

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 1751/2014

In the matter between:

L[...] N[...] D[...]

Applicant

and

D[...] D[...]

First Respondent

DIRECTOR GENERAL HOME AFFAIRS

Second Respondent

HEARD ON: 31 AUGUST 2014

JUDGMENT BY: E.K. TSATSI, AJ

DELIVERED ON: 11 SEPTEMBER 2014

- [1] This is an opposed application for a mandatory order in which the applicant asked the court to issue authorisation to direct the second respondent to consider altering the surname of the minor child, L[...]-D[...], to that of the applicant, without the prescribed consent of the first

respondent, as envisaged in terms of section 25(2) of the Births and Deaths Registration Act, 51 of 1992.

- [2] The applicant asked the court to order the first respondent to sign any documentation that the second respondent may require for the issuing of a passport of a minor child.
- [3] Should the first respondent not abide by the order as set forth in paragraph [2] above, then and in that event the applicant asked the court to order the sheriff of the court, with jurisdiction, to sign all such documentation on behalf of the first respondent.

3.1 The applicant also asked the court to order the first respondent to pay the costs of this application, save in the event that the second respondent may elect to oppose same, then and in that event a cost order be sought against both respondents jointly and severally the one paying the other to be absolved.

3.2 The second respondent did not oppose this application.

FACTS

- [4] The applicant, L[...] N[...] D[...], met with the first respondent, D[...] D[...], during the 2010 soccer world cup. They had a romantic relationship. Out of this union a daughter named L[...]D[...] D[...] was born on 5 November 2011. The parties lived together in a cohabitation

relationship. The relationship between the applicant and the first respondent ended on 21 May 2013. There has been problems of communication between the parties ever since the parties broke up.

- [5] The applicant has custody and care of the minor child. What really prompted the applicant to approach the court about the application in question is the fact that she experienced problems whenever she wanted to travel with the minor child, locally or abroad. The problem was related to the fact that the minor child's surname is similar to that of the first respondent and differed from that of the applicant.
- [6] The applicant asked the first respondent on numerous occasions to give his consent to have the minor child's surname changed from D[...] to D[...]. As a result, an incident happened where the applicant was supposed to travel with the minor child to the United Kingdom from 13 April to 2 May 2014, and the trip did not materialise. The minor child was supposed to get a passport. The minor child could only get a passport if the first respondent cooperated in giving his consent. This consent could be either by signing the necessary papers for applying for the passport for the minor child or assisted in having the minor child's surname changed.
- [7] The applicant cancelled the minor child's air ticket due to the fact that the first respondent refused to cooperate by signing the passport papers. An amount of 531 British pounds was

forfeited, as a result. Apart from the problem with this particular incident, the applicant experienced the following difficulties, because of the first respondent's refusal to sign the papers:

- 7.1 When she wanted to enlist and registered the minor child in a pre-primary school. It was alleged that it was a prerequisite of such schools that both parents gave consent to the pre-primary school to register the child. Time is of essence, as most of the pre-primary schools already have a nine months waiting list for 2015. The applicant had to register the minor child as soon as possible.
 - 7.2 Boarding on local flights with the minor child was cumbersome for the applicant due to the problem of different surnames. This included opening of bank accounts in the minor child's name and submitting medical aid forms.
- [8] There are allegations of drug and alcohol abuse against the first respondent by the applicant. The applicant alleged that prior to L[...]D[...]’s birth the first respondent agreed that L[...]D[...]’s surname would be D[...]D[...].
- [9] It was the applicant's contention that the first respondent displayed very little or no interest in the welfare of the minor child. For example, on 27 March 2014 the first respondent showed up at the applicant's place unannounced at the time

when the minor child was already asleep. The reason for the applicant to have the minor child accompanied her to the United Kingdom was for the child to meet with the applicant's family members who live in the United Kingdom. It is the applicant's concern that the first respondent denied the minor child this opportunity of bonding and knowing the said family members in the United Kingdom. The applicant expected the first respondent to reimburse her for the cancelled air ticket of the minor child to the United Kingdom. The first respondent ignored the applicant's request to reimburse her for the cancelled air ticket that she bought for the minor child.

- [10] At birth of their minor child, the first respondent suggested to the applicant that they made L[...]D[...]’s surname a double-barrelled surname. This meant that the minor child’s surname would contain both the applicant’s and the first respondent’s surnames. The applicant refused and told the first respondent that she did not mind if their minor child had the first respondent’s surname only. As a result, the first respondent was not willing to change his minor child’s surname or even amended it to a double-barrelled surname.

