

SOUTH AFRICA / JUDGMENT

L v H and Another (2205/2016) [2018] ZAKZDHC 61 (28 November 2018)

[2018] ZAKZDHC 61

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Henriques

CASE / FILE NUMBER

2205/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

LOCAL DIVISION, DURBAN

CASE

NO: 2205/2016

In

the matter between:

L

Applicant

and

H

First Respondent

DIRECTOR

GENERAL: HOME AFFAIRS

Second Respondent

AND

IN THE MATTER OF an application by a co-holder of full parental
responsibilities and rights in respect of a minor child to amplify
and vary an Order in respect of contact, and other relief

ORDERS

GRANTED

1.

The first respondent is directed to sign and fill in all the relevant details and information so required in the form attached to the

founding affidavit marked X being annexure 6 of the Regulations to the Births and Deaths Registration Act 51 of 1992, in respect of an application for the insertion of an unmarried natural father's particulars in the registration of a child born out of wedlock.

2.

After submission of the application in terms of s 11 of the Births and Deaths Registration Act 51 of 1992, read together with Regulation 14 thereof, the second respondent is authorised and directed to insert the particulars of the applicant into the Birth Register of the Republic of South Africa, administered by the Department of Home Affairs, so as to reflect on the minor child's unabridged birth

certificate the details of the applicant as the minor child's biological father.

3.

The first respondent is directed to sign and fill in all the relevant details and information still required in the form attached hereto

marked 'Y', being annexure 9 of the Regulations to the Births and Deaths Registration Act 51 of 1992, in respect of an application for the alteration of the surname of the minor child.

4.

After submission of the application in terms of s 25 of the Births and Deaths Registration Act 51 of 1992, read together with Regulation 17 to the said Act, the second respondent is authorised and directed to amend the minor child's surname in the Population Register of the Republic of South Africa, administered by the Department of Home Affairs, so as to reflect his surname as 'Harvey-Lurie'

5. In the event of the

first respondent's signature not being sufficient to give effect to the orders in paras 1 to 4 above,

the first respondent is

to appear in person at a nominated regional office of the Department of Home Affairs (DHA) in Durban KwaZulu-Natal, together with the

applicant at a date and time determined by the applicant on not less than 14 days' notice to the first

respondent, for the purpose

of complying with any additional requirements to give effect to the orders.

JUDGMENT

Henriques J

Introduction

[1] On 19 May 2017, when the opposed application served before me, the legal representatives advised me that only two issues remained for determination, namely:

- (a) the change or alteration to the surname of the minor child, AH; to include that of the applicant, and
- (b) the costs of the application.

[2] As a consequence of settlement discussions, the parties[1] had agreed a consent order. I heard argument in respect of the two issues. The relief relating to the issue referred to in para 1(a) above was adjourned sine die and judgment in respect thereof reserved.

[3] After considering the submissions of the parties on the costs of the application, I directed that it would be appropriate, given the circumstances, to make no order as to costs. I provided brief reasons for doing so and indicated that detailed reasons would follow in the judgment. These detailed reasons are set out at paragraphs 81 to 88 of the judgment.

Factual matrix relevant to the determination of the issues in para 1 (a)

- [4] It is common cause that the applicant and the first respondent were previously involved in a relationship and are the biological parents of the minor child AH Harvey, a boy born on 6 December 2013 and are co-holders of full parental responsibilities and rights.[2]
- [5] The applicant resides in Gauteng and the first respondent in KwaZulu-Natal. The relationship is an extremely acrimonious one and it appears they are unable to agree on how to co-parent AH as a consequence of the constant discord. This has necessitated various court applications and counter-applications. The applicant has instituted various applications initially to be recognised as a co-holder of full parental rights and responsibilities and to exercise rights of contact to AH and more recently, to further define the exercise of such contact as AH grows older.
- [6] Apart from the urgent interim relief which the applicant sought in respect of the exercise of indirect communication with AH, via Skype or Facetime, the applicant sought additional relief as set out in paragraphs 14 and 15 of the founding affidavit.[3]
- [7] It is common cause that the applicant was present at the time of AH's birth and when his relationship with the first respondent ended, had to resort to a court application[4] inter alia declaring him co-holder of full parental responsibilities and rights and defining his rights of contact to him. At the time of the institution of such application, AH was approximately 4 months old.

