

SOUTH AFRICA / JUDGMENT

Wile and Another v MEC for the Department of Home Affairs, Gauteng and Others (21150/2014) [2016] ZAWCHC 80; [2016] 3 All SA 945 (WCC); 2017 (1) SA 125 (WCC) (24 June 2016)

[2016] ZAWCHC 80

COURT

Western Cape High Court, Cape Town

BEFORE

Bozalek

CASE / FILE NUMBER

21150/2014

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THE

REPUBLIC OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case

No: 21150/2014

DATE:

24 JUNE 2016

REPORTABLE

In

the matter between:

INGRID
ELEANORA
WILE.....1st
Plaintiff
MARGERITA
JOSEFA MORCHE (born
Kampling).....2nd
Plaintiff
And
THE
MEC FOR THE DEPARTMENT OF
HOME
AFFAIRS,
GAUTENG.....1st
Defendant
THE
NATIONAL MINISTER /DIRECTOR GENERAL
OF
THE DEPARTMENT OF HOME
AFFAIRS.....2nd
Defendant
OF
SOCIAL
DEVELOPMENT.....3rd
Defendant

JUDGMENT

Before the Hon. Mr Justice Bozalek

Hearing: 21 April 2016

Judgment

Delivered: 24 June 2016

BOZALEK J

- [1] The first plaintiff in these provisional sentence proceedings is a 50 year old South African citizen resident in Cape Town. She is, in terms of German law, the adoptive daughter of the second plaintiff, a woman who is a German national and permanently resident in Germany. The relief which the plaintiffs seek calls upon the respondents to authorise the employees of the Department of Home Affairs in Johannesburg to give effect to a judgment granted by the Local Court of Freiburg im Breisgau, Family Court, in Baden – Württemberg, Germany, (the ‘Amtsgericht Freiburg Im Breisgau, Familien gericht’) which I shall refer to as the ‘German court’ or ‘the court’. That court’s order, together with reasons, was annexed to the summons together with a translation from German to English.

[2] The relevant portions of the decision and order of the German court reads as follows:

‘Decision

(1) Following the requests by the adoptive parent and the person to be adopted dated 30 July 2012 and 22 August 2013 respectively, the adoption of the South African citizen

Ingrid Eleonora Wile, born on t May 1966

Marital Status: single

resident of S 3 Main Road, P, P N 5 A.P, I

- Person to be adopted –

by

Margereta Josefa Morche, born on April 1937

Nationality: German

39 F 2

Marital Status: widowed

resident of R 8 B K, G

- Adoptive Parent –

has been pronounced

(2) The adoptee shall henceforth bear the family name Morche.

(3) Pursuant to section 1757 para.4 no. 1 of the German Civil Code (BGB), the adoptee shall be given the additional first name of Merseram to the effect that her first names shall from now on be Ingrid Eleonora Merseram.

(4) ...

(5) If the request was made for the adoption to have the same effects as those given when a minor is adopted, the request shall be rejected.

(6) ...’ .

[3] The order was corrected by the Court on 21 November 2013 to reflect the correct spelling of the first plaintiff’s name i.e. ‘Eleanora’.

[4] The reasons for the court’s decision were given as follows:

‘REASONS FOR THE DECISION

The Local Court of Freiburg Im Breisgau is the competent local court for this adoption case because the adoptive parent's domicile or place of habitual residence is within the court's area of jurisdiction.

In accordance with article 22 sentence 1 of the Introductory Act to the German Civil Code (EGBGB), the adoption is governed by German law because the adoptive parent is of German nationality.

The adoption request was duly made (section 1767 para. 2, section 1768 para 1, section 1752 para. 2 BGB).

The requirements pertaining to age pursuant to section 1767 para. 2, section 1768 para. 1 and section 1743 BGB have been fulfilled.

The adoptive parent and person to be adopted were heard in person.

The adoption was pronounced as a result of all the necessary legal requirements being met.

The adoption is based in sections 1767 and 1770 BGB. The requirements entitling an adoption to have the same effects as those given when a minor is adopted pursuant to section 1772 para. 1 BGB have not been met. The request to this effect made by the adoptive parent and person to be adopted was rejected.

The decision pertaining to the costs was based on section 81 para. 1 sentence 1 of the Act on Procedure in Family Matters and in Matters of Non-contentious Jurisdiction (FamFG).'

