SUPREME COURT OF SEYCHELLES

Not Reportable
[2019] SCSC 750
CS59/2019

In the matter between

D K M **Plaintiff**
(rep. by Alexia Amesbury)

and

S L N **Defendant**
(in forma pauperis rep. by Serge Rouillon)

Neutral Citation:	M v N CS 20/2018 [2019] SCSC 10 September 2019
Before:	Twomey CJ
Summary:	*action en recherche de paternité naturelle* – standing of alleged father-
Heard:	16 July 2019
Delivered:	10 September 2019

ORDER

The child is declared the natural daughter of the Plaintiff; the Chief Officer of the Civil Status is ordered to rectify her Act of Birth accordingly.

JUDGMENT

TWOMEY CJ

[1] In a Plaint entered in this Court, the Plaintiff avers that he is the biological father of a female child, namely e i a e born on 8 July 2017 and that the Defendant is the said child's mother.

[2] The Plaintiff further avers that he and the Defendant lived together notoriously during the period of the child's conception and that there are several writings in the form of text messages emanating from the Defendant admitting that he is the father of the said child.

[3] He therefore brings this case pursuant to Article 340 of the Civil Code *en recherche de paternité naturelle* for the said child. He has prayed *inter alia* for a declaration that he is the father of the said child and that she is entitled to bear his name, that the Defendant (sic) submits to a DNA test, that he has a right to maintain the child and that should he not be entitled to have the said declarations from this Court, that the matter be referred to the Constitutional Court pursuant to Article 46(7) of the Constitution for a declaration that Article 340(3) of the Civil Code of Seychelles violates his right to equality before the law.

[4] The Defendant in her statement of Defence raised a plea in *limine litis* that the Plaint should be dismissed as the Plaintiff has already recognised the child and that he is stated as the father of the child on the child's official Birth Certificate. On the merits she he has generally denied the Plaintiff's averments.

[5] At the hearing the Plaintiff testified that he knew the Defendant for a long time as they had gone to school together and that they were involved in a relationship in 2016 which ended in November 2016.

[6] The Plaintiff subsequently learnt from the Defendant's family that she was expecting his child. He then approached the Defendant who did not deny that he had made her pregnant but accused him of doing so deliberately and messing up her plans. She told him that she would do her best to keep the child away from him. The text messages to that effect were produced without objection (Exhibit P1). The following July 2017 the child [redacted] was born.

[7] After the birth of the child, he was denied access to her by the Defendant. He filed a case for access to the child before the Family Tribunal who ordered that a DNA test to be carried out to establish the child's paternity.

[8] On appeal by the Defendant, the Supreme Court set aside the Family Tribunal's order on the ground that the order could only have borne fruit if the parties were willing to engage

voluntarily with the Director of Social Services for the taking of the DNA test and that if there was unwillingness on the part of the Defendant the order could not be enforced since the Tribunal had no such jurisdiction. In this respect, the Court noted that the Family Tribunal only had jurisdiction as granted by section 78(1) of the Children Act to:

> *"(a) hear and determine matters relating to the care, custody, access or maintenance of a child under this Act and a written law specified in Schedule 3;*
>
> *(b) hear and determine matters relating to children who may need compulsory measures of care under this Act;*
>
> *(c) hear and determine matters regarding consent to medical, dental or surgical treatment in respect of a child."*

[9] It must be noted that Schedule 3 of the Children Act concerns the following legislation: the Matrimonial Causes Act, the Civil Code, the Maintenance Orders (Attachment of Earnings) Act, and the Summary Jurisdiction (Wives and Children) Act.

[10] In *obiter* the Court stated that it was convinced that the Plaintiff was indeed the child's father and was being used as a pawn to settle the differences between the parties. It also stated that a DNA test could not amount to medical treatment in respect of the child in terms of section 78(1) (c) of the Children Act.

[11] In the present matter, the Plaintiff further testified that subsequent to his application before the Family Tribunal and the Defendant's successful appeal against the Tribunal's decision, he formally acknowledged the said child by notarial deed in January 2018 and made a similar declaration to the Civil Status Office which amended the child's Birth Certificate in which his name was entered as the child's father. In this respect I note that section 35 of the Civil Status Act provides that

> *"Whenever the birth of a natural child shall be declared, every Officer is hereby expressly forbidden to mention in the act of birth the name of the father, unless the father consents to such mention, either by appearing and signing or marking the act, either personally or by agent appointed under an authentic deed to sign for him.*

Where any such deed is produced mention thereof shall be made in the margin of the act of birth and the original or copy of the authority shall be kept by the Officer."