- [8] In the application which served before Vahed J on 23 June 2015 under Case No. 10832/2014, the applicant was recognised as a co-holder of full parental rights and responsibilities in respect of AH. At paragraph 26 of the judgment, the first respondent was urged to give serious consideration, in AH's best interest, to the applicant's request that the first respondent take all necessary steps to ensure that the applicant's personal details were reflected in the minor child's unabridged birth certificate as his biological father.[5]
- [9] The parties have over the years been unable to resolve any issues in relation to the minor child amicably amongst themselves without resorting in court applications and litigation, even attempts at mediation have failed.

Applicant's submissions in support of the relief

- [10] The basis for requiring the relief relating to the inclusion of his particulars in the unabridged birth certificate and the change to AH's surname is the following:
- (a) In various correspondence exchanged between the applicant and the first respondent, the first respondent had agreed to the change in AH's surname and the recognition of the applicant as AH's biological father on his unabridged birth certificate.
 - (b) In addition, he indicates that they had agreed to AH's surname being changed to reflect a double-barrelled surname being that of Harvey-Lurie.
 - (c) The new regulations to the Immigration Act 13 of 2002 (Immigration Act) which came into effect on 1 June 2015, have imposed strict compliance in relation to travelling with a minor child, specifically where one parent travels alone with a minor child.
 - (d) According to the applicant, the first respondent would not require the applicant's co-operation in obtaining a South African passport for AH, nor would she require a parental consent affidavit in order for her to travel with AH overseas, including his consent should she decide to emigrate.[6]
 - (e) Despite an exchange of numerous correspondence with the first respondent, relating to the surname change and the insertion of the applicant's names in the unabridged birth certificate, the first respondent has refused to co-operate and assist in ensuring the changes are made.[7]
 - (f) To corroborate his submissions, apart from the exchange of correspondence annexed to the application papers, the applicant relies on a photograph sent to him by the first respondent of AH's name displayed on his school locker at his Little Treasurer's Play School in Mount Edgecombe, reflecting the name AH H-L.
 - (g) The applicant submits that an important factor to consider relating to AH's welfare, in respect of the surname change and his details being included in the unabridged birth certificate, is that AH will be eligible for a German passport. The applicant acquired German citizenship and currently holds dual German and South African citizenship. He submits that

it is important that AH have this advantage in that the German passport had been recently ranked number 1 in the world as it allows access to various countries in the world without a need for a Visa. In addition, being part of the European Union, it creates opportunities for AH to, in the future, live and work in any of the countries which form part of the European Union.[8]

- [11] These changes, he submits, apart from recognising him as AH's father, will ensure that his consent will be required for compliance with the Immigration Act (for travelling and emigration purposes) and should the first respondent marry and wish to change AH's surname.

The respondent's opposition

- [13] The stance of the first respondent is that she does not believe that there is any valid reason why the applicant's details ought to be reflected on AH's unabridged birth certificate and why it is in his best interests for his surname to be altered to read 'Harvey-Lurie'. She submits that her daughter, I H, AH and her form a close family unit and it would not be in his interests to distinguish him from them by adding the word 'L' to his surname.
- [14] If one were to impose the applicant's surname, L, into AH's surname, it would be confusing for him and have the effect of distinguishing him from the family unit being his mother and primary care-giver, and his sister. She submits that AH is accustomed to the surname Harvey and is known at school amongst his friends as AH. AH can, on attaining majority, decide whether he wishes to change his surname.

Applicable legal principles in matters pertaining to children

- [15] 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.'

- [16] 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.'

- [17] 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.

[18] Our law makes it clear that the interest of children are 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.

[19] 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'.

[20] 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.'

[21] 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.'

[22] 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. . . .'

Issue for determination

- [23] I am required to decide whether it is in the best interests of AH for his surname to be altered to include that of his father, resulting in a double-barrelled surname.
- [24] In doing so, I am to have regard to the factual matrix as set out in the affidavits, the submissions and views expressed by the applicant and first respondent, the Family Advocate and Family Counsellor, the best interests of the child standard defined in the Children's Act and developments in terms of applicable case law and legislation.

Submissions

of the parties

[25] Mr Humphrey submitted that if one had regard to the affidavits filed, the first respondent was always in favour of a surname change in respect of AH. Having regard to the emails which had been exchanged, the first respondent was in favour of AH's surname being a double-barrelled surname, namely to one of H-L. The effect of the judgment of Vahed J was to declare the applicant and first respondent to be co-holders of full parental rights and responsibilities.