[5] The first defendant is cited as the MEC for the Department of Home Affairs, Gauteng. No such official exists, the description clearly confusing provincial and national functions. In any event when service on this party was sought to be effected through the State Attorney, a secretary correctly responded that there is no MEC for the Department of Home Affairs and therefore she cannot accept process. There is, accordingly, no first defendant before Court. The second and third defendant were cited as the National Ministers/Directors-General of the Department of Home Affairs and Social Development, respectively. This somewhat ambiguous description was not challenged by the second and third defendants who gave notice of their intention to oppose and filed opposing affidavits. These were deposed to by the Acting Director-General in the Department of Social Development and a Director in the Registration of Births and Deaths division in the Department of Home Affairs.

THE PROCEDURE ADOPTED

[6] The use of the provisional sentence procedure by the plaintiffs was entirely inappropriate. Plaintiffs' counsel relied in this regard on the fact that the relief sought turned around the recognition of a foreign judgment and in such cases proceedings are often brought using the provisional sentence procedure. However, this completely overlooks the fact that provisional sentence is primarily a mode of procedure providing a creditor with a speedy remedy for the recovery of monies due where the plaintiff is armed with sufficient documentary proof of claim in the form of a liquid document. The foundation of such a

remedy is the existence of a liquid document which establishes a fixed and determinate sum of money, as the commentary in *The Civil Practice of the High Courts of South Africa*, Herbstein and Van Winsen, Juta 5th Ed at page 1313 et sequor makes clear. In the present case, the plaintiffs seeks no relief sounding in money and the enforcement of the foreign judgment concerns the question of the first plaintiff's status, more particularly, the names by which she is entitled to be known as.

- [7] The matter has, however, been dealt with by the parties as if it was brought by way of application and there is a strong case for approaching this matter on the basis of its substance rather than its form, a question to which I shall return later.
- [8] Firstly, however, the nature of the plaintiffs' cause of action and the relief sought must be examined. As initially set out in the provisional sentence summons, the relief sought was to give effect, apparently in its entirety, to the order of the German court. The only explanation furnished was that the order had been obtained following requests made in 2012 and 2013, in Germany, by the adoptive parent (the second plaintiff), a German citizen and widow, for the adoption of the first plaintiff, a citizen of the Republic of South Africa. It was further stated that second plaintiff, who made the request as the person who raised the first plaintiff, was permanently resident in Germany and had 'assumed responsibility' for the first plaintiff in order to ensure that she became part of the second plaintiff's family.
- [9] The provisional sentence summons alleged that this Court had jurisdiction over the first plaintiff, a South African citizen who had a residential address in Cape Town and was domiciled within the area of the Court's jurisdiction. It was alleged that only by means of this Court giving the relief sought that the defendants would be in a position to give effect to such orders and to amend the first plaintiff's name and surname in the records of the Department of Home Affairs.
- [10] In their opposing affidavits, the second and third defendants adopted a common position, namely, that the first plaintiff was adopted when she was 47 years old and that all legal issues pertaining to adoption in this country are set out in the Children's Act, 38 of 2005 ('the Children's Act') which does not provide for adult adoption. South Africa, it was said, does not have any legislation providing for the adoption of majors and therefore the defendants could not recognise or record the adoption of the first plaintiff by the second plaintiff. It was further alleged that sec 26(2) of the Births and Deaths Registration

Act 51 of 1992 ('the Registration Act'), read with the relevant regulation, deal with the situation of a person applying for change of surname but makes no provision for the basis of the first plaintiff's proposed change of surname. Consequently, it was alleged, the second defendant was statutorily 'prohibited' from amending the first plaintiff's surname (although not her forename). Both defendants asked for the plaintiffs' claim to be dismissed with costs.

- [11] The plaintiffs filed replying affidavits providing more background to the action and their reasons for instituting it. In her reply, the first plaintiff focussed on the aspect of the German court's order whereby she was authorised to assume the additional forename ('Merseram')

and surname ('Morche') referred to in the summons. She explained that she left home at the age of 17, breaking all ties with her biological family who had rejected and disowned her. She met the first plaintiff and was introduced to her family consisting of herself and her late husband. They did not have children of their own and decided to take in the second plaintiff who, in a sense, became their daughter. The possibility of adoption was often discussed amongst them or, if that was not possible, the possibility of the first plaintiff changing her surname to that of the second plaintiff and that of her husband.

