

IN THE SEYCHELLES COURT OF APPEAL

Reportable

[2021] SCCA 25 9 July 2021
SCA 46/2018
Arising in CS 72/2018) SCSC 700

In the matter between

1. A. B.

(a minor represented by his legal guardian Albertine Bacco)

2. ALBERTINE BACCO

(rep. by Lucie Pool)

Appellants

and

JACQUES PATRICK BACCO

(rep. by Manuella Parmentier)

Respondent

MINISTERE PUBLIC

(rep. by Neesha Monthy)

Neutral Citation: *Bacco v Bacco* ([2021] SCCA 25 9 July 2021 SCA 46/2018
Arising in CS 72/2018) SCSC 700

Before: President, Twomey, JA, Robinson, JA

Summary: Appeal against the decision of Supreme Court ordering First Appellant from using the name of Respondent - jurisdiction of Supreme Court of Seychelles to disavow paternity and rectify registration of the name in the Civil Register of Madagascar - rights of minor under the Constitution of Seychelles

Heard: 7 April 2021

Delivered: 9 July 2021

ORDER

The appeal is partly granted insofar as the Court declares that Jacques Patrick Bacco is not the father of A.B.

TWOMEY JA

Introduction

[1] This case illustrates an old conundrum: *mater semper certa est* but *pater semper incertus est*, in other words, while maternity results from childbirth and is certain, paternity is always uncertain. In Seychelles, the filiation of a child born of a married couple is

automatic at the moment of his registration of birth. In contrast, the filiation of a child born outside marriage must be established in either of two ways: by voluntary formal acknowledgement by the father or by a court order.

- [2] Rescinding a paternity acknowledgement (*desaveu de paternité*) is also provided for by the law and may be made by anyone having a lawful interest therein.

The facts of the present case

- [3] The Respondent, Jacques Bacco, married the Second Appellant, Albertine Bacco on 13 December 2014 in Madagascar. On 10 December 2014, previous to the marriage and (it would appear from the evidence in the court below) in contemplation of the marriage, he acknowledged the First Appellant, Albertine's Bacco's child, A.B. as his son despite the latter not being his biological child. The parties travelled back and lived in Seychelles, first together as a family and then separately. Jacques Bacco divorced Albertine Bacco on 6 April 2017 with a decree absolute of the same pronounced on 6 June 2017.
- [4] Jacques Bacco filed a plaint on 14 July 2017 in which he prayed the court to disavow his paternity of A.B. and to order A.B. to stop bearing his name "Bacco".
- [5] In her statement of defence in the court below, Albertine Bacco admitted that Jacques Bacco was not the father of A.B. but that he had nevertheless voluntarily acknowledged the child as his own under the laws of Madagascar. She further averred that A.B. subsequent to the acknowledgement of paternity by Jacques Bacco, a Seychellois citizen, automatically secured Seychellois nationality and was issued with a Seychellois passport and identity card and that the present action would result in him losing his nationality and becoming stateless. She further averred that A.B.'s rights were protected under Article 31 of the Constitution of Seychelles and that the Chief Civil Officer of the Civil Status Office of Seychelles had no power to rectify an Act of Birth drawn up and registered in Madagascar.
- [6] In a seven paragraph judgment delivered on 20 July 2018, Govinden J, as he then was, stated, inter alia:

“[3] Article 339 of the Civil Code of Seychelles Act provides that the recognition by a father or mother and all claims on the part of the child may be contested by all those having a lawful interest therein. The Author of the recognition (which in this case is the Plaintiff) is allowed to contest his own recognition even though that recognition has been effected by an authentic document. The reason for this rule is that the recognition has value only in so far as it corresponds to the truth. Vide Jurrisclasseur Civil Articles 335 and 339 verbo Filiation Naturelle paragraphs 143 and 155 D.A. 1913. 1.83 DH I 932.540. However, the child who has been recognised has a right of action as against the author of the untruthful recognition for the prejudice that he may have suffered therefrom. Vide A. Sauzier in Cosimo Centaro v/s Jones Dorothy Anne Centaro and Jeanine Vel (1981) SCR P209.

[4] It is abundantly evident from the averments in the Pleint and Statement of Defence and the evidence of the Plaintiff and the 2nd Defendant that the Plaintiff was not the father of the 1st Defendant and that the recognition of the 1st Defendant by the Plaintiff does not represent the truth.

[5] Accordingly, I therefore order that the Plaintiff is not the father of the 1st Defendant and that the 1st Defendant should stop bearing the surname "Bacco".