[26] Subsequent to the order of Vahed J and from August 2015, the applicant attempted to engage the first respondent regarding the

changes, to the extent of requesting her to accompany him to the Department of Home Affairs when it became apparent that her signature

on the documents would not suffice to ensure the name change. It was apparent that over an extended period of time, the first respondent

agreed to the names of the applicant being included in the unabridged birth certificate and agreed that the surname change was in AH's best interests. Support for this, Mr Humphrey submitted was Annexure 'FA31', which was a snapshot of AH's locker at school, it reflected his surname as being H-L.

[27] It is only when animosity arises and there is a deadlock with the parties, specifically in relation to the other interlocutory

application[9], that the surname change and the inclusion of the applicant's names on the unabridged birth certificate, became an issue for the first respondent. Mr Humphrey submitted that the best interests of AH are served by the surname change as having regard to the amendment to the provisions of the Immigration Act, it will be near impossible for AH to obtain a passport without his mother's signature to the documents.

[28] In addition, it was submitted that the applicant can offer AH another passport, a German passport which can only serve his best interests. Given AH's tender age, this would be the appropriate time to effect the surname change in particular.

[29] It also provides the applicant with the 'security' of being an active participant in major decisions in AH's life given that the first respondent does not in her conduct recognise that they are required to co-parent and consult each other, despite him being declared co holder of full parental rights and responsibilities.

First Respondent's Opposition to the relief sought

[30] Mr Marais SC, who appeared for the first respondent submitted that the first respondent's opposition to the surname change and inclusion of the applicant's particulars in the unabridged birth certificate were the following:

- (a) No case has been made out in the application papers that it is in AH's best interests for the surname change;
- (b) The court does not have jurisdiction to direct the surname change until such time as the pre-jurisdictional requirements in terms of s 25(2) of the Births and Deaths Registration Act have been complied with.

He conceded, correctly so in my view, that the standard or test to be applied in matters of this nature is that of the 'best

interest' of the child.

[31] He submitted that insofar as the founding affidavit is concerned, the general rule is that the parties are required to make out a case in a founding affidavit. He submitted that the applicant simply had not made out a case for the relief he sought in the founding affidavit. He submitted that the argument in respect of the eligibility for a German passport arises in reply and the court must still decide if it is in the best interest of the minor child. The surname change appears to have been sought to assert the applicant's best interest and not that of the minor child. He submitted that no case has been made out in the founding affidavit to demonstrate that it is in AH's best interest to interfere with and effect the surname change. In addition, having regard to the general rules of interpretation, one must attempt to achieve harmony between the legislation.

[32] As regards the pre-jurisdictional requirements, he submitted that before the court enforces the constitutional rights of parties, one must ensure harmony between the interests of the child which is of paramount importance and that of parents. If one considers the provisions of s 25(2) of the Births and Deaths Registration Act, it would appear that an approach to the Director General is the first requirement before the court can grant the applicant the relief that he wants. In other words, the applicant must approach the second respondent to amend the surname of AH which is an exercise of administrative action before he can come to court and obtain an order directing the second respondent to do so.

[33] In addition he was of the view that there was authority for the proposition that the High court does not have jurisdiction to issue an order in terms of section 25(2). He submitted that the judgment of Fisher AJ together with the judgment of Strijdom AJ[10] is apposite and the court can only be approached once the Director General has exercised his mind and made an administrative decision.

- [34] In reply on this aspect, Mr Humphrey submitted that s 25(2) of Births and Deaths Registration Act presupposes the consent of the mother. An approach in terms of s 25(2) cannot be made unless the mother consents. The applicant cannot enforce his rights or approach the Director General without the consent of the first respondent, which she has refused to give.