[12] The first plaintiff agreed to assume the full name and the surname of the second plaintiff and her husband on condition that they allowed her to change her forename and surname in South Africa. Before funds could be obtained to commence any legal process, the second plaintiff's husband died in March

2007. Funds then became available and, after a legal opinion was taken in South Africa, the German court was approached. That court required letters and affidavits from friends to testify to the relationship between the plaintiffs and in particular whether they regarded that relationship as one of mother and daughter. The court then investigated the second plaintiff's friends and heard their evidence. Both the plaintiffs were required to appear before a

German 'commissioner/notary' who was instructed by the court to investigate the relationship between them and to report to the court which then set a date for the hearing of the evidence of both plaintiffs. That evidence was duly led before the court with the plaintiffs being questioned by the court. Thereafter, it granted the order in question.

[13] Armed with the order, the plaintiffs made contact with the Department of Home Affairs in Johannesburg to enquire as to the process to be followed for the first plaintiff to change her forename and surname to correspond with the order granted by the German court. The advice received from an official was that a name change was possible in terms of South African law but not without an 'entitlement' to the surname. Further advice received from the Department was that the recognition by a South African court of the German court order would constitute such an entitlement for the first plaintiff to assume her new surname in this country.

[14] The plaintiffs explained further in their affidavits that the German court's order was not an adoption order as envisaged by the Children's Act, 38 of 2005 which provides, inter alia, that a child may be adopted where the adoption is in the best interests of the child. They stated that the German court did not intend to grant an order whereby the first plaintiff was adopted by adoptive parents or parent as envisaged in the Children's Act but instead granted her leave to change her name and surname to that of the family which had accepted her into their family years ago.

[15] I pause here to note that some confirmation of this is to be found in the terms of the German court's order, more particularly paras (2) and (3) thereof which deal specifically with the names which the first plaintiff would be entitled to bear and para (5) which states that the order was not to be regarded as having the same effect as an order given in the case of a minor who is adopted.

[16] The only provisions of the German law to which I was referred were sections 1767 and 1757 of the German Civil Code which, to the extent that they are relevant, read as follows:

'Sec 1767

Admissibility of adoption, applicable provisions

- (1) A person of full age may be adopted if the adoption is morally justified; this is to be assumed in particular if a parent – child relationship has already developed between the adoptive parent and the person to be adopted.
- (2) The adoption of persons of full age is governed by the provisions on the adoption of minors with the necessary modifications, except as otherwise provided in the following provisions.'

[17] Section 1757:

'Name of the Child

- (1) The child receives as its birth name the family name of the adoptive parent.
- (2) ...
- (3) ...
- (4) The family court may, on the application of the adoptive parent, with the consent of the child to the pronouncement of the adoption:
 1. change the first name of the child or give him one or more than one new first names, if this is conducive to the best interests of the child.'

[18] It was contended by the plaintiffs, and not disputed by the defendants, that the adoption of the first plaintiff by the second plaintiff was morally justified. Given the circumstances surrounding the adoption as described by the plaintiffs this, in my view, is not a conclusion which can be challenged.

[19] The first plaintiff also explained in greater length in her replying affidavit, her need for the relief sought. She stated that as far as she was concerned as a result of the German court's order, her South African identity document and passport no longer correctly reflected her particulars. In order for these documents to reflect the names which the German court's order had allowed her to assume, she needed an order of this Court giving effect to the German court's order. She averred further

that the only 'good and sufficient reason', as contemplated by sec 26(2) of the Registration Act to change her surname would be an order of this Court to the effect that the German court's order was binding upon the second defendant in this regard. To the extent that the relevant regulation did not prescribe recognition of a foreign court order as a ground for a change of surname, such grounds were not exhaustive.