[6] I am aware of the consequence of this order on the 1st Defendant. That it may lead to him losing the Seychellois nationality or even possibly render him stateless. However, to my mind these are only consequential to the matter at hand. The right of the Plaintiff under Article 339 cannot be denied because of its effect that it may have on the 1st Defendant (sic). In balancing the interest of the parties in this case the Court has to ensure that at the end of the day the truth prevails above possible fraud in official transaction which has to be averted at all cost (sic). The 1st Defendant may or may not lose his Seychellois nationality and hence be rendered stateless, however is a separate legal procedure that is not the subject matter of this case before the Court.”

The appeal

[7] It is against this decision that the mother and child in the suit below have appealed and filed the following four grounds to this court:

1. The learned judge had no power to order that the 1st Appellant should stop bearing the name “Bacco” since the said name was registered under the civil laws of Madagascar and not the Civil Status Act of Seychelles.

2. In ordering the 1st Appellant to stop bearing the name “Bacco” the learned judge failed to take into consideration the seriousness of the consequences resulting from the Respondent’s untruthful recognition of the 1st Appellant.

3. The learned judge failed to further take into consideration the provisions of the Children Act and the right of minors under the constitution in coming to his decision.

4. The learned judge ought to have awarded costs to the Appellants.

I deal with the grounds of appeal together.

The Appellants’ submissions

[8] With regard to the grounds of appeal, the mother and child have submitted that the act of recognising the child, A. B., by Jacques Bacco in the jurisdiction of Madagascar precludes an application for the disavowal of paternity of A.B. in the jurisdiction of Seychelles. They submit that judicial proceedings for the same would have to be instituted in Madagascar according to its laws.

[9] They have also submitted that if the best interests of the child were taken into account according to the provisions of Article 31 of the Constitution (the right to the special protection of minors) and section 3 of the Children Act (consideration to be given to the need to safeguard and promote the welfare of the child throughout childhood), this would trump Article 339 of the Civil Code (the contestation of recognition by the father) which the Respondent has relied on.

The Respondent’s Submissions

[10] Counsel for Jacques Bacco, on the other hand, has in the court below and in this court submitted that this was a marriage of convenience. Mr and Mrs Bacco had communicated on the phone and physically met only 2 weeks before they were married. Proceedings for recognition of the child had started before the marriage. After their return to Seychelles, they lived for a short time together (4 months) together and then Mrs Bacco went to work at Silhouette after which Mr Bacco only saw the boy intermittently.

The Law

- [11] Our laws provide for the claim of status, for the revocation of status and for rights of standing for both. In particular, the Civil Code provides:

Article 334

“The recognition of an illegitimate child shall be made by an authentic document, if it has not been made in the act of birth.

It may also be made by a declaration signed or marked before a Judge, a Magistrate, a civil status officer or the Registrar of the Supreme Court.

...

Article 339.

“The recognition by a father or mother and all claims on the part of the child may be contested by all those having a lawful interest therein.”

- [12] The provisions of the Civil Status Act also provide for the amendment of acts of status, specifically in this regard, section 100 states:

“A judge may, upon the written application of the Chief Officer of the Civil Status or any party, order the amendment without any fee, stamp or registration due of any act whenever such judge shall be satisfied that any error has been committed in any such act or in the registration thereof. Nothing herein contained shall prevent any interested person from asking by action before the Supreme Court for the rectification or cancellation of any act.”

- [13] It must also be noted that the Civil Status Act also provides that:

10. (1) The Chief Officer of the Civil Status shall register or cause to be registered all births, marriages and deaths and all other acts connected with the civil status in the Republic of Seychelles. (emphasis added)

Discussion

- [14] Although not directly relevant to the issues, in this case, Mr Bacco alleges that this was a marriage of convenience. However, this is not borne out by his evidence: He testified that they returned together as a family to Seychelles in December 2014. The following is an informative extract of the transcript of proceedings (P. 26) proceedings:

Q...when did Ms Albertine or yourself leave the marital home

A. She left home on the 10 of August.

Q. Which year?

A. 2015

Q. And where did she live after she left home?

A. She said she was going to work on Silhouette and I told her “I did not send you to Silhouette.”

Q. Had the relationship ended at that point?

A. It was not completely over.

Q. So how long after your marriage did your relationship end completely with Ms Albertine

A. On the 30 October 2016 ... she would get off on Saturdays for us to go to the mass ceremony at the church. I went to meet her at her eldest sister’s place but her sister was not there. The little boy was with me by the time I went to meet up with her, she took the child and put him inside the house and I told her we would go home to my place and this is how it usually works. But that day she closed the door in my face and for my years of living, I can say this disturbed me quite a lot...

Q. Why do you wish to have [the child] disavowed?

A. Today I got separated with this lady and I want to move forward and start over...”

[15] To all intents and purposes, this was a marital relationship with a focus on a family unit. The conflict and breakdown of the marital relationship arose from Mrs Bacco obtaining employment on a different island to where the family was living.

