



14 February 2023

ATT: The Portfolio Committee on Home Affairs

C/O Secretariat: Eddie Mathonsie at emathonsi@parliament.gov.za

ATT: The Portfolio Committee on Social Development

C/O Secretariat: Lindiwe Ntsabo at Intsabo@parliament.gov.za

Dear Chairpersons and Committee Members,

**RE: SUBMISSIONS re VARIOUS DEVELOPMENTS IN THE LAWS RELATED TO BIRTH REGISTRATION AS A RESULT OF
4 RECENT JUDGMENTS**

INTRODUCTION

1. The Centre for Child Law ("the CCL") is a registered law clinic with the Legal Practice Council based at the University of Pretoria. The CCL contributes toward the establishment and promotion of the best interest of children in South Africa through research, advocacy, litigation, and education.
2. We write to provide you with a brief on, and recommendations regarding, various developments in the law regulating birth registration in South Africa. The text of the Births and Deaths Registration Act 51 of 1992 ("the Act") has been altered significantly through 4 court judgments in the past 5 years. These judgments have declared several provisions of the Act constitutionally invalid, and have either struck them from the text or have read in additional text.



3. This brief seeks to provide parliamentary decision-makers with a consolidated version of the text of the Act as it currently reads, taking into consideration the latest jurisprudential developments. We hope that our submission will provide insight, as well as an accessible source for what is law scattered across several judgments, to enable you to provide effective monitoring of implementation. Implementation of these judgments have been lacking in the past 5 years.
4. We also make the following recommendations toward better implementation of birth registration rights for affected children. We urge the Committees to request the Department of Home Affairs to:
 - a. Circulate a Departmental directive to all its offices, informing them of the 4 court judgments, and instructing them on implementation procedures.
 - b. Amend the Standard Operating Procedures (SOPs) for birth registration to include instructions regarding the implementation of the 4 court judgments.
 - c. Monitor implementation of the 4 court judgments.
 - d. Withdraw Circular no 5 of 2014 requiring DNA paternity test results from unmarried and/or foreign fathers for the purposes of birth registration.
 - e. Issue a new circular setting out a list of documents to be accepted as sufficient proof of paternity, where an unmarried father seeks to register the birth of their child where the mother is unavailable.Suggested wording is set out in paragraph 16 on page 8 below.
5. The CCL also request an opportunity to address the Portfolio Committees on this matter.



THE 4 JUDGMENTS AND THEIR EFFECT ON THE BIRTH AND DEATHS REGISTRATIONS ACT

6. The judgement in [*Centre for Child Law v The Director-General & Others* Case number CA319/ \[2020\] 4 All SA 76 \(ECG\)](#) declared the following:
 - a. The following regulations are declared unconstitutional, and are amplified by a reading in:
 - i. Regulation 3(3)(f); 3(3)(i) and 3(5).
 - ii. Regulation 4(3)(f); 4(3)(i) and 4(5).
 - iii. Regulation 5(3)(f); 5(3)(i) and 5(5).
 - iv. Regulation 12(1).
7. The judgement in [*Centre for Child Law v The Director-General & Others* Case number CA319/ \[2020\] 4 All SA 76 \(ECG\)](#) declared the following:
 - a. Section 10 of the Births and Deaths Registration Act is declared unconstitutional.
 - b. The words “subject to the provisions of section 10” in section 9(2) of the Act is deleted.
8. The judgement in [*Centre for Child Law v Director General: Department of Home Affairs and Others* \[2021\] ZACC 31](#) declared the following:
 - a. Section 10 of the Act is unconstitutional and is struck from the Act.
9. The judgement in [*J & Another v The Minister of Home Affairs \(Case no. 1986/2021\)*](#) declared the following:
 - a. Regulation 12(2)(c) of the Act is unconstitutional and invalid.



TABLE A - AFFECTED PROVISIONS OF THE BIRTHS AND DEATHS REGISTRATION ACT 51 OF 1992

Text as amended between 1992 up until latest Amendment Act 18 of 2010, which took effect on 1 March 2014.	Text with amendments / reading from court judgments illustrated and highlighted in yellow
Section 10 Section 9(2)	Section 10 declared invalid and deleted in its entirety by <i>Constitutional Court in CCL v DG Minister of Home Affairs</i> Section 9(2) reference to section 10 deleted
10. Notice of birth of child born out of wedlock.—(1) Notice of birth of a child born out of wedlock shall be given— (a) under the surname of the mother; or (b) at the joint request of the mother and of the person who in the presence of the person to whom the notice of birth was given acknowledges himself in writing to be the father of the child and enters the prescribed particulars regarding himself upon the notice of birth, under the surname of the person who has so acknowledged. (2) Notwithstanding the provisions of subsection (1), the notice of birth may be given under the surname of the mother if the person mentioned in subsection (1) (b), with the consent of the mother, acknowledges himself in writing to be the father of the child and enters particulars regarding himself upon the notice of birth. Section 9(2) Subject to the provisions of section 10, the notice of birth referred to in subsection (1) of this section shall be given under the surname of either the father or the mother of the child concerned or the surnames of both the father and mother joined together as a double barrelled surname.	10. Notice of birth of child born out of wedlock.—(1) Notice of birth of a child born out of wedlock shall be given— (a) under the surname of the mother; or (b) at the joint request of the mother and of the person who in the presence of the person to whom the notice of birth was given acknowledges himself in writing to be the father of the child and enters the prescribed particulars regarding himself upon the notice of birth, under the surname of the person who has so acknowledged. (2) Notwithstanding the provisions of subsection (1), the notice of birth may be given under the surname of the mother if the person mentioned in subsection (1) (b), with the consent of the mother, acknowledges himself in writing to be the father of the child and enters particulars regarding himself upon the notice of birth. Section 9(2) Subject to the provisions of section 10, the notice of birth referred to in subsection (1) of this section shall be given under the surname of either the father or the mother of the child concerned or the surnames of both the father and mother joined together as a double barrelled surname.



Regulations 3(3)(f) and (i), and 3(5) Regulations 4(3)(f) and (i), and 4(5) Regulations 5(3)(f) and (i), and 5(5)	Regulations 3, 4, 5 (with reading-in highlighted in yellow as read in by Bodlani AJ in <i>Naki v DG Home Affairs</i>)
3 (3) A notice of birth referred to in subregulation (1) must be given by, where possible, both parents to the Director-General on Form DHA-24/LRB illustrated in Annexure 1B and be accompanied by – (f) a certified copy of the identity document or passport and visa or permit of the parents of the child or person whose birth is sought to be registered, where one of the parents is a non-South African citizen; (i) where applicable, a certified copy of the identity document or passport and visa or permit of the next-of-kin or legal guardian of the child or person; 3 (5) A notice of birth which does not meet the requirements of subregulations (3) and (4), shall not be accepted.	3(3) A notice of birth referred to in subregulation (1) must be given by, where possible, both parents to the Director-General on Form DHA-24/LRB illustrated in Annexure 1B and be accompanied by – (f) where it is available a certified copy of the identity document or passport and visa or permit of the parents of the child or person whose birth is sought to be registered, where one of the parents is a non-South African citizen; (i) where applicable, and available a certified copy of the identity document or passport and visa or permit of the next-of-kin or legal guardian of the child or person; 3 (5) A notice of birth which does not meet the requirements of subregulations (3) and (4), shall not be accepted.
4 (3) A notice of birth referred to in subregulation (1) must be given by, where possible, both parents to the Director-General on Form DHA-24/LRB illustrated in Annexure 1B and be accompanied by – (f) a certified copy of the identity document or passport and visa or permit of the parents of the child or person whose birth is sought to be registered, where one of the parents is a non-South African citizen; (i) where applicable, a certified copy of the identity document or passport and visa or permit of the next-of-kin or legal guardian of the child or person; 4 (5) A notice of birth which does not meet the requirements of subregulations (3) and (4), shall not be accepted.	4(3) A notice of birth referred to in subregulation (1) must be given by, where possible, both parents to the Director-General on Form DHA-24/LRB illustrated in Annexure 1B and be accompanied by – (f) where it is available a certified copy of the identity document or passport and visa or permit of the parents of the child or person whose birth is sought to be registered, where one of the parents is a non-South African citizen; (i) where applicable, and available a certified copy of the identity document or passport and visa or permit of the next-of-kin or legal guardian of the child or person; 4 (5) A notice of birth which does not meet the requirements of subregulations (3) and (4), shall not be accepted.



5 (3) A notice of birth referred to in subregulation (1) must be given by, where possible, both parents to the Director-General on Form DHA-24/LRB illustrated in Annexure 1B and be accompanied by – (f) a certified copy of the identity document or passport and visa or permit of the parents of the child or person whose birth is sought to be registered, where one of the parents is a non-South African citizen; (i) where applicable, a certified copy of the identity document or passport and visa or permit of the next-of-kin or legal guardian of the child or person; 5 (5) A notice of birth which does not meet the requirements of subregulations (3) and (4), shall not be accepted.	5(3) A notice of birth referred to in subregulation (1) must be given by, where possible, both parents to the Director-General on Form DHA-24/LRB illustrated in Annexure 1B and be accompanied by – (f) <i>where it is available</i> a certified copy of the identity document or passport and visa or permit of the parents of the child or person whose birth is sought to be registered, where one of the parents is a non-South African citizen; (i) where applicable, <i>and available</i> a certified copy of the identity document or passport and visa or permit of the next-of-kin or legal guardian of the child or person; 5 (5) A notice of birth which does not meet the requirements of subregulations (3) and (4), shall not be accepted.
Regulation 12(1)	Regulation12(1) with reading in by Bodlani AJ in <i>Naki v DG Home Affairs</i>
12. Notice of birth of child born out of wedlock (1) A notice of birth of a child born out of wedlock shall be made by the mother of the child on Form DHA-24 illustrated in Annexure 1A or Form DHA-24/LRB illustrated in Annexure 1A, whichever applicable.	12. Notice of birth of child born out of wedlock (1) A notice of birth of a child born out of wedlock shall be made by <i>either</i> the mother <i>or father</i> of the child on Form DHA-24 illustrated in Annexure 1A or Form DHA-24/LRB illustrated in Annexure 1A, whichever applicable.
Regulation 12(2)(c)	Regulation 12(2)(c) declared unconstitutional and invalid by Jolwana J in <i>UJD11 v Minister Home Affairs</i>
12. Notice of birth of child born out of wedlock (2) The person who acknowledges that he is the father of the child born out of wedlock must - (c) have his fingerprints verified online against the national population register: Provided that in the event of the father being a non-South African citizen, he must submit a certified copy of his valid passport and visa or permit, permanent resident's identity document or refugee identity document.	12. Notice of birth of child born out of wedlock (2) The person who acknowledges that he is the father of the child born out of wedlock must - (c) have his fingerprints verified online against the national population register: Provided that in the event of the father being a non-South African citizen, he must submit a certified copy of his valid passport and visa or permit, permanent resident's identity document or refugee identity document.



BARRIERS TO BIRTH REGISTRATION THROUGH EXPENSIVE DNA REQUIREMENTS

10. The CCL receives hundreds of requests for assistance from unmarried fathers who are barred from registering the births of their children. Officials at the local offices instruct them to return with DNA proof of paternity at a cost of between R1500 and up to R4500 depending on how many children he has. This is an unaffordable expense to many South Africans. Children go undocumented as a result.
11. Having considered the matter carefully, the CCL has come up with a list of alternative ways of proving paternity which are free, and which already exist within South African law. We recommend that these alternatives to DNA proof of paternity be adopted by the Department and circulated via Departmental Circular to all its offices.
12. The children of married persons are not required to provide DNA proof of paternity. The marriage certificate is accepted as proof of the birth mother's spouse's paternity. This is regulated under regulation 3(3)(h). The children of unmarried parents who register the birth of their child within 30 days are not required by the Circular to provide DNA test results.
13. When a birth is registered after the 30-day period has lapsed, the registration becomes a late registration of birth (LRB) (see section 9(3A) and regulations 3, 4, and 5. Additional requirements must be complied with in an LRB application. Although the regulations do not prescribe DNA as a requirement of LRB, a Departmental Circular (5 of 2014) requires all LRB applications of children of unmarried parents, where one of the parents is a foreigner, to provide DNA proof of paternity. This DNA proof of paternity acts as an absolute barrier to the right to birth registration and is unconstitutional as a result.
14. The CCL suggest that a Departmental Circular be issued and circulated to all offices which confirms the alternative documents to prove paternity. We suggest the following documents in line with existing South African law:



SUGGESTED WORDING FOR ALTERNATIVES TO DNA TESTING FOR PROOF OF PATERNITY

- a. The following documents shall serve as sufficient proof of paternity for the purposes of birth registration, including late registration of birth:
- i. Where the child's parents are married; a marriage certificate.¹
 - ii. Where the child's parents are unmarried, an affidavit deposed to by each parent confirming the paternity of the father, including where either parent is undocumented and / or illegally present in the Republic in terms of the Immigration Act.²
 - iii. Where the child is adopted, the adoption order, as is already allowed by section 27B of the Act.
 - iv. Where the child is conceived via artificial fertilisation, a marriage certificate (where the parents are married); or an affidavit by both parents (where the parents are unmarried).
 - v. Where the child is being registered by an unmarried father and the father is in possession of an court order declaring his rights in terms of section 21 of the Children's Act, a copy of such order which declares his parental rights and responsibilities as the unmarried father of the child.
 - vi. Where the child is being registered by an unmarried father and the father is in possession of a court order declaring his paternity in terms of section 26 of the Children's Act, a copy of such order.

¹ When parents are married, the common law presumption of paternity establishes a rebuttable presumption that the spouse of the mother is the biological parent. This presumption is already allowed by the Act and is uncontested.

² The common law presumption of paternity, which is also codified in section 36 of the Children's Act, is triggered by such an affidavit. In the absence of proof to the contrary by the party who denies paternity, the person who is proved to have had intercourse with the mother at any time when that child could have been conceived is presumed to be the father of the child. An affidavit by both parents confirming such intercourse is acceptable evidence in a court of law, and thus also in a Home Affairs application.



- vii. Where the child is being registered by an unmarried father and the mother cannot or does not provide consent, an order of the Children's Court or the High Court declaring him to be the father of the child in terms of section 36 of the Children's Act.

ANNEXURES IN SUPPORT

15. To this end we attached the following annexes:

- a. The judgement of Bodlani AJ in the High Court Eastern Cape Division, Makhado in [*Centre for Child Law v The Director-General & Others Case number 4996/2016 \(ECG\)*](#) delivered on 27 June 2018 (annexures page 10 – 33).
- b. The judgement of Rugunanan J in the High Court Eastern Cape Division, Makhado, sitting as an appeal court in [*Centre for Child Law v The Director-General & Others Case number CA319/ \[2020\] 4 All SA 76 \(ECG\)*](#) delivered on 19 May 2020 (annexures page 34 – 49).
- c. The judgement of the Constitutional Court of South Africa in [*Centre for Child Law v Director General: Department of Home Affairs and Others \[2021\] ZACC 31*](#) delivered on 22 September 2021 (annexures page 50 – 110).
- d. The judgment of the High Court Eastern Cape Division, Makhado, in [*UJDJ1 & another v The Minister of Home Affairs*](#) (Case no. 1986/2021) delivered on 10 January 2023 (annexures page 111 – 130).
- e. The consolidated text of the Act as amended up until the last Amendment Act (18 of 2010) and its Regulations Act published in GN R128 in Government Gazette 37373 which took effect on 1 March 2014, with the changes affected by the judgements highlighted in yellow (annexures page 131 – 173).
- f. Departmental Circular numbers 5 of 2014; and 14 of 2021 regarding the requirement of DNA paternity testing for unmarried fathers (annexures page 174 – 180).
- g. [*Parliamentary question and reply*](#) regarding the implementation of the judgement c above (annexures page 181 – 182).



- h. A letter sent to the Ministry of Home Affairs to request a solution for the DNA proof of paternity barrier, and providing evidence that the Constitutional Court judgment in *CCL v DG of Home Affairs & others* is not being implemented, including a list of approximately 30 children being assisted by the CCL and Lawyers for Human Rights (annexures page 183 - 194).

Yours faithfully,



Liesl H. Muller

Senior Attorney, Centre for Child Law

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN**

CASE NO. 4996 / 2016

In the matter between:

MZILENI LAWRENCE NAKI First Applicant

DIMITRILA MARIE NDOVYA Second Applicant

CENTRE FOR CHILD LAW Third Applicant

and

DIRECTOR GENERAL: DEPARTMENT OF HOME AFFAIRS First Respondent

THE MINISTER OF HOME AFFAIRS Second Respondent

JUDGMENT

BODLANI AJ

Factual background

[1] The first applicant, a South African Citizen and member of the South African National Defence Force, and the second applicant, a citizen of the Democratic Republic of Congo (DRC), met whilst the former was posted in the DRC as a peacekeeper. They fell in love and out of that love relationship two children were born. Later, they married each other in the DRC and in accordance with the second applicant's culture and customs. The content of the second applicant's culture and of the customary marriage between the applicants is irrelevant for purposes of the issue that has to be decided in this application. Importantly, the applicants'

marriage was not registered and no marriage certificate was issued to them because in the DRC, customary marriages are not registered.

