

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**



(1)REPORTABLE: YES / NO
(2)OF INTEREST TO OTHER JUDGES: YES/NO
(3)REVISED.

CASE NO: 24613/2019

DATE SIGNATURE

In the matter between:

LAVANI GOVENDER

Applicant

and

DIRECTOR –GENERAL OF THE DEPARTMENT
OF HOME AFFAIRS

First Respondent

MINISTER OF THE DEPARTMENT OF
HOME AFFAIRS

Second Respondent

YASHEEL MAHARAJ

Third Respondent

JUDGMENT

SARDIWALLA J:

Introduction

[1] The proceedings before this Court is a review application brought in terms of PAJA to set aside the decision of the first respondent to reject an application made by the applicant in terms of section 25 (2) of the Births and Death Registration Act 51 of 1992 (“the Act”).

[2] On or about 9 March 2018 the applicant completed the Notice of Birth form to register her son Keshaan, born on 15 February 2018. At the time the applicant and the third respondent were “married” according to hindu rites and customises, which marriage was never formally legally registered. On the Notice of Birth form the applicant had indicated Keshaan’s surname to be “Govender”. However, the applicant alleges that without her knowledge and consent, the third respondent unilaterally altered the document and crossed out the surname “Govender” and inserted the surname “Maharaj” in the remaining space provided. The alteration was signed by the third respondent only.

[3] In April 2018 the applicant received Keshaan’s birth certificate which recorded his surname as “Maharaj” and not “Govender”. The applicant thereafter made an application in terms of section 25(2) of the Birth and Death Registration Act to have Keshaan’s name changed to “Govender”. On 3 and 4 December 2018 respectively, the applicant received responses from the first respondent rejecting her application. The reasons provided are as follows:

“Afternoon

Please note that according to our records held at this department, the child was registered with the Maharaj surname. There is a scratch off of the surname Govender which shows that it was the initial one however it was cancelled and the surname Maharaj was put on the record.

We consider that to be legal hence there is initials to show that the person acknowledged the corrections, I think what I just explained is what you are also in possession of.

.....

Morning

I have never seen a record with two signatures or initials on the corrections the reason might be that all records are not filled in by two people, the two individuals only attach their signatures on the acknowledgement part. (consents)

However, let's not forget the fact that the parents were religiously married."

[4] It is that decision which the applicant in these proceedings seeks to have reviewed and set aside. The applicant seeks an order that the matter be remitted to the first respondent for reconsideration *de novo* alternatively, that Keshaan's surname is replaced and the first respondent be directed to alter the surname to record it as Govender.

Grounds of review

[5] The applicants' grounds of review are that:

5.1 the decision was materially influenced by an error of law as contemplated in section 6(2) (d) of PAJA;

5.2 the decision was taken because irrelevant considerations were taken into account and relevant considerations were ignored as contemplated in section 6(2)(e)(iii) of PAJA;

5.3 the decision was taken arbitrarily and capriciously as contemplated in section 6(2)(e)(vi) of PAJA;

5.4 the decision was not rationally connected to the information placed before the first respondent as contemplated in section 6(2)(f)(ii)(cc) of PAJA;

5.5 The decision is otherwise unconstitutional or unlawful as contemplated in section 6(2)(i) of PAJA.

Applicant's submissions in support of the relief

[6] The basis for requiring the relief relating to the exclusion of the third respondent's particulars in the unabridged birth certificate and the change to Keshaan's surname is the following:

- (a) the “marriage” of the parties is not legally recognised by the Act and therefore the provisions of section 10 of the Act applies in so far as the registration is concerned;
- (b) In addition, section 10 of the Act only permits that the child be registered under the name of the mother or that a joint request by the parties that the child be registered under the surname of the father;
- (c) That the applicant has not consented to the alteration on the notice of Birth that the requirement for joint request has not been met;
- (d) According to the first respondent, the third respondent’s actions are fraudulent in so far as the correspondences between the applicant’s attorney and the department official Tsietsi Sebelemetjia;
- (e) Despite an exchange of numerous correspondence with the first respondent, relating to the surname change and the insertion of the third respondent’s surname in the unabridged birth certificate, the first respondent has refused to co-operate and assist in ensuring the changes are made.
- (f) To corroborate her submissions, the applicant relies on exchanges of correspondence annexed to the application papers.

The respondent’s opposition

[7] The stance of the third respondent is that the applicant has failed to demonstrate that she has exhausted any internal remedy and or has failed to follow the proper procedure for judicial review in terms of the Act. That one cannot be afforded redress through Rule 53 applications and the principle of legality in order to obtain declaratory relief as these applications do not apply to matters involving PAJA.

[8] If one were to impose the applicant’s surname to the minor child that it would be in contravention of section 25 of the Act which requires the written consent of the biological father, which consent he withholds. Further that the parties had agreed that Keshaan would carry the surname “Maharaj”.