[16] The fact remains however that both Mr and Mrs Bacco agree that A.B. was not Mr Bacco’s son and that the recognition of A.B. by him was a sham. That would ordinarily suffice to set aside the declaration of recognition.

[17] However, the grounds of appeal as I understand them do not dispute the fact that according to the above-stated provisions of the Civil Code, and the specific facts of this case even a father can disavow a child he has voluntarily acknowledged as his own. The most important submissions of Mrs Bacco and A.B. are to the effect that the courts of this land have no jurisdiction over acts drawn up and registered in Madagascar.

[18] In other words, this is a conflict of laws issue - whether courts of this land are competent to hear a case concerning the status of an individual registered in another country.

[19] Acts of status of this nature have formed the subject matter of two relevant and specific cases in this jurisdiction and although not on all fours with the present case are informative on the issue this court is concerned with.

[20] In the case of *Ex-Parte D. B. A Minor* (1989) SLR 144, a Seychellois mother of a child born to her in Beirut on 14 June 1987 applied in 1988 in Seychelles for an order of the court to have the birth of the child registered in the Civil Status Office of Seychelles. She had sought to do so under the provisions of section 32 (2) of the Civil Status Act relating to the registration of births outside the stipulated 30-day delay after birth. The court ruled that the law provides that such declaration shall be made “before the officer of the district where the child is born.” Reference was made to section 30 (now section 29) of the Act which provides that:

“Any act of civil status drawn up in any country out of Seychelles shall be deemed valid as an act of the civil status if it has been drawn up in accordance with the law in force in such country.”

[21] Seaton CJ stated that these provisions read with section 10 of the Act (see above at paragraph 13) acknowledged that apart from acts of birth in Seychelles, the duties of the Chief Officer of the Civil Status include extra-territorial jurisdiction with respect to vessels registered in Seychelles during any voyage when a ship is not in any harbour in Seychelles. He emphasised the application of the condition of what he termed ‘localisation’ with regard to the registration of acts of status.

[22] In my view, the localisation principle is subsumed within the larger concept of comity which would impose on Seychelles the duty to respect the laws of another country.

[23] In the event, the court in *D. B.* refused to register the birth despite its great sympathy for the situation in which the child was placed.

[24] In the case of *Ex-Parte Cecile Bonne* Ch 100/1993 (unreported), a Seychellois grandmother of a child attempted to register the birth of her granddaughter who had been

born in Lebanon and who had entered Seychelles on a laissez-passer and left in her care. The Honorary Consul for Seychelles in Lebanon in a letter informed the Department of External Affairs that all relevant records had been destroyed during the civil disturbances there and that there was no possibility of obtaining a birth certificate in respect of the little girl in any way. Perera J as he then was, reiterated the localisation principle as laid down by Seaton CJ in *D. B.* and stated that the registration of a foreign birth in Seychelles was impossible under the provisions of the Civil Status Act.

[25] It is my view, therefore, that by logical extension the same principle must apply to all acts of civil status registered in a foreign country. Seychelles is not alone in this respect. A similar case arose recently in France in *Cass. Ire civ., 15 mai 2019, no 18-12602, FS-PBI*. A child born in Barcelona, Spain to a French father was recognised by him in the register of the civil status of Barcelona. Years later after the death of the father, his other children in France attempted to have the child's paternity revoked through a DNA test. The Cour de Cassation overturned the decision of the Cour d'Appel de Montpellier which had granted the application, finding in conformity with the Code Civil (the provisions of which are similar to section 30 of our Civil Status Act) that:

« La reconnaissance volontaire de paternité ou de maternité est valable si elle a été faite en conformité, soit de la loi personnelle de son auteur, soit de la loi personnelle de l'enfant ».

[26] At the time the recognition was made it was the laws of Spain that applied and would continue to apply until and unless the act was revoked in that jurisdiction.

[27] The remedy sought by Mr Bacco in Seychelles, namely the revocation of his acknowledgement of paternity of A. B., would have the consequence of making null and void the acknowledgement of paternity as if it had never been registered or that it existed in Madagascar. This court cannot assume universal jurisdiction on the issue of status registered in another country.

[28] However, given the fact that both Mr and Mrs Bacco admitted in court that A.B. is not Mr Bacco's son the court takes notice of this judicial admission and an order to that effect can be made in this jurisdiction. Under Article 1356 Of the Civil Code, three

consequences flow from such a judicial admission: it is good against the person making it, it is irrevocable and it is indivisible. Such an admission is therefore binding in this jurisdiction and may be relied on to negate any prospective inheritance claim against Mr Bacco's estate on his death in Seychelles. However, I cannot say whether it would be binding in Madagascar as it must be emphasised that insofar as A. B.'s birth certificate or status based on his birth is concerned, this Court has no jurisdiction to order any amendment to it nor make any changes in respect of the child using the surname Bacco.