[2] The first applicant's first involvement in a peace mission in the DRC ended in 2009 when he returned to South Africa and continued to work for the SANDF, leaving the second applicant in the DRC but maintained contact with her. In 2013, the first applicant was posted by the SANDF on another peace keeping mission in the DRC and came back to South Africa in 2014. Again, he left the second applicant in the DRC.

[3] In September 2015, the second applicant came to South Africa. She travelled using her DRC passport having been issued, on 23 September 2015, with a visitor's visa which was valid for three months in Lubumbashi, DRC. At the time of expiration of the second applicant's visitor's visa, she was highly pregnant and thus could not apply for a new visa inasmuch as she could not travel back to the DRC. She gave birth to NN¹ at Settler's Hospital in Grahamstown on 01 February 2016. On discharge from Settler's Hospital, she was given a document titled "Department of Home Health, Maternity Certificate Proof of Birth of Infant" to complete and submit to the respondents' department in order to apply for the issue of NN's birth certificate.

[4] During February 2016, the applicants approached the offices of the Department of Home Affairs, presumably in Grahamstown, submitted the duly completed document titled "Department of Home Health, Maternity Certificate Proof of Birth of Infant" to the officials present thereat. The

¹ In this judgment, the full names of the minor child are not disclosed.

officials present thereat refused to accept the application. They left but went back again, still in February 2016 when they were told that the Regulations on the Registration of Births and Deaths, 2014 (Regulations) prevented the second respondent's department's officials from registering NN's birth.

[5] Effectively, though a South African citizen² the failure to register NN's birth and to issue for her, of a birth certificate, meant that she is not accounted for in the population register that is administered by the second respondent,³ and no citizenship and other interrelated constitutional rights can be enforced by her parents on her behalf.

[6] Aggrieved by the effects of the second respondent's failure to register NN's birth, the first and second applicants approached this Court seeking an order in the following terms:

"1. Reviewing, setting aside and declaring invalid the decision taken, on behalf the first respondent, to refuse to register the birth of Novuyo Francina Naki, alternatively the failure to take a decision on the application to register her birth.

2. Directing the first respondent to do all things necessary to register Novuyo Francina Naki's birth in terms of section 9(3A) of the Births and Deaths

² Citizenship is acquired at birth. Section 2(1)(b) of the Citizenship Act, 1995 (Act No. 88 of 1995) provides as follows:

"Any person who is born in or outside the Republic, one of his or her parents, at the time of his or her birth, being a South Africa citizen, shall be a South African citizen by birth".

³ Section 5(1) of the Identification Act, 1997 (Act No. 68 of 1997) empowers the Director General of the Department of Home Affairs to compile and maintain the population register.

Registration Act and to issue the applicants with a South African birth certificate for her;

3. Declaring that:

3.1 the requirements of sub-regulation (3) of regulations 3, 4 and 5 of the regulations on the registration of Births and Death, 2014, promulgated in terms of the Births and Deaths Registration Act 51 of 1992 ("the Regulations"), are not mandatory; and

3.2 the conduct of the first respondent and of those officials of the Department of Home Affairs acting on his behalf, in insisting on mandatory compliance with all the requirements of regulation 5(3) is unconstitutional and invalid.

4. *Alternatively to prayer 3 above:*

4.1 declaring that sub-regulations (3) and (5) of each of regulations 3, 4 and 5 of the Regulations are unconstitutional and invalid;

4.2 remedying the alleged defect by severing the word "*must*" in sub-regulation (3) with the words "*must generally*" and the word "*shall*" in sub-regulation (5) with the word "*may*"

[7] The first and second applicants also sought a cost order against the respondents in the event of the opposition to the application. The office of the State Attorney, Port Elizabeth filed a notice of opposition on behalf of the respondents.

[8] On 19 July 2017, the third applicant instituted an application to intervene as third applicant. Leave to intervene was granted on 29 August 2017 without opposition. In its notice of motion, the third respondent sought an

order:

“1. Declaring section 9 of the Births and Deaths Registration Act 51 of 1992 (“BDRA”) unconstitutional and invalid to the extent that it does not allow unmarried fathers to register the births of their children in the absence of the mothers.

2. To remedy this defect, section 9 of the BDRA is deemed to read as though it provides as follows:

2.1 In the case of any child born alive, **to married or unmarried parents,** anyone of his or her parents, or if the parents are deceased, any of the prescribed persons, shall, within 30 days after the birth of such child, give notice thereof in the prescribed manner, and in compliance with the prescribed requirements, to any person contemplated in section 4.

3. Alternatively to prayer 2:

3.1 The declaration of invalidity is suspended for a period of 18 months from the date of this judgment in order to allow Parliament to correct the defects in section 9 of the BDRA.

4. It is declared that section 10 of the BDRA is unconstitutional and invalid to the extent that it does not allow unmarried fathers to register the births of their children in the absence of the mothers.

5. To remedy this defect, section 10 of the BDRA is deemed to read as though it provides as follows:

5.1 Notice of birth of a child born out of wedlock shall be given:

5.1.1 under the surname of the mother; or

5.1.2 under the surname of the father where the father is the person giving notice of the child's birth and acknowledges his paternity in writing under oath.

5.1.3 at the joint request of the mother and of the person who in the presence of the person to whom the notice of birth was given acknowledges himself in writing to be the father of the child.

6. Alternatively to prayer 5:

6.1 The declaration of invalidity is suspended for a period of 18 months from the date of this judgment in order to allow Parliament to correct the defects in section 9 of the BDRA.

7. It is declared that sub-regulations (3) and (5) of each of regulations 3, 4 and 5 of the Regulations on the Registration of Births and Deaths (2014) are unconstitutional and invalid insofar as it does not allow fathers of children to register that child's birth in the absence of the child's mother where the mother is undocumented.

8. It is declared that section 12(1) of the Regulations on the Registration of Births and Deaths (2014) is unconstitutional and invalid insofar as it does not allow fathers of children to register that child's birth in the absence of the child's mother.

9. Condoning the late filing of the affidavit.

10. That the costs of this application are to be paid, jointly and severally, by any respondents opposing it.

11. Further and/or alternative relief."

[9] On 03 November 2017, the office of the State Attorney, Port Elizabeth

filed a notice of opposition on behalf of the respondents.

[10] In accordance with the provisions of local rule 15 k) i)⁴ the applicants set the application down as an uncontested opposed matter. The opposing respondents having been accorded 3 (three) days' notice of the fact that the application had been set down for hearing and that final relief would be sought. Notice withstanding the filing of a notice to oppose to both applications, the respondents did not file answering papers and were not represented by counsel when the matter served before me. This notwithstanding, the matter remained opposed.

[11] On 4 April 2017, an order in terms of prayers 1 and 2 of the first and second applicant's notice of motion was granted. The crisp issue remaining for determination is whether the applicants are entitled to relief in terms of which it is declared (i) not mandatory certain portions of the Regulations and; (ii) unconstitutional and invalid certain portions of the Regulations together with some sections of the BDRA.

The issues

[12] The central issues are whether (i) sections 9, 10 of the BDRA, (ii) Sub-regulations (3) and (5) of each of Regulations 3, 4 and 5 of the Regulations; and Sub-regulation (1) of Regulation 12 of the Regulations do not allow fathers of children to register their child's birth in the event the child's mother is a foreigner whose presence in the Republic of South

⁴ In all matters where a notice of opposition has been delivered but no answering affidavit or notice in terms of rule 6(5)(d)(iii) of the Uniform Rules has been delivered within the period prescribed in terms of the Uniform Rules, the applicant must apply for the matter to be set down on the unopposed roll, and the registrar must set the matter on the unopposed roll under the caption "UNCONTESTED OPPOSED MATTERS". (Court Notice 1/2009 para 2).

Africa may not be in accordance with the law and/or in the event of the absence of the child's mother.

[13] In the event the answer to the questions posed above is in the affirmative, the next inquiry will be whether the Court can interpret sections 9 and 10 of the BDRA, (ii) sub-regulations (3) and (5) of each of Regulations 3, 4 and 5 of the Regulations and Sub-regulation (1) of Regulation 12 of the Regulations in a manner that is consistent with and gives effect to the rights in sections 28(1)(a) and (2) of the Constitution, 1996 (act No. 108 of 1996).

[14] Sections 9 and 10 of the BDRA provide:

9. Notice of birth

(1) In the case of any child born alive, anyone of his or her parents or, if neither of his or her parents is able to do so, the person having charge of the child or a person requested to do so by the parents or the said person, shall within 30 days after the birth give notice thereof in the prescribed manner to any person contemplated in section 4.

(2) Subject to the provisions of section 10, the notice of birth referred to in subsection (1) of this section shall be given under the surname of the father of the child concerned.

(3) Where the notice of a birth is given after the expiration of 30 days from the date of the birth, the Director-General may demand that reasons for the late notice be furnished and that the fingerprints be taken of the person whose notice of birth is given.

(4) No registration of birth shall be done of a person who dies before notice of his birth has been given in terms of subsection (1).

(5) The person to whom notice of birth was given in terms of subsection (1), shall furnish the person who gave that notice with a birth certificate, or an acknowledgement of receipt of the notice of birth in the prescribed form, as the Director-General may determine.

(6) No person's birth shall be registered unless a forename and a surname have been assigned to him.

10. Notice of birth of illegitimate child

(1) Notice of birth of an illegitimate child shall be given

(a) under the surname of the mother; or

(b) at the joint request of the mother and of the person who in the presence of the person to whom the notice of birth was given acknowledges himself in writing to be the father of the child and enters the prescribed particulars regarding himself upon the notice of birth, under the surname of the person who has so acknowledged.

(2) Notwithstanding the provisions of subsection (1), the notice of birth may be given under the surname of the mother if the person mentioned in subsection (1)(b), with the consent of the mother, acknowledges himself in writing to be the father of the child and enters particulars regarding himself upon the notice of birth.

[15] Sub-regulation (3) to Regulation 3 provides:

3. Notice of birth for children born of South African citizens

(1). Any South African citizen must give notice of the birth of his or her child within 30 days of the birth as contemplated in subregulation (3).

(2). Where both parents of a child whose birth is sought to be registered in terms of subregulation (1) are deceased, the notice of birth must be made by the next-of-kin or legal guardian of the child.

(3). A notice of birth referred to in subregulation (1) must be given by, where possible, both parents to the Director-General on Form DHA-24 illustrated in Annexure 1A and be accompanied by –

(a) proof of birth on Form DHA-24/PB illustrated in Annexure 1D attested to by a medical practitioner who -

(i) attended to the birth; or

(ii) examined the mother or the child after the birth of the child;

(b) an affidavit attested to by a South African citizen who witnessed the birth of the child where the birth occurred at a place other than

a health institution on Form DHA-24/PBA illustrated in Annexure 1E;

- (c) biometrics, in the form of a palm, foot or fingerprint of the child whose birth is sought to be registered in the appropriate space on Form DHA-24 illustrated in Annexure 1A;
- (d) fingerprints of the parents, which shall be verified online against the national population register: Provided that where the fingerprints cannot be verified online, the full set of fingerprints of the parents shall be taken on Form DHA-24/A illustrated in Annexure 1C;
- (e) a certified copy of the identity document of the biological or adoptive mother or father or both parents of the child whose birth is sought to be registered, as the case may be;
- (f) a certified copy of a valid passport and visa or permit, where one parent is a non- South African citizen;
- (g) where applicable, a certified copy of a death certificate of any deceased parent;
- (h) where applicable, a certified copy of the marriage certificate of the parents of the child whose birth is sought to be registered;
- (i) where applicable, a certified copy of the identity document or valid passport and visa or permit of the next-of-kin or legal guardian;
and
- (j) where applicable, Form DHA-288/B illustrated in Annexure 2C.

[16] Sub-regulation (3) to Regulation 4 provides:

(3). A notice of birth referred to in subregulation (1) must be given by, where possible, both parents to the Director-General on Form DHA-24/LRB illustrated in Annexure 1B and be accompanied by –

- (a) proof of birth on Form DHA-24/PB illustrated in Annexure 1D attested to by a medical practitioner who -
 - (i) attended to the birth; or
 - (ii) examined the mother or the child after the birth of the child;
- (b) an affidavit attested to by a South African citizen who witnessed the birth of the child where the birth occurred at a place other than a health institution on Form DHA-24/PBA illustrated in Annexure 1E;
- (c) biometrics, in the form of a palm, foot or fingerprint of the child whose birth is sought to be registered in the appropriate space on Form DHA-24 illustrated in Annexure 1A;
- (d) fingerprints of the parents, which shall be verified online against the national population register: Provided that where the fingerprints cannot be verified online, the full set of fingerprints of the parents shall be taken on Form DHA-24/A illustrated in Annexure 1C;
- (e) a certified copy of the identity document of the biological or adoptive mother or father or both parents of the child whose birth is sought to be registered, as the case may be;
- (f) a certified copy of a valid passport and visa or permit, where one parent is a non- South African citizen;
- (g) where applicable, a certified copy of a death certificate of any deceased parent;

- (h) where applicable, a certified copy of the marriage certificate of the parents of the child whose birth is sought to be registered;
- (i) where applicable, a certified copy of the identity document or valid passport and visa or permit of the next-of-kin or legal guardian;
- (j) Form DHA-288/B illustrated in Annexure 2A;
- (k) where applicable, Form DHA-288/B illustrated in Annexure 2C;
and
- (j) proof of payment of the applicable fee.

[17] Sub-regulation (3) to Regulation 5 provides:

- (3). A notice of birth referred to in subregulation (1) must be given by, where possible, both parents to the Director-General on Form DHA-24/LRB illustrated in Annexure 1B and be accompanied by –
 - (a) proof of birth on Form DHA-24/PB illustrated in Annexure 1D attested to by a medical practitioner who -
 - (i) attended to the birth; or
 - (ii) examined the mother or the child after the birth of the child;
 - (b) an affidavit attested to by a South African citizen who witnessed the birth of the child where the birth occurred at a place other than a health institution on Form DHA-24/PBA illustrated in Annexure 1E;
 - (c) biometrics, in the form of a palm, foot or fingerprint of any child younger than 7 years whose birth is sought to be registered in the appropriate space on Form DHA-24 illustrated in Annexure 1A;

- (d) fingerprints of the parents, which shall be verified online against the national population register: Provided that where the fingerprints cannot be verified online, the full set of fingerprints of the parents shall be taken on Form DHA-24/A illustrated in Annexure 1C;
- (e) two recent identity size photographs of a child or person who is 7 years or older, affixed to the appropriate space on Form DHA-24/A illustrated in annexure 1C;
- (f) a certified copy of the identity document or passport and visa or permit of the parents of the child or person whose birth is sought to be registered, where one of the parents is a non-South African citizen;
- (g) where applicable, a certified copy of a death certificate of any deceased parent of the child or person;
- (h) where applicable, a certified copy of the marriage certificate of the parents of the child or person;
- (i) where applicable, a certified copy of the identity document or passport and visa or permit of the next-of-kin or legal guardian of the child or person;
- (j) Form DHA-288/B illustrated in Annexure 2A;
- (k) Form DHA-288/B illustrated in Annexure 2B;
- (j) where applicable, Form DHA-288/B illustrated in Annexure 2C;
and
- (m) proof of payment of the applicable fee.

[18] Sub-regulation (5) to Regulations 3, 4 and 5 provides:

- (5). A notice of birth which does not meet the requirements of subregulations (3) and (4), shall not be accepted.

[19] Sub-regulation (1) to Regulation 12, provides:

- (1). A notice of birth of a child born out of wedlock shall be made by the mother of the child of Form DHA-24 illustrated in Annexure 1A of Form DHA-24/LRB illustrated in annexure 1A, whichever applicable.

[20] Essentially, the dispute turns on the interpretation of sections 9 and 10 of the BDRA and certain subregulations promulgated thereunder. In doing so, a Court should endeavour to interpret the statute and the Regulations in a manner which is constitutional rather than seeking to strike these down. Accordingly, a declaration of invalidity where the words can be read sensibly and plausibly to be constitutional should not result.

The approach to statutory interpretation

[21] The Constitutional Court has previously stated that when interpreting a statute, Judicial Officers must consider the language used as well as the purpose and context and must endeavour to interpret the statute in a manner that renders the statute constitutionally compliant.⁵

[22] In *Bertie Van Zyl Ltd and Another v Minister of Safety and Security and Others*, the Constitutional Court stated that “[t]he purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of a law”.⁶ It pointed out that a contextual or purposive

⁵ *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 28.

⁶ [2009] ZACC 11; 2010 (2) SA 1 (CC); 2009 (10) BCLR 978 (CC) at para 21.

reading of a statute must remain faithful to the actual wording of the statute.⁷

[23] In *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*, it was held that legislation must be interpreted in a way that promotes the spirit, purport and objects of the Bill of Rights but limited to what the text of the statute is reasonably capable of meaning.⁸ This position was echoed in *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others*, where Langa DP stated that “judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section”.⁹ He, however, warned against an unduly strained interpretation.¹⁰ In recent times, the correctness of these statements was met with approval by the Constitutional Court in *Democratic Alliance v African National Congress and Another*.¹¹

The meaning of sections 9 and 10 of the BDRA

[24] Sections 9 and 10 of the BDRA regulate the registration and notification of birth of children born alive. Section 9 of the BDRA, in particular, permits that notification of birth of a child born alive be given by any one of his

⁷ Id at para 22.

