

MOIDEEN MAHENDRA VAGHMARIA

Versus

DARSHAN MADANLAL VAGHMARIA

AND

NEEMA MADANLAL DULABH

AND

BHANUMATI MADANLAL VAGHMARIA

AND

THE REGISTRAR OF BIRTHS AND DEATHS N.O

IN THE HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 11 & 27 FEBRUARY 2020

Opposed Application

Advocate G Nyoni, for the applicant

Advocate T Mpofu instructed by Ms S Ngwenya, for the 1st – 3rd respondents

MOYO J: In this matter the applicant seeks an order against the 3 respondents that they submit to DNA tests to establish applicant's paternity and that if such paternity is so established, 4th respondent be ordered to register the late Madanlal Prag Vaghmaria as applicant's biological father and that applicant pays for the costs of the DNA tests.

In paragraph 7 of the founding affidavit, the applicant says that he has a very good reason to believe that 1st and 2nd respondents are his half siblings as they share with him a biological father, one Madanlal Prag Vaghmaria whom he believes is his biological father. He further says he has a right to establish his paternity and to enjoy the incidental rights that flow therefrom including the constitutional right to family. He further says that other than through an order of this court, he has no other way of establishing his paternity and to cause

4th respondent to register such information in his birth certificate. The applicant further avers that he was born on 18 February 1967 and that his name was recorded as Moideen Manuel. That he has since changed his name through a Notarial Deed to Moideen Mahendra Vaghmaria. He says he was born out of wedlock and his paternity was not so registered in the birth certificate because his parents did not attend to do so. He further avers that his biological parents had religions incompatibility hence it became impossible to register his paternity seeing he was born out of wedlock. The applicant's mother died on 30 April 2004 and his father died on 1 February 2015. Applicant further avers that during her lifetime, his mother told him that his biological father was the now late Madanlal Prag Vaghmaria. He further avers that his late father, per information given to him by his late mother, told him that the late Madanlal Prag Vaghmaria used to pay maintenance for him until he attained the age of 18 years. He says he tried to uplift the records for the year 1967, which could no longer be obtained from the relevant offices. He has further attached an affidavit by his late mother's friend to confirm the issue of maintenance payments.

He further avers that he approached the late Madanlal Prag Vaghmaria concerning the matter of his (applicant's) paternity but that while he did acknowledge, he refused to formally register the applicant as his son. He further avers that he has continuously approached 1st respondent on numerous occasions about this matter and that 1st respondent refused to assist him. The 1st respondent and the other 2 respondents opposed the application on the basis that applicant's claim has prescribed, among other reasons. That applicant is now 52 years old, having been born on 18 February 1967 and that he attained the age of majority 34 years ago. That if applicant wanted to ascertain his paternity he must have done so while his parents were alive and that no reasons have been given for applicant's 34 year wait.

Counsel for the respondents argued at the hearing that in fact applicant's claim is prescribed as it befits the definition of a debt as defined in section 2 of the Prescription Act. Respondent's Counsel avers that the applicant's need for correct paternity details, and a right to a family arose, 34 years ago when he became a major and realised that his paternity was not registered. Respondent's Counsel contends that the applicant sat back and did nothing for 34 years until when the parties who should be responsible for answers on his paternity both died. Applicant's Counsel argued that the claim could not have prescribed because it is a

right, a constitutionally entrenched right and that the right became available in 2013 with the new constitution and that it was only exercisable then. Respondent's Counsel submitted that even if it were to be argued that the right became available in 2013, prescription still applies because the application before me was only filed in October 2019, six years down the line.

Applicant's Counsel did not present to this court authorities to support the contention that a right exercisable against another, is not a debt and cannot prescribe. Yet the respondent's Counsel did provide authority for the contention he made that is the case of *Taruona v Zvaredzana & Others* HH 87/12 which is authority for the position that a right also prescribes. In that case it was held that a right to directorship in a company, prescribed where a director did not take action within a period of 3 years.

On the other hand, applicant's Counsel, did not respond particularly to this point and the case authorities thereto, an assertion was simply made that neither the passage of time nor death of applicant's biological parents ought to stand in the way of applicant establishing his paternity. I was not favoured with an authority to support this contention neither have I stumbled upon one in my research. I am therefore unable to use the applicant's mere assertion as precedent. The Supreme court in the case of *Brooker & Others v Mudhanda & Others* SC 5/18, agreed with the position that even rights to claim ownership of property do prescribe save for the exception that in certain instances the debtor has to be placed *in mora* first before prescription runs.

In the case before me applicant has always been aware of his status from the time he became a major 34 years ago. He even says his mother who died as early as 2004 told him that the now late Madanlal Prag Vaghmaria was his biological father. He then states in paragraph 8:10 of his founding affidavit that he did approach the now late Madanlal Prag Vaghmaria concerning the registration of his paternity who refused to co-operate and said it was too complicated a process to embark on. At this juncture, one would say his cause of action then arose with certainty. The now late Madanlal Prag Vaghmaria specifically refused to give the applicant his rights to paternity upon demand. Therefore applicant need not have waited beyond then. Even if we are not aware at what stage applicant did so, we however know from the facts that the now late Madanlal Prag Vaghmaria died on the 1st of February 2015, when the new Constitution was already in place and he denied him the right to the

registration of his paternity in specific terms. This means in essence that even if we are to assume that the now late Madanlal Prag Vaghmaria denied him such right in 2015 just before he died, the claim would still have prescribed by the time this application was issued in October 2019, 4 – 5 years down the line.

Applicant having made no case at all against the claim of prescription by the respondents, and the legal position on prescription being clear in our law and from the cases I have referred to herein, I find that respondent's contention on prescription is thus correct.

I accordingly uphold the point *in limine* raised by the respondents and I will dismiss applicant's claim with costs.

Webb, Low & Barry, applicant's legal practitioners
Messrs Coghlan & Welsh, 1st – 3rd respondent's legal practitioners