity and this should signal the end of the matter.

[53] It might be a matter of interest for the Minister to know who fathered the minor child but that does not elevate the desire to know, to the position where it can be said it is in the best interests of the minor child to do so. While on this issue, it is important to mention that when one has regard to the scheme of the Act, read *in tandem* with the Constitution, there is no requirement that there should be a biological link between the parent and the child. If that had been the case, then children who are adopted may be refused citizenship by descent, as mentioned earlier.

[54] Whilst on this issue, it may be necessary to also refer to the provisions of s 95 of the Child Care and Protection Act.[11] I again do so expressly subject to the finding that I make in para [71] below, regarding the propriety of the Minister placing reliance on the provisions of this Act in support of his case.

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[11] Child Care and Protection Act, Act No. 3 of 2015.

[55] This is a provision that Mr. Ncube referred to earlier in related proceedings but did not refer to it in the instant matter. The said provision is entitled, 'Presumption on refusal to submit to scientific tests' and it provides the following:

'95. (1) At any legal proceeding at which the parentage of any person has been put in issue, the refusal by either party –

(a) to submit himself or herself; or

(b) to cause any child over whom he or she has parental authority to be submitted,

to any physical procedure which is required to carry out scientific tests relating to the parentage of the person in question, must be presumed, until the contrary is proved, to be aimed at concealing the truth concerning the parentage of that person.

(2) Despite subsection (1), the High Court as the upper guardian of all children has the power to order that a child, a parent, a putative parent or any potential blood relative of the child be submitted to a physical procedure referred to in subsection (1) if this is in the opinion of that court in the best interests of the child.

(3) To the extent that this section authorises the interference with any individual's rights to privacy and bodily integrity, it is justified by the right of children to know their parents in terms of Sub-Article (1) of Article 14 of the Namibian Constitution.'

[56] The provision raises a presumption that any person who refuses to submit himself or herself to a scientific procedure to determine the issue of parentage of any child, seeks to conceal the truth regarding the paternity of the child in question. It further authorises this court, in its capacity as the upper guardian of all children, when satisfied that it is in the best interests of the child, to order the child, parent or other person relevant, to submit to a scientific procedure to determine the paternity.

[57] Lastly, the section records that a party may not refuse to submit to a scientific procedure to determine paternity, if so ordered, on the basis of the rights to privacy and bodily integrity. In this connection, the Act regards the scientific procedure a justified interference with the rights to privacy and bodily integrity and gives primacy in this regard, to the child's right to know his or her parent.

[58] It would appear to me that the refrain in this provision, and which informs the drastic step to compel a person to himself or herself submit or cause a child to be submitted to a scientific procedure to determine parentage of the child, is the best interests of the child concerned. This best interest of the child has been regarded so fundamental as to justify the interference with the right to privacy and bodily integrity of a person affected thereby.

[59] I am of the considered opinion that in this matter, no compelling case has been made out by the Minister that would justify the interference with the rights of the applicant, his partner and the minor child YDL. There is no dispute between the applicant and his partner regarding the paternity of the child, nor can it be said in fairness that the child has an issue at this stage. It must not be forgotten that the birth certificate stipulates the positions and responsibilities of the applicant and his partner regarding the minor child.

[60] When one has proper regard to the provision, it comes into play in instances where, as in the *LB v YD* case (*supra*), the parties thereto have a dispute or lack of necessary clarity regarding the issue of parentage of a child. In that setting, it is clearly in that child's best interest to know who the father is, especially in circumstances where issues of maintenance and parenting may loom large in the future, including the need to form a bond with the biological father. In the instant case, the applicant and his partner are in a marriage solemnized in South Africa and there is no dispute between them regarding the issue of paternity, no less because of the order of the Western Cape High Court.