Analysis

- [35] I propose to deal firstly, with the submission of Mr Marais that a case has been made out in reply. The relief which forms the subject matter of this application has been dealt with in the founding affidavit.[11]
- [36] In the replying affidavit the issue in respect of the German passport is dealt with in more detail, but is also alluded to in the founding affidavit having regard to the exchange of correspondence.[12]
- [37] Both parties have had an opportunity to file further affidavits as a consequence of the report of the Family Advocate which was obtained a considerable period after the application was initiated. Given the passage of time, and the negotiations taking place, circumstances change and facts may come to light which can be amplified in reply.
- [38] In my view a case was made out by the applicant in the founding affidavit, which has been amplified in the replying affidavit. In matters of this nature the factual position is often fluid, justifying this.
- [39] As already indicated, the applicant is a co-holder of full parental rights and responsibilities together with the first respondent in respect of the minor child AH. There appears to be no sound basis for the first respondent initially refusing to allow the personal details of the applicant to be included in the minor child's unabridged birth certificate. The first respondent appears to acknowledge this as she no longer opposes this relief.
- [40] The applicant, an unmarried father, has satisfied the requirements in terms of s 21 of the Children's Act to be recognised as co-holder of full parental rights and responsibilities and such order was issued by my brother Vahed J. I agree with the submission that the effect of such order is rendered nugatory, unless the applicant's name is included as the biological father of the minor child in his birth certificate.
- [41] The amendment to the regulations to the Immigration Act have far-reaching consequences for parents travelling alone with a child. Despite this parties have in limited instances been able to circumvent them.[13] Apart from providing recognition of the applicant as the biological father of AH, it is essential to have the particulars inserted to cater for unforeseen circumstances which may arise e.g. medical procedures, change of the surname in the event of the first respondent marrying etc.

[42] I agree with the submission that the effect of granting such relief is to give substance to the order of Vahed J declaring the applicant to be a co-holder of full parental responsibilities and rights in respect of the minor child.

[43] As there appears to be merit in the applicant's complaint that the first respondent had refused to co-operate initially in this regard, no prejudice can arise from issuing an order to ensure compliance in respect of the inclusion of the applicant's

particulars in the unabridged birth certificate.

[44] The next aspects for consideration relate to the submissions advanced by the respondent that the High court may not have jurisdiction to issue an order in terms of section 25(2) and that a pre-jurisdictional requirement in terms of the section, is that an approach must first be made to the Director-General.

[45] Section 25 of the Births and Deaths Registration Act[14] deals with the alteration and change of the surname of a minor child. The relevant provisions of s 25(2) which are applicable in this matter, read as follows:

'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 this 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.'

[46] The first respondent in the heads of argument dated 10 May 2017 submits that this court may not have jurisdiction to grant the order sought in respect of the change in surname of the minor child. In this regard the first respondent referred to the decision of *W v S & others* (1)[15] a decision of Findlay AJ. Firstly, the facts in this case are distinguishable from the one referred to. In addition apart from the statement quoted in the first respondent's heads at para 6 of the judgment, the court goes on to state the following:[16]

'...I am not persuaded that there is any basis for the grant of such relief. The case made by the applicant is that M should be given his birthright by this means and, as rightly pointed out by the first respondent in her opposing affidavit, a change of name will not legitimise M nor has the applicant placed before me any circumstances which might be said to demonstrate that M's best interests lie in this direction.'

[47] It would thus appear that the basis for the court not exercising its discretion was that it was not satisfied that the applicant had shown it would be in the best interests of the minor child for there to be a change of surname.

[48] I do not agree with the submission in para 7 of the first respondent's heads that the jurisdiction of the court is ousted

as reference is only made to the Director General.[17] This decision in my view incorrectly interprets the provisions of the Births and Deaths Registration Act. (This is dealt with more fully hereinafter).

[49] There are a number of cases to which I have been referred,[18] which hold a different view and the High Court has directed the Director General to alter the name 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.[19]

[50] The case of *Damon v Dasram* appears to be on all fours with the facts of the present matter. The submission was that the father was being unreasonable in withholding his consent to have the surname of the minor child altered in terms of s 25(2) of the Act. The court was of the view that even though the problem would not be resolved completely altering the minor child's surname, it may relieve some of the problems that the applicant experienced before, like consent to travel locally or abroad and to register the minor child in school.

[51] In any event as the Constitution recognises that the ultimate standard is the 'best interests of the child', in my view, this would constitute good and sufficient reason for the Director General to exercise such discretion.

[52] If one considers the provisions of the Registration of Births and Deaths Act, Chapters 2 and 4 must be considered together as a distinction is drawn in relation to children whose parents were married at the time of conception and or registration of birth and children born out of wedlock. Section 11 deals with the amendment of birth registration of children born out of wedlock. Once the applicant's details are reflected on the unabridged birth certificate it would appear at first glance an approach can be made to the Director General by the applicant for the alteration of the surname. This is with the consent of the mother of such child.[20]

[53] However, where the mother of the child does not consent, a father can invoke the provisions of s 11(5). As in the present matter, where the first respondent refuses consent the requirement of consent to the amendments to the registration of AH's birth by the first respondent is dispensed with. I thus agree with the submission of Mr Humphrey that s 25(2) presupposes consent by the first respondent. The form which is annexed to the regulations confirms this as both signatures are required on the form submitted to effect the change.

