

SOUTH AFRICA / JUDGMENT

Monchusi v Taaibosch (1418/2013)

[2013] ZAFSHC 209 (14 November 2013)

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COURT

Free State High Court, Bloemfontein

BEFORE

L. M. Sesele

CASE / FILE NUMBER

1418/2013

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

.....
..... Case No: 1418/2013

In the matter between:

ELDRID CLAYTON MONCHUSIApplicant

and

GERONIQUE TAAIBOSCHRespondent

JUDGMENT BY: SESELE, AJ

HEARD ON: 17 OCTOBER 2013

DELIVERED ON: 14 NOVEMBER 2013

[1] The applicant seeks an order in the following terms:

1. that the applicant be declared the biological father and acquires full responsibilities and rights in respect of the minor child in terms of section 21 of the Children's Act 38 of 2005 ("the Act");
2. that the parenting plan marked annexure "A" entered into between the parties on 19 March 2013 be made an order of court in terms of section 33 of the Act;

3. that the applicant and the respondent be awarded guardianship of the minor child in terms of section 24 of the Act;
 4. that the respondent be ordered to alter the surname of the minor child from the respondent's surname to that of the applicant in terms of the Births and Registration Act 51 of 1992, as amended, alternatively, that the applicant be entitled to amend the surname of the minor child.
 5. costs in the event of opposition.
- [2] The parties had a [.....] from 2004 until December 2009 and thereafter they had a [.....] which they call "on and off".
- [3] The minor child was conceived and was subsequently born during December 2010. The child was registered under the surname of the applicant.
- [4] Sometime thereafter the respondent changed the minor child's surname to the respondent's without the applicant's consent.
- [5] Both Mr Oosthuizen and Mr Thompson submit that prayers 1, 2 and 3 should be made the order of court by agreement between the parties.
- [6] Mr Thompson for the respondent takes the view that the only issue for determination is whether the respondent can be ordered to change the minor child's surname from the respondent's surname to the applicant's, alternatively, whether the applicant is entitled to change the minor child's surname.
- [7] Mr Oosthuizen contends that the applicant acquired full parental responsibilities and rights as well as guardianship of the minor child at birth and the applicant was as such not the sole guardian of the minor child.
- [8] Mr Thompson argues that the respondent acted within her power in terms of section 25(1)(c) and section 25(1A) of the Births and Deaths Registration Act 51 of 1992 when the respondent changed the minor child's surname because the respondent was the sole guardian of the minor child.
- [9] In my view the starting point is to determine whether the applicant had the power to change the minor child's surname at the material time.
- [10] 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.”

[11] 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.”

[12] 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.

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

The biological mother of a child, whether married or unmarried, has full parental responsibilities and rights in respect of the child;

If –

the biological mother of a child is an unmarried child who does not have guardianship in respect of the child; and

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.”

[14] It follows therefore that as at the date when the respondent changed the minor child’s surname, the respondent was the sole guardian of the minor child, and did not need the applicant’s permission to change the minor child’s surname.

[15] Now that the applicant acquires a, inter alia, guardianship of the minor child by agreement, both parties become the joint guardians of the minor child. It follows that they must both agree and effect any change that they may wish regarding the surname of the minor child.

[16] The court is unable to make an order the applicant seeks in prayer 4 because it is not the applicant’s case that the respondent refuses to give consent to the change of surname subsequent to acquiring guardianship of the minor child.

[17] The circumstances of the case are such that a cost order against either party may be detrimental to their relationship as the biological parents are also the joint guardians of the minor child.

ORDER

- [18] The applicant is declared the biological father and acquires full parental responsibilities and rights in respect of the minor child, C.J.T, in terms of section 21 of the Children's Act 38 of 2005.
- [19] The parenting plan marked annexure "C" entered into by and between the parties on 19 March 2013 is hereby made the order of court in terms of section 33 of the Children's Act 38 of 2005.
- [20] The applicant and the respondent are awarded joint guardianship of the minor child in terms of section 24 of the Children's Act 38 of 2005.
- [21] There is no cost order.

L. M. S. SESELE, AJ

On behalf of the applicant: A. Oosthuizen

Instructed by:

Justice Centre

BLOEMFONTEIN

On behalf of the respondent: Adv. D. R. Thompson

Bruintjies Attorneys

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