[61] It would appear that properly interpreted, the provision in question, together with that in s 93 of the CCPA, to which Ms. Katjipuka, for the applicant, referred, are invoked in circumstances where the paternity of a child has not yet been established or where it has been acknowledged subject to a dispute to confirm or disprove the allegation of paternity. The CCPA is not, when properly considered, a piece of legislation intended to apply to the question of the granting of citizenship by descent to children born to Namibian parents outside the jurisdiction.

[62] I am accordingly of the considered view that in the peculiar circumstances of this case, the court is not persuaded that it is necessary to compel any of the parties to submit to the scientific procedure of a DNA analysis. This is because there is nothing that suggests that it is in the best interests of the minor child to do so. For the court to compel the parties to undergo a DNA test would, in my view, not meet the stringent test that justifies the interference with the right to bodily integrity and privacy. It is only in serious and deserving cases that the court should resort to that invasive measure. The instant case does not meet that high standard.

[63] It is important to reiterate that the Act does not refer to the interests of the child. The interest has been deliberately qualified by the Legislature to be 'the best interests of the child'. In this regard, it is not just a consideration of the interests of a child from an isolated and exclusionist perspective. It must be wide and all encompassing, weighing in the process the sometimes diverse and divergent interests of the minor child. At the end of the day, it becomes a value judgment as to what is not just in the interests of the minor child, but in that minor child's best interests, that must carry the day. The provisions of s 3 of the CCPA, in this regard, are useful.[12]

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[12] (1) This Act must be interpreted and applied so that in all matters concerning the care, protection and well-being of a child arising under this Act or under any proceedings, actions and decisions by an organ of state in any matter concerning a child or children in general, the best interests of the child concerned is the paramount consideration. (2) In determining the best interests of the child, the following factors must be taken into consideration, where relevant - (a) the child's age, maturity and stage of development, sex, background and any other relevant characteristics of the child; (b) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development; (c) views or opinions expressed by the child with due regard to the child's age, maturity and stage of development; (d) the right of the child to know and be cared for by both parents, unless his or her rights are persistently abused by either or both parents or continued contact with either parent or both parents would be detrimental to the child's well-being; (e) the nature of the personal relationship between the child and other significant persons in the child's life, including each of the child's parents, any relevant family member, any other care-giver of the child or any other relevant person; (f) the attitude of each of the child's parents towards the child and towards the exercise of parental responsibilities and rights in respect of the child; (g) the capacity of the parents or any specific parent or of any other care-giver or person to provide for the needs of the child, including emotional and intellectual needs; (h) the desirability of keeping siblings together; (i) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from - (i) both or either of the parents; or Republic of Namibia 18 Annotated Statutes Child Care and Protection Act 3 of 2015 (ii) any brother or sister or other child or any other care-giver or person, with whom the child has been living; (j) the practical difficulty and expense of a child having contact with the parents or any specific parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents or any specific parent on a regular basis;

[64] Whilst still on the Child Care Protection Act, it is important to note that the Act is designed, amongst other things, to give effect not only to the Constitution of Namibia, but also to international agreements and treaties, which are binding on Namibia. In particular, it is also geared to give effect to the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. This means that the court is at large, and actually obliged, in dealing with these matters, not to close its eyes to the international instruments to which Namibia is a State party and which are binding on Namibia as envisaged in Art. 144, of the Constitution. The court is, in my view, obliged to apply them as they form part of Namibian law.

[65] It would appear to me, in the premises, that the unusual circumstances of YDL's birth have given rise to the attitude the Minister has adopted in challenging the application. Had he been born, even in a surrogacy arrangement, to a hetero-sexual couple, I have no doubt in my mind that the questions the court is answering at the applicant's behest, would not even have been conceived, let alone expressed and indeed escalated to the level of court proceedings.