[54] 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.

[55] Consequently, it follows that I agree with the submission, that as the first respondent did not consent, an approach must be made to court, the effect of which would be to dispense with such consent. There is no bar to the court issuing such an order as envisaged in the motion court in this regard.

[56] A name is an important aspect of identity and personality. The right to have one's birth officially recognised and registered is specifically catered for in s 9(6) of the Births and Deaths Registration Act, as it provides that no person's birth shall be registered unless a full name and surname has been assigned to him or her. Legislation enacted in 2002, amended these provisions to provide that a child may be assigned the surname of either the father or the mother of a child or the surnames of birth joined together as a double-barrelled surname.[21] A clear distinction however, is drawn in circumstances where a child is born out of wedlock.

[57] Section 28 of the Constitution does not expressly protect illegitimate children. Although s9 of the Constitution, in the equality clause, prohibits any "unfair discrimination", the grounds enumerated therein do not include discrimination on the grounds of legitimacy, although one of the grounds enumerated in the section is "birth". In public international law

discrimination on the grounds of legitimacy is regarded as "unfair". Article 2 of the Convention on the Rights of the Child also prohibits discrimination on the grounds of the child's birth or other status.'

[58] Section 28 of the Bill of Rights gives considerable protection to children's rights in terms of the Constitution. Section

28(1)(a) records that every child has the right to a name and a nationality from birth and with submission, this includes a name identifiable in respect of both holders of parental responsibilities and rights. As upper guardian of the minor child AH, this court must make an order which it considers to be in the best interests of AH and this also relates to the change of the minor child's surname in the absence of consent by the first respondent.

[59] It is undeniable that the relationship between the parties is acrimonious. They cannot seem to agree on anything in relation to the minor child. This is evident from the plethora of litigation which has been instituted in this court, the first of which commenced with the applicant's application to be recognised as a co-holder of full parental rights and responsibilities.

[60] Despite the order being granted, the first respondent appears to persist in opposing the relief to have the applicant's details inserted into the register, on the unabridged birth certificate and reiterates her reasons for not doing so initially. This is despite the fact that for purposes of the Children's Act, he is recognised as a co-holder of full parental rights and responsibilities.

[61] Since 2014, the parties have been engaged in litigation and despite the comments of my brother Vahed J in that initial application, once again the parties cannot agree on the alteration of AH's surname and require a court to do so.

[62] It is undeniable that the applicant is committed and devoted to playing a meaningful role in AH's life. If one has regard to the history of litigation between the parties, it appears that the first respondent remains reluctant to acknowledge his role and his commitment to not only being a dedicated father, but to also be recognised as his father. Such concern was voiced by Vahed J in his judgment in relation to the 2014 court application, at paragraph 26, where he records as follows:[22]

'I am concerned about the respondent's attitude towards including the applicant (as father) in AH's unabridged birth certificate. I urge her to give serious consideration, in AH's interests, to the applicant's request in that regard.'

[63] Having regard to the annexures attached to the founding affidavit, specifically 'FA29'[23] and the additional correspondence, it would appear that the parties had reached agreement on the alteration to reflect it as being that of Harvey-Lurie, a double-barrelled surname. In fact, the first respondent indicated that 'there is no issue on his name on my side'.

[64] She also appeared to acknowledge the advantage of AH having a German passport, the only issue appeared to be whether or not the double-barrelled surname would be hyphenated or not. From the e-mail exchange on the day it appeared that the applicant was all for an unhyphenated double-barrelled surname, whereas the first respondent wanted the surname hyphenated. Annexure 'FA25',[24] records an e-mail exchange between the first respondent to the applicant. Paragraph 3 of such e-mail exchange records an undertaking

by the first respondent to forward the documents the applicant would need in order to complete AH's birth certificate and a willingness to hand over the documents completed with her details to the applicant for him to complete his details and attend at the Department of Home Affairs.

[65] 'FA31' is a photograph forwarded to the Applicant by the First Respondent reflecting AH's name on his locker at the nursery school as being that of Harvey Lurie.[25] In addition, it would appear that the parties, as early as late 2014 and early 2015, regarded child's name as being 'AG H L'.

[66] The applicant's submissions that an agreement had been reached in relation to AH's surname as being H L, is evident not only from the founding papers but also the papers filed by the first respondent. The fact of the agreement is also corroborated by documents which the applicant has presented in the replying affidavit completed at the time of AH's birth. The form signed by the first respondent for stem cell storage, 'RA6', pages 396 to 399, Applicant's replying affidavit, bundle 5 records AH's surname as being 'H-L'.

