

SOUTH AFRICA / JUDGMENT

Vos v Muller (3282/2019) [2020] ZAMPMBHC 23 (28 October 2020)

[2020] ZAMPMBHC 23

COURT

Mbombela High Court, Mpumalanga

BEFORE

Mashile

CASE / FILE NUMBER

3282/2019

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REPUBLIC OF SOUTH
AFRICA

IN THE HIGH COURT OF
SOUTH AFRICA
(MPUMALANGA DIVISION,
MBOMBELA)

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: YES

Case

No: 3282/2019

In the matter between:

NINETTE
VOS
Applicant
and
IAN
MULLER
Respondent

JUDGMENT

MASHILE J:

INTRODUCTION

[1] The Applicant is the mother and natural guardian of two minor children, Markus and Joshua Muller, born in 2006 and 2008 respectively. She applies to court seeking relief as follows:

1.1 That this Court grants consent to the Applicant to change the surnames of the two minor children from Muller to Vos;

1.2 The Applicant be authorized to approach the Department of Home Affairs of the Republic of south Africa to effect the change of surname in respect of the minor children as per para 1. Above; and

1.3 The Respondent be ordered to pay the costs of this Application only in the event that he opposes this Application;

[2] The Respondent opposes the application mainly on the basis that it is founded on incorrect factual background contained in the Applicant's founding affidavit. For reasons different from those furnished by the Applicant, he nonetheless agrees that his relationship with the minor children is estranged. He avers in his counterclaim that prior to the

minor children taking such a major decision in their lives, it will be in their best interest as envisaged in Section 28(2) of the Constitution that he be afforded opportunity to salvage his relationship with them through the appointment of a binding therapist. He has suggested Dr Kirsten Du Toit ("Dr Du Toit") as a possible expert or any such therapist in the area of Mbombela.

If the binding therapy fails, he will be prepared to concede that it is in their best interest to do so.

Factual matrix

[3] The Applicant and Respondent once lived together as husband and wife. The two minor children were born of that marriage relationship. The parties' marriage relationship became estranged and culminated in their divorce on 3 August 2012 on which date The court directed that primary residence of the Minor Children be awarded to the Applicant. As such, the minor children have since the date of divorce been living with the Applicant.

[4] On 23 September 2017 at Hazyview, the Applicant concluded another marriage relationship with LODEWIJK JOHANNES VOS ("Vos"). The Applicant and the minor children have since commencement of her marriage relationship with Vos been residing at AP Vos and sons, Farm Lulu, Kiepersol, Province of Mpumalanga.

- [5] The Applicant alleges that the Minor Children have developed a positive and loving relationship with Vos. They now regard the Applicant, Vos and they as a single integral part forming the Vos family. It is ostensibly this feeling of the minor children of being part of the Vos family that has incited them to request the Applicant to seek means of altering their surname to Vos.
- [6] Fundamentally, the Applicant's contention is that the Respondent has been profoundly absent in the lives of the Minor Children since the parties' divorce. His absence from the minor children manifested itself both emotionally and financially. It is this lack of meaningful contact with the minor children and material support that have left them alienated from him.
- [7] In consequence, the children have turned to the Applicant and Vos for financial and material support. Vos has filled in the perceived void left by the Respondent. His steady and consistent backing of the minor children has won him a favourite spot in their hearts as a responsible and caring father figure in their everyday lives prompting them to want to change their surname to his.

ASSERTIONS OF THE RESPONDENT

- [8] The Respondent acknowledges that it is patent from the report of the social worker attached to the founding affidavit of the Applicant that the minor children do not want to have contact with him. Believing that this has been as a result of negative influence by the Applicant, he proposes that the court should direct that the minor children and he should attend binding therapy sessions conducted by Dr Du Toit or some other such expert in the area of Mbombela.
- [9] It is only in this manner that what is in the best interest of the minor children can be fully comprehended. He holds the view that changing their surname to another at this juncture of their lives when their attitudes is clouded in what they have been fed by the Applicant could be impetuous and premature. A binding therapy would level the playing field. For that reason, he is prepared to accept the outcome of the proposed therapy whether favourable to his wishes or not.

