

CONSTITUTIONAL COURT OF SEYCHELLES

Reportable
[2021] SCSC ...6..
CP 12/2020

In the matter between:

ANDRE LESLIE BENOITON

1st Plaintiff

(rep. by Basil Hoareau)

JENETTE SHIRLEY OTAR

2nd Plaintiff

(rep. by Basil Hoareau)

CHRISTINE NICHOLE FRICHOT

3rd Plaintiff

(rep. by Basil Hoareau)

BRIGITTE ALICE HERMITTE

4th Plaintiff

(rep. by Basil Hoareau)

NATHALIE RACHEL ARISSOL

5th Plaintiff

(rep. by Basil Hoareau)

and

SARAH ZARQUANI RENE

1st Defendant

(rep. by Joel Camille)

LOUISA CARMELLE RENE

2nd Defendant

(rep. by Joel Camille)

ELLA SETAREH RENE

3rd Defendant

(rep. by Joel Camille)

DAWN ELSA RENE

4th Defendant

(rep. by Joel Camille)

PANDORA RENE

5th Defendant

(rep. by Joel Camille)

ATTORNEY GENERAL
(rep. by Stephen Knights)

Respondent

Neutral Citation: *Benoiton & Ors v Rene & Ors* (CP 12/2020) [2021] SCSC 6 (19/10/21)
October 2021).

Before: Burhan, Dodin, Pillay JJ

Summary: Referral from Supreme Court – *Is the refusal of the Plaintiffs, to undertake a DNA test to prove their paternity and to prove paternity by way of Articles 340 and 321 of Civil Code, an infringement of Article 32 of the Constitution, where the state undertakes to promote legal, economic and social protection of the Rene family (Defendants)?*

Heard: By way of submissions

Delivered: 19/10 October 2021

ORDER

- [1] The question referred to this Court; “*Is the refusal of the Plaintiffs, to undertake a DNA test to prove their paternity and to prove paternity by way of Articles 340 and 321 of Civil Code, an infringement of Article 32 of the Constitution, where the state undertakes to promote legal, economic and social protection of the Rene family (Defendants)?*” is fundamentally flawed there having been no refusal from the Plaintiffs but rather acquiescence to the extent of already having undertaken preliminary tests with the 5th Defendant. It follows therefore that this Court cannot make a finding that there is a breach of Article 32 of the Constitution.
- [2] The referral is dismissed. The matter is referred back to the trial Court for a decision on the merits.

JUDGMENT

PILLAY J (BURHAN AND DODIN JJ concurring)

- [1] This matter is before the Constitutional Court on a referral made from the Supreme Court under Article 46 (7) of the Constitution of the Republic of Seychelles for its determination of the following question;

Is the refusal of the Plaintiffs, to undertake a DNA test to prove their paternity and to prove paternity by way of Articles 340 and 321 of Civil Code, an infringement of Article 32 of the Constitution, where the state undertakes to promote legal, economic and social protection of the Rene family (Defendants)?

- [2] The background to this matter is that the Plaintiffs have filed an action seeking to establish that they are the biological and illegitimate children of the late France Albert Rene.
- [3] The 1st, 2nd, 3rd and 4th Defendants (hereinafter the Defendants) contested the claim made by the Plaintiffs whereas the 5th Defendant is not contesting the claim. The thrust of the Defendants denial that the Plaintiffs are the biological children of the late France Albert Rene is that they have not undertaken any DNA tests to prove the same. They prayed for all of the Plaintiffs to be ordered to undergo a DNA test to establish paternity and if they refuse to have the matter referred to the Constitutional Court.
- [4] The Plaintiffs through Learned counsel indicated that they were willing to undergo the testing however there was a disagreement as to the facility where the testing would be done. Counsel for the Plaintiff subsequently informed the Court that the Plaintiffs had undergone testing amongst themselves in a laboratory in South Africa with the results showing by over 99% that all five Plaintiffs were related. At that stage the Court was left to decide whether the matter should be referred to the Constitutional Court on the basis of the refusal of the Plaintiffs to undergo DNA testing and concluded that the question sought to be referred meets the threshold requirements under Article 46 (7) resulting in the present referral.
- [5] The Plaintiffs' counsel submits that the cornerstone of the question which the Defendants have raised before the Supreme Court and requested the Supreme Court to refer to the

Constitutional Court is “the refusal of the Plaintiffs, to undertake a DNA test to prove their paternity”.

[6] Learned Counsel invited the Court to take notice that the Plaintiffs have not refused to undergo a DNA test to prove their paternity. On the contrary he submits that the Plaintiffs have always been willing to undergo a DNA test to prove their paternity. The Plaintiffs refusal was to have a test done at a laboratory proposed by the Defendants.

[7] Learned Counsel for the Plaintiffs referred to the case of CS 91/2019 involving the same parties wherein the Defendants made a similar request for referral to the Constitutional Court which Govinden J as he then was declined in the following words:

6. [H]aving thoroughly scrutinized this point for determination, in the light of submission of parties and the law, I have come to view that the constitutionality of Article 321, 323, 324 and 340 have not been impugned in this case for referral. There is no specific allegations, that they are per se unconstitutional. The allegation is that, simply, the refusal of the test on the part of the relevant Defendants would be unconstitutional as it amounts to a breach of Article 32 as read with Article 27 of the constitution.

[8] Learned Counsel further submitted, as he had before the trial court, that this “Court has inherent powers to direct the undergoing of a DNA test in paternity cases when the need arises and where it is possible for such a test to be conducted as in the present case”.