- [20] Thus, to the extent that this may not have been clear from the provisional sentence summons, the plaintiffs' replying affidavits clarified that the first plaintiff's interest in the recognition of the German court's order was limited to its effect insofar as it would enable her to effect changes to her forename and surname in this country.
- [21] The first plaintiff also explained that the change of her names, as permitted by the German court, did not give her German citizenship and that as far as residence in that country was concerned, she only enjoyed a 90 day visa which had to be regularly re-issued. She envisaged that the second plaintiff would in future need care and support from her which would mean constant travelling by the first plaintiff between South Africa and Germany. As matters presently stood, the process of obtaining a new visa on a regular basis entailed her entering and leaving South Africa using different and confusing names.
- [22] The plaintiffs also made extensive submissions in their replying affidavits regarding the satisfaction of the customary requirements in South African law for the recognition of foreign judgments, another issue to which I will return.
- [23] In her replying affidavit, the second plaintiff testified that she regarded the first plaintiff as her own child and that her family, upon her request, decided to request the first plaintiff to change her name and surname to those of the family names. The first plaintiff agreed and advice was taken from an attorney in Germany who used the word 'adoption' in papers before the German court. However, that court had made it quite clear that the word 'adoption' was not used in the context of the adoption of a minor child and that its order did not have the same consequences.
- [24] Finally, as regards the scope of the relief sought, the draft order put up by plaintiffs' counsel sought only that the German court's order be 'recognised to the extent that the first plaintiff may be known by the surname Morche and included amongst her forenames may be Merseram'. It was thus made clear that the plaintiffs did not seek direct enforcement of any provisions of the German court's order

relating to any other incidences of the adoption order.

THE

ISSUES

- [25] In my view, two main issues fall to be determined: firstly, the procedural question of whether the plaintiffs can obtain the relief they seek through the provisional sentence procedure. Secondly, assuming this to be the case, the principal issue is whether, on these papers, the plaintiffs have made out a case that the German court's order should be recognised, to the limited extent sought.

THE PROCEDURAL QUESTION

- [26] Notwithstanding the fact that the plaintiffs clearly utilised the wrong procedure in seeking the relief sought, this elicited no immediate objection or steps from the defendants. In their heads of arguments, however, it was contended that the action failed to meet the requirements for provisional sentence and, in particular, that the foreign judgment did not constitute a liquid document and did not found a claim for the provisional sentence sought.
- [27] As I have indicated, the provisional sentence procedure adopted by the plaintiffs was inappropriate but it was equally inappropriate for the defendants to have engaged with the plaintiffs' case without raising any objection thereto. An obvious step for the defendants was to have invoked Rule of Court 30 and applied to court to set aside the summons as an irregular step. Instead the defendants engaged with the merits of the action by filing opposing affidavits. To compound matters they were party to at least eight postponements of the matter stretching from February 2015 to 16 March 2016 when the matter was finally postponed for hearing on the semi-urgent roll.
- [28] In substance the matter has been treated as an opposed application and has been allowed to drag out over a period of 16 months. In these circumstances to dismiss the claim on the basis that an inappropriate procedure has been followed would elevate form over substance and would ill-serve the interests of justice. It would mean that should the plaintiffs persist in seeking relief they

will have to commence afresh, presumably by way of application, with the result that another set of papers will be generated, in all material respects probably the same as those which presently serve before Court.

- [29] As matters stand all the issues between the parties have been fully ventilated in the existing papers. There do not appear to be any disputes of fact and the primary issue between the parties is a question of law, namely, whether it would be appropriate for this Court to recognise, albeit to a limited degree, the German court's order. There is, moreover, precedent for the enforcement of a foreign judgment by way of a declaratory order, particularly where there is no dispute of facts. See *Righetti v Pichen* 1955 (3) SA 338 (D) particularly at 348 A – C and, more pertinently, *Cosmopolitan National Bank of Chicago v Steinberg* 1973 (4) SA 579 (R) particularly at 580 A – C.

[30] In these circumstances I consider that the interests of justice and those of the parties are best served by simply treating the present proceedings as application proceedings. I turn now to the substantive question of whether the foreign court order should be recognised.

[31] Broadly speaking, the requirements for the recognition and enforcement of a foreign judgment are that the foreign court had 'international competency' according to South African law, that the judgment is final and conclusive in its effect and has not become superannuated, that its recognition and enforcement would not be contrary to public policy, that it was not obtained by fraudulent means, does not involve the enforcement of a penal or revenue law of the foreign state, and is not precluded by the provisions of the Protection of Business Act, 99 of 1978[1]. A foreign judgment can also be impeached on other grounds under the common law. Before its judgment will be recognised, certain minimum standards of justice must have been observed by the foreign court in its proceedings including that court's impartiality, reasonable notice to affected persons and an application of the *audi alteram partem*[2] principle.