[29] For present purposes, it would be academic to consider ground 3 of the appeal but for completeness sake, I propose to deal with the issue in brief if only to commence a debate on the subject. The issue is an important one: would the rights of minors as protected by Article 31 of the Constitution and the provisions of the Children Act supersede the provisions of the Civil Status Act when it would result in the deprivation of the status and citizenship of a Seychellois child. In the present case, the most egregious consequences would occur - the deprivation of Seychellois citizenship of A.B. Until the 25 January 2017, Malagasy mothers were only permitted to confer nationality on children born in wedlock, in other words, Madagascar did not recognise a mothers' independent right to confer nationality on children. However, in practice, discriminatory administrative practice persists and may Malagasy children born outside wedlock remain stateless (See on this issue The Institute on Statelessness and Inclusion, The World's Stateless Children <https://www.corteidh.or.cr/tablas/r36668.pdf> and Focus Development Association, Global Campaign for Equal Nationality Rights and Institute on Statelessness and Inclusion: Joint Submission to the Human Rights Council at the 34th Session of the Universal Periodic Review (Third Cycle, November 2019) https://files.institutesi.org/UPR34_Madagascar.pdf). In this respect, it must be noted that Madagascar is not a party to the 1954 or 1961 Statelessness Conventions.

[30] Article 31 of the Constitution of Seychelles recognises the right of children and young persons to special protection and to ensure the effective exercise of that right makes several undertakings including ensuring special protection against social, economic, physical and moral dangers to which they might be exposed. No restrictions are imposed on that right as opposed to other rights in the Charter. Article 32 of the Constitution also protects the family recognising it as the fundamental element of society.

- [31] Further section 2A of the Children Act imposes a duty on courts in determining any question with respect to the upbringing of a child, to have as its primary consideration, the child's wellbeing.
- [32] Undoubtedly the paternity of the child, in this case, would have an impact on its wellbeing as it might result in the child losing his name, status and citizenship. These are draconian consequences. The Ministère Public was joined to the suit in the court below but its intervention was scant and neither addressed the rights of the child under the Constitution or the applicability of the provisions of the Children Act to the case. This is regrettable as it would have assisted the court on this important issue. We wish to note that in matters occasioning the deprivation of citizenship, child-specific submissions need to be made on the issue.
- [33] The European Court of Human Rights in both the cases of the case of *Görgülü v. Germany*, no. 74969/01, § 43, 26 February 2004) and *Krisztián Barnabás Tóth v Hungary*, n° 48494/06, February 12, 2013), stated that consideration of what lies in the best interest of the child concerned is of paramount importance in every case of this kind; depending on their nature and seriousness, the child's best interests may override those of the parents.
- [34] The French Court of Cassation in overturning the decision of the Court of Appeal of Saint-Denis, Réunion of 28 August 2007 implicitly recognized that it may be in the interests of the child to maintain filiation which does not correspond to biological reality (Arrêt n° 630 du 16 juin 2011 (08-20.475)
- [35] These cases recognise the discretionary power of the judge in determining the child's best interests while ensuring a fair balance of conflicting interests. It is my opinion that this issue was live in the court below and was raised in the pleadings and addressed in the submissions of the Appellants. These competing interests ought to have been considered by the learned trial judge.
- [36] However, as we have already ruled that the appeal partly succeeds on the first and second grounds of appeal, my consideration of ground 3 is now moot.

[37] Ground 4 was not pursued at the appeal and is therefore disregarded.

Decision and Orders

[38] For all the above reasons, this appeal partly succeeds and the Order of the Supreme Court as contained in paragraph 5 of the judgment is substituted by the following Order of this Court:

The Court declares that Jacques Patrick Bacco is not the father of A.B.

[39] I make no order as to costs in the appeal.



Dr. Mathilda Twomey JA

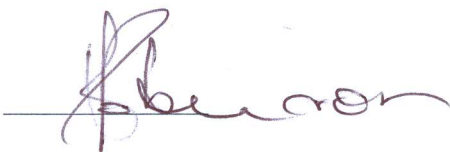
I concur



A. Fernando PCA

ROBINSON JA

[40] I agree with the conclusion reached by Twomey J.A that this appeal partly succeeds insofar as the Court of Appeal declares that the Respondent is not the father of the minor child Ali Maolana Bacco. I make no order as to costs



Robinson JA

Signed, dated and delivered at Ile du Port on 9 July 2021.