Issue for determination

[9] I am required to decide whether it is in the best interests of Keshaan for his surname to be altered to his mother's surname or to remit the matter back to the first respondent for reconsideration.

Applicable legal principles and analysis

[10] Section 28(2) of the Constitution of the Republic of South Africa, 1996 reads as follows:

'A child's best interests are of paramount importance in every matter concerning the child.'

[11] The principle of *'best interests of the child'* has pervaded both statutory provisions pertaining to children and our case law and is the starting and end point, in my view, when dealing with matters pertaining to children. The enactment of the Children's Act 38 of 2005 ('the Children's Act') places significant emphasis on the 'best interests of the child' with s 9 of the Children's Act specifically reading as follows:

'In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied.'

[12] The court as upper guardian of minor children has extremely wide powers to determine what is in the best interests of minor children. This is having regard to the evidence presented and/or the submissions advanced by the respective parties who 'appear' to be acting in the best interest of the child.

[13] Our law makes it clear that the interest of children is of paramount concern in all matters relating to them and often takes preference over the interests of the parents and the views expressed by parents and guardians.

[14] The preamble to the Children's Act recognises that children 'should grow up in a family environment and in an atmosphere of happiness, love and understanding'.

[15] Section 2 deals with the objects of the Children's Act and reads as follows at (i):

' . . .generally, to promote the protection, development and well-being of children.'

[16] Chapter 2 of the Children's Act, specifically s 6(2)-(5) records the following:

'(2) All proceedings, actions or decisions in a matter concerning a child must-

(a) respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 and the rights and principles set out in this Act, subject to any lawful limitation;

(b) respect the child's inherent dignity;

(c) treat the child fairly and equitably;

(d) protect the child from unfair discrimination on any ground, including on the grounds of the health status or disability of the child or a family member of the child;

(e) recognise a child's need for development and to engage in play and other recreational activities appropriate to the child's age; and

(f) recognise a child's disability and create an enabling environment to respond to the special needs that the child has.

(3) If it is in the best interests of the child, the child's family must be given the opportunity to express their views in any matter concerning the child.

(4) In any matter concerning a child-

(a) an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided; (my emphasis).....

(5) A child, having regard to his or her age, maturity and stage of development, and a person who has parental responsibilities and rights in respect of that child, where appropriate, must be informed of any action or decision taken in a matter concerning the child which significantly affects the child.'

[17] Section 7 of the Children's Act sets out the factors to be considered when applying the best interests of the child standard and the relevant portions thereof read as follows:

'(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely-

(a) the nature of the personal relationship between-

(i) the child and the parents, or any specific parent; and

(ii) the child and any other care-giver or person relevant in those circumstances;

(b) the attitude of the parents, or any specific parent, towards-

- (i) the child; and*
- (ii) the exercise of parental responsibilities and rights in respect of the child;*
- (c) 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;*
-
- (f) the need for the child-*
 - (i) to remain in the care of his or her parent, family and extended family; and*
 - (ii) to maintain a connection with his or her family, extended family, culture or tradition;*
- (g) the child's-*
 - (i) age, maturity and stage of development;*
 - (ii) gender;*
 - (iii) background; and*
 - (iv) any other relevant characteristics of the child;*
- (h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;*
-
- (k) the need for a 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. . . .'*

[18] Section 10 of the Birth and Death Registrations Act¹ provides as follows:

“(1) Notice of birth of a child born out of wedlock shall be given
(a) under the surname of the mother; or
(b) at the joint request of the mother and of the person who in the presence of the person to whom the notice of birth was given acknowledges himself in writing to be the father of the child and enters the prescribed particulars regarding himself upon the notice of birth, under the surname of the person who has so acknowledged.
(2) Notwithstanding the provisions of subsection (1), the notice of birth may be given under the surname of the mother if the person mentioned in subsection (1)(b), with the consent of the mother, acknowledges himself in writing to be the father of the child and enters particulars regarding himself upon the notice of birth.”

¹ Act 51 of 1992

[19] Section 25(1)(c) of the Births and Deaths Act provides:

“When the birth of any minor born out of wedlock has been registered under the surname of his or her natural father and the natural father consents thereto in writing, unless a competent court grants exemption from such consent, his or her mother or his or her guardian, as the case may be, may apply to the Director-General for the alteration of his or her surname to the surname of his or her mother, or the surname which his or her mother has resumed, or the surname of his or her guardian, as the case may be, and the Director-General may alter the registration of birth of that minor accordingly in the prescribed manner: Provided that the man who married the mother of a minor mentioned in paragraph (a) or (b), shall grant written consent to the alteration.”

[20] Section 25(1A) of the same Act provides:

“Notwithstanding subscription 1(b) and (c), the natural father’s written consent is not required where the mother has sole guardianship of the child concerned.”

[21] In my view a proper interpretation of section 25(1)(c) read with section 25(1A), is that the natural mother has the power to change the minor child’s surname if the minor child was born out of wedlock and the natural mother is the sole guardian of the minor child.