[66] In this regard, Art 10 of our Constitution, deals with the right to equality and not to be discriminated against. In this case, I cannot help but note that the insidious attitude of discrimination appears to rear its ugly head in this matter. It must be chopped off, even ruthlessly, because it does not resonate with the vision of the Founding Mothers and Fathers of this Nation, who conceived Namibia as amongst others, to be a secular State,

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(k) the need for the child to maintain a connection with his or her family, extended family, culture or tradition; (l) any disability that the child may have; (m) any chronic illness from which the child may suffer; (n) the need for the child to be brought up within a stable family environment and where this is not possible in an environment resembling as closely as possible a caring family environment; (o) the need to protect the child from any physical or psychological harm that may be caused by - (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation; (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person; or (iii) any family violence involving the child or a family member of the child; (p) the need to avoid or minimise further legal or administrative proceedings in relation to the child; and (q) any other relevant factor.

founded on the rule of law and justice for all.[13] I may add that the 'for all' applies to all people in Namibia, regardless of colour, gender, sexual orientation, etc.

[67] The court spoke with authority in *Mueller v President of the Republic of Namibia and Another*[14] when it stated the following, regarding discrimination:

'In regard to the Namibian Constitution the recognition of the equal worth of all human beings is at the root of the provisions thereof. In its preamble, the Constitution starts off with recognition of the inherent dignity of all members of the human family and expresses the desire to promote amongst all the dignity of the individual and this is further echoed and implemented in the various articles in Chap 3, and others, of the Constitution . . . the words "discriminate against" in art 10(2) were intended to refer to the pejorative meaning of the word "discriminate", and not to its benign meaning. This stems from the fact that the grounds which are enumerated in art 10(2) are all grounds which in the past were singled out for discrimination and which were based on personal traits where the equal worth of all human beings and their dignity was negated. This is the history against which the drafters of the Constitution formulated the provisions of the Constitution and more particularly art 10 is not only to prevent further discrimination on these grounds but also to eliminate discrimination, which occurred in the past. To that extent, and where art 23 does not cover the situation, art 10 should not become an obstacle in the elimination of discrimination.'

[68] Of course the Minister denied that his attitude and approach in this matter are actuated or informed by discrimination. It is sometimes the actions rather than the words that determine whether or not there is discrimination. The platitudes sometimes count for very little in this regard. As mentioned earlier, had the circumstances of the minor child been different, namely he was born to a heterosexual couple, this is a case that would not have been before court. It would have been resolved by the Minister in his office without further ado.

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[13] Article 1(1) of the Constitution.

[14] *Mueller v President of the Republic of Namibia and Another* 1999 NR 190 at 202 C-F.

[69] I am also of the considered view that the counter-application was actuated by discrimination as well. Because I have found that the counter-application does not meet the requisites in s 95 of the CCPA, it follows that the compulsory subjection of the applicant to a scientific procedure, as contended by the applicant, violates his right to dignity, in addition to the rights mentioned in s 95 of the CCPA, namely, privacy and bodily integrity. It must be demeaning and ignominious for a parent, who has no issue or dispute regarding the paternity of his or her child, to be forced to undergo a scientific procedure based on grounds that violate that person's constitutionally enshrined rights. The Minister's curiosity should not be a basis for violating human rights, particularly those of a vulnerable child.

[70] As the Constitutional Court of South Africa poignantly reminds us in *AB And Another v Minister of Social Development*[15] ' . . . it cannot be gainsaid that inherent dignity is at the heart of individual rights, including the right to equality. It is also true that equality will mean nothing if it does not recognise the person's equal worth as a human being.' These are imperatives that we as a society, should always internalise and be careful not to be found wanting.

Namibia's international obligations

[71] Before dealing with the issue of Namibia's international obligations, it will be plain that the Minister, in support of his case, referred to some provisions of the CCPA. I am uncertain whether the Minister is correct in doing so. I say this for the reason that the only instrument that was promulgated by Parliament to deal with issues of citizenship in Namibia, is the Citizenship Act. There is no logical link, in my view, that requires the invocation of the CCPA in this matter because that Act was promulgated to deal with issues that have nothing to do with the question of citizenship.