10.1 The first respondent denied allegations of drug and alcohol abuse against him. According to the first respondent it is not correct that they both agreed that L[...]D[...]’s surname would be changed to D[...]D[...]. The correct fact was that the parties agreed that L[...]D[...]’s surname would be that of the first respondent’s only. A good relationship still existed

between the applicant and the first respondent. The first respondent loves his child dearly, despite the fact that the applicant accused the first respondent of showing no or little interest in the minor child's welfare. To show that the first respondent has interest in the child, on 27 March 2014, the date on which the applicant alleged that the first respondent showed up, unannounced, the applicant, first respondent and the minor child all had supper together. The first respondent and the applicant bathed their minor child together. Some of the reasons why the first respondent refused to assist the applicant in signing forms for the minor child's passport was because the first respondent feared that the applicant may immigrate to the United Kingdom with the minor child. This fact was not baseless as this meant that the first respondent may never see his minor child again. The other concern that the first respondent had, was that he was informed that the applicant had a boyfriend in the United Kingdom.

- [11] The first respondent did not believe that the applicant actually bought the air ticket for the minor child. The reason being, that the applicant refused to provide the first respondent with a copy of the air ticket. This would have enabled the first respondent to reimburse the applicant for the cancelled air ticket. Finally, the first respondent agreed to the signing of the documents for the passport to be issued for the minor child, on condition that: firstly, that the applicant

allowed the first respondent to take the minor child with him to Port Elizabeth to visit his mother. Secondly, that the first respondent wanted the applicant to inform him where they were going to stay and who they were going to stay with in the United Kingdom. However, it was already late for the papers to be signed as the first respondent missed the deadline.

ISSUES

- [12] The main issue in this application is whether or not this court can authorise and direct the second respondent to consider the alteration of the surname of the minor child, L[...]D[...]D[...], without the prescribed consent of the first respondent as envisaged in terms of section 25(c) of the Births and Deaths Registration Act, Act 51 of 1992.

SUBMISSIONS

- [13] It was submitted on behalf of the applicant that it will be in the best interest of the minor child to have her surname altered without the father's statutory consent. The reason being, that the father was being unreasonable in withholding his consent. Counsel for the applicant further argued that, the paramountcy of the best interest standard relating to minor children is firmly established in international law. Section 28(2) of the Constitution provides that a child's best interest is of paramount importance in every matter concerning the child.

- [14] In **Van Deijl v Van Deijl** 1966 (4) SA 260 (R) at 261H the court said the interest of the minor child as meaning the welfare of the minor child. Welfare in its widest sense include economic, social, moral and religious considerations.
- [15] Counsel for the first respondent argued that the best interest of the child is of paramount importance as envisaged in section 28(2) of the Constitution. However, he submitted that the best interest of the minor child will be better served if the applicant ensured that there was independent legal assistance for the minor child in terms of section 28(1) (h) of the Constitution. This legal assistance should be a curator who will be able to represent the interests of the minor child – (see **Legal Aid Board v R and Another** 2009 (2) SA 262 (D)).
- [16] Counsel for the first respondent argued that whenever factual disputes existed in an application where a final relief was sought, the version of the first respondent should be accepted as the truth if that version was not on face value untenable or false – **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A).

16.1 It was submitted on behalf of the applicant that a costs order be issued against the first respondent. Counsel for the first respondent argued that the application be dismissed with costs.

THE LAW

[17] Section 25(c) of the Births and Deaths Registration Act, 51 of 1992 provides that:

“25 Alteration of surname of minor

(1) When-

(c) 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;

(d)

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.....

(2) Any parent of a minor whose birth has been included under a specific surname in the population register, may on the strength of a reason not mentioned in subsection (1), apply in the prescribed manner to the Director-General for the alteration of the surname of the minor under which his or her birth was registered, and the Director-General may, on submission of a good and sufficient reason given for the contemplated alteration of

the surname, alter the said original surname accordingly in the prescribed manner.

- (3) For the purpose of this section 'guardian' includes any person who has in law or in fact the custody or control of a minor.”