[67] In addition, in correspondence to her medical aid broker to record AH as a dependent on her medical aid, the subject line refers to AH as AG H L.[26]

[68] The report of the Family Advocate, dated 22 February 2017, reflected the relationship between the parties as still being acrimonious, despite the previous enquiry of 8 October 2014, and the subsequent court order issued by Vahed J on 30 June 2015 and the passage of time.

[69] The family counsellor, Ms. A. Sewcharan, in her report dated 22 February 2017, also recorded the level of acrimony between the parties as not having diminished and led to the attempt at mediation failing. As with the family advocate, Ms. Reding, Ms. Sewcharan encourages the parties to co-parent AH to ensure his emotional well-being in the long term.

[70] At paragraph 16 of the report,[27] she makes this recommendation having regard to various authorities on the point and records the following:

‘According to (Lamb et al., 1999 page 25) in general, relationships with parents play a crucial role in shaping children’s social, emotional, personal and cognitive development and there is substantial literature documenting the adverse effects of disrupted parent-child relationships on children’s development and adjustment. The evidence further shows that children who are deprived of meaningful relationships with one of their parents are at greater risks psychologically, even when they are able to maintain relationships with the other parent. Children are more likely to attain their psychological potential when they are able to develop and maintain meaningful relationships with both parents, whether the two parents live together or not. A large body of research documents the adverse effects of severed father-child relationships in particular, including father-infant relationships, as well as the positive contributions that fathers make to their children’s development undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be a primary consideration. . . .’

[71] Her report acknowledges that the applicant loves AH and wants to be afforded the opportunity of spending more time with him and being part of his life. She records the following:

‘The nature and quality of the relationship between parents and children is vital in contributing to growth and development of a child. It contributes to a child’s self-image, identity and sense of belonging. Psycho-social research shows many benefits for children who have secure bonds with their parents. For these reasons, children should be given opportunities to develop strong and lasting bonds with both parents.’[28]

[72] In relation to aspects involving the change of the unabridged birth certificate to reflect the applicant’s details, the family counsellor records the following:

‘A birth document provides a child with the sense of identity and belonging to two parents. Therefore the Mother needs to take the above into consideration.’[29]

- [73] Apart from the agreement reached by the parties in respect of the surname change, even if there was no agreement, on the facts of this matter, in my view it is in the best interests of AH that the applicant's particulars are reflected on the unabridged birth certificate as his father, and more importantly in terms of s 25(2) application be made by the applicant to the Director General for his surname to be altered to that of AG H-L and the first respondent's consent be dispensed with. In my view the first respondent had agreed to the alteration of his surname. It appears that the contention in relation thereto was whether the double-barrelled surname would be hyphenated or not.
- [74] Although there is a suggestion in the affidavits that the change of heart on the part of the first respondent, may have been brought about by the advice of her legal representatives, to now withhold the consent in the circumstances is unreasonable. The first respondent in my view remains steadfast in her refusal to recognise the role that the applicant plays and will play in future in AH's life. For her to simply refuse to agree to the alteration because she Isabella and AH are a family unit in my view is unreasonable. By having a double-barrelled surname AH will not only be recognised as part of her family unit, but would also give recognition to the applicant and his role as AH's father.
- [75] I draw from the words of Findlay AJ in *W v S* (supra) at 489F-I where he said the following:
- 'I accept that any investigation into the well-being of children carried out by the Court when functioning as upper guardian should be aimed at a determination of what is in the child's best interests and, although in respect of certain matters this may relate to a present-day situation, the Court must not ignore likely future developments, as shown by the evidence, which may indicate a need to look to the long-term benefit rather than short-term. Any fetter unduly limiting the Court's power of investigation or excluding what might otherwise be a relevant factor should therefore be viewed with circumspection and be applied only in circumstances in which a rule of law may so dictate or the Court is clearly satisfied that it is proper to do so. Clearly that is why Courts have avoided rigid classifications and speak of tests such as "good cause" or "best interests of the child" in such investigations.'
- [76] Given the nature of the relationship between the parties various judgments and various interlocutory applications are such that the relationship is acrimonious and four years after the initiation of the investigation I am once again reminded of the views expressed by Findlay AJ in *W v S* (supra) at 491D-F where he says the follows:
- 'The potential for disagreement and conflict as to decision-making and temptation to use the child as a weapon against each other seem to me, having regard to human nature, to be real difficulties which can militate against such a regime being in the best interests of a child; the more so where the parents may not have parted on good terms and there may be a measure of friction between them. This danger is, in my view, heightened where the parents come from different racial, cultural and social backgrounds and may therefore
- be, to some extent, subject to the pressures of their respective environments.'