ISSUES

- [10] The Respondent raised a point in limine concerning the long form of the notice of motion. It appears that by the time the matter was argued in court, the point was not pursued with the same vigour as when it was raised in the papers making it safe to conclude that it is not an issue anymore. Central to this application is, given the facts in this matter, will it be in the best interest of the minor children that they be divested of their biological surname to enable them to adopt that of their step father, Vos? Insofar as the counterclaim is concerned, the main issue is whether it will be in the best interest that the Applicant in reconvention be afforded an opportunity to revive the father-children bond, which he had admittedly lost as a result of lack of contact.

LEGAL POSITION

[11] The subject of change of surnames due to the dissolution of marriage by either death or divorce is governed by Section 25 of the Births and Deaths Registries Act, 52 of 1992 as Amended, which lays down that:

“(1) When—

(b) the father of any minor is deceased or his or her parents’ marriage has been dissolved and his or her mother remarries or his or her mother as a widow or divorcee resumes a surname which she bore at any prior time and the father, where the marriage has been dissolved, 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 for the alteration.”

[12] For an applicant to succeed in an application for the change of a minor’s surname such as in casu, it is necessary to demonstrate that granting the order will be in the best interest of the minor as contemplated in Section 28(2) of the Constitution of South Africa, which provides that ‘a child’s best interests are of paramount importance in every matter concerning the child.’ It is inexorable that an assessment of what is in the best interest of a child will vary from one to the next for as long as factual backgrounds are used to determine the outcome.

[13] The provisions of section 28 of the Constitution finds expression in the Children’s Act 38 of 2005 (“the Children’s Act”). Thus, Section 6(2)(a) and (b) hereof provides that:

“(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;”

[14] Section 7 of the Act headed, Best Interest of Child Standard, is one of the Sections in the act that contains pertinent provisions concerning what must be considered when determining the best interest of the child. For that reason, I think it is important to reproduce it below in full:

“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;
- (d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from-
 - (i) both or either of the parents; or
 - (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;
- (e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
- (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;
- (i) any disability that a child may have;
- (j) any chronic illness from which a child may suffer;
- (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;

- (I) the need to protect the child from any physical or psychological harm that may be caused by-
- (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or
 - (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;
 - (m) any family violence involving the child or a family member of the child; and
 - (n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.
- (2) In this section 'parent' includes any person who has parental responsibilities and rights in respect of a child.”

EVALUATION

- [15] It is indubitable that presently the Respondent does not have any form of access to his children at all. The parties point fingers at each other why their relationship has come to the respondent losing contact with the minor children. The Applicant is persistent that loss of contact with the minor children is due to the Respondent because of his failure to make any significant efforts to secure access to the minor children. Additionally, she alleges that the Respondent has discouraged any contact plans, has not been of any financial assistance to the minor children and he would not disclose his residential address to neither her nor the minor children.
- [16] It is interesting that it is not disputed that in fact the Respondent, following the divorce order of the Regional Magistrate's Court, applied to court for amendment of the order. The amendment concerned the inclusion of his parental rights and responsibilities over the minor children as the initial order, granted in his absence, failed to set out those rights. Why would the Respondent go to such great lengths to modify the order of the Regional Magistrate's Court to ensure that his parental rights as contemplated in the children's Act are observed if he did not care about the minor children? Accordingly, it is misleading that the respondent made no meaningful attempts to secure contact with the minor children. It is also clear from correspondence exchanged between the attorneys that the Respondent sought the intervention of his attorney to resolve the matter without any success.
- [17] What sort of a parent would travel for approximately 250 Kilometres with full knowledge that he might be afforded only 2 hours or less to have contact with his minor children if not one who places contact with his children at the top of his priority list? In my opinion the Respondent bears all the hallmarks of a responsible and concerned parent. While I am mindful that exercise of contact by the respondent is ultimately conceded in her replying affidavit and opposing affidavit, the omission in the founding affidavit is too conspicuous to miss. In the light of the hostile environment in which it happened, it is difficult not to conclude that it was a deliberate act designed to make the Respondent look worse than he

actually is.