[12] In a subsequent case, the Family Tribunal, relying on Article 336 of the Civil Code upheld the Defendant's submission that the acknowledgment of the child's paternity by the Plaintiff only had effect in regard to him but not as regards the child (Article 336 of the Civil Code provides that the recognition by the father without reference to, or admission by the mother shall only have regard to the father). Subsequently, the Plaintiff acting on the advice of the Tribunal filed the present case *en recherche de paternité naturelle* of the child before the Supreme Court.

[13] The Defendant in her evidence in Court stated that she was not sure that the Plaintiff was her child's father and that she was unwilling to have the child undergo a DNA test. She added that the decision could be taken by the child when she was old enough and that she did not want to have anything to do with the Plaintiff. When the issue was pursued she stated that she was seeing other people apart from the Plaintiff during the time the child was conceived. When asked who else she was seeing at the time she refused to answer.

[14] In her closing submissions, Counsel for the Plaintiff has stated *inter alia* that the father's official acknowledgement of the child was not set aside by the mother and is therefore deemed to be admitted.

[15] She has also submitted that despite the fact that the Court cannot order the taking of DNA evidence to confirm the child's paternity, the evidence produced in this case establish the Plaintiff as the father of the child.

[16] Counsel for the Defendant has submitted in closing that the suit reveals more of King Solomon situation than a purely legal matter. He has also submitted *inter alia* that the evidence produced by the Plaintiff to prove that he is the father of the child is not enough to pass the evidential threshold in this case especially since no independent corroborative evidence has been produced. In this respect he has relied on the authorities of *Payet v Anderson* (1983) SLR 39, *Pillay v Lespoir* (1984) SLR 105 and *Larue v Eulentin* (1981)

SLR 122. He has also relied on the Defendant's plea in *limine litis* that having formally acknowledged the child the Plaintiff's present action was redundant.

[17] Before I consider the main issue in this case, namely whether the child Grace Nicette is the Plaintiff's daughter, I must consider the point raised in *limine* by the Respondent. As has already been observed, Article 336 is categorical that an acknowledgement of a child by a father without the mother's admission only operates with regard to the father. In other words, it triggers the duties and responsibilities of the father towards the child including the inheritance rights of the child but it does not grant rights to the father in respect of the child, for example for access or custody. In this respect the Plaintiff's present action for a judicial declaration of paternity of the chid is easily understood. The plea in *limine litis* is therefore dismissed.

[18] However, there is another threshold issue to be considered arising from the plea in *limine litis,* which was admitted and articulated by the Plaintiff himself in his pleadings and in his closing submissions - that is - given the provisions of the Civil Code whether the Plaintiff has standing to bring the suit. In this respect the Plaintiff has submitted that the provisions of Article 340 (3) should be read neutrally when read with section 19 of the Interpretation and General Provisions Act (IGPA) which provides that "words importing the masculine gender include females and words importing the female gender include males".

[19] In this respect the following relevant provisions of the Civil Code have to be considered:

> *"Article 321*
> *Possession of status may be established when there is a sufficient coincidence of facts indicating the relationship of descent and parenthood between a person and the family to which he claims to belong.*
> *The principal facts are:*
> *That a person has always borne the name of the father whose child he claims to be;*
> *That the father has been treating him as his child and that, in his capacity as father, he has provided for his education, maintenance and start in life;*
> *That he has always been recognised as a child of that father in society;*
> *That he has been recognised as such by the family.*

2. Natural descent may also be established by the possession of status, both as regards to the father and the mother in the same manner as legitimate descent.

.

Article 340

1. It shall not be allowed to prove paternal descent, except:

...

(b) When an illegitimate child is in possession of status with regard to his natural father or mother as provided in article 321

...

(d) When there exist letters or other writings emanating from the alleged father containing an unequivocal admission of paternity

e) When the alleged father and the mother have notoriously lived together as husband and wife, during the period of conception.

2. The right to prove paternal descent under this Article is for the benefit of the child alone, even if born of an incestuous or adulterous relationship.

3. An action under this Article may be brought

(a) by the child's mother, even if she is under age, or by his guardian, at any time during the child's minority;

...

Article 389

1. The father during marriage shall be the administrator of the property of his minor unemancipated children...

2. If the father cannot act or if he is deprived of his administration, the mother shall have such administration...

Article 394

1. Illegitimate children shall have a guardian in the same manner as legitimate children. If the father and mother of the illegitimate child have both recognised the child, the Court may decide which of them shall become guardian. If only one of the parents has recognised his child he shall be his guardian."

2. If an illegitimate child has not been recognised he shall have his natural mother as a guardian as of right. The Court shall be entitled to grant the custody of a child to the other, even if the father has recognised the child and acts as a guardian.