[22] The Children’s Act 38 of 2005 and in particular section 19 provides:

“

1. *The biological mother of a child, whether married or unmarried, has full parental responsibilities and rights in respect of the child;*
2. *if –*
 - (a) *the biological mother of a child is an unmarried child who does not have guardianship in respect of the child; and*
 - (b) *the biological father of the child does not have guardianship in respect of the child, the guardian of the child’s biological mother is also the guardian of the child.”*

[23] There are a number of cases to which I have been referred,² which hold a different view and the High Court has directed the Director General to alter the name

² *D v D & 1 Other*, (case number 1751/2014) Judgment of Tsatsi AJ in the Bloemfontein High Court delivered on 11 September 2014, *EC Monchusi v G Taaibosch*, (case number 1418/2013) Judgment of Sesele AJ in the

of a minor child in circumstances where the mother has opposed the granting of such relief and where the consent of both parents of the child is absent.³

[24] In my view the wording in s 25(2) allows a parent to apply to the Director General for the change of surname of a minor child in circumstances where 'good and sufficient reason' is given for the alteration to the surname. It does appear that the Director General has the discretion in the event of him/her being satisfied that good and sufficient reason exists for the alteration of the surname then such an application can be considered on such basis. This would be in circumstances where both parties consent and agree to same. In circumstances like the present, where they do not, an approach must be made to the court to dispense with consent of the non-consenting parent.

[25] I think it is important at this stage for me to mention that this Court is not tasked with determining whether or not the parties' marriage consisted of a "marriage" as defined in the Act but rather whether or not the first respondent acted lawfully in rejecting the application made in terms of section 25(2) by the applicant. In any event the third respondent has not disputed that the "marriage" between the parties was not legally registered and in fact he confirms that they were married under hindu rites⁴, I am therefore satisfied that section 10 of the Act applies in so far as the minor child is concerned.

[26] Whilst the third respondent contends that there was an agreement that Keshaan would carry his surname, he has not provided any evidence before this Court nor a reasonable version that on a balance of probabilities this Court could accept. It remains undisputed that the primary residence of the minor child since birth has been with the applicant. It follows therefore that according to section 25 (1A) as at the date when the third respondent altered the minor child's surname, the applicant was the sole guardian of the minor child born out of wedlock in terms of section 10.

Bloemfontein High Court delivered on 14 November 2013, *GM Mulomba v K Idisi*, (case number 05881/2014) Judgment of Fisher AJ in the Johannesburg High Court, delivered on 6 October 2014

³ *EM v GT* [2015] JOL 32692 (FB); *Damon v Dasram* 2014 JDR 2708 (FB).

⁴ Answering Affidavit, Indexed and paginated bundle page 45, para 21

[27] Upon interpretation of section 10 it is clear that a minor child born out of wedlock automatically assumes the surname of the mother unless there is a joint request. In specifically looking at the wording of section 25(1)(b) in order for this requirement to be fulfilled the father of the minor child born out of wedlock must be in the presence of the mother when completing the Notice of Birth form. The third respondent has not disputed that at the time of the completion of the Notice of Birth that he was not in the presence of the applicant⁵. It is significant to note that this section makes no mention regarding the initials of both parties as a requirement to prove legality and therefore the reasoning of the first respondent is flawed. The applicant avers that she handed the Notice of Birth form to the third respondent's father for the third respondent to complete and submit to the Department of Home Affairs⁶. Therefore, I am of the view that the requirement for joint request has not been fulfilled. In the premise section 10(1)(a) and 25(1A) of the Act applies and the applicant does not need the third respondent's permission to change the minor child's surname.

[28] In any event section 25(1)(c) of the Act confers powers on this Court as upper guardian to exempt the requirement of the father's consent and order that the Director-General of the Department of Home Affairs alter the name of the minor child to the surname of the mother, where the father of the minor child refuses consent. Therefore, I am of the view that it is unnecessary for the matter to be remitted to the first respondent for reconsideration. I am satisfied that the applicant as the sole guardian of the minor child had no knowledge of and did not consent to the alteration and therefore the surname of the minor child must be altered to that of the applicant.

[29] **I accordingly make the following order:**

- 1. The first respondent is directed to alter its records to record the surname of the minor child Keshaan, as Govender.**
- 2. There is no order as to costs.**

⁵ Answering Affidavit, Indexed and paginated bundle page 45, para 23

⁶ Founding Affidavit, Indexed and paginated bundle page 8, para 13

C M SARDIWALLA
JUDGE OF THE HIGH COURT

Appearances:

Date of hearing : **21 OCTOBER 2019**
Date of judgment : **25 FEBRUARY 2020**

For the Applicant: ADV R M COURTENAY
Instructed by: Nance-Kivell Attorneys

For the Third Respondents: ADV K POTGIETER
Instructed by: David Mey & Partners Attorneys