⁸ [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at paras 23-4.

⁹ [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 23.

¹⁰ Id at para 24.

¹¹ [2015] ZACC 1; 2015 (2) SA 232 (CC); 2015 (3) BCLR 298 (CC) at para 41.

parents.¹² It does not appear anywhere in section 9 of the BDRA that the section only deals with the notification of birth of children born to married parents. The section refers to “*any child born alive*” without differentiation as to whether such child was born to married and/or unmarried parents. It would seem to me that the requirement for notification of birth of a child in section 9 of the BDRA is that the child must have been born alive and not that the child’s parents must be married.

[25] In *Abahlali Basemjondolo Movement SA and Another v Premier of the Province of Kwazulu-Natal and Others*, the Constitutional Court warned that while it is important to prefer an interpretation of a statutory provision that avoids any constitutional inconsistency, one must be careful not to choose an interpretation that cannot be readily inferred from the text of the provision.¹³

[26] The words “any child born alive” in section 9 of the BDRA mean just about any child provided that that child was born alive regardless of the marital status of their parents. Accordingly, the parents of that child can notify the relevant authorities that such a child has been born. The absence of the word “jointly” and the presence of the words “any one” before the words “his or her parents” in section 9(1) of the BDRA suggests in so many terms that it was never intended by the legislature that only one of the child’s married parents and/or only married parents to a child born alive would be permitted to give notification of a child’s birth but that any one of

¹² Section 9(1) of the BDRA.

¹³ [2009] ZACC 31; 2010 (2) BCLR 99 (CC) at para 120.

the parents of a child who is able to and/or both would, in law, enjoy the right to give notice of their child's birth regardless of their marital status.

[27] Section 9(6) of the BDRA prescribes that no person's birth shall be registered unless a forename and a surname have been assigned to him. Despite the rubric to the section, section 10 of the BDRA does not deal with the notification of a child's birth. On a proper construction, the section deals with the assignment of a surname to a child during the process of notification of their birth, which is dealt with in section 9 of the BDRA. An analysis of this section in its current form shows that the first "mother" in subsection (2) was intended to be "father". The question whether section 10(1)(a) is constitutional or otherwise did not serve before me, as such I will not make a pronouncement on it. Suffice it to mention that on their current formulation, sections 9 and 10 of the BDRA do not forbid unmarried fathers to register the births of their children in the absence of the mother who gave birth to such children. The requirement is that such children must have been born alive, in which event any one of the parents, regardless of their marital status, would be able to give notice of birth. This interpretation is not only faithful to the actual wording of the statute, it also leaves the statute constitutionally compliant inasmuch as it does not strain the meaning of the words employed therein.

[28] It is trite that an order of constitutional invalidity ought not to be granted where words are capable of being interpreted in a manner that renders the provision constitutional. In my view, the ordinary interpretation of the words used in sections 9 and 10 of the BDRA leaves the statute

constitutionally compliant.

The regulations

[29] The BDRA reposes to the second respondent, the power to make regulations on any issues that the BDRA regulates.¹⁴ The Regulations were promulgated under Government Notice R128 in Government Gazette 37373 dated 26 February 2014 and commenced on 01 March 2014. The challenge to the Regulations only relates to sub-regulations (3) and (5) of Regulations 3, 4 and 5 and subregulation (1) of Regulation 12.

[30] The order sought by the applicants suggests that the entire content of sub-regulation (3) of Regulations 3, 4 and 5 is inimical to the registration of a child's birth when such child was born to a one or both parents of foreign descent and whose presence in the Republic of South Africa Republic of South Africa may not be in accordance with the law and/or in the event of absence of the child's mother. This is obviously not the case. Subregulations (3)(a), (b), (c), (d), (e), (g), (h), (j) to Regulations 3, 4 and 5 do not yield the impugned effect. Indeed, until the order granting relief in terms of prayers 1 (one) and 2 (two) of the first and second applicants' notice of motion, these applicants could not register NN's birth because NN's mother, the second applicant, could not produce a valid visa or permit and thus, their application for the registration of NN's birth was not in compliance with subregulations (3) of Regulations 3, 4, and 5 and could not be accepted.¹⁵

¹⁴ Section 32 of the BDRA.

¹⁵ See subregulation (5) to Regulations 3, 4 and 5.

[31] It is subregulations (3)(f), (i) and (5) to Regulations 3, 4 and 5 that, when applied, yield the consequences that led to the first and second applicants approaching this Court for relief. Subregulation (1) to Regulation 12 has the same effect as subregulations (3)(f), (i) and (5) to Regulations 3, 4 and 5. In consequence, I see no reason why subregulations (3)(a), (b), (c), (d), (e), (g), (h), (j) to Regulations 3, 4 and 5 should be tempered with.

[32] The next inquiry is whether the Court can interpret subregulations (3)(f), (i) and (5) to Regulations 3, 4, 5 and subregulation (1) to Regulation 12 in a manner consistent with and giving effect to the rights in sections 28(1)(a) and (2) of the Constitution, 1996 (act No. 108 of 1996). I cannot. It is clear from the text of the impugned subregulations that in the event there is a missing requirement the requirements of subregulations (3) to Regulations 3, 4, 5 are not met notice of such birth shall not be accepted with the result that there will be no registration of birth. The words “shall not” in subregulation (5) to Regulations 3, 4, 5 are positive and certain.¹⁶ The result is that the implementation of the impugned subregulations inhibits access to the rights in sections 28(1)(a) and (2) of the Constitution. For this reason, they are inconsistent with the Constitution.

[33] In terms of section 172(1)(a) of the Constitution, this Court has the power to declare a law that is inconsistent with the Constitution invalid to the extent of its inconsistency. In that event, this Court, in terms of section 172(1)(b), is enjoined to make an order that is just and equitable, including an order suspending a declaration of invalidity to allow a competent

¹⁶ *R v Govinder* 1956 (4) SA 136 (N). Also see *Ndzimande v Durban Country Rural Licensing Board* 1969 (3) SA 35 (N); *Justus v Stutterheim Municipality* 1962 (4) SA 505 (E).

authority to correct the defect.

[34] The question that arises is whether this Court should read words into subregulations (3) and (5) to Regulations 3, 4, 5 and to subregulation (1) of 12 in order to render these compatible with section 28(1)(a) and (2) of the Constitution. It is well to start off with the *dictum* in *Gaertner and Others v Minister of Finance and Others* where the Constitutional Court held that “reading- in” should be resorted to sparingly because the “actual act of writing or editing legislation may constitute a possible encroachment by the Judiciary on the terrain of the Legislature and, therefore, a violation of the separation of powers”. It also held that depending on its nature and extent, reading-in does not unduly encroach on the terrain of the Legislature.¹⁷ In *National Coalition*, the Constitutional Court summarized the applicable principles when considering whether or not to employ “reading-in” as a remedial measure.¹⁸ It held: (i) The provision which results from reading words into a statute should be consistent with the Constitution; (ii) The result achieved should interfere with the laws adopted by the legislature as little as possible; (iii) A court should be able to define with sufficient precision how the statute ought to be extended in order to comply with the Constitution; (iv) A court should endeavour to be as faithful as possible to the legislative scheme within the constraints of the Constitution; and (v) Even where the remedy of reading in is otherwise justified, it ought not to be granted where it would result in an

¹⁷ *Gaertner and Others v Minister of Finance and Others* [2013] ZACC 38; 2014 (1) SA 422 (CC); 2014 (1) BCLR 38 (CC) at paras 82 and 84.

¹⁸ *National Coalition* above n 7 at paras 74-5.

unsupportable budgetary intrusion.

[35] I am satisfied that the defects in subregulations (3)(f), (i) to Regulations 3, 4, 5 and (1) to Regulation 12 can be cured, with sufficient precision, by reading in (i) after before the word “a” at the commencement of subregulation (3)(f) to Regulations 3, 4 and 5 the words “where it is available,”; (ii) immediately after the word “applicable” in subregulation (3)(i) to Regulations 3, 4 and 5 the words “and available”; (iii) immediately after the word “by” to subregulation (1) of 12 the words “either” and immediately after the word “mother” the words “ “or father”. The only bar to this is if it were not possible to define with sufficient precision how the impugned subregulations would be extended in order for these to be create the passageway to the enjoyment of the rights in section 28(1)(a) and (2) of the Constitution.

[36] Regard being had to the fact that the Legislature may at any time amend and/or vary the regulations, the reading in method adopted herein does not impermissible intrude upon the domain of the Legislature and is being preferred by this Court to a generally bald declaration of invalidity inasmuch as its interference with the regulations is minimal.

[37] The reading in method is, however, not the correct remedy insofar as subregulation (5) to Regulations 3, 4 and 5. A declaratory of unconstitutionality and the setting aside thereof is preferred because subregulation (5) to Regulations 3, 4 and 5 is a catchall subregulation which renders impossible the registration of birth in circumstances where there is noncompliance with regulation (3) and (4) to Regulations 3, 4 and

5.

Costs

[38] Notwithstanding the fact that sections 9 and 10 of the BDRA have not been tempered with, additional to the declaratory order of invalidity of these sections, the third applicant also joined hands in seeking a declaratory order of invalidity of the Regulations in the same manner as did the first and second applicants. Accordingly, I am of the view that the third applicant has substantially succeeded in the application in the same way as has the first and second applicants. The result is that all applicants are entitled to costs.

The order

[39] In all the circumstances, I make the following order:

1. The application to declare invalid and unconstitutional sections 9 and 10 of the Birth and Deaths Registration Act, 1992 is dismissed.
2. Subregulations (3)(f) and (i); (5) to Regulations 3, 4, 5; and subregulation (1) to Regulation 12 of the Regulations on the Registration of Births and Deaths, 2014 are declared unconstitutional.
3. In order to cure the defects in the subregulations mentioned in paragraph 2 of this order, the following remedy shall apply:
 - (a) It shall be read in:

- (i) before the word “a” at the commencement of subregulation (3)(f) to Regulations 3, 4 and 5 the words “where it is available,”;
 - (ii) immediately after the word “applicable” in subregulation (3)(i) to Regulations 3, 4 and 5 the words “and available”;
 - (iii) immediately after the word “by” to subregulation (1) of Regulation 12 the words “either” and immediately after the word “mother” in that subregulation the words “or father”.
4. Subregulation (5) to Regulations 3, 4 and 5 is declared unconstitutional and invalid.
 5. The first and second respondents are directed to pay costs of the application, jointly and severally, the one paying the other to be absolved.

AM BODLANI

ACTING JUDGE OF THE HIGH COURT

Counsel for the first and second applicants	:	Ms. Sephton
Counsel for the third applicant	:	Mr. Bhima
Counsel for the respondents	:	No appearance
 Date of hearing	 :	 27 March 2018
 Date of delivery of judgment	 :	 27 June 2018

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GRAHAMSTOWN)**

CASE NO. CA 319/2018

Reportable

Date heard: 02 March 2020
Date Delivered: 19 May 2020

In the matter between:

CENTRE FOR CHILD LAW

Appellant

and

**DIRECTOR-GENERAL:
DEPARTMENT OF HOME AFFAIRS**

First Respondent

THE MINISTER OF HOME AFFAIRS

Second Respondent

MENZILE LAWRENCE NAKI

Third Respondent

DIMITRILA MARIE NDOVYA

Fourth Respondent

JUDGMENT

RUGUNANAN, J:

- [1] Before us is an appeal, with the leave of the Court *a quo*, in which section 10 of the Births and Death Registration Act ¹ ("the Act") is laid at the centre of a challenge to its constitutional validity which Bodlani AJ dismissed in a judgment handed down on 9 July 2018. The appellant is a Law Clinic based in the Law Faculty of the University of Pretoria. It is an institutional applicant

¹ Act No. 51 of 1992, as amended

and its involvement in this matter stems from acting in the public interest in accordance with the Constitution of the Republic of South Africa.²

- [2] The appellant's participation initially derived from an application in the Court *a quo* where it sought leave to intervene³ as third applicant in proceedings launched by the third and fourth respondents (as first and second applicants) in which they sought an order⁴ reviewing and setting aside the first respondent's refusal to register the birth of their minor child. Since the judgment *a quo* renders sufficient factual context it is unnecessary to elucidate the background to the matter as this appeal concerns a legal issue that arises from the interpretation and implementation of section 10 of the Act.
- [3] Referring to the founding papers of the appellant, it is only necessary to state that its involvement in the matter was triggered by the multitude of child cases,⁵ all of which are similar to the refusal that confronted the third and fourth respondents. Although the appeal is unopposed it is regrettable that this Court has not had the benefit of submissions from the first and second respondents on an issue affecting vulnerable members of society, more particularly unregistered children born to unmarried fathers.

THE BEST INTERESTS OF THE CHILD

- [4] The registration of the birth of a child commences with the act of giving notice of the child's birth.⁶ The process culminates in the issuing of a birth certificate⁷ reflecting the child's legal name containing a forename and surname, the date of birth and place of birth. Children without birth certificates are "invisible".⁸

² Section 38 provides in the relevant part: "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are- (a) ...; (b) ...; (c) ...; (d) anyone acting in the public interest;

³ Such leave was granted on 29 August 2017

⁴ the order was granted on 4 April 2017

⁵ Founding affidavit: Anjuli Leila Maistry, Record pages 86-98, paragraphs [32]-[43]

⁶ Sections 9 and 10 of Births and Death Registration Act No. 51 of 1992, as amended ("the Act")

⁷ See section 9(7) read with section 5 of the Act

⁸ and will remain as such notwithstanding acquiring citizenship status in terms of section 2 of the South African Citizenship Act No. 88 of 1995, as amended. The relevant section in the Citizenship Act does

Their lack of recognition in the civil birth registration system exposes them to the risk of being excluded from the education system and from accessing social assistance and healthcare. They are effectively denied support and assistance considered necessary for their positive growth and development.⁹ The numerous child cases, (among them, those labouring under generational statelessness¹⁰) in the appellant's papers evokes empathy if one comprehends the extent to which lack of birth registration exacerbates marginalisation and potentially underscores inability to participate in development strategies aimed at socio-economic advancement for the achievement of productive and fulfilling lives. There is undoubtedly a disproportionate severity of such consequences for children from indigent families.

- [5] The appellant's case demonstrates that section 10 poses a bar that is discriminatory on the basis of the marital status of the father of a child born out of wedlock. This directly violates the affected father's right to equality in section 9(3) of the Constitution¹¹ and is tantamount to unlawfully discriminating against him. By extension, the bar has the effect of denying children, with a legitimate claim to a nationality from birth,¹² a birth certificate; and in this manner it discriminates against children born to unmarried fathers on grounds that are arbitrary. A law that engenders discrimination with the potential for consequences of the enormity shown, cannot be said to be in the best interests of a child. This is the normative standard recognised by the Constitution as paramount in every matter concerning a child¹³ notwithstanding, in my view, the marital status of the child's parents. This

not purge section 10 of the BDRA. Where the Citizenship Act does make provision for citizenship by birth, it is still dependant on birth registration.

⁹ *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development* 2014 (2) SA 168 (CC) at paragraph [1]

¹⁰ This occurs when an undocumented child, having attained majority, cannot give notice of the birth of his newborn child because he (or she) is undocumented. Thus the cycle of generational statelessness is repeated with the newborn child

¹¹ Act 108 of 1996, as amended

¹² Section 28(1)(a) of the Constitution

¹³ Section 28(2) provides: "A child's best interests are of paramount importance in every matter concerning the child." See also *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) at paragraph [12]

expanded connotation of the best interests standard permits the protection of children in matters extending beyond the realm of the rights enumerated in section 28(1) of the Constitution.¹⁴

THE ISSUE ON APPEAL

[6] Section 10 of the Act provides:¹⁵

“10. Notice of birth of child born out of wedlock

(1) *Notice of birth of a child born out of wedlock shall be given -*

(a) *under the surname of the mother; or*

(b) *at the joint request of the mother and of the person who in the presence of the person to whom the notice of birth was given acknowledges himself in writing to be the father of the child and enters the prescribed particulars regarding himself upon the notice of birth, under the surname of the person who has so acknowledged.*

(2) *Notwithstanding the provisions of subsection (1), the notice of birth may be given under the surname of the mother if the person mentioned in subsection (1)(b), with the consent of the mother, acknowledges himself in writing to be the father of the child and enters particulars regarding himself on upon the notice of birth.”*

(my own underlining)

¹⁴ See *Minister for Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC) at paragraph [17]

¹⁵ The section was amended by the Births and Deaths Registration Amendment Act 40 of 1996 – Gazette No.17412, dated 5 September 1996. Commencement date: 5 September 1996

[7] In summary, the section makes provision for the notification of the birth of a child born out of wedlock and contemplates three scenarios in which this is achieved, namely:

- (i) giving notice under the surname of the mother (section 10(1)(a));
- (ii) under the surname of a person who acknowledges himself in writing to be the father but at the joint request of him and the mother (section 10(1)(b)); or
- (iii) under the surname of the mother if the person mentioned in section 10(1)(b), with the consent of the mother, acknowledges in writing that he is the father (section 10(2)).