[77] I am also likewise reminded of the words echoed by Vahed J in his initial judgment in this matter recognising the applicant as co-holder of full parental rights and responsibilities where he held as follows:

‘It is about time that both the applicant and the respondent realised that they need to create a mature, responsible and caring approach in their interpersonal relationship so as to achieve a situation and routine that works best for AH for it is ultimately AH that must be seen to be, and must be, the victor in this process, not either of the parties.’[30]

[78] In my view the advantages the applicant can offer AH by the alteration of his surname and by him being able to apply for a German passport for him, takes into consideration future developments. It can only be in the best interests of AH. In addition to maintain a healthy relationship with his father and to give recognition to both his birth right of L and H, in my view a double-barrelled surname recognising both parents and their commitment to him can hardly be said not to be in his best interests.

[79] I have also had regard to the amended order prayed which is annexed to the papers, and the relief which the applicant sought in para 1 of the amended order prayed. I am concerned that the first respondent, may feel that the applicant has the upper hand, should such an order be issued, and can dictate to her the date and time on which they are required to appear at the nominated office of the Department of Home Affairs (DHA). It is for this reason that I believe the alternative relief as set out in para 2 of the draft order may be the appropriate order.

[80] However, mindful of the red tape which exists at DHA I have also included a further order, should the applicant experience difficulty or require further assistance from the first respondent to give effect to the orders. I encourage the first respondent to sign whatever documents are necessary in order to achieve this purpose and make herself available to attend at the Office of the DHA should the need arise.

Reasons

for the cost order

[81] Mr Humphrey submitted that the first respondent ought to pay the costs occasioned by the application given her recalcitrant attitude throughout these proceedings. He indicated that she has refused to acknowledge the applicant’s role as AH’s father and makes decisions to the exclusion of him, without considering that she is required to co-parent with him. She had also opposed all the relief in the application and eventually relented. He based these submissions on the judgment of Lopes J annexed to the applicant’s supplementary heads of argument.[31]

[82] Mr Marais SC on the other hand submitted that the normal rule is that no order is made as far as costs are concerned in matters involving the best interests of minor children. He submitted that there was no basis to depart from this rule. He conceded, correctly so in my

view, that he was not suggesting that the first respondent is not without blame for the manner in which the litigation between the parties has ensued. However, the matter has been resolved through the efforts, not only of the parties' legal representatives but also by the parties.

[83] Any further cost order in this matter, may be an incentive to the party who succeeded in recovering costs to institute further court applications given the history of the litigation between the parties and the acrimony which has not dissipated.

[84] These submissions were considered when I issued the costs order. In matters involving children the usual practice is for the court to make no order as to costs. In *McCall v McCall*[32] King J said the following:

'...both parents have, in contesting this case, acted in what they believe to be the best interests of their child. There is no winner and no loser. There are two concerned parents. I intend to make no order as to costs.'

[85] However, this is not a general rule of practice and constitutes guidelines to the court in the exercise of a judicial discretion.

There is no bar to a court awarding costs against a party for unreasonable conduct. The ultimate consideration must be that the

court, as upper guardian of minors ought not to discourage bona fide and reasonable approaches by parents to place information before the court. Each case must be determined on its own set of particular

facts.

[86] In *Bethell v Bland & others*[33] Wunsh J held the following at 475E-J:

- '1. Generally speaking, a successful litigant is entitled to his or her costs.
2. Whilst it is quite true that a custody dispute should not be seen as an adversarial contest in the ordinary sense but rather as an enquiry into the best interests of the child, it cannot be denied that in most cases the litigants are advancing their own preferences and seeking satisfaction of their love of the child. Often, too, the papers contain many attacks on the character and conduct of the opponents.
3. On the other hand it is also a consideration that a party should not be discouraged from putting up a case which he or she, on broadly reasonable grounds, thinks to be in the interests of the child for fear of having costs awarded against him or her if unsuccessful. By the same token, a party who is, on what turned out to be good grounds, confident that his or her case will prevail, should not be discouraged from taking or resisting action because of the costs which he or she will incur.