[32] As far as the requirement of 'international competency' is concerned, the rules determining this vary according to the legal issues involved. In Law of South Africa (LAWSA), it is stated that the effects of adoption and the rights it creates are as much a question of status as marriage and divorce and should be treated in the same way[3]. In the case of adoption, a foreign adoption order will in principle be recognised if it was given by a court of the child's domicile before adoption though it is possible that the adoptive parent's domicile will prevail[4]. Because of the principle of domestic South African law that the superior courts are the upper guardian of all minors within their jurisdiction, our courts have adopted the doctrine of *McKee v McKee*, a Privy Council decision, that the local court can form an independent judgment before enforcing a foreign custody or guardianship order[5]. Given, however, that the first plaintiff was a major when the adoption order was made by the German court and was a party to that action, the question of her not being domiciled in Germany at the relevant time should in my view, not in itself be an obstacle to recognition and enforcement of the order.

[33] What is at issue in the present matter is not so much a question of status but whether the right to use a certain name or names in a foreign country can form the basis for a change of names in this country. In these circumstances the question of whether the German court's order should be recognised is, in the first place, principally a question of whether the German court had jurisdiction to issue the order, according to its own law. In that regard there is nothing in the papers to suggest that the German

court did not have jurisdiction to make the order which is the subject of these proceedings. The second plaintiff is, it is common

cause, a German national, and was resident in that country at the time when the order was sought and obtained. The first plaintiff,

although a South African national and domiciled in this country, also resides in Germany from time to time for temporary periods.

- [34] In its 'Reasons for the Decision' the German court stated that it was the 'competent local court for this adoption case because the adoptive parent's domicile or place of habitual residence is within the court's area of jurisdiction'. It proceeds to state that 'in accordance with article 22 sentence 1 of the Introductory Act to the German Civil Code, the adoption is governed by German law because the adoptive parent is of German nationality'.
- [35] Another requirement for recognition is that the foreign judgment must be final and conclusive in its effect and has not become superannuated. Again, there is nothing to gainsay the plaintiffs' averment that the judgment is a 'final order'. Neither the order nor the reasons for the decision suggest that it was anything but final in effect. The fact that there was no opposing party or any other obvious interested party who might have contested the order makes the case for finality conclusive.
- [36] A further requirement is that the foreign judgment cannot be impeached on any grounds under the common law. In this regard, the only challenge put up by the defendants is that recognition of the judgment would be contrary to public policy in this country. This consideration is an additional requirement which the plaintiffs must meet to have the German court's order recognised. The authors of LAWSA state that the exact scope of this overriding check is unclear although it used to be recognised as applicable to polygamous marriages, incestuous marriages and marriages celebrated without the necessary consent[6]. They add that a contract which is contra bonos mores under South African law, such as a gambling contract or a pactum successorium, would also be affected. The authors note, however, that the mere fact that the foreign legal rule is the result of different social, economic or political systems does not mean that it offends South African policy in this sense.
- [37] In *Sperling v Sperling*[7], a case dealing with the South African rule of private international law prescribing the proprietary consequences of a foreign marriage, the court was faced with the argument that it ought not to permit the matrimonial property regime of persons living in this country to be altered by a foreign statute. Linked thereto was the submission that the property regime of the parties should be determined by the law of East Germany but only as it was at the time when the parties came to settle in South Africa and not retrospectively. In this regard the court stated as follows:

'This argument, of course, reaches to the kernel of the matter. As a matter of general principle, there appears to be nothing untoward in foreign legislation touching the rights of persons living in this country. Were this not permitted, the scope of Private International Law would be greatly reduced. The real question is whether this should be permitted when it affects the property regime of spouses domiciled here.'

To my mind similar considerations apply in the present matter inasmuch as the defendants' objection was that this Court's recognition of the German court's order would amount to recognition of the institution of adult adoption, a concept not recognised in our law and which therefore would require the defendants to act contrary to the provisions of the Children's Act. But in any event there is another answer to this proposition which is that, on a proper analysis, this is not the relief which the plaintiffs seek.