[8] What can be extrapolated from the above is that the notification process for a child born out of wedlock has a dominant preference for the surname of the mother. Moreover, in all three scenarios it is manifest that the involvement of the mother is required whether through presence (section 10(1)(a) and (b)) or by giving her consent (section 10(2)). In its present form **section 10 in its entirety implicitly bars the unmarried father of a child born out of wedlock from giving notice of the child's birth under his surname if the mother is absent.** The limited effect of the reading-in or substitution of wording proposed by the Court *a quo* in section 10(2)¹⁶ did not, as will become evident later in this judgment, expunge the bar presented by section 10. This is the substantial issue in terms of which this appeal is grounded in the appellant's challenge to the constitutionality of the impugned provision.

THE APPROACH OF THE COURT *A QUO*

[9] Mindful of a purposive interpretation that renders a statute constitutionally compliant so that it promotes the spirit, purport and objects of the Bill of

¹⁶ i.e. the first "mother" by the word "father"

Rights, the Court *a quo* had regard to the appropriate prescripts for reading legislation in the context of a constitutional challenge. In summary, courts are enjoined to interpret legislation in conformity with the Constitution so far as this is reasonably possible and subject to the caution that the interpretation should not be unduly strained.¹⁷ While the soundness of these prescripts is not doubted it will become apparent from the ensuing discussion that the Court *a quo* erred in their application. This resulted a strained interpretation of the legislation and effectively did not address the issue.

[10] In dealing with the issue, the starting point for the Court *a quo* was section 9 of the Act. The section (in the form in which it appears in the judgment) provides:¹⁸

¹⁷ *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) at page 599E

¹⁸ In its current form the section reads:

"9. Notice of Birth

- (1) In the case of any child born alive, any one of his or her parents, or if the parents are deceased, any of the prescribed persons, shall, within 30 days after the birth of such child, give notice thereof in the prescribed manner, and in compliance with the prescribed requirements, to any person contemplated in section 4.
- (1A) ...
- (2) Subject to the provisions of section 10, the notice of birth referred to in subsection (1) of this section shall be given under the surname of either the father or the mother of the child concerned or the surnames of both the father and mother joined together as a double barrelled surname.
- (3) ...
- (3A) Where the notice of a birth is given after the expiration of 30 days from the date of birth, the birth shall not be registered, unless the notice of the birth complies with the prescribed requirements for a late registration of birth.
- (4) No registration of birth shall be done of a person who dies before notice of his or her birth has been given in terms of subsection (1).
- (5) The person to whom notice of birth was given in terms of subsection (1), shall furnish the person who gave that notice with a birth certificate, or an acknowledgement of receipt of the notice of birth in the prescribed form, as the Director-General may determine.
- (6) No person's birth shall be registered unless a forename and a surname have been assigned to him or her.
- (7) The Director-General may on application in the prescribed manner issue a prescribed birth certificate from the population register.
- (8) An original birth certificate issued in terms of subsection (7) shall in all courts of law be on the face of it evidence of the particulars set forth therein."

“9. Notice of Birth

- (1) *In the case of any child born alive anyone of his or her parents or, if neither of his or her parents is able to do so, the person having charge of the child or a person requested to do so by the parents of the said person, shall within 30 days after the birth give notice thereof in the prescribed manner to any person contemplated in section 4.*
- (2) *Subject to the provisions of section 10, the notice of birth referred to in subsection (1) of this section shall be given under the surname of the father of the child concerned.*
- (3) *Where the notice of a birth is given after the expiration of 30 days from the date of the birth, the Director-General may demand that the reasons for the late notice be furnished and that the fingerprints be taken of the person whose notice of birth is given.*
- (4) *No registration of birth shall be done of a person who dies before notice of his birth has been given in terms of subsection (1).*
- (5) *The person to whom notice of birth was given in terms of subsection (1), shall furnish the person who gave that notice with a birth certificate, or an acknowledgement of receipt of the notice of birth in the prescribed form, as the Director-General may determine.*
- (6) *No person's birth shall be registered unless a forename and a surname have been assigned to him.”*

[11] Having applied the aforementioned prescripts for reading legislation, the reasoning of the Court *a quo* is that nowhere does section 9 indicate that the notification of birth may only be given by married parents. Consequently, any one or both parents of a child enjoys the right to give notice of the child's birth regardless of the parents' marital status. The rationale for advancing this interpretation arose from the wording “*any child born alive*” which meant any

child born alive regardless of the marital status of the child's parents. Accordingly, in the opinion of the Court *a quo*, section 9 did not differentiate between married and / or unmarried parents.¹⁹

[12] Dealing specifically with section 10, this is what the judgment (quoting only where relevant) states:²⁰

(my own emphasis is in bold)

*"Section 9(6) of the Act which prescribes that no person's birth shall be registered unless a forename and a surname have been assigned to him. Despite the rubric to the section [i.e. section 10], section **10 of the BDRA does not deal with the notification of a child's birth.** On a proper construction **the section deals with the assignment of a surname to a child during the process of notification of their birth, which is dealt with in section 9** of the BDRA. An analysis of this section in its current form shows that the first "mother" in subsection (2) was intended to be "father". ... on their current formulation **sections 9 and 10 of the BDRA do not forbid unmarried fathers to register the births of their children in the absence of the mother who gave birth to such children. The requirement is that such children must have been born alive, in which event any one of the parents, regardless of their marital status, would be able to give notice of their birth.** This interpretation is not only faithful to the actual wording of the statute, it also leaves the statute constitutionally compliant inasmuch as it does not strain the meaning of the words employed therein."*

¹⁹ Judgment, paragraphs [24] and [26]

²⁰ At paragraph [27]

ANALYSIS

- [13] Section 9 regulates the notification of all births by any one of the parents of a child born alive, and incorporates provision to the effect that no person's birth shall be registered unless a forename and a surname has been assigned to that person (*per* section 9(6)). Evident from the reasoning employed by the Court *a quo* is that section 9 heralds section 10 because it does not differentiate between married and unmarried parents. The corollary to such reasoning is that the child of an unmarried father may be notified under the surname of the father. For reasons that will become apparent below, I am unable to agree that the approach charted by the judgment *a quo* cures section 10 of the issue occasioning this appeal. This is because the interpretation of section 9 achieved a strained effect by excluding from consideration that the notification of any child born alive is subject to the provisions of section 10 which deals with the notification of birth of a child born out of wedlock.
- [14] What section 9(1) read with section 9(2) seeks to make provision for is that notice of a child's birth should be given immediately upon the birth of the child and not later than 30 days by either parent but "*Subject to the provisions of section 10*". In the latter respect, the Court *a quo* overlooked the effect specifically of section 9(2).²¹ It maintains a distinction between the overall functioning of section 9 and section 10. For clarification, section 9 serves to regulate the notification of all children's births by parents regardless of marital status, whereas section 10 regulates the surname of a child born out of wedlock. Thus section 10 constitutes the mechanism through which the content of the notice in section 9 is fulfilled. Put otherwise, section 10 regulates the surname under which a child born out of wedlock will be notified under section 9. That surname is of paramount importance to a child's identity particularly where the child's mother is absent during the notification process.

²¹ and this includes sub-section (2) as it appears in the amended section 9

In its analysis of section 9 and 10, the Court *a quo* did not appreciate this distinction and its importance.

[15] Even though section 9 empowers an unmarried father to give notice of his child's birth, the exercise by an unmarried father of his right under section 9(1) is (by reason of section 9(2)) contingent on either the mother's presence (as *per* section 10(1)(b) or her consent (*per* section 10(2)). In the latter regard Counsel for the appellant pointed to section 26 of the Children's Act²² which he correctly submitted did not provide a solution to the hurdle posed by section 10 of the BDRA, since its efficacy is similarly dependent on a mother's consent. In effect, despite an unmarried father being permitted to give notice of his child's birth in terms of section 9, section 10 presents a bar when it comes to notifying the birth of his child under his surname in the mother's absence. Conceivably, such absence (or want of consent) might be occasioned by any number of reasons: the mothers in question are not capable or willing to give their consent either because they are themselves undocumented, or they are unwilling, or perhaps have absconded, or died either during childbirth or later, or are unable to be located.

[16] In addressing the impediment presented by section 10, the judgment *a quo* proposes a substitution of wording i.e. the first "*mother*" in section 10(2) by the word "*father*". Differently stated, this constitutes a reading-in. The reading-

²² Act No. 38 of 2005, as amended. The relevant section reads:

26. Person claiming paternity

- (1) A person who is not married to the mother of a child and who is or claims to be the biological father of the child may-
 - (a) apply for an amendment to be effected to the registration of birth of the child in terms of section 11(4) of the Births and Deaths Registration Act, 1992 (Act No. 51 of 1992), identifying him as the father of the child, if the mother consents to such amendment; or
 - (b) apply to a court for an order confirming his paternity of the child, if the mother-
 - (i) refuses to consent to such amendment;
 - (ii) is incompetent to give consent due to mental illness;
 - (iii) cannot be located; or
 - (iv) is deceased.
- (2) This section does not apply to-
 - (a) the biological father of a child conceived through the rape of or incest with the child's mother; or
 - (b) any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation.

in achieved a limited scope of application, in that, although notice of birth may be given under the surname of the father, section 10(2) still requires the consent of the child's mother (see paragraph 7(iii) above).

- [17] In heads of argument counsel for the appellant correctly submitted that the reading-in of the word "*father*" in section 10(2) does not address the provisions of section 10(1) which prescribe that the notice of birth of a child born out of wedlock must be given under the surname of the mother, or at the joint request of a mother under the surname of the father where the father acknowledges paternity.
- [18] Clearly, the reading-in exercise proposed by the Court *a quo* is inadequate particularly because it does not pertinently address the fundamental problem that section 10 (in its entirety) does not provide a mechanism for a child born out of wedlock to be notified in the surname of his or her father **where the mother is absent**. Somewhat ironically, the Court *a quo* appeared to recognise this bar in Regulation 12(1)²³ which states that "*a notice of birth of a child born out of wedlock shall be made by the mother of the child*". Considering that the regulation is inextricably interwoven with section 10 and is defective in the same manner, the judgment *a quo* nonetheless reflects a finding that the regulation is unconstitutional because it does not provide for an unmarried father to give notice of his child born out of wedlock in the absence of the child's mother. In its judgment²⁴ the Court *a quo* corrected the defect in regulation 12(1) to include reference to a child's father. The effect of the inclusion is that notice may be made by either the mother or father of a child born out of wedlock.
- [19] Reverting to the Act, to overcome the bar presented by section 10 the appellant has proposed, as indicated by the underlined wording below, that section 10 be deemed to read as follows:

²³ i.e the *Regulations on the Registration of Births and Deaths*, 2014 published in *Government Notice R128 in Government Gazette 37373 dated 26 February 2014. Commencement date: 1 March 2014.*

²⁴ At paragraph [35]

"10. Notice of birth of child born out of wedlock

(1) *Notice of birth of a child born out of wedlock shall be given -*

(a) *under the surname of the mother; or*

(b) *under the surname of the father where the father is the person giving notice of the child's birth and acknowledges his paternity in writing under oath; or*

(c) *at the joint request of the mother and of the person who in the presence of the person to whom the notice of birth was given acknowledges himself in writing to be the father of the child and enters the prescribed particulars regarding himself upon the notice of birth, under the surname of the person who has so acknowledged."*

[20] The Court *a quo* did not consider the practicality of the remedy proposed by the appellant as an expedient means of removing the bar against unmarried fathers, and by extension, their children. I am minded that the reading-in proposed by the appellant addresses the issue raised in this appeal by (i) removing the impediment confronting unmarried fathers, and (ii) removing the impediment affecting a specific class of children, in this case, children born out of wedlock. Against the background of what has been said in the preceding paragraphs of this judgment, I am satisfied that section 10 of the *BDRA* falls to be declared inconsistent with the Constitution and is invalid to the extent that it does not allow an unmarried father to register the birth of his child in the absence of the child's mother.

THE APPROPRIATE REMEDY

[21] Where any law is declared invalid and inconsistent with the Constitution a Court may make an order that is just and equitable²⁵ and which provides appropriate relief.²⁶ The appellant's proposal for section 10(1)(b) eliminates wording chosen by the Legislature which has been shown to be constitutionally non-compliant. The choice of reading-in proposed by the appellant serves a legitimate purpose and is premised on "*curing unconstitutionality based on under-inclusiveness*" of the impugned statutory provision "*that unjustifiably infringes the rights of identifiable groups that are excluded from certain benefits*".²⁷

[22] I am satisfied that the present is an appropriate circumstance for this Court to adopt the course proposed by the appellant. It is constitutionally permissible for a court to read words into a statute to remedy unconstitutionality.²⁸ The doctrine of the separation of powers renders me cognisant that a reading-in should not easily be resorted to as it may constitute a possible encroachment onto legislative territory. For this reason, the order below incorporates a suspensive component in recognition of the Legislature's ultimate responsibility for amending legislation or devising other means as a legislative solution²⁹ while simultaneously ensuring effective redress for an identifiable group of fathers and their children.

[23] In the circumstances the following order issues:

1. The appeal is upheld.
2. It is further ordered in terms of section 172 of the Constitution of South Africa Act No. 108 of 1996, as amended:

²⁵ Section 172(1)(b) of the Constitution

²⁶ Section 38 of The Constitution

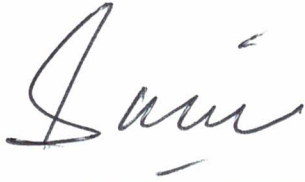
²⁷ **C and Others v Department of Health and Social Development, Gauteng and Others** 2012 (2) SA208 (CC) at 231B

²⁸ **National Coalition for Gay and Lesbian Equality and Another v The Minister of Justice and Others** 2000 (2) SA 1 (CC) at paragraphs [69]-[73]

²⁹ **Gaertner and Others v Minister of Finance and Others** 2014 (1) SA 442 (CC) at paragraph [84]

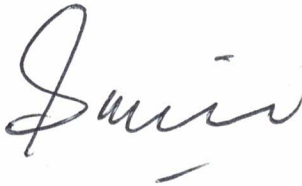
- 2.1 Section 10 Births and Death Registration Act No 51 of 1992, as amended ("the Act") is, with effect from the date of this order, declared invalid and inconsistent with the Constitution to the extent that it does not allow unmarried fathers to give notice of the births of their children under the father's surname in the absence of the mothers of such children.
- 2.2 To remedy this defect section 10 of the Act shall be deemed to read as though it provides as follows:
- "(1) Notice of birth of a child born out of wedlock shall be given:
- (a) under the surname of the mother; or
 - (b) under the surname of the father where the father is the person giving notice of the child's birth and acknowledges his paternity in writing under oath;
 - (c) at the joint request of the mother and of the person who in the presence of the person to whom the notice of birth was given acknowledges himself in writing to be the father of the child and enters the prescribed particulars regarding himself upon the notice of birth, under the surname of the person who has so acknowledged.
- 2.3 The declaration in paragraphs (2.1 and 2.2) is suspended for 24 (twenty four) months to enable the Legislature opportunity to amend section 10 of the Act or to devise means for ensuring that it is constitutionally compliant.

2.4 This order is referred to the Constitutional Court for confirmation of the order of constitutional invalidity.



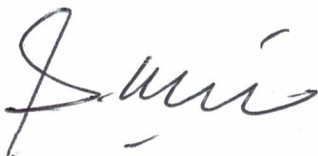
S. RUGUNANAN
JUDGE OF THE HIGH COURT

I agree. It is so ordered.



E. REVELAS
JUDGE OF THE HIGH COURT

I agree. It is so ordered.



S. X. MAPOMA
ACTING JUDGE OF THE HIGH COURT

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This judgment was handed down electronically by circulation to the abovementioned legal representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 19 May 2020.



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 101/20

In the matter between:

CENTRE FOR CHILD LAW

Applicant

and

**DIRECTOR-GENERAL:
DEPARTMENT OF HOME AFFAIRS**

First Respondent

MINISTER OF HOME AFFAIRS

Second Respondent

MENZILE LAWRENCE NAKI

Third Respondent

DIMITRILA MARIE NDOVYA

Fourth Respondent

Neutral citation: *Centre for Child Law v Director General: Department of Home Affairs and Others* [2021] ZACC 31

Coram: Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ

Judgments: Victor AJ (majority): [1] to [89]
Mogoeng CJ (dissenting): [90] to [145]

Heard on: 1 September 2020

Decided on: 22 September 2021

Summary: Births and Deaths Registration Act 51 of 1992 — constitutionality of section 10 — section is unconstitutional

ORDER

On application for confirmation of an order of constitutional invalidity granted by the Full Court of the High Court of South Africa, Eastern Cape Division, Grahamstown (hearing an appeal from the High Court of South Africa, Eastern Cape Division, Grahamstown):

1. The declaration of constitutional invalidity of section 10 of the Births and Deaths Registration Act 51 of 1992 (Act) by the Full Court of the High Court of South Africa, Eastern Cape Division, Grahamstown, is confirmed in the terms set out in paragraphs (a) and (b):
 - (a) It is declared that section 10 of the Act is invalid in its entirety and consequently severed from the Act.
 - (b) The proviso in section 9(2) of the Act stating that the provision is “subject to the provisions of section 10” is severed from section 9(2) by reason of the declaration of constitutional invalidity of section 10.
2. The declaration of constitutional invalidity referred to in paragraphs (a) and (b) takes effect from the date of this order.
3. The first respondent must pay the costs of the applicant in this Court, including the costs of two counsel.