[9] It is his submission that the question referred is misleading and a gross misrepresentation of the Plaintiffs’ position. On that basis he submits that this Court should hold that there has been no infringement of Article 32 of the Constitution.

[10] The Defendants’ counsel submitted that the question referred by the learned Judge Carolus cannot be faulted in any shape or form. He submitted that there has been tacit refusal by the Defendants in that the Plaintiffs have refused to have the testing done at an ISO 17025 accredited laboratory.

[11] Learned Counsel proceeded to submit on the constitutionality of Article 340 of the Civil Code. It was his submission that “the fact that individuals refuse to undertake DNA testing...will result in imposters succeeding in their claim for paternity and succession

under false pretence”. According to him that is the reason the Defendants wish to challenge the constitutionality of Article 340 of the Civil Code.

- [12] Learned Counsel submitted at length on the position of different jurisdictions on the matter of DNA tests making reference to several cases to support his stance that the court should evolve taking into consideration the advancement in modern day science in resolving paternity disputes.
- [13] Indeed as stated by Learned counsel for the Plaintiffs, the crux of the issue is whether there has been a refusal to undergo DNA testing since if one is to pick apart the question referred, the Defendants’ assertion is that the Plaintiffs’ refusal to undertake DNA testing would mean that the only way to prove paternity would be by way of using the provisions of Article 340 of the Civil Code which would result in the breach of Article 32 of the Constitution.
- [14] Learned counsel Mr. Hoareau states that there has been no refusal but that the two parties cannot agree on the laboratory where the test will be undertaken. Mr. Camille, though he disputes the Plaintiffs position, more or less said the same thing; that there is tacit refusal because the Plaintiffs refuse to agree to do the testing at an ISO accredited laboratory.
- [15] I fail to follow Learned Counsel Mr. Camille’s reasoning. The Plaintiffs and the Defendants have agreed to the use of DNA testing to prove the paternity of the Plaintiffs. In fact the Plaintiffs indicated to the trial judge that they had already undergone DNA testing amongst themselves with the results showing that there is a 99% likelihood that they were all five related. The disagreement is with regard to the place where the testing should be done. The issue referred to this Court is not that the Plaintiffs’ refusal to undertake the testing at the same facility as the Defendants or at an ISO accredited facility is in breach of Article 32 of the Constitution but that their blanket refusal to the testing at all will result in the only manner of proving paternity to be under Article 340 of the Civil Code which will be a breach of Article 32 of the Constitution.
- [16] To my mind in circumstances where parties disagree where the test should be undertaken, it is for them to undertake the testing at the laboratories of their choice and for the trial

Judge to make a determination on the basis of the expert evidence before him/her in the event the two results are different. The matter becomes matter of evidence as opposed to a constitutional issue.

[17] In any event there is in law no requirement for the DNA testing to be done at a facility agreed by both parties. The jurisprudence is that there must be consent of the parties for the DNA testing to be done.

[18] I note at this point the decision of Twomey CJ in the case of **Esparon v Low Wah and Ors CS 63/2016** delivered on 29th May 2017 wherein she stated that;

[7] ...I intimated to the parties that although our statutory provisions do not provide for DNA testing which would be conclusive proof in this case, were I to receive the unanimous consent of the parties, a test could be carried out and the matter disposed of conclusively.

[19] The Plaintiff in the case was seeking an order declaring that the deceased William Low Wah was his biological father. What was needed in order for the Learned trial judge to make an order for DNA tests to be done was the unanimous as opposed to unequivocal consent. In the current matter there is “unanimous” consent by all parties. The only disagreement is with regards to the facility where the test is to be carried out.

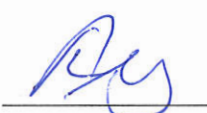
[20] Paragraph 41 and 42 of the Ruling from the Supreme Court referring the question to this Court is also noted. The trial judge noted at paragraph 41 that “the plaintiffs agree that courts have such inherent jurisdiction and can make an order where the need arises and where it is possible for a test to be conducted such as in the present case.” The Learned trial judge further notes at paragraph 42 that “they [the plaintiffs] submit that the issues of possible infringement of their privacy rights and right to dignity as a result of an order to undergo the DNA test does not arise, due to the fact that they are willing to undergo the test.” The Plaintiff not only indicated their willingness to undertake the test but submitted themselves to the jurisdiction of the trial court to make an order for the test to be undertaken.

- [21] Paragraph 44 of the Ruling is also noted to the extent that the 5th Defendant had taken part in DNA tests along with the Plaintiffs with the results showing that the Plaintiffs are the half-siblings of the 5th Defendant.
- [22] With that in mind I decline to address or consider Learned counsel Mr. Camille's submissions casting aspersions on the Plaintiffs' intention and the legacy of the late France Albert Rene as I find that neither issue has any bearing on the matter at hand.
- [23] On the basis of the above, it is my finding that the question referred to this Court; "*Is the refusal of the Plaintiffs, to undertake a DNA test to prove their paternity and to prove paternity by way of Articles 340 and 321 of Civil Code, an infringement of Article 32 of the Constitution, where the state undertakes to promote legal, economic and social protection of the Rene family (Defendants)?*" is fundamentally flawed there having been no refusal from the Plaintiffs but rather acquiescence to the extent of already having undertaken preliminary tests with the 5th Defendant. It follows therefore that this Court cannot make a finding that there is a breach of Article 32 of the Constitution.
- [24] The referral is dismissed. The matter is referred back to the trial Court for a decision on the merits.

Signed, dated and delivered at Ile du Port on 19th October 2021


Burhan J


Dodin J


Pillay J