[38] The relief first sought in the provisional sentence summons appeared at first blush to be widely cast, namely, an order authorising the employees of the Department of Home Affairs to give effect to the German court's judgment. Paragraph 15 of the summons made it clear, however, that its recognition was sought only to the extent that it would place the defendants in a position to 'amend the first plaintiff's name and surname' in the records of the Department. Furthermore, by the time of argument the plaintiffs had narrowed their relief even further, namely that the German court's order 'is recognised to the extent that the first plaintiff may be known by the surname Morche and included amongst her forenames may be Merseram'. This order was sought, furthermore, on the basis that this Court's recognition of the German court's order would not in itself entitle the first plaintiff to effect a change in her forenames and surname. Such a step would remain subject to the administrative process for such name changes as provided by the Registration Act.

[39] In my view, the relief sought by the plaintiffs falls short of a recognition, explicit or implicit, of the institution of adult adoption. The German court's order itself appears to authorise an adult adoption but one with limited effect hence its pronouncement that 'if the request was made for the adoption to have the same effects as those given when a minor is adopted, the request shall be rejected'

and by the court's focus on the consequential change of names for the first plaintiff.

[40] Admittedly, it remains unclear, apart from the changes to the first plaintiff's names, precisely what the effect of the adoption order is on her since the papers do not address this issue. Be that as it may, the recognition sought by the plaintiffs of the German court's order is limited to its effect upon the first plaintiff's names. In these circumstances the argument that granting the limited relief sought would amount to the recognition by this Court of the institution of adult adoption is in

my view exaggerated and without merit.

[41] The defendants' counsel, Ms Slingers, had a second string to her bow, namely, the contention that recognition of the German court's order would require the second defendant to act contrary to sec 26 of the Births and Deaths Registration Act. That section, it was submitted, read with the regulations promulgated thereunder, whilst permitting the first plaintiff to alter her forename, provided it is done in the prescribed manner, makes no provision for her to change her surname in the circumstances which exist.

[42] In terms of sec 26(2) of the Registration Act, ‘the Director-General: may, if he or she is satisfied that there is a good and sufficient reason as may be prescribed for that person’s assumption of another surname, authorize the person to assume a surname other than his or her surname as included in the population register.’

[43] Regulation 18 of the regulations promulgated by the Minister of Home Affairs in terms of sec 32 of the Act[8], deals with the assumption of another surname and purports to limit the reasons for such a change to three listed reasons, none of which apply to the first plaintiff’s circumstances. Thus, it was contended on behalf of the defendants, Regulation 18, read together with section 26 of the Registration Act, precluded the Director-General from effecting the surname change sought by the first plaintiff.

[44] In order to evaluate this argument, it is necessary to set out the relevant parts of sec 26 and Regulation 18. Section 26 reads as follows:

‘26 Assumption of another surname

- (1) Subject to the provisions of this Act or any other law, no person shall assume or describe himself or herself by or pass under any surname other than that under which he or she has been included in the population register, unless the Director-General has authorized him or her to assume that other surname: Provided that this sub-section shall not apply when –
 - (a) a woman after her marriage assumes the surname of the man with whom she concluded such marriage or after having assumed his or her surname, resumes a surname which she bore at any prior time;
 - (b) a married or divorced woman or widow resumes a surname which she bore at any prior time; and
 - (c) a woman, whether married or divorced, or a widow adds to the surname which she assumed after the marriage, any surname which she bore at any prior time.
- (2) At the request of any person, in the prescribed manner, the Director-General may, if he or she is satisfied that there is a good and sufficient reason as may be prescribed for that person’s assumption of another surname, authorize the person to assume a surname other than his or her surname as included in the population register, and the Director-General shall include the substitutive surname in the population register in the prescribed manner.’

[45] To the extent that it is relevant Regulation 18 provides as follows:

‘18 Assumption of another surname

- (1) An application for assumption of another surname referred to in section 26 of the Act by a person of age must be made on Form ...
- (2) The reasons referred to in sec 26(2) of the Act must relate to –
 - (a) a change in the marital status of a woman;

- (b) assumption by a person of his or her biological father's surname, where the father has recently acknowledged paternity in terms of regulation 13 or 14; or
- (c) protection of a person in terms of the Witness Protection Act, 1998 (Act 122 of 1998).
- (3) ...'