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[15] *AB And Another v Minister of Social Development* CCT155/15) [2016] ZACC 43; 2017 (3) BCLR 267 (CC); 2017 (3) SA 570 (CC) (29 November 2016).

[72] In this particular regard, it must be pointed out that the CCPA records that 'Minister' in that Act, refers to the Minister responsible for the protection of children. That does not appear to be the Minister of Home Affairs, the respondent in this matter. The reliance on the CCPA is, for the above reasons, in my respectful view, misplaced. To the extent that I may be incorrect on this score, I proceed to consider the Minister's submissions below.

[73] Article 144 of the Constitution, reads as follows:

'Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.'

[74] I do not want to entangle myself in the debate whether Namibia is a monist State or not. Monist states are those in which international treaties to which the State is signatory, or subsequently ratifies, become binding on that State, without the need to have them domesticated by national legislation. Countries, like South Africa, Botswana and Lesotho, in the Region, are, on the other hand, regarded as dualist. This is because in addition to signing or ratifying international instruments and treaties, a local process to make them binding, becomes necessary and this is achieved through legislation, which is referred to as domestication of the treaty or instrument concerned.

[75] It is unnecessary to deal with the monist and dualist question in this matter. I say so for the reason that it is plain from the preamble of the CCPA that two international treaties, in issue in this case, namely, the United Nations Convention on the Rights of a Child and the African Charter on the Rights of a Child are binding on Namibia. The CCPA was promulgated, in part, to give effect to these two binding international instruments.

[76] There can, in the circumstances, be no question that the relevant provisions of those instruments are binding on Namibia, and the Government is compelled, in

formulating policy positions and dealing with relevant matters, to consider and treat them as forming an integral part of Namibian law.

[77] In this regard, the African Charter, referred to above, records that 'every child shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in this Charter irrespective of the child's parents or his parent's or legal guardian's race, ethnic group, colour, race, sex, language, religion, political or other national and social origin, fortune, birth or other status.'[16]

[78] I am of the considered view that the approach of the Minister in this matter, although primarily addressed to the applicant, clearly and obviously, affects the rights and interests of the minor child. It affects the said child in respects that are recorded in the African Charter as those to which he is entitled. This is and should be so regardless of the manner and circumstances of that child's birth. The status of his or her parent, which in my view, would include sexual orientation, should not matter, if this protection is to be afforded to every child.

[79] Pertinent in this connection, are the comments of the African Commission on Human and Peoples' Rights in 2014. It noted with alarm that 'acts of violence, discrimination and other human rights violations continue to be committed on individuals in many parts of Africa because of their actual or imputed sexual orientation or gender identity'. Namibia cannot and should not be mentioned in the same breath and associated with such violations.

[80] There can be no dispute as well that the Minister's stance in this case, interferes with the child's right to acquire nationality, protected under Article 6(3) of the African Charter. A Namibian parent has approached the Minister to register this child in order for the latter, to receive Namibian citizenship by descent. It would be very anomalous and insensitive in this case, to visit, whatever misgivings or disapproval the ministerial policy

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[16] Article 3 of the African Charter on the Rights and Welfare of the Child.

may have regarding the parents, to the innocent child. In this instance, the child would not be entitled to acquire the citizenship of his parent, which would interfere with the child's right to acquire nationality.

[81] Children, because of their ages, are not able to apply for citizenship on their own but that should not in any way, shape or form, affect their right to acquire nationality. It is grossly unfair to deny them citizenship which they otherwise qualify for because of the nature and circumstances of their birth, or the sexual preference of their parents and over which the children can exercise no control whatsoever.

[82] The Minister's counter-application, as shown above, appears to run counter to the rights in Art 10 of the African Charter. This article protects the child from arbitrary or unlawful interference with the child's family, home or correspondence, among others. It guarantees a child's right to protection against these interferences. The effect of the counter-application, in my considered view, has the ominous and deleterious effect of interfering with the child's family and home and this is plain from the aspects dealing with the CCPA in particular.