JUDGMENT

VICTOR AJ (Jafta J, Khampepe J, Madlanga J, Majiedt J, Mhlantla J, Theron J and Tshiqi J concurring):

Introduction

“Children are the soul of our society. If we fail them, then we have failed as a society.”¹

[1] A surname connects us to our heritage and roots us in history and family tradition. In many African cultures, names not only connect a person to their immediate family, but also convey a spiritual connection to one’s broader community, clan, and ancestors.

[2] Despite South Africa having one of the most progressive Constitutions in the world,² which prescribes that a child’s best interests are of paramount importance,³ there remains a piece of legislation in which the registration of children born out of wedlock is classified as a separate category. Section 10 of the Births and Deaths Registration Act⁴ (Act) bears the heading “Notice of birth of child born out of wedlock” and provides for a bifurcated registration procedure between children born in and out of wedlock.

[3] The interplay between sections 9 and 10 of the Act is foundational to the issues in this case. Section 9 of the Act, in relevant part, provides for notice to be given of a child born alive in the following circumstances:

¹ *SS v Presiding Officer, Children’s Court, Krugersdorp* 2012 (6) SA 45 (GSJ) at para 1.

² In an interview before her death, the late Justice Ruth Bader Ginsburg of the Supreme Court of the United States of America said on Egyptian TV, Egyptians, who were selecting a team to draft a new constitution, should not consider the United States of America’s iconic document, but instead the “great piece of work” completed in South Africa in 1996. See Staff Writer “Eighteen Years of the World’s Best Constitution” *Brand South Africa* (11 December 2014), available at <https://www.brandsouthafrica.com/people-culture/history-heritage/eighteen-years-of-the-world-s-best-constitution>.

³ Section 28 of the Constitution provides:

“(1) Every child has the right—
 (a) to a name and a nationality from birth;
 . . .
 (2) A child’s best interests are of paramount importance in every matter concerning the child.”

⁴ 51 of 1992.

“(1) In the case of any child born alive, any one of his or her parents, or if the parents are deceased, any of the prescribed persons, shall, within 30 days after the birth of such child, give notice thereof in the prescribed manner, and in compliance with the prescribed requirements, to any person contemplated in section 4.

(1A) The Director-General may require that biometrics of the person whose notice of birth is given, and that of his or her parents, be taken in the prescribed manner.

(2) Subject to the provisions of section 10, the notice of birth referred to in subsection (1) of this section shall be given under the surname of either the father or the mother of the child concerned, or the surnames of both the father and mother joined together as a double barrelled surname.

(3A) Where the notice of a birth is given after the expiration of 30 days from the date of birth, the birth shall not be registered, unless the notice of the birth complies with the prescribed requirements for a late registration of birth.”

[4] Section 10 of the Act provides:

“(1) Notice of birth of child born *out of wedlock* shall be given—

- (a) under the surname of the mother; or
- (b) at the joint request of the mother and of the person who in the presence of the person to whom the notice of birth was given acknowledges himself in writing to be the father of the child and enters the prescribed particulars regarding himself upon the notice of birth, under the surname of the person who has so acknowledged.

(2) Notwithstanding the provisions of subsection (1), the notice of birth may be given under the surname of the mother if the person mentioned in subsection (1)(b), with the consent of the mother, acknowledges himself in writing to be the father of the child and enters particulars regarding himself upon the notice of birth.”

[5] It is this bifurcated procedure that is the subject of this matter. At issue here are an array of difficulties that arise from section 10 of the Act. The first is the difficulty experienced by unmarried fathers in registering the births of their children in their own

surnames, if the consent of the mothers has not been obtained or if the mothers are unavailable. There are instances where a mother may be available but, for whatever reason, consent may not have been obtained. There are also instances where the mother may have disappeared and left the child with the father, and thus not be available to give consent. Second, there is the problem of undocumented mothers who live and give birth to children in South Africa and are unable to register the births of these children. Third, another difficulty arises as a result of the requirement that parents who are non-South African citizens must produce a certified copy of a valid passport or visa.⁵

⁵ Regulations on the Registration of Births and Deaths, GN R128 GG 37373, 26 February 2014. Regulation 8 provides:

“Notice of birth of children born of parents who are non-South African citizens:

- (1) A notice of birth of a child born of parents who are non-South African citizens and who are not permanent residents or refugees must be given as contemplated in sub-regulation (3) by either parent of the child within 30 days of the birth of the child in the Republic.
- (2) Where the parents of the child whose birth is sought to be registered as contemplated in sub-regulation (1) are deceased, the notice of birth may be given by the next-of-kin or legal guardian of the child.
- (3) A notice of birth referred to in sub-regulation (1) must be given to the Director-General on Form DHA-24 illustrated in Annexure 1A and be accompanied by—
 - (a) proof of birth on Form DHA-24/PB illustrated in Annexure 1D attested to by a medical practitioner who—
 - (i) attended to the birth; or
 - (ii) examined the mother or the child after the birth of the child;
 - (b) an affidavit attested to by a person who witnessed the birth of the child where the birth occurred at a place other than a health institution on Form DHA-24/PBA illustrated in Annexure 1F;
 - (c) a certified copy of a valid passport and visa or permit of the mother or father, or both parents, of the child, as the case may be;
 - (d) where applicable, a certified copy of the valid identity document or passport and visa or permit of the next-of-kin or legal guardian;
 - (e) where applicable, a certified copy of an asylum seeker permit issued in terms of section 22 of the Refugees Act of the mother or father or both biological parents of the child;
 - (f) where applicable, a certified copy of the death certificate of any deceased parent of the child;
 - (g) where applicable, a certified copy of the marriage certificate of the parents of the child whose birth is sought to be registered;
 - (h) where applicable, Form DHA-288/B illustrated in Annexure 2C; and
 - (i) proof of payment of the applicable fee.
- (4) Where a woman gives birth to more than one child during a single confinement, the notice of birth contemplated in sub-regulation (1) must be

The Act and its Regulations make no provision for the scenario where one of the parents is a South African citizen and the other parent is a foreign national who does not have a valid passport or visa.

[6] This case requires a careful analysis of the impact of the interplay between sections 9 and 10 of the Act in order to determine whether the sections further the constitutional goal of equality and dignity for unmarried parents and their biological children.

[7] These are confirmation proceedings in terms of sections 172(2)(d) and 167(5) of the Constitution for confirmation of the unanimous order granted by the Full Court. Accordingly, this Court's supervisory jurisdiction is automatically engaged.

Background

[8] The third respondent, Mr Menzile Lawrence Naki (Mr Naki), and the fourth respondent, Ms Dimitrila Marie Ndovya (Ms Ndovya), met around 2008 in the Democratic Republic of Congo (DRC) whilst Mr Naki, a South African citizen and member of the South African Defence Force, was stationed in the DRC for a peace-keeping mission. They married in the DRC in accordance with the culture and customs of Ms Ndovya, a citizen of the DRC. This marriage was not registered because customary marriages are not registered in the DRC. Two children were born from their marriage, one of whom is their daughter, NN, born in Grahamstown on 1 February 2016. Before NN's birth, Ms Ndovya travelled to and from South Africa on a visitor's visa. Shortly before NN's birth, Ms Ndovya's visa expired while in

given for each child separately on Form DHA-24 illustrated in Annexure 1A with all the supporting documents contemplated in sub-regulation (3) and the exact time of each birth must be recorded in that Form.

- (5) Upon approval of a notice of birth, the Director-General must issue to the parents a birth certificate without an identity number on Form DHA-19 illustrated in Annexure 24, in terms of section 5(3) of the Act."

South Africa. Upon its expiry, she was at an advanced stage of pregnancy and could neither apply for a new visa nor travel back to the DRC.

[9] Following the birth of their daughter, they sought to register her birth with the Department of Home Affairs (Department). The Department refused to register her birth because Ms Ndovya was not in possession of a valid visa or permit and could not comply with Regulations 3(3)(f),⁶ 4(3)(f)⁷ or 5(3)(f),⁸ regardless of the fact that their daughter was a South African citizen.⁹ They were informed that their daughter's birth could not be registered until such time that Ms Ndovya complied with the Regulations. The Department refused to recognise their customary law marriage, and thus, NN had to be treated as a child born out of wedlock.

Litigation history

[10] The parents subsequently brought an application in the High Court of South Africa, Eastern Cape Division, Grahamstown to: (i) review and set aside the

⁶ Regulation 3(3)(f) provides:

“A notice of birth . . . must be given by, where possible, both parents . . . and be accompanied by—

. . .

(f) a certified copy of a valid passport and visa or permit, where one parent is a non-South African citizen.”

⁷ Regulation 4(3)(f) provides for the late registration of the birth of children of South African citizens:

“A notice of birth . . . must be given by, where possible, both parents . . . and be accompanied by—

. . .

(f) a certified copy of a valid passport and visa or permit, where one parent is a non-South African citizen.”

⁸ Regulation 5(3)(f) provides for the late registration of the birth of children older than one year born of South African citizens:

“A notice of birth . . . must be given by, where possible, both parents . . . and be accompanied by—

. . .

(f) a certified copy of the identity document or passport and visa or permit of the parents of the child or persons whose birth is sought to be registered, where one of the parents is a non-South African citizen.”

⁹ Section 2(1)(b) of the South African Citizenship Act 88 of 1995 provides that “any person who is born in or outside the Republic, one of his or her parents, at the time of his or her birth, being a South African citizen, shall be a South African citizen by birth”. See further this Court's recent judgment in *Chisuse v Director-General, Department of Home Affairs* [2020] ZACC 20; 2020 (6) SA 14 (CC); 2020 (10) BCLR 1173 (CC) (*Chisuse*).

Department's decision to refuse to register their daughter's birth, or alternatively, the Department's failure to take a decision on the application to register her birth; (ii) compel the Department to register their daughter's birth; (iii) challenge the Department's interpretation of Regulations 3(3), 3(5), 4(3), 4(5), 5(3) and 5(5); and (iv) challenge, to the extent necessary, the constitutionality of those Regulations.

High Court

[11] The Centre for Child Law, a registered law clinic based in the Law Faculty at the University of Pretoria, which is the applicant before this Court, was admitted as an intervening party in the High Court. It sought orders declaring sections 9 and 10 of the Act unconstitutional to the extent that they do not allow unmarried fathers to register the births of their children in the absence of the mothers of such children. It proposed the remedy of reading-in to both sections. It also sought orders declaring sub-regulations (3) and (5) of Regulations 3, 4 and 5 and Regulation 12(1)¹⁰ unconstitutional to the extent that they do not allow unmarried fathers to register the birth of their child in the absence of the child's mother or where the child's mother is undocumented.

[12] The High Court, per Bodlani AJ, granted the parents' relief regarding the registration of their daughter's birth. The remaining issues for determination were those relating to the constitutionality of the Regulations and the Act. The central issue was whether sections 9 and 10 of the Act, sub-regulations (3) and (5) of Regulations 3, 4, and 5 and Regulation 12(1) prevent fathers from registering their child's birth if the child's mother is a foreigner whose presence in the Republic may not be in accordance with the law and/or in the event of the absence of that child's mother.

¹⁰ Regulation 12(1) provides:

"A notice of birth of a child born *out of wedlock* shall be made by the mother of the child on Form DHA- 24 illustrated in Annexure 1A [to the Regulations] or Form DHA-24/LRB illustrated in Annexure 1A [to the Regulations], whichever applicable."

[13] In relation to section 9, the High Court found that nowhere does it indicate that the notification of birth may only be given by married parents. It held that the wording of section 9(1) suggests that it was never intended by the Legislature that only one of the child's married parents and/or only married parents to a child born alive would be permitted to give notification of a child's birth. It further held that any one of the parents of a child who is able to and/or both such parents would, in law, enjoy the right to give notice of their child's birth regardless of their marital status. The rationale for this interpretation arose from the wording "any child born alive", which meant any child born alive regardless of the marital status of the child's parents.

[14] In relation to section 10, the High Court noted that the section does not deal with the notification of a child's birth. It held that, on a proper construction, the section deals with the assignment of a surname to a child during the process of notification of their birth, which is dealt with in section 9 of the Act. It found that the first "mother" in subsection (2) was intended to be "father". It did not make a pronouncement on the constitutional validity of section 10(1)(a). It held that on their current formulation, sections 9 and 10 of the Act do not forbid unmarried fathers to register the births of their children in the absence of the mother who gave birth to such children. It held that the requirement is that such children must be born alive, in which case any one of the parents, regardless of their marital status, would be able to give notice of birth. This interpretation, it held, is not only faithful to the wording of the statute, but also does not unduly strain the meaning of the words employed therein. The sections could thus be interpreted to be constitutionally compliant.

[15] In relation to the Regulations, the High Court held that sub-regulations (3)(a), (b), (c), (d), (e), (g), (h) and (j) of Regulations 3, 4 and 5 need not be tampered with, as it was only sub-regulations (3)(f), (i) and (5) of Regulations 3, 4 and 5 that had yielded the consequences that led the parents to approach the Court. It found that, based on the text of the impugned sub-regulations, in the event that the requirements of sub-regulation (3) of Regulations 3, 4 and 5 are not met, notice of such birth will not be accepted, with the result that there will be no registration of birth. It held that the

implementation of the impugned sub-regulations inhibits access to the rights in sections 28(1)(a) and (2) of the Constitution and is thus inconsistent with the Constitution.

[16] The High Court thus refused to declare sections 9 and 10 of the Act unconstitutional, but declared sub-regulations (3)(f) and (i), and sub-regulation (5) of Regulations 3, 4 and 5, and sub-regulation (1) to Regulation 12 as constitutionally invalid. The High Court read in certain words in order to cure the defects in the sub-regulations.

Full Court of the High Court

[17] With leave, the applicant appealed the order of Bodlani AJ to the Full Court on the question of the constitutional validity of section 10 of the Act. In brief, it argued that the word “mother” is duplicated in section 10, and this was an error. And if the duplication of the word “mother” was an error, and was actually intended to be “father”, that would not remedy the unconstitutionality because section 10 would still not allow for the notice of birth of a child born out of wedlock to be given under the surname of an unmarried father in the absence of the child’s mother. Such notice still required the mother’s consent.

[18] The Full Court found that, even though section 9 empowers an unmarried father to give notice of his child’s birth, the exercise by an unmarried father of his right under section 9(1), by virtue of section 9(2), is contingent on either the mother’s presence (as per section 10(1)(b)) or her consent (as per section 10(2)). In effect, the Full Court found that section 10 presents a bar when it comes to the father notifying the birth of his child under his surname in the mother’s absence. In this case, the mother did not have the requisite permission to be in South Africa.

[19] In conclusion, the Full Court accepted the reading-in proposed by the applicant on the basis that it addressed the issues raised in the appeal by: (i) removing the impediment confronting unmarried fathers and (ii) removing the impediment affecting

a specific class of children, in this case, children born out of wedlock. It declared section 10 of the Act inconsistent with the Constitution and invalid to the extent that it does not allow unmarried fathers to give notice of the births of their children under their surname in the absence of the mothers of such children. As an interim remedy, the Full Court proposed reading-in two additions to section 10(1) of the Act. These additions are highlighted below as (b) and (c). The Full Court proposed that section 10(1) be deemed to read as follows:

- “(1) Notice of birth of a child born out of wedlock shall be given—
- (a) under the surname of the mother; or
 - (b) *under the surname of the father where the father is the person giving notice of the child’s birth and acknowledges his paternity in writing under oath;*
 - (c) *at the joint request of the mother and of the person who in the presence of the person to whom the notice of birth was given acknowledges himself in writing to be the father of the child and enters the prescribed particulars regarding himself upon the notice of birth, under the surname of the person who has so acknowledged.”*

In this Court

Applicant’s submissions

[20] The applicant contends that section 10 of the Act is unconstitutional on the basis that it prohibits unmarried fathers from giving notice of their child’s birth under their surname in the absence of the child’s mother. This, the applicant submits, unfairly discriminates against children and results in the children not being able to fully realise

their constitutionally guaranteed rights, such as the rights enshrined in sections 28(1)(a), 28(2), 3(2)(a),¹¹ 19(3),¹² 10,¹³ 20,¹⁴ 27¹⁵ and 29 of the Constitution.¹⁶

[21] The applicant submits that the starting point in any matter concerning the rights of a child is always the best interests of the child principle. Children are vulnerable members of society, even more so when they are without valid birth certificates. The latter are at greater risk of exclusion from accessing social assistance and healthcare, and crucially, access to their nationality. As children have a fundamental right to be registered immediately after their birth to acquire a nationality, it is not in the best interests of a child to be rendered stateless. The applicant submits that the effects of the impugned legislative provisions result in disproportionately more severe consequences for children who are born to indigent families.

¹¹ Section 3(2)(a) of the Constitution provides:

“(2) All citizens are—
(a) equally entitled to the rights, privileges and benefits of citizenship.”

¹² Section 19(3) of the Constitution provides:

“(3) Every adult citizen has the right—
(a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
(b) to stand for public office and, if elected, to hold office.”

¹³ Section 10 of the Constitution provides:

“Everyone has inherent dignity and the right to have their dignity respected and protected.”