4. However bona fide and concerned a party may be, if his or her opponent's judgment of the issue prevails, it is not, in the absence of circumstances justifying it, fair that the opponent should be mulcted in his or her own costs.'

[87] At the time of issuing the order in respect of costs on 19 May 2017, I had regard to the authorities referred to. I also considered the following in the exercise of my discretion. The applicant was successful in obtaining a punitive costs order in the interlocutory

application which served before Sishi J. The reasons are a matter of record. Whilst the first respondent initially opposed the relief in toto, she eventually acquiesced and agreed that the applicant's names be recorded in the unabridged birth certificate.

[88] The applicant has been substantially successful in this matter and is already "armed" with a punitive costs order. There is a potential for this to be regarded as him having "the upper hand" and for this to add further discord to the already strained and acrimonious relationship. The nature of the parties relationship and that such acrimony has not dissipated is also a matter of record. The parties are to co-parent AH for a period of time. So as to encourage them going forward to adopt an approach "...conducive to conciliation and problem-solving.." and non-confrontational I deemed it prudent not to mulct the first respondent with a further costs order.

[89] I hope that this will be considered by both parties when giving effect to the orders in this judgment.

[90] In the result the orders, I issue are the following:

4. After submission of the application in terms of s 25 of the Births and Deaths Registration Act 51 of 1992, read together with Regulation 17 to the said Act, the second respondent is authorised and directed to amend the minor child's surname in the Population Register

of the Republic of South Africa, administered by the Department of Home Affairs, so as to reflect his surname as 'H-L'

Henriques J

APPEARANCES

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Date of Argument :

19 May 2017

Date of judgment

: 28 November 2018

[1] The applicant and first respondent.

[2] As defined in s 18 of the Children's Act 38 of 2005.

[3] Page 24, founding papers, Bundle 1.

[4] Unreported judgment, Wayne Leslie Lurie vs Sarah Louise Harvey and One Other, Case No. 10832/2014 in the KZN High Court, Durban delivered on 30 June 2015.

[5] The applicant in the founding affidavit also indicated that he instituted an application in respect of his particulars being

reflected in the unabridged birth certificate which also served before Vahed J.

[6] Paragraphs 89, 90 and 92, pages 48 and 49 Founding Papers, Bundle 1.

[7] Paragraph 96, page 50 Bundle 1 annexed to the papers and paragraph 101, founding affidavit, pages 51 to 53, founding papers, bundle 1.

[8] Paragraph 18, pages 298 to 299, applicant's replying affidavit, bundle 4.

[9] The interlocutory application here refers to the judgment of Sishi J in relation to the presence of legal representatives at an enquiry held by the Family Advocate's offices.

[10] LJ v TB 2013 JDR 1234 (GNP).

[11] Paragraphs 86 to 105, pages 47-56 Founding Papers Bundle 1.

[12] Annexure FA29, page 190 Founding Papers Bundle 2.

[13] Here I have in mind matters brought in terms of The Hague Convention on Civil Aspects of International Child Abduction Act 72 of 1996.

- [14] 51 of 1992
- [15] W v S & others (1) 1988
- (1) SA 475 (N).
- [16] At 492F-H.
- [17] LJ v TB 2013 JDR 1234 (GNP)
- [18] 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 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
- [19] EM v GT
- [2015] JOL 32692 (FB); Damon v Dasram 2014 JDR 2708 (FB).
- [20] Apart from a mere reading of the section, the form utilised in terms of the regulations reflect a signature by both the mother and the father of the child.
- [21] Section 9(2).
- [22] Page 127, founding papers, bundle 2.
- [23] Page 190, founding papers, bundle 2.
- [24] Page 184, founding papers, bundle 2.
- [25] Page 193, founding papers, bundle 2.
- [26] Annexure “RA7”, pages 400 to 402. Applicant’s replying affidavit, bundle 5.
- [27] Page 452.
- [28] Page 454, applicant’s replying affidavit, bundle 5 .
- [29] Page 458, applicant’s replying affidavit, bundle 5.
- [30] Para 23 unreported judgment Wayne Leslie Lurie v Louise Harvey & 1 other Case No. 2205/2016, judgment delivered on 30 June 2015.
- [31] AKN v The Central Authority for the Republic of South Africa, unreported Appeal Judgment of Lopes J, with Bezuidenhout J and Gyanda J, Case No: AR571/2015, delivered on 10 May 2016.
- [32] 1994 (3) SA 201(C) at 209 B.
- [33] 1996 (4) SA 472 (W).

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