[46] It will be seen that Regulation 18(2) purports to limit the permissible reasons for the assumption of another surname to only three categories (one of which, a woman's marital status, is already covered by the provisions of sec 26(1). It was on this basis that the defendants' counsel submitted that the relief sought by the first plaintiff was incompetent inasmuch as her reasons for assuming another surname could not be entertained by the Director-General.

[47] In my view, to the extent that Regulation 18 seeks to establish a closed list of reasons for the assumption of another surname, it is ultra vires in that it misconceives the meaning and scope of sec 26(2) of the Act, as does the defendants' argument based on this interpretation of the regulation.

[48] Section 26(2), in providing that a surname may be changed if the Director-General is satisfied 'that there is a good and sufficient reason' is cast in wide terms. This is understandable since, apart from the reasons listed in Regulation 18, one can readily conceive of many other reasons why a person might, legitimately, wish to change his or her surname. By way of example, that person's existing surname may cause him or her embarrassment because of its meaning or associations, or it may be unpronounceable to all but a few persons. It would be strange indeed if, no matter how compelling a reason a person had for the change of a surname, he or she was precluded from doing so because that reason was not included in the three categories prescribed in Regulation 18.

[49] The words 'as may be prescribed' in sec 26(2) do not, in my view, limit the phrase 'a good and sufficient reason'. What they convey is merely that, for whatever reason the authorities may have, the Minister may wish to prescribe certain reasons which, all things being equal, will automatically be regarded as 'a good and sufficient reason' for a person to assume another surname. It is significant that the words 'as may be prescribed' are permissive and not prescriptive. Had it been the intention of the Legislature that a closed list of 'good and sufficient reason(s)' could be prescribed by regulation then the words 'good and sufficient' would arguably have been unnecessary. Furthermore, the word 'may' would not have been used but rather a peremptory formulation such as 'as prescribed', or some variation thereof, indicating that only name changes for prescribed reasons could be permitted.

[50] That the phrase 'as may be prescribed' is merely permissive is borne out by the signed, Afrikaans version of the Act where the relevant part of sec 26(2) is rendered as follows:

'(2) Op aansoek, op die voorgeskrewe wyse, van 'n persoon kan die Direkteur-Generaal, indien hy of sy oortuig is dat daar 'n

gegronde rede is, soos voorgeskryf kan word, vir die persoon se aanname van 'n ander van, die persoon magtig om 'n ander van as sy of haar van soos in die

bevolkingsregister opgeneem, aan te neem..' [my underlining]

[51] In my view, both the punctuation in the text (in the form of the commas before and after 'soos voorgeskryf kan word') and the use of the word 'kan' emphasise that the power to prescribe 'gegronde redes' is permissive and is a contra-indication that the Minister enjoys the power to prescribe by regulation a closed list of reasons which, if not applicable to an applicant for a name change, has the result that his or her application must fail.

[52] The narrow interpretation contended for by the defendants would, moreover conduce to the Minister enjoying what borders on legislative powers to definitively determine, at any one time, what constitutes a 'good and sufficient reason' for a name change, with the result that the Director-General would then have to close his mind to all other applications based on different reasons. Such a narrow interpretation also runs counter to the presumption that remedial statutes should be liberally

construed[9].

[53] For these reasons, I am satisfied that on a proper interpretation of sec 26(2) of the Registration Act, there can be no closed list of 'good and sufficient reason(s)' and to the extent that Regulation 18(2) purports to decree otherwise, it is ultra vires.

[54] A further argument as to why the relief sought could not be granted, under the rubric of it being repugnant to policy, was raised by the defendants' counsel. The contention was that an additional requirement of the recognition of a foreign non-monetary judgment was that it should be clear and specific in order that the domestic court can ascertain what rights, duties and obligations the foreign order imposed, in this case on the defendants. Again I consider that there is no merit in this argument since the relief sought by the first plaintiff is limited to a recognition of the German court's order only insofar as it authorised her to use the surname of the second plaintiff and a family forename.

[55] It was also contended that a further requirement was that the foreign judgment should be clear about whether it was intended to apply outside the jurisdiction in which it was made. It is correct that there is no such indication in the German court's judgment to this effect but common sense suggests that it must have been contemplated by that court, at least, that its judgment would place the first plaintiff in a position where she could invoke an administrative procedure in another country in which she is permanently resident with a view to changing her name in accordance with the name change authorised by the German court's

judgment.