[83] The United Nations Convention on the Rights of a Child, which boasts of being the most ratified human rights treaty in history, also has provisions that deal with non-discrimination - (Art 2); the best interests of the child – Art 3; the right to nationality – Art 7; the right to preserve nationality – Art 8; the right not to be separated from parents – Art 9 and the right to privacy – Art 16. All these rights are implicated in the current case. In particular, the Minister's stance in this matter, placed the applicant and the child on the precipice of being separated, contrary to Article 9 of the Convention.

[84] In dealing with the best interests of the child, the Committee on the Rights of the Child, commented as follows:[17]

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[17] General Comment No. 14 (2013).

'Article 3(1) is one of the four general principles of the Convention for interpreting and implementing all the rights of the child, and is a dynamic concept that requires an assessment appropriate to the specific context . . . The concept of the child's best interest is aimed at ensuring both the full and effective enjoyment of all the rights recognised in the Convention and the holistic development of the child . . . The full application of the concept of the child's best interests requires the development of a rights-based approach, engaging all actors, to secure the holistic physical, psychological, moral and spiritual integrity of the child and promote his or her human dignity.'

[85] The court has, in dealing with this matter, been constrained to consider it, wearing goggles that are informed by a rights-based approach. Furthermore, the court, impelled also by its duty to remind the Minister and the nation at large, not only to be true to the letter and spirit of the Namibian Constitution, but to also constantly be alive and compliant to Namibia's international obligations. These obligations become particularly pronounced when they relate to children, the future and treasure of this Nation.

[86] Children must, regardless of the manner or circumstances of their conception or birth, family background, or other circumstance, be afforded the utmost protection of the law. They must be afforded a healthy and conducive upbringing and environment to become worthwhile citizens of Namibia, the Region and outstanding citizens of the globe. The court was obliged, as it considered the case, not lose sight of the fact that although the applicant is an adult, the case, stripped to the bare bones, is at the end of the day, about the child YDL and his rights in terms of the Constitution and laws of the Republic of Namibia and her international obligations.

Conclusion

[87] Having carefully considered the case and the submissions of both parties, I have come to the conclusion that the applicant, in terms of the Constitution of Namibia, qualifies to apply and for his son YDL to be granted Namibian citizenship by descent. Furthermore, the Minister, is obliged, by Namibia's international obligations, as envisaged in Art 144 of the Constitution, to act in the best interests of the child YDL. In this connection, the Minister's counter-application, is not meritorious and must fail.

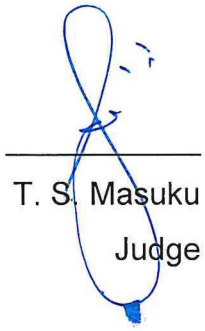
Costs

[88] It does not seem to me, having had regard to the entire matter, that a reason or consideration exists that should necessitate or justify a departure from the general rule that costs should ordinarily follow the event. The applicant has been successful in this application and he is entitled to his costs. Correspondingly, the Minister has been unsuccessful in both his opposition and attack. He must pay the applicant's costs.

Order

[89] The considerations as well as the conclusions reached above, led me to the issue the following order on 13 October 2021, namely that:

1. The minor child YDL, born on 6 March 2019, is hereby declared to be a Namibian citizen by descent, as envisaged by Article 4(2)(a) of the Constitution of the Republic of Namibia.
2. The Minister of Home Affairs and Immigration is within 30 days of issue of this order, directed to issue the said minor child YDL a certificate of Namibian citizenship by descent.
3. The counter-application launched by the Minister of Home Affairs and Immigration to compel the Applicant to submit to a DNA test, to prove the paternity of the minor child YDL, is hereby dismissed.
4. The Respondent is ordered to pay the costs of the application.
5. The matter is removed from the roll and is regarded as finalised.



T. S. Masuku
Judge

Appearances

APPLICANT	U. Katjipuka Of Nixon Marcus Public Law Office
RESPONDENT	J. Ncube Of Office of the Government Attorney