[20] In regard first to the submission regarding the IGPA and the interpretation and construction of the above articles of the Civil Code, it must be observed that section 19 of the IGPA would have no application since a specific contrary intention to gender appears in the Civil Code in this respect (see section 2 (1) b) of the IGPA).

[21] From the above specific Civil Code provisions the following conclusions may be drawn from the evidence adduced: In terms of Article 340 (3) (a) an action *en recherche de paternité* can be initiated either by the child's mother or the child's guardian. In the present case both the Plaintiff and the Defendant have recognised the child. In this regard, Article 394 (2) is to the effect that prior to the recognition of the child by the father, the mother was the child's guardian. However on his recognition of the child in January 2019 the provisions of Articles 389 by extension and 394 (1) create a presumption that as the father of the child he is also her guardian.

[22] It follows therefore that as the child's guardian, the Plaintiff is entitled to bring the present action en *recherche de paternite naturelle* of the child. There is therefore no constitutional issue arising and no need to refer the matter to the Constitutional Court. The Plaintiff has standing to bring the present matter.

[23] I now turn to the main issue in this case, that is whether the Plaintiff is the child's father. Courts in this land have on a regular basis bemoaned the fact that despite scientific

advances of nearly twenty years, the Legislature has not found it fit to amend the provisions of Article 313 of the Civil Code to permit the use of DNA tests to prove or disprove the paternity of a child. That would have been conclusive evidence in this case to settle the matter.

[24] Instead the Court has only arcane and outdated tools at its disposal to help it in its enquiry, namely the provisions of Article 321 (supra). In this regard, I find the Plaintiff's evidence overwhelmingly compelling and that of the Defendant to be incredible, spiteful and untruthful. She was singularly unimpressive in the misandry she displayed during her testimony and as is borne out by her text messages to the Plaintiff. She has throughout showed no regard or care for the rights and interests of the child in this case. She preferred to tell a bare faced lie of her sleeping around rather than admitting to having an exclusive relationship with the Plaintiff in order to thwart his efforts to assert his parental rights to their child. The thrust of her testimony is that she does not want to have anything to do with the Plaintiff. In this regard she ought to be reminded that the Court is not concerned with her interest but rather with the best interest of the child.

[25] The Respondent has never denied her relationship with the Plaintiff and their *concubinage notoire*. That *concubinage notoire* does not have to amount to the parties cohabiting – it suffices that they conducted themselves as if they were living together (See in this respect *Adeline v Benoiton* (1962) SLR 310 and *Mein v Chetty* (No 2) (1975 SLR 204).

[26] Further, in respect of the provisions of Articles 321 and 340 of the Civil Code, I find that the status of the child is established. In this respect, it is trite that not all three elements of status under Article 321 of the Civil Code (*nomen*, *tractatus* and *fama*) need coincide (see *Belle v Labaleine & Ors* (CS 13/2013) [2017] SCSC 931 (10 October 2017). I find that since the child's Birth Certificate contains her father's name *(nomen*) and her father's recognition of her in the deed of acknowledgement (*tractatus*) her status has been proved. Similarly, the provisions of Article 340 are satisfied by the writings emanating from the Plaintiff containing an unequivocal admission of paternity and the *concubinage notoire* of the parties.

[27] With respect to her Counsel's submissions that there is no independent corroborative evidence of the Plaintiff's claim, I find therefore and to the contrary that a large body of such evidence has been produced.

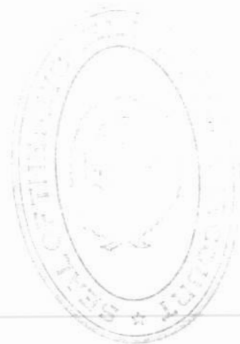
[28] In the circumstances, I am satisfied from the provisions of Article 340 and 321 of the Civil Code that there is a sufficient coincidence of facts indicating the relationship of descent and parenthood between the Plaintiff and the child [redacted] and that the said child is the natural daughter of the Plaintiff. The Respondent has been cruel and irresponsible in refusing the child to have a father when it is clear from the evidence that the Plaintiff is the child's father. These are matters that ought to be taken into account by the Family Tribunal in considering the award of custody of the child.

[29] I hereby order that the child be declared as the natural daughter of the Plaintiff, Dereck Marimba and that the Chief Officer of the Civil Status rectify her Act of Birth accordingly to reflect this judicial recognition of her status and that her surname be amended accordingly to Marimba.

[30] I make no order as to costs as the Defendant appears *in forma pauperis*.

[31] A copy of this Order is to be delivered without fail on the Chief Officer of Civil Status.

Signed, dated and delivered at Ile du Port on 10 September 2019.



Twomey CJ