¹⁴ Section 20 of the Constitution provides:

“No citizen may be deprived of citizenship.”

¹⁵ Section 27(1) of the Constitution provides:

“(1) Everyone has the right to have access to—
(a) health care services, including reproductive health care;
(b) sufficient food and water; and
(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.”

¹⁶ Section 29(1)(a) of the Constitution provides:

“(1) Everyone has the right—
(a) to a basic education, including adult basic education.”

Respondents' submissions

[22] The first and second respondents concede that section 10 is unconstitutional, but raise different reasons from those of the applicant. They contend that section 10 of the Act does allow an unmarried father to register the child's birth without the mother's consent; but that the father cannot do so under his surname. Essentially, the respondents argue that section 10 only addresses the issue of the child's surname and not the manner and requirements for notification of the child's birth. Furthermore, in their view, section 9 establishes equality between both parents with respect to the right and obligation to register the child's birth, irrespective of their marital status.

[23] The main issue, according to the respondents, is that section 9 and section 10 are in conflict with each other. Whereas section 9 empowers either parent to register their child's birth and assign their surname or a double-barrelled surname, as the case may be, section 10 enables only the mother's surname to be used and sets out the requirements for this. Accordingly, the respondents submit that the problem with section 10 is that it is under-inclusive. The first and second respondents also argue that section 11(4) and (5) of the Act compound this discrimination by placing additional burdens and hurdles on unmarried fathers in respect of their children born out of wedlock.¹⁷

[24] They also submit that this under-inclusiveness infringes the father's right to equality and the child's right to their father's surname from birth. During oral argument before this Court, the respondents submitted that if section 10 is struck down in its entirety and the words "subject to the provisions of section 10" in section (9)(2) are excised, any father, irrespective of their marital status, will be able to give notice and register the birth of their child.

¹⁷ The additional hurdles to a father's ability to give notice of a child's birth under his surname are evident in the processes detailed in sections 11(4) and (5). Section 11(4) provides that where the parents agree to amend the birth register to reflect the father's surname they may apply to the Director-General to amend the registration of birth. In terms of section 11(4A), this application is to be supported by prescribed conclusive proof of that person being the father of the child. Section 11(5) provides that if the parents cannot agree on the paternity of the child, the father of such a child shall apply to the High Court for a declaratory order confirming his paternity of the child.

Issues

[25] This matter raises two main issues. First, does the impugned section prohibit an unmarried father from registering a child's birth in the mother's absence? Is there a way to read section 10 in a constitutionally compliant manner? If not, does section 10 result in unfair discrimination (in respect of both the father and the child) and an infringement of their dignity?

[26] The second issue is the proper interplay between sections 9 and 10. The Full Court, as well as the respondents, reason that section 9 enables either parent to register the child's birth without the other parent's consent, whereas section 10 only relates to the issue of the child's surname. Thus, a proper interpretation of section 9 is also required, which addresses how the two sections interact and whether the sections reinforce or contradict each other.

Constitutional challenge

Proper approach to interpretation under the Constitution

[27] In respect of the first issue, section 39(2) of the Constitution provides a guide to statutory interpretation under our constitutional order. It creates an obligation to interpret all legislation in a manner that promotes "*the spirit, purport and objects of the Bill of Rights*". This means that all statutes, including section 10 of the Act, must be interpreted through the prism of the Bill of Rights. When the constitutionality of legislation is in question, a court must examine the objects and purport of that legislation and read the provisions of the legislation, as far as is possible, in conformity with the Constitution. A judicial officer must prefer an interpretation of legislation that falls within constitutional bounds over one that does not, provided that such interpretation

can be reasonably ascribed to the legislation.¹⁸ However, as this Court has noted “[l]imits must . . . be placed on the application of this principle”.¹⁹

[28] Equally, the Legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them.²⁰ A balance will often have to be struck as to how this tension is to be resolved when considering the constitutionality of legislation. There will be occasions when a judicial officer will find that the legislation, although challenged as to its constitutionality, is reasonably capable of being read “in conformity with the Constitution”.²¹ Such an interpretation should not, however, unduly strain the language of the legislative provision.

Interplay between sections 9 and 10 of the Act

[29] As a point of departure, we should consider a plain reading of the sections. Section 9(1) of the Act refers to “any child born alive” and “any one of his or her parents” or “any prescribed person” if the parents are deceased. Evidently, this allows either parent of the child, irrespective of their marital status, to give notice of the birth. Section 9(2) begins with the words “subject to section 10”. If section 10 is declared invalid, then, by implication, section 9(2) will not be read subject to section 10 and this will mean that the notification and registration of every child will be dealt with under section 9. This in turn means that there is no differentiation between the notification of children born in or out of wedlock. This amended version of section 9(2), in terms of which the words relating to section 10 of the Act are excised, would result in a

¹⁸ *Chisuse* above n 9 at paras 58-9; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit N.O.* [2000] ZACC 12; 2001(1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) (*Hyundai*) at para 22; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) (*National Coalition*) at para 24; and *S v Zuma* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 18.

¹⁹ *Hyundai* id at para 24; *National Coalition* id at paras 23-4; *Mistry v Interim Medical and Dental Council of South Africa* [1998] ZACC 10; 1998 (4) SA 1127 (CC); 1998 (7) BCLR 880 (CC) at para 32; and *S v Bhulwana*; *S v Gwadiiso* [1995] ZACC 11; 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) at para 28.

²⁰ *Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at paras 47-8; *Hyundai* above n 18 at para 24.

²¹ *Hyundai* above n 18 at para 24.

constitutionally compliant application of the notification and registration process of a child.

[30] If the phrase in section 9(2) of the Act: “*Subject to the provisions of section 10*” is excised, then it means the surname of either the father or the mother of the child concerned, or the surnames of both the father and mother joined together as a double barrelled surname, can be used. Thus, either parent can register the child and it matters not whether a parent is married.

[31] A contextual reading supports this: section 9(2) deals with the surname to be given to the child and section 10 deals with the same issue. The ordinary reading of section 10(1) is quite simply that notice of a birth of a child is given under the surname of: (a) the mother, and does not stipulate who must give notice other than it must be under the mother’s surname; or (b) the father, which requires there to be a “joint request” by the mother and the father whereas section 10(1)(a) does not indicate who must give notice of birth. However, since section 9(1) deals with who may give the request for the registration of any child, it appears that either parent may do so (or any of the prescribed persons where the parents are deceased) and there is nothing in the text of either sub-sections of section 9 that contradicts this.

[32] In my view, based on a plain reading of section 9(1) and (2) read with section 10, constitutional issues remain, even on the assumption that the High Court’s interpretation that the word “mother” first mentioned in section 10(2) means “father” is correct. First, in terms of section 9 either parent may give notice of birth, but in the case of unmarried parents there are limited possibilities for the father’s surname to be given to the child as it is the mother’s automatic right unless the parents *jointly* request the father’s surname in terms of section 10(1)(b). Second, that according to the default position under section 10, the surname must be that of the mother. So much is clear from section 10(1)(a). If not, then there is a cumbersome process in terms of section 10(1)(b) involving a joint request by the mother and the father and that has to take place in the presence of the official to whom the notice of birth was given, and the father must

acknowledge himself in writing to be the father of the child. Only then is the father's surname entered as the child's surname. Whilst section 10(2) avoids the cumbersome process of appearing before the official, there is still the formality requirement of a joint request which still requires the mother's consent.

[33] This would fit with the interpretation advanced by the applicant that the mother must always be involved. However, that interpretation seems to contradict section 10(1)(b) read with section 9(1), and it is a canon of interpretation that we should interpret two provisions in legislation so that they do not contradict each other.²²

[34] To this end, section 10 still potentially infringes the rights of both the biological father and the child in two main respects. First, it potentially violates the rights of the child born to parents who are not married, particularly their constitutional right to a name and nationality at birth and the paramountcy principle. Second, it potentially violates the biological and unmarried father's right not to be unfairly discriminated against on the basis of his marital status, sex and gender which are listed grounds in terms of section 9(3) of the Constitution.

[35] For all these reasons, I disagree with the interpretation of section 10 advanced by the applicant. In my view, section 10(1)(a) does enable an unmarried father to give notice of birth without the mother's consent or presence. The only limitation imposed by section 10 (in its entirety) relates to the father's capacity to confer his surname on the new-born child. As things stand, an unmarried father (unlike a married father) can only confer his surname when giving notice of birth if he follows the procedures set out in sub-sections 10(1)(a) and 10(1)(b).

[36] The reason it is necessary to adopt a proper interpretation is that it centers the constitutional infringement discussion on the applicable concerns. We are able to focus on the real issue – whether there are any reasons that could justify the unfair

²² *Independent Institute of Education (Pty) Ltd v KwaZulu-Natal Law Society* [2019] ZACC 47; 2020 (2) SA 325 (CC); 2020 (4) BCLR 495 (CC) para 38.

discrimination that is established by section 10 when a distinction is drawn between children born to parents who are married versus those who are not. For the reasons that follow, I do not think that it is justifiable to distinguish between children born to married parents and children born to unmarried parents for the purpose of regulating what surname may be given to a child. And it is notable that the respondents, who are tasked with administering the impugned provisions, did not advance any justification for this discrimination.

Unmarried fathers' rights to equality and non-discrimination

[37] Section 10 of the Act undermines the role an unmarried father can play in this naming aspect. The parental rights of unmarried fathers are conditional in the sense that they are dependent on the status of their relationship with the mothers.²³

Section 9 analysis

[38] The differentiation which the impugned law draws between married fathers and mothers on the one hand, and unmarried fathers on the other, infringes the rights of an unmarried father to equal protection and benefit of the law. However, because the grounds of differentiation in this case – namely sex, gender and marital status – are listed grounds in terms of section 9(3) of the Constitution, this may also raise questions of unfair discrimination, which I consider below.

[39] It is the applicant's case that the discrimination against the biological father and biological mother (because she does not have the necessary documentation or her visa has expired), is based on their marital status. In this particular case, their marriage is not recognised in South Africa, and this means that their child cannot be registered with the father's surname. The constraints of section 10 affect all unmarried fathers as a category. It results in disadvantages for them which are not experienced by married fathers.

²³ Louw "The Constitutionality of a Biological Father's Recognition as a Parent" (2010) 13 *Potchefstroom Electronic Law Journal* 156 at 189.

[40] In giving effect to the Constitutional principles of equality, it is instructive to consider the principles distilled from *Harksen*.²⁴ In that matter, this Court said the first enquiry must be directed to the question whether the impugned provision differentiates between people or categories of people. If it does differentiate, then there must be a rational connection between the differentiation in question and the legitimate government purpose it is designed to further or achieve.²⁵

[41] Applying the first stage of the *Harksen* enquiry²⁶ to the facts at hand, it is clear that the impugned law differentiates between married and unmarried fathers in relation to their capacity to confer their surname onto their new-born child when giving notice of their child's birth. In addition, the impugned law differentiates between mothers (irrespective of their marital status) and unmarried fathers (as a category).

[42] It may well be that a legitimate government purpose is advanced by this differentiation, however none was proffered by the respondents who are tasked with administering the legislation in question. To the contrary, during oral argument, the respondents requested that this Court excise section 10 from the Act in its entirety. In my view, for the reasons that follow, no legitimate government purpose is advanced by distinguishing between married and unmarried fathers, at least not in respect of their capacity to register their new-born child's birth and confer their surname on him or her. Nor is there any legitimate basis for this gendered differentiation of the conferral of a surname where a child automatically bears the mother's surname but cannot assume their father's surname. As such, even on the first stage of the *Harksen* enquiry, the impugned law would be liable to be declared unconstitutional and invalid.

[43] This, however, is not the end of the enquiry. In this matter, the differentiation may also amount to discrimination because it differentiates between categories of

²⁴ *Harksen v Lane N.O.* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) (*Harksen*).

²⁵ *Id.*

²⁶ *Id.*

people on several listed grounds, namely marital status, sex and gender. I consider the unfair discrimination claim next.

Section 9(3) of the Constitution

[44] Section 9(3) of the Constitution prohibits unfair discrimination on several grounds including sex, gender and marital status. In evaluating whether there is unfair discrimination, it is important to keep in mind the Constitution's commitment to substantive equality and establishing a non-sexist society.

[45] A further consideration regarding the validity or otherwise of section 10 is the extent to which it infringes the rights of unmarried fathers. When a child is born, the rights of both the mother and father should become vested. While a father can elect not to be legally recognised as the child's parent by simply absconding from his parental role, his position is rather precarious if he actually wants to be legally recognised as the child's father. His recognition will, to a large extent, depend on the mother's co-operation.²⁷ This begs the question: is marital supremacy a necessity for the registration process for the surname of his child? Should the concept of marriage even factor in the registration process? In my view, a marital neutral approach would better give effect to substantive equality as envisioned in the Constitution.

[46] Section 10 provides for differential treatment of an unmarried father. The Children's Act²⁸ recognises the role of both parents in bringing up a child.²⁹ It is *both* parents that bear the primary responsibility to care for their child, as is provided for in the Children's Act.³⁰ And, it is a child's right to bask in the parenting of *both* parents, irrespective of their marital status. Section 10 is problematic because it perpetuates stereotypical gender roles and the assumption that child-care is inherently a mother's duty.

²⁷ Louw above n 23 at 191.

²⁸ 38 of 2005.

²⁹ Sections 18, 19 and 20 of the Children's Act.

³⁰ *Id.*

[47] Because the discrimination is on a specified ground, the unfairness of the discrimination is presumed. Nothing to the contrary has been established by the State. In *Hugo*, this Court said:

“To determine whether that impact was unfair it is necessary to look not only at the group who has been disadvantaged but at the nature of the power in terms of which the discrimination was effected and, also at the nature of the interests which have been affected by the discrimination.”³¹

[48] In *Hugo*, this Court also stated:

“The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups.”³²

[49] This Court in *Hugo* proceeded to refer, with approval, to the dictum in *Egan*³³ that “inherent human dignity is at the heart of individual rights in a free and democratic society”.³⁴ Furthermore, in *Harksen* this Court stressed that “[t]he prohibition of unfair discrimination in the Constitution provides a bulwark against invasions which impair human dignity, or which affect people adversely in a comparably serious manner”.³⁵

[50] Turning again to the decision in *Hugo*, this Court said that this stage of the enquiry focuses primarily on the experience of the victim of discrimination. In the final

³¹ *President of the Republic of South Africa v Hugo* [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) (*Hugo*) at para 43.

³² *Id* at para 41.

³³ *Egan v Canada* [1995] 2 SCR 513.

³⁴ *Hugo* above n 31 at para 41.

³⁵ *Harksen* above n 24 at para 51.

analysis, it is the impact of the discrimination on the complainant that is the determining factor regarding the unfairness of the discrimination.³⁶

[51] In order to determine whether the discriminatory provision is unfair, various factors must be considered. In *Harksen*, this Court identified the following three factors:

- “(a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;
- (b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question. . . .
- (c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.

These factors, assessed objectively, will assist in giving ‘precision and elaboration’ to the constitutional test of unfairness.”³⁷

[52] The impugned law establishes a prejudicial distinction between married and unmarried fathers. The impact on unmarried fathers is clear. They cannot register the birth of their child with their surname without the mother’s consent or presence. The unmarried father and the child of unmarried parents are a vulnerable group who are affected by the discrimination.³⁸ They are stripped of the rights that married fathers

³⁶ *Hugo* above n 31 at para 43.

³⁷ *Harksen* above n 24 at para 52.

³⁸ I explain the vulnerability of unmarried fathers at [69] below.

have to register children in their own name as these rights are made conditional and dependent on their relationship with the mother. This is a barrier to their full participation as parents and perpetuates gendered narratives about men's caregiving. So too, the children of unmarried parents are a vulnerable group who are also affected by the discrimination. It is a primordial need for some parents to want to name their child and register their birth and this should be a right for both biological parents.

[53] Section 10 unfairly discriminates against unmarried *fathers* on the basis of their marital status. The parents may be in a permanent life partnership or some other form of bond not within the traditional marital structure. Because of the different approach to the traditional concept of marriage, whether in the form of a permanent life relationship or other forms of relationships, it is the unmarried father who has to be subjected to the indignity of having his child registered as being born out of wedlock. The import of section 10 of the Act is that the unmarried father who has shown the necessary commitment to the child by wanting to possibly register the child with his surname, is discriminated against. Surely, there must be many unmarried fathers who, like the unmarried father in this case, commit to the notification and registration of their children in their surnames, which reinforces their commitment as fathers.

[54] Discrimination based on sex and gender has often been said to overlap with discrimination based on marital status.³⁹ Section 9(3) of the Constitution provides that the State may not discriminate directly or indirectly on the grounds of gender or marital status, and this is “deemed unfair unless the violation of the fathers’ right to equality can be justified in terms of section 36 of the Constitution”.⁴⁰

³⁹ Albertyn and Goldblatt “Equality” in Woolman et al *Constitutional Law of South Africa* 2nd ed (Juta & Co Ltd, Cape Town 2006) Vol 3 at 35–61. In both the judgments of *Du Toit v Minister of Welfare and Population Development* [2002] ZACC 20; 2003 (2) SA 198 (CC); 2002 (10) BCLR 1006 (CC) and *J v Director-General, Department of Home Affairs* [2003] ZACC 3; 2003 (5) SA 621 (CC); 2003 (5) BCLR 463 (CC) the unfair discrimination on the ground of sexual orientation overlapped with discrimination on the ground of marital status.