- [56] Finally, there is the question of whether the judgment was obtained without observance of the principles of natural justice. It was quite clear from the plaintiffs' affidavits, nor has it been disputed by the defendants, that there was a full and open investigation of their application before the German court pronounced *inter alia* on the first plaintiff's adoption and her right to change her names. There was no suggestion on behalf of the defendants that the *audi alteram partem* principle, or for that matter any other principle of natural justice, was not observed by the German court in arriving at its conclusion. The only persons who might have had an interest in the adoption proceedings were the first plaintiff's biological parents, presuming they are still alive. On this the plaintiffs' papers are silent apart from the averment that the first plaintiff has long been estranged from her original family. I do not regard this omission as a fatal flaw, however, since the first plaintiff is an adult and entitled to choose to be adopted, as an adult, in a foreign country which recognises such an institution.
- [57] In the circumstances, I am satisfied that the limited recognition of the foreign judgment sought by the first plaintiff will not offend against public policy in this country. The result is, further, that the opposition by the defendants to the relief sought by the plaintiffs on this ground, cannot be sustained.
- [58] For these reasons, I consider that this Court would be justified in recognising the German court's order to the extent that it gave effect to a change in the surname of the first plaintiff and afforded her another forename. It should be clear, however, that this Court's recognition of that judgment does not, in and of itself, entitle the first plaintiff to change her forename or surname in this country without further ado. That must still be the subject of an administrative application to the second defendant. This Court's judgment will, however, allow the first plaintiff to rely on this Court's recognition of the German court's order insofar as it changed her surname to 'Morche' and allowed her to take the additional forename 'Merseram'.

COSTS

- [59] As indicated earlier, this matter has been subject to at least eight postponements. Three of these, between February and June 2015 appear to have been occasioned by the fact that the second and third defendant took some time to get to grips with the matter and file opposing papers notwithstanding that service of the summons had been effected upon them in November 2014. The defendants tendered the wasted costs occasioned by the postponement in 3 June 2015 thereby. The reasons for the balance of the postponements are less clear although a few appear to have been as a result of no judge being available. There is no indication that any postponement was the result of fault on the part of the plaintiffs and therefore no reason why they should not be awarded their costs in full, subject to the proviso that the defendants cannot be prejudiced by the fact that the plaintiffs used out of town attorneys and counsel.

ORDER

[60] In the result the following order is made:

1. The Order granted by the Local Court of Freiburg im Breisgau, Family Court, 'Amtsgericht Freiburg Im Breisgau, Familiengericht' on 16 October 2013, as corrected on 21 November 2013, to the extent that it provides that the first plaintiff shall henceforth bear the family name 'Morche' and is given the additional forename of 'Merseram', is recognised;
2. The first plaintiff is hereby authorised to utilise the Order referred to in para 1 above in support of applications for name changes in terms of sec 24 and 26 of the Births and Deaths Registration Act, 51 of 1992;
3. The second and third defendant are to pay the costs of this application, jointly and severally, the one paying the other to be absolved.

BOZALEK J

APPEARANCES

For the Plaintiffs: Mr GH Meyer

Instructed by:

Nerina Wessels Attorneys

For the 2nd & 3rd Defendants: Ms H Slingers

Instructed by: The State Attorney

[1] Jones v Krok [1994] ZASCA 177; 1995 (1) SA 677 (A). See also Purser and Another v Sales and Another [2000] ZASCA 135; 2001 (3) SA 445 (SCA)

[1] Jones v Krok [1994] ZASCA 177; 1995 (1) SA 677 (A).

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[2] LAWSA Second edition Vol 2 Part 2 para 345

[3] Board of Executors v Vitt 1989

(4) SA 480 (C) at 485 D

[4] LAWSA supra para 351

[5] LAWSA supra para 350 and the authorities there cited

[6] LAWSA Vol 2 para 293

[7] 1975

(3) SA 707 (A)

[8] Published under GN R128 in GG 37373 of 26 February 2014 (with effect from 1 March 2014)

[9] See *Looyen v Simmer & Jack Mines Ltd and Another* 1952

(4) SA 547 (A)

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