- [18] Insofar as lack of financial support is concerned, I agree with the Respondent that the Applicant cannot utilise it to withhold the Respondent's access to the minor children. Failure to pay maintenance ought to be viewed as a grave matter by this Court. That said, one would have expected the Applicant to have taken appropriate steps to have that issue addressed. Her lackadaisical approach to have the question of maintenance resolved by the Maintenance Court since her divorce from the Respondent raises suspicions of what her true intentions have always been. In the circumstances and in any event, lack of maintenance of the minor children cannot legally be used as a device to bar the respondent's contact with the minor children.
- [19] Turning to the Respondent's alleged refusal to supply his physical address to the Applicant and/or the minor children, I am at a complete loss who supplied the Applicant's attorneys with the address of service of the process in this matter, if not the applicant herself. Moreover, it is discernible from the exchange of correspondence between the attorneys of the parties that the Applicant has always had the Respondent's physical address. Furthermore, the Applicant has been aware of the address where the Respondent exercised his overnight contact with the minor children in Mbombela. The excuse therefore must be a façade to deprive the Respondent of contact with the minor children and this Court views this in a serious light.
- [20] I have already stated that the factual background in each case plays a material role in the consideration of what is in the best interest of minor children. In doing this, matters such as the impact that the change in surname will have, the relationship between the parties and the relevant facts leading up to this application are but some of the factors to consider. It is manifest that the relationship between the parties post-divorce was characterised by some form of cordiality but for some reason deteriorated and finally descended into acrimony especially following the Applicant's second marriage. The geniality is evident because the Applicant did allow the Respondent to exercise contact with the minor children post-divorce but prior to

her next marriage in 2017.

- [21] The report of the psychologist set a complete new tone to the parties' relationship. The fact that the Applicant took the minor children to the psychologist after the Respondent had not seen them for a while is emblematic of a person who was finalising preparation for severance of relations between the minor children and their father. It is indeed disquieting that the minor children seem to have been privy to information to which only the Applicant would have been exposed alone. The following questions are unavoidable to raise:

21.1 How did the minor children know that their father was possibly living with a partner?

21.2 How did the minor children acquire knowledge that their father was not making any meaningful financial contribution towards their support?

21.3 Who fed them with information that the Respondent's whereabouts were unknown or that he was refusing to avail his physical address to them and their mother?

[22] These are questions that unfolded during the interview with the psychologist. It leaves one with very little doubt that the minor children would have been exposed to this information by the Applicant most probably in preparation for severance of their relationship with the respondent. I find myself in agreement with Counsel for the Respondent that the extent to which the Applicant has been willing to go to refuse access to the Respondent and her destructive influence on the minor children may be branded parental alienation insofar as it seeks to destabilise the Respondent's relationship with the minor children.

[23] The upshot of the adoption of a surname of another by minor children is not only a grave decision but it is a major decision, which ordinarily should not be dictated by the prevailing mood and impetuosity of the party wishing it to happen. The change would not only cut the minor children's relationship with the Respondent alone but is likely to negatively affect their relationship with their paternal family. The intention that the switch from Muller to Vos is calculated to discard relations with the Mullers in favour of Vos is hard to shake-off given the minor children's assertion that the adoption of the Vos surname would lead to their integration into the Vos family and truly feel like one family with their mother and her new husband as their father. In this regard it could be necessary to be reminded of the provisions of Section 7(1)(f)(1i) and (ii) of the Children's act:

“(f) the need for the child-

(ii) to maintain a connection with his or her family, extended family, culture or tradition;”

[24] I need to reiterate that this is a serious step to be taken by minor children aged 12 and 14 who may later live to regret their decision in life. The background circumstances and facts demonstrate that the environment within which this change of the surname is sought is characterised by hostilities between the parties. As such, one is left with an uneasy feeling that the change is necessary to settle scores of the parties whose relationship has turned ugly. Again, the status of the minor children cannot be dictated by the whims of the parties and sight that the best interest standard may often vary from what is in the best interest of their

parents should not be lost. See, *L v H and Another* (2205/2016) [2018] ZAKZDHC 61 (28 November 2018).

COUNTERCLAIM

[25] The Parties are referred to as in convention. The Respondent has conceded that his relationship with the minor children has virtually died albeit not by means of his own formation. Given the significance of a biological relationship between parents and their minor children especially in circumstances where there are no allegations of abuse by the parent whose relationship is sought to be terminated, would it not be fair to afford the minor children to endeavour to rekindle their relationship with their father? It is the opinion of

this court that the Respondent and the minor children must be given that opportunity before the proposed severance of relationship.