⁴⁰ Louw above n 23 at 170.

[55] There is no justification for limiting an unmarried father's right to equality and as noted, none was proffered by the respondents. From a scholarly perspective, Sinclair proposes transforming the law to reflect a "fundamental premise of equality between parents".⁴¹ Sinclair questions women's demands for constitutional equality while at the same time still insisting that it would be unfair to vest unmarried fathers with full rights.⁴² In my view, advancing the rights of unmarried fathers in this context will not be prejudicial to the achievement of gender equality. If anything, a gender-neutral and marital-neutral approach to the process of registration of a child's birth enhances substantive equality by abolishing gendered and sexist stereotypes that regard women, and women alone, as responsible for the care of children.

[56] For all these reasons, it is clear that section 10 constitutes unfair discrimination against unmarried fathers on the basis of sex, gender and marital status. Furthermore, this discrimination cannot be justified when considering the egregious impact, it has on (i) an unmarried father's dignity; (ii) the manner in which it compromises his relationship with his newly born child; and (iii) the way it entrenches sexist and gendered stereotypes about the parental role of fathers vis à vis mothers. In any event, no justification was proffered for the discrimination by the respondents. In the result, the invalidity of section 10 must follow.

Unmarried fathers' right to dignity

[57] Section 1 of our Constitution, which sets out our founding values, provides:

"The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms."

⁴¹ Sinclair "Family rights" in Van Wyk et al *Rights and Constitutionalism: The New South African Legal Order* (Juta & Co Ltd, Cape Town 1994) 502–572 at 540.

⁴² Id.

[58] Whilst dignity is a complex concept and difficult to define, there is a universal minimum core concept that highlights its importance. Dignity transcends culture, politics and society.⁴³ The unmarried father, in asserting his right to register his child, is entitled to the recognition and affirmation of his dignity.⁴⁴

[59] Human dignity is not just a founding value that informs the society sought to be created under the new constitutional order but also a justiciable and enforceable right. Section 10 of the Constitution provides that “[e]veryone has inherent dignity and the right to have their dignity respected and protected”. It follows therefore, that everyone, irrespective of his or her marital status or status at birth, is a bearer of this right by virtue of being a human being.

[60] In *Makwanyane*, O’Regan J stated that:

“Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in chapter 3.”⁴⁵

[61] Similarly, in *Freedom of Religion South Africa*⁴⁶, Mogoeng CJ dealt with the right to human dignity and explained:

⁴³ Binder “Cultural Relativism and Cultural Imperialism in Human Rights Law” (1999) 5 *Buffalo Human Rights Law Review* 211.

⁴⁴ See Chaskalson “The Third Bram Fischer Lecture – Human Dignity as a Foundational Value of Our Constitutional Order” (2000) 16 *SAJHR* 193 at 196 and 204. Chaskalson explains when writing extra-curially that—

“The affirmation of [inherent] human dignity as a foundational value of the constitutional order places our legal order firmly in line with the development of constitutionalism in the aftermath of the second world war. . . .

As an abstract value, common to the core values of our Constitution, dignity informs the content of all the concrete rights and plays a role in the balancing process necessary to bring different rights and values into harmony.”

⁴⁵ *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) (*Makwanyane*) at para 328.

⁴⁶ *Freedom of Religion South Africa v Minister of Justice* [2019] ZACC 34; 2020 (1) SA 1 (CC); 2019 (11) BCLR 1321 (CC).

“There is a history and context to the right to human dignity in our country. As a result, this right occupies a special place in the architectural design of our Constitution, and for good reason. As Cameron J correctly points out, the role and stressed importance of dignity in our Constitution aim ‘to repair indignity, to renounce humiliation and degradation, and to vest full moral citizenship to those who were denied it in the past’. Unsurprisingly because not only is dignity one of the foundational values of our democratic state, it is also one of the entrenched fundamental rights.”⁴⁷

[62] Further clarity can be garnered from the Supreme Court of Appeal in *Watchenuka*. In *Watchenuka*, that Court eloquently described the right to human dignity as the “ability to live without positive humiliation and degradation”.⁴⁸

[63] Section 10 of the Act constitutes an infliction of an indignity that detracts from an unmarried father’s primordial and biological connection to his child. Dignity cannot be a static concept as it must be “responsive to evolving attitudes, structures and beliefs”.⁴⁹ Yet, it is perspicuous that the core content of section 10 of the Act has not evolved in accordance with our constitutional imperative to uphold and promote dignity.

[64] Despite the fluidity of the concept of dignity, there is a core content which embraces the humanity and intrinsic worth of every human being. In this case, it is the unmarried father and his child who are constitutionally entitled to this, and this entitlement must be protected by the State. The retention of section 10 of the Act would also undermine the unmarried father’s right to dignity. It would imply that he is not entitled to be treated as worthy of registering the birth of his child with his surname in the mother’s absence merely because he and the child’s mother are not married.

⁴⁷ Id at para 45.

⁴⁸ *Minister of Home Affairs v Watchenuka* [2003] ZASCA 142; 2004 (4) SA 326 (SCA) at para 32.

⁴⁹ Henry “The Jurisprudence of Dignity” (2011) 160 *University of Pennsylvania Law Review* 169 at 189.

Unmarried fathers in a society based on ubuntu

[65] In *Makwanyane*, Langa J described *ubuntu* as a concept that “recognises a person’s status as a human being entitled to unconditional respect, dignity, value and acceptance” from the community.⁵⁰ To this end, *ubuntu* conveys our fundamentally interconnected nature as human beings and how, when we diminish the worth of even one segment of society, all of us lose a portion of our humanity.

[66] According to Mokgoro J, the meaning of *ubuntu* is better understood when examined in its “practical effect on everyday life”.⁵¹ She argues that a society based on *ubuntu* places “strong emphasis on family obligations”.⁵² It obliges family members to “help one another”.⁵³ This is particularly apt in the case before us now. In this case, if an unmarried father cannot even carry out the obligation to register his child and obtain a birth certificate in his surname, then that is a form of intolerable humiliation.

[67] The application of the right to dignity embraces and stands alongside the value of *ubuntu*. A basic application of the principle of *ubuntu* shows that, in the operation of section 10, the unmarried father and his child are not only deprived of their dignity, but also of *ubuntu*. Undoubtedly, section 10 is an injury to an unmarried father’s dignity, and perpetuates the societal stigma attached to unmarried couples and their children. It deems his bond with his child as less worthy, merely on account of his marital status. Furthermore, in doing so, it demeans this particular class of individuals (unmarried fathers and their children). For all these reasons, the impugned provision is clearly inconsistent with our fundamental constitutional right to human dignity, and the value of *ubuntu* which that right embraces.

⁵⁰ *Makwanyane* above n 45 at para 224. *Ubuntu* entails the idea that *umuntu ngumuntu ngabantu* which means that a person is a person through other persons.

⁵¹ Mokgoro “Ubuntu and the Law in South Africa” (1998) 4 *Buffalo Human Rights Law Review* 15 at 16.

⁵² *Id.*

⁵³ *Id.*

The rights of children “born out of wedlock”

Is the amendment of the Act from the term “illegitimate” to “born out of wedlock” a euphemism for “illegitimate”?

[68] An analysis of the word illegitimate means “not allowed by law or rules”.⁵⁴ Whilst the Act no longer uses the term “illegitimate child” this is implied by the reference to so-called children “born out of wedlock” which continues to perpetuate the common law distinction between so-called “legitimate” and “illegitimate” children.

[69] This reference is a stark reminder that we, as a nation, are still grappling with outmoded legal terminology which goes to the core of dignity and equality, not only for the child but also the unmarried father, and indeed the unmarried mother as well. The use of the expression “born out of wedlock” to describe a child undoubtedly injures their dignity and implies that they are not worthy of equal respect and concern. The continued distinction between children born within or out of wedlock, which the impugned law conveys, stigmatises the latter category of children. A separate process for the conferral of a father’s surname during the birth registration process for children born out of wedlock remains contradictory to the rights of the child as embedded in the Bill of Rights and contradicts the paramountcy principle.

[70] The differentiation and supremacy of a married couple in comparison to unmarried couples continues to be problematic. South African society is not homogeneous, and it must be accepted that the concept of “marriage” no longer retains its stereotypical meanings. O’Regan J stated in *Dawood* that:

“[F]amilies come in many shapes and sizes. The definition of family also changes as social practices and traditions change. In recognising the importance of the family, we must take care not to entrench particular forms of family at the expense of other forms.”⁵⁵

⁵⁴ See the dictionary meaning of the word “illegitimate” in the Oxford English Dictionary (Oxford University Press, Oxford 2012) at 359.

⁵⁵ *Dawood* above n 20 at para 31.

[71] Children born to parents outside the marital bond are blameless, yet the retention of section 10 of the Act serves to harm children born outside of wedlock. The status of being born out of wedlock, in effect, penalises the child and the unmarried father, and of course the mother too. This differential treatment of children born out of wedlock is invidious and unconstitutional. This differential treatment cannot be justified.

[72] Whilst society *may* express its condemnation of *irresponsible liaisons* outside the bonds of marriage, visiting this condemnation on an infant, through the application of the law, is illogical and unjust. This Court has warned against punishing children for the *sins* of their parents; rather, children must be regarded as autonomous right-bearers and not “mere extensions” of their parents.⁵⁶ Moreover, imposing undue burdens on the “child born out of wedlock” is contrary to the basic concept of our system that legal burdens should be imposed on relationships between individuals. Obviously, no child is responsible for her birth and penalising the child is an ineffectual, as well as an unjust way of forcing parents to comply with stereotypical norms of the supremacy of the marital family.

[73] Mayeri, writing about American laws on “illegitimacy”, emphasises that “[l]egal discrimination between men and women or legitimates and illegitimates (born in or out of wedlock) with no rational basis should no longer be tolerated”.⁵⁷ She notes that this

⁵⁶ In *AB v Pridwin Preparatory School* [2020] ZACC 12; 2020 (5) SA 327 (CC); 2020 (9) BCLR 1029 (CC) at para 234, Khampepe J expounded upon this principle as follows:

“As a point of departure, *it must be emphasised that children are individual right-bearers and not ‘mere extensions of [their] parents, umbilically destined to sink or swim with them’*. It is the child whose world will be upturned by being told to leave the only school they have ever known. Moreover, it is their right to basic education that is interfered with; and it is their best interests that schools and parents are required to have due consideration of. *A child’s participation right acknowledges their ‘separate personhood’ and ‘the need to take seriously the view expressed by the child’*. It is hardly in line with the constitutional recognition of a child as *‘an individual with a distinctive personality’* and with *‘their own dignity’* for a school to submit that it has acted fairly by giving the parents a hearing but not granting the child an opportunity to express their views before they are removed from their school.”

⁵⁷ Mayeri “Marital Supremacy and the Constitution of the Nonmarital Family” (2015) 5 *California Law Review* 1277 at 1328 where Mayeri refers to the *Fiallo* plaintiff’s in *Fiallo v Bell* 430 US 787 (1977) at 169 (Weinstein J, dissenting) sex discrimination claim which focused almost exclusively on discrimination against unmarried fathers in an immigration case. Mayeri explains further that “They succeeded in persuading one of three judges, former civil rights lawyer Jack B Weinstein, whose dissent proclaimed that no legal discrimination between men

invidious statutory discrimination punishes American citizens by denying them familial association, one of the most precious attributes of humanity. And, in such situations, “the courts should say what is plain: the statute is unconstitutional”.⁵⁸ Some foreign jurisdictions have abolished the legal concept of illegitimacy entirely.⁵⁹ Others have “permitted legitimation by subsequent marriage and have legislated to mitigate the adverse legal consequences by extending to illegitimate children the same rights accorded to legitimate children”.⁶⁰

[74] For all these reasons, in my view, the concept of illegitimacy and differential rights for children born in and out of wedlock is inconsistent with the paramountcy principle and advancing the rights of children. As recognised in *Dawood*, the Constitution recognises a diversity of family relationships and regards children as autonomous, albeit vulnerable, beings who are bearers of rights and responsibilities in their own right. To the extent that section 10 entrenches the notion of marital supremacy and seeks to punish or condemn children for the nature of their parents’ relationships, this is inconsistent with our constitutional values and has no place on our statute books.

The child’s right to equality and to be free from unfair discrimination

[75] Section 10 of the Act also constitutes an infringement of a child’s constitutional right not to be discriminated against on the grounds of social origin and birth (out of wedlock) in terms of section 9(3) of the Constitution, the child’s right to dignity in terms of section 10 of the Constitution, as well as a child’s right for their interests to be paramount in terms of section 28(2).

and women or legitimates and illegitimates with no rational basis is no longer tolerated. Where, as here, statutory invidious discrimination punishes American citizens by denying them familial association, one of the most precious attributes of humanity: the courts should say what is plain: the statute is unconstitutional.”

⁵⁸ *Id.*

⁵⁹ Roche “Children and the Law” in Neil et al in *International Encyclopedia of the Social and Behavioral Sciences* (Elsevier, Amsterdam 2001) 15.

⁶⁰ *Id.*

[76] In my view, section 10 of the Act unfairly discriminates on the ground of social origin. In this context, social origin refers to an amalgam of intersecting factors related to a person's class or social position in society. Some commentators have noted the intersectional nature of social origin-based discrimination and how it often overlaps with discrimination against groups who are already vulnerable due to their race, ethnicity, nationality, and so on.⁶¹ This observation is pertinent on these facts as the applicant has demonstrated that section 10 has a disproportionate impact on children from homes who cannot litigate in the DRC in order to obtain the necessary marriage certificate in order to comply with the Act. In addition, it is no coincidence in my view, that on these facts, section 10 had an impact on a child whose mother was a foreign national and who was unable to register their birth on her own for this reason. Thus, the intersectional nature of social origin-based discrimination is evident in this matter.

[77] Section 10 of the Act also clearly unfairly discriminates on the grounds of birth. Discussing discrimination against children born out of wedlock, this Court in *Bhe* said the following:

“Historically in South Africa, children whose parents were not married at the time they were conceived or born were discriminated against in a range of ways. This was particularly true of children whose family lives were governed by common law. Much of the stigma that attached to extra-marital children was social and religious in origin, rather than legal, but that stigma was deeply harmful. The legal consequences of extra-marital birth at common law flowed from the Dutch principle that ‘een wijf maakt geen bastaard’, the implications of which were that the extra-marital child was not recognised as having any legal relationship with his or her father, but only with his or her mother. The child therefore took the mother's name, inherited only from his or her mother, and the father of the child had no parental obligations or rights vis-à-vis the

⁶¹ See generally Capuano “Giving Meaning to ‘Social Origin’ in International Labour Organization (‘ILO’) Conventions, the Fair Work Act 2009 (CTH) and the Australian Human Rights Commission Act 1986 (CTH): ‘Class’ Discrimination and its Relevance to the Australian Context” (2016) 39 *University of New South Wales Law Journal* 84 at 117-8, where he discusses how discrimination against Indigenous Australians overlaps with their race, class and social origin.

child. The law and social practice concerning extra-marital children without doubt conferred a stigma upon them, which was harmful and degrading.”⁶²

[78] When a child is born, the rights of both the mother and father are vested in terms of the Children’s Act. Section 21 of the Children’s Act provides that the rights of the unmarried father become vested if the parents live together in a permanent partnership or if the father successfully applies to be recognised as the child’s father. Clearly, the constitutional rights of the child born to parents out of wedlock should not be subjected to differential treatment when it comes to the registration of their birth in their father’s surname.

Conclusion on children’s rights

[79] In conclusion, the section is manifestly inconsistent with the best interests of the child as well as her rights to dignity and equality and her right to a name and nationality from birth. Historically, children born out of wedlock have been discriminated against under the law including in the law of testation such as the denial of an inheritance. Social attitudes have also historically led to active prejudice towards children born out of wedlock. This may have been ameliorated somewhat in modern times but still a child born out of wedlock remains outside of the stereotypical nuclear family where a married couple and their dependent children are regarded as a basic social unit. These social attitudes are unfortunate and keeping the category of separate registration for children born out of wedlock on the statute book further reinforces these perceptions.

[80] Their vulnerability also goes to the family affiliation where the child is that of one parent as opposed to married parents. Children may see themselves as being of inferior status as they do not have a proper family, and this can cause stresses such as social isolation and social stigma.

⁶² *Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) at para 57.

[81] The section sediments the long-held distinction between “legitimate” and “illegitimate” children in our law which is abhorrent to our constitutional values of human dignity, *ubuntu* and substantive equality.

Possible human trafficking

[82] I must briefly address an issue which arose during oral argument. Essentially, this concerns the potential for human trafficking if proper safeguards are not provided by the remedy of this Court in respect of unmarried fathers and their children. Section 9(1)(A) of the Act provides that “[t]he Director-General may require that biometrics of the person whose notice of birth is given, and that of his or her parents, be taken in the prescribed manner”.