[18] Section 21 of the Children’s Act provides that an unmarried biological father has automatic parental rights and responsibilities, if he was living with a mother in a permanent life-partnership at the time of the child’s birth and consents to be identified as a father. If the unmarried father was living in a cohabitation relationship with the mother of the child, he will have an inherent right of contact, care and guardianship (section 18 of the Children’s Act). At common law a mother of a child born out of wedlock has full custody, guardianship and parental authority (Clark B (ed) **Family Law Service** 1988 with loose leaf updates; Butterworths Durban). The father of a child born out of wedlock does not have an inherent right of guardianship over his minor child – Sinclair JD assisted by Heaton J: **The Law of Marriage** Vol 1 (1996) Juta Cape Town): Unless there is an application to the High Court in terms of section (2) (1) of the Natural Fathers Born out of Wedlock Act by the father of a child born out of wedlock, the mother of the child remains the sole guardian and custodian of the child. The Guardianship Act does not affect the common law position regarding the mother’s position of sole guardianship and custody – Clark **Family Law Service**, E32 – *supra*.

APPLICATION OF THE LAW TO THE CASE

- [19] Based on section 25(1) (c), the applicant asked the court to grant exemption from the first respondent's consent in altering the minor child's surname. In addition the applicant asked the court to authorize and direct the second respondent to consider changing the surname of the minor child. According to section 25 (d) and (2) the applicant may apply to the Director General directly for the alteration of the minor child's surname to that of the applicant. However the first respondent's consent may still be needed in this regard.
- [20] Even though the court was to direct and authorize the second respondent to consider altering the surname of the minor child to that of the applicant without the prescribed consent of the first respondent, the problem will not be completely solved. The applicant will still need the first respondent's consent in future. This consent would be needed in issues that affected the minor child, like travelling locally or abroad and or to be registered in a school. The list is not exhaustive. I am of view that even though the problem will not be resolved completely, altering the minor child's surname may alleviate some of the problems that the applicant experienced before. The applicant will be able to perform day to day tasks that affected the minor child's life without necessarily having to ask for the first respondent's consent. For example, opening a bank account for the minor child, signing of the medical forms.

[21] It is important that in the minor child's best interest the father cooperated in signing the documents that the second respondent may require for the issuing of the minor child's passport. The issuing of a passport for the minor child will alleviate most of the problems the applicant experienced when travelling with the minor child – section 28(2) of the Constitution.

[22] In light of the preceding and based on the law discussed the first respondent has inherent right of contact, care and guardianship as contemplated in sections 18 and 21 of the Children's Act. Therefore the Act supersedes common law.

22.1 The first respondent's concern that the applicant may emigrate with the minor child abroad was not unfounded. I am mindful of the fact. However, the applicant cannot emigrate with the minor child without the first respondent's knowledge. The first respondent's consent will be needed in signing documents regarding emigration. The first respondent will still decide whether or not he was willing to sign such documents.

[23] Based on the evidence placed before me and submissions made in court, I am of the view that the first respondent was unreasonable in withholding his consent which was needed in signing documents for the minor child to be issued with a passport. In addition the first respondent was also unreasonable in withholding his consent when he was

supposed to assist the applicant in complying with her parental obligations like registering the minor child in pre-primary school. The applicant had no choice but to ask for the court's intervention.

[24] Accordingly the following order is made:

24.1 The second respondent is authorized and directed to consider altering the surname of the minor child, L[...]-D[...] D[...], to that of the applicant without the prescribed consent of the first respondent as envisaged in terms of section 25 (2) of the Births and Deaths Registration Act 51, 51 of 1992.

24.2 The first respondent is ordered to sign any documents that the second respondent (Department of Home Affairs) may require for the issuing of a passport to the minor child L[...]-D[...] and to do all any such other acts as may be necessary to give effect to the issuing of the passport and visa to the minor child L[...]-D[...] within 14 (fourteen) days after service of this order upon him.

24.3 Should the first respondent not abide by the order set forth in paragraph 24.2 above, then and in that event the Registrar of the Honourable Court with jurisdiction is authorised and directed to sign all such documentation on the first respondent's behalf.

24.4 The first respondent is ordered to pay the costs of this application.

E.K. TSATSI, AJ

On behalf of the applicant:

Adv S. Tsangarakis
Instructed by:
Rossouws Attorneys
BLOEMFONTEIN

On behalf of the respondent:

Adv J.L. Olivier
Instructed by:
Webbers Attorneys
BLOEMFONTEIN

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