[26] The minor children are a step away from attaining the age where they can themselves make a decision whether to change their surname or not. If a change is required now, it will only be fair to everyone concerned, to level the playing ground by exposing them to an environment that is free of the influence of either party before they can dispassionately resolve to make this immutable decision. To allow the change without certainty that they fully appreciate the decision that they are about to make cannot be in their best interest as contemplated in Section 28(2) of the Constitution of the Republic of South Africa and Section 7 of the children's Act.

[27] To decide otherwise would be to go against the essence of the amended court order of the Regional Magistrate's Court that directs that the Respondent is entitled to exercise his parental rights and responsibilities over the minor children. Embarking on this route is the safest because, if for some unforeseen reasons, this matter is, through no one's fault, delayed until either one of them is of age to independently make a decision, he will have been exposed to unbiased facts through the binding therapy, which will assist him to make an objective decision. Against that background, I find that:

27.1 While the minor children might have expressed a wish to change their surname from Muller to Vos, it would be inappropriate and not in their best interest to allow this in circumstances where the source of the wish could have been provoked by the hostile relationship between the parties;

27.2 The logical corollary of refusing the application is that unbiased facts must be laid bear to the minor children to make it stress-free for them to make an unprejudiced decision;

27.3 The application must fail and the counterclaim must succeed.

CONCLUSION

[28] The application fails and the counterclaim succeeds. Accordingly, I make the following order:

APPLICATION

1. The application is dismissed with costs;
2. The Respondent and the minor children are to commence attendance of a binding therapy conducted by Dr Du Toit or any other expert with similar expertise in the area of Mbombela within a period of 60 days from the date of this order;
3. The court further directs as follows:

3.1 Both parties are to retain full parental rights and responsibilities with regards to the care of the minor children as envisaged in Section 18(2)(a) of the Children's Act 28 of 2005;

3.2 Primary residence of both minor children will vest with the Applicant and the Respondent will have right of care and contact with the minor children that he will exercise as follows:

3.2.1 Every third weekend from the Friday evening at 19:00 where the Respondent will collect the minor children, until the Sunday evening at 18:00 when the Respondent will return the minor children to the Applicant;

3.2.2 The minor children will spend mother's day with the Applicant and Father's day with the Respondent;

3.2.3 The minor children's birthdays are to be rotated between the parties, and the Respondent is entitled to arrange his contact weekend for the weekend following the child's birthday should his birthday fall on a weekday;

3.2.4 The Respondent is entitled to arrange his contact weekend on the weekend following his birthday should his birthday fall on a weekday and is entitled to spend his birthday with the minor children;

3.2.5 The Applicant is entitled to spend her birthday with the minor children and the Respondent will arrange his weekend contact visits accordingly;

3.2.6 The Respondent is entitled to telephonic contact with the minor children three times a week at 19:00 in the evening, which will be arranged with the Applicant on the day prior to the contact being exercised;

3.2.7 The short school holidays will be alternated between the parties as well as long holidays in such a way that both Christmas and New Year is spent with a different party every year, the minor children to rotate on or about the 28th of December every respective year;

3.2.8 Each party is to notify the other party 24 hours prior to any contact session of any changes in times and locations.

4. The abovementioned contact rights contained in prayer 3 are suspended until the Respondent and the minor children have attended binding therapy with Dr du Toit or any other expert with similar qualifications practicing in the field in the area of Mbombela until Dr Du Toit or such other expert in the area of Mbombela reports that the Respondent and the minor children are ready to implement the abovementioned contact rights.
5. The Respondent will be entitled to enjoy intermittent contact with the minor children as recommended by Dr du Toit or any other expert in the area of Mbombela from time to time until the binding therapy has been completed.
6. The costs of the binding therapy will be paid by the Respondent.

Costs of the counter application are to be paid by the Applicant in convention

B A MASHILE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email. The date and time for hand-down is deemed to be 10h00 on 28 October 2020.

APPEARANCES:

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Instructed by:

IAN Muller

Date of Hearing:

01 July 2020

Date of

Judgment:

28 October 2020

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