[83] In addition, section 9 must be read with Regulations 3, 4 and 5. These Regulations require the parents of the child to identify themselves by providing, amongst other things, their identity documents, fingerprints and the child’s biometrics. In addition, Regulations 3, 4 and 5 require numerous documents that must be provided to give notice of birth. I also agree with the applicant’s submission that reading-in “paternity tests” and other requirements would venture into the legislative terrain and may create insuperable practical burdens.

[84] The respondents also correctly point out that sub-sections 7(1)(a) and (b) of the Act empower the Director-General to request further particulars where a suspicion is raised as to the validity of the parent’s relationship to the child. In my view, taken together, these safeguards are sufficient. The applicant correctly submits that evidence was not led in the High Court or in this Court on the extent, frequency, or circumstances in which human trafficking takes place, and what impact, if any, this has on what order this Court should make. As such, providing any relief on this aspect would amount to reopening the case, requiring evidence.

[85] Lastly, the contention that a married father can be trusted, without more, whereas an unmarried father automatically raises suspicions, is ultimately a prejudicial

approach. A married father can also falsify a marriage certificate and be a trafficker. As submitted by the respondents, the Department is addressing these issues, so it is not necessary, or appropriate, that this Court does so.

Remedy

[86] Save for what is set out below in relation to the proviso in section 9(2), section 9 can be read to mean that the notice and registration of the surname can be given by either parent regardless of the parents' marital status and without any prescription in terms of the manner of selection of the surname as provided for in section 9(2). Therefore, section 9 can be interpreted to be constitutionally compliant by taking into account the role of the unmarried father and the best interests of the child.

[87] However, section 10 is inconsistent with the Constitution and to that extent invalid. I am now required to consider a remedy that is not only appropriate but also just and equitable. The applicant submits that in the present case, appropriate relief demands more than a mere declaration that the impugned provisions are inconsistent with the Constitution and therefore invalid.

[88] The finding of unconstitutionality means that this Court ought to declare section 10 invalid to the extent that it limits the right of unmarried fathers to give notice of the birth of their child in their surname thereby unfairly discriminating against children born to unmarried parents. For this reason, section 10 is declared unconstitutional. In these circumstances, severance is the appropriate remedy and there is no need to read any words into section 10. In addition, however, the proviso in section 9(2) which states that the provision is "subject to the provisions of section 10" must consequently also be severed, but the rest of section 9 remains intact.

[89] The following order is made:

1. The declaration of constitutional invalidity of section 10 of the Births and Deaths Registration Act 51 of 1992 (Act) by the Full Court of the High

Court of South Africa, Eastern Cape Division, Grahamstown, is confirmed in the terms set out in paragraphs (a) and (b):

- (a) It is declared that section 10 of the Act is invalid in its entirety and consequently severed from the Act.
 - (b) The proviso in section 9(2) of the Act stating that the provision is “subject to the provisions of section 10” is severed from section 9(2) by reason of the declaration of constitutional invalidity of section 10.
2. The declaration of constitutional invalidity referred to in paragraphs (a) and (b) takes effect from the date of this order.
 3. The first respondent must pay the costs of the applicant in this Court, including the costs of two counsel.

MOGOENG CJ (Mathopo AJ concurring):

Introduction

[90] I have had the benefit of reading the main judgment, authored by my Sister Victor AJ, with great interest and much appreciation. I however disagree with the approach, much of the reasoning and the proposed remedy. Hence this judgment.

[91] Sections 9 and 10 of the Act make it much easier for a married father of a child, who was born alive, to register the birth of his child and under his surname with or without the mother’s involvement, but imposes somewhat cumbersome requirements on an unmarried father. For this reason, the constitutional validity of these provisions has been challenged.

[92] Shorn of all its frills, this application is about whether these provisions impermissibly limit an unmarried father’s constitutional rights to equality and dignity.⁶³ Additionally, it seeks to address the question whether it is in the best interests or to the

⁶³ Sections 9 and 10 of the Constitution, respectively.

prejudice of a child⁶⁴ for legislation to readily permit a father of a child born in wedlock to register the birth of and give his surname to that child and extend the same possibility to an unmarried man but subject to the consent of the child's mother. Put differently, the issue is whether these differential birth registration dispensations exist for the advancement of a legitimate, important and worthy governmental or societal purpose or for a wholly unnecessary perpetuation of marital supremacy with the resultant impairment of unmarried fathers' rights to equality and dignity and the best interests of a child.

[93] Inevitably, a question arises whether this differential treatment is reasonable and justifiable. In substance, does this not constitute unfair discrimination on the grounds of marital status, sex or gender?⁶⁵ These are the questions that lie at the heart of this matter.

The correct approach to interpretation

[94] With the advent of our constitutional democracy, this Court has been at pains to develop the jurisprudence on constitutional interpretation that is now settled. In *Hyundai, Langa DP* said:

“Section 39(2) of the Constitution provides a guide to statutory interpretation under this constitutional order. . . . This means that all statutes must be interpreted through the prism of the Bill of Rights.

The purport and objects of the Constitution find expression in section 1 which lays out the fundamental values which the Constitution is designed to achieve. The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.

⁶⁴ Section 28(2) of the Constitution.

⁶⁵ Section 9 of the Constitution.

Accordingly, judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section.

Limits must, however, be placed on the application of this principle. On the one hand, it is the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible. On the other hand, the Legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them. A balance will often have to be struck as to how this tension is to be resolved when considering the constitutionality of legislation. There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read 'in conformity with the Constitution'. Such an interpretation should not, however, be unduly strained.

It follows that where a legislative provision is reasonably capable of a meaning that places it within constitutional bounds, it should be preserved.”⁶⁶

[95] And in *Bato Star*, Ngcobo J said:

“The Constitution is now the supreme law in our country. It is therefore the starting point in interpreting any legislation. Indeed, every court ‘must promote the spirit, purport and objects of the Bill of Rights’ when interpreting any legislation. That is the command of section 39(2). Implicit in this command are two propositions: first, the interpretation that is placed upon a statute must, where possible, be one that would advance at least an identifiable value enshrined in the Bill of Rights; and, second, the statute must be reasonably capable of such interpretation. This flows from the fact that the Bill of Rights ‘is a cornerstone of [our constitutional] democracy’. It ‘affirms the democratic values of human dignity, equality and freedom’.”⁶⁷

[96] Inspired and guided by these principles, Khampepe J had this to say in *Chisuse*:

⁶⁶ *Hyundai* above n 18 at paras 21-4 and 26.

⁶⁷ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (*Bato Star*) at para 72.

“Presently, this principle is captured fully by the provisions of section 39(2) of the Constitution, which oblige every court, where reasonably possible, to interpret every statute in a manner that makes it consonant with the Constitution. A claim for invalidity must fail if the impugned statute is reasonably capable of a meaning that is constitutionally compliant.”⁶⁸

[97] These then are the principles that must guide our approach to the interpretation of sections 9 and 10 of the Act. Our first choice must always be to construe provisions whose constitutionality is impugned in conformity with the Constitution. Only where the language of the provisions is incapable of that construction and that approach would only be possible if the language of the provisions were to be unduly strained, may they be interpreted in a way that yields unconstitutionality. This is so because that arm of the State charged with national legislative authority⁶⁹ – Parliament – must ordinarily be assumed to have carried out its legislative functions, alive to the spirit, purport and objects of the supreme law of the Republic and for the greater good of the populace. Regard being had to considerations of separation of powers, constitutionality challenges must necessarily be met with a judicial reluctance to readily interfere and read the impugned provisions as unconstitutional unless their language cannot reasonably be construed in conformity with the Constitution. This means that the provisions must thus be given their ordinary grammatical meaning, construed with due regard to the objects and purport for their enactment, but through the prism of the Constitution. And that meaning would, as the first prize, be one which preserves their validity.

Relevant provisions

[98] The Centre for Child Law has launched a frontal challenge to the constitutional validity of sections 9 and 10 of the Act. And section 9, says:

“Notice of birth—

⁶⁸ *Chisuse* above n 9 at para 58.

⁶⁹ See sections 43 and 44 of the Constitution.

(1) In the case of any child born alive, any one of his or her parents, or if the parents are deceased, any of the prescribed persons, shall, within 30 days after the birth of such child, give notice thereof in the prescribed manner, and in compliance with the prescribed requirements, to any person contemplated in section 4.

(1A) The Director General may require that biometrics of the person whose notice of birth is given, and that of his or her parents, be taken in the prescribed manner.

(2) Subject to the provisions of section 10, the notice of birth referred to in subsection (1) of this section shall be given under the surname of either the father or the mother of the child concerned or the surnames of both the father and mother joined together as a double barrelled surname.

(3A) Where the notice of a birth is given after the expiration of 30 days from the date of birth, the birth shall not be registered, unless the notice of the birth complies with the prescribed requirements for a late registration of birth.”⁷⁰

[99] Section 10 provides:

“Notice of birth of a child born out of wedlock shall be given—

- (a) under the surname of the mother; or
- (b) at the joint request of the mother and of the person who in the presence of the person to whom the notice of birth was given acknowledges himself in writing to be the father of the child and enters the prescribed particulars regarding himself upon the notice of birth, under the surname of the person who has so acknowledged.

(2) Notwithstanding the provisions of subsection (1), the notice of birth may be given under the surname of the mother if the person mentioned in subsection (1) (b), with the consent of the mother, acknowledges himself in writing to be the father of the child and enters particulars regarding himself upon the notice of birth.”⁷¹

[100] Sections 9 and 10 lay down the requirements for the registration of the birth of a child born alive that are different for married parents and unmarried parents. In order for a man who is married to register his child, the mother’s consent is not required. And

⁷⁰ Section 9 of the Act.

⁷¹ Id section 10.

married parents may also have a child registered under both their surnames. Provision is also made for a situation where the child's parents are deceased. In that event "any of the prescribed persons" may, subject to compliance with the set requirements, register the birth of the child. Regulation 3(2) identifies those persons as "the next-of-kin or legal guardian of the child".

[101] This also applies to unmarried parents, provided they meet the section 10 requirements. Meaning, where an unmarried mother is deceased, the next-of-kin or legal guardian of the child would be entitled to register the birth of that child. And if the mother had given the written consent envisaged by section 10, obviously before she died, and the father is still alive, then either the father or the man who acknowledges in writing that he is the father, may register the birth of the child in terms of the section 10 process or as the next-of-kin. It is necessary to make the point that there is nothing about section 10 to suggest that the mother must necessarily be physically present at the Home Affairs offices to give the requisite consent. A written and signed consent that contains all the essential particulars of the mother or testified to by her verifiable close relations should suffice.

[102] Section 10 presents three scenarios that apply to children whose parents are unmarried. The first is a straightforward registration of the birth of the child by the mother regardless of what the views of the father, to whom she is not married or a man who has acknowledged or professed fatherhood in writing, might be. The second relates to a consensual request by the mother and either the biological father or a man who may not even be the biological father but who has, out of caring or special relationship with the mother or for whatever reason, in writing, assumed the responsibility of being the father. In that event, the child may be registered under that man's surname. The last relates to a situation where the biological father, or another man, acknowledges in writing that he is the father, and does so with the permission of the child's mother. In that instance, the child may nevertheless be registered under the surname of the mother.

[103] There is yet another scenario that unmarried parents could opt for. And this flows from a reading of section 10 with section 9(2). Once the section 10 requirements have been complied with, it should be open to both unmarried parents to agree that their surnames be “joined together as a double barrelled surname” of the child.

[104] To narrow or concretise the issue, an unmarried father is not precluded from registering his child. On the contrary, he may even register the child under his surname or under a double barrelled surname. The only difference is that the impugned provisions prescribe that this be conditional upon compliance with certain requirements. The central or dominant feature of these differential dispensations is that unlike in the case of a married man, the mother of the child must signify approval. The contention here is that because they are both fathers they should without more enjoy the exact same entitlements. This therefore is a demand for unbridled or absolute equality or identical treatment in all circumstances purely on the basis that they are after all men and fathers. Failure to adopt that approach does, in the view of Centre for Child Law, constitute unfair discrimination on the basis of marital status, sex and gender and is detrimental to the best interests of a child.

[105] By the way, the constitutionality of sections 9 and 10, really has no direct bearing on the experience of Mr Naki, as an unmarried father, and the facts that actually apply to their situation. The birth of his child could not be registered only because the visa of her mother, Ms Ndovya who is a citizen of the Democratic Republic of Congo, had expired. She therefore did not have a valid one required, not by sections 9 or 10 but, by the Regulations.⁷² Hence the inability to register the birth of the child. In any event, that matter was appropriately dealt with and disposed of by the courts below. Additionally, the mother of the child was present and presumably had no objection to the registration of the birth of their daughter by her biological father and under his surname. Evidently, her section 10 consent was readily available.

⁷² Regulation 8(3)(c).

[106] There is therefore nothing really about these provisions that stood in the way of the remedy sought by these “unmarried” parents. In other words, the concerns being raised about the paramountcy of the best interests of the child, and discrimination against an unmarried father, on whatever basis, do not arise here. It is just that the Centre for Child Law chose to pursue a case that is somewhat unrelated to the rights and interests of the child, of her father and mother that are directly implicated in that case. Also, issues relating to statelessness or the right to a name and a nationality⁷³ do not arise. For, these are not issues that are inextricably connected to a father. Birth registration by a child’s mother does release these benefits or entitlements to a child. In sum, one of the challenges about this case is therefore that hypotheticals are being relied on to seek to address matters of profound constitutional significance.

[107] Ideally, the application should be dismissed so that the constitutionality of the impugned sections could be addressed under more appropriate circumstances in the future. But, the issues were fully ventilated and the Department is also supportive of the immediate disposition of the matter. And it is in the interests of justice in the circumstances that these issues be resolved once and for all.

Analysis

Our law on discrimination

[108] The Centre for Child Law contends that the impugned provisions discriminate against unmarried men on the basis of marital status, sex or gender and must therefore be declared constitutionally invalid. This enjoys the support of the Minister. Needless to say, this broad convergence of viewpoints on this legal issue is not binding on this Court. We are therefore at large to determine the correct interpretation of these challenged provisions. These guidelines from *Harksen* will be helpful in this exercise:

“In order to determine whether the discriminatory provision has impacted on complainants unfairly, various factors must be considered. These would include:

⁷³ See section 28 of the Constitution.

- (a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;
- (b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question;
- (c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.

These factors, assessed objectively, will assist in giving ‘precision and elaboration’ to the constitutional test of unfairness.

If the discrimination is held to be unfair then the provision in question will be in violation of section 8(2). One will then proceed upon the final leg of the enquiry as to whether the provision can be justified under section 33 of the interim Constitution, the limitations clause. This will involve a weighing of the purpose and effect of the provision in question and a determination as to the proportionality thereof in relation to the extent of its infringement of equality.”⁷⁴

[109] Aspects of *Harksen* that stand out for this interpretive exercise are in sum and context:

- (a) the nature of the purpose sought to be achieved by the provision;
- (b) whether the provision is manifestly directed at impairing unmarried biological fathers;

⁷⁴ *Harksen* above n 24 at paras 52-3.

- (c) whether the rights or interests of biological fathers are affected and if so, to what extent;
- (d) whether the provision is aimed at achieving a worthy and important societal goal;
- (e) whether biological fathers have in fact suffered the alleged impairment; and
- (f) whether the provisions constitute unfair discrimination on the grounds of marital status, sex or gender.

[110] In *Hugo* this Court said:

“We need, therefore, to develop a concept of unfair discrimination which recognises that, although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.”⁷⁵

[111] The pursuit of equal treatment and equal worth is not similar to an instance where identical treatment is always sought to be realised in all circumstances. This project is not about some box-ticking exercise that is divorced from or not informed by a deep and broad reflection on the overall impact of our decisions on related but contextually dissimilar scenarios. For, easy and mechanical equalisation without context could frustrate the legitimate pursuit of substantive equality. An outline of these principles sets the stage for a careful and thoroughgoing reflection on whether the dissimilarities between child registration dispensations for married parents and those who are not, constitute a constitutionally impermissible discrimination, based on marital status, sex or gender, between these two sets of parents, fathers in particular, or whether it is a mere

⁷⁵ *Hugo* above n 31 at para 41.

discrimination grounded on the need to promote the best interests of a child with particular regard to the paramountcy of the importance of those interests.

[112] This issue was addressed squarely in *Volks*, although it was in a slightly different context. There this Court said:

“The question for determination in this case is whether the exclusion of survivors of permanent life partnerships from the protection of the Act constitutes unfair discrimination. The Act draws a distinction between married people and unmarried people by including only the former.

Although it is arguable whether the distinction or differentiation amounts to discrimination, I am prepared to accept that it amounts to discrimination based on marital status. That being the case, the discrimination is presumed to be unfair in terms of section 9(5) of the Constitution. The question however is whether it is indeed unfair discrimination.

In determining whether discrimination is unfair one must consider the differences between the two groups. . . . The constitutional recognition of marriage is an important starting point for determining the question presented in this case.”⁷⁶

Here, too, a question arises whether the institution of marriage is being illegitimately used as an instrument for unfairly discriminating against a certain category of men on the basis of marital status, sex or gender.

Is marriage an instrument of unfair discrimination?

[113] Arguable as it still is whether drawing a distinction between married and unmarried men constitutes discrimination, and despite some of the observations I have made and will be making on this aspect, I do for the purpose of resolving the issues in this matter accept that section 10 of the Act does discriminate against an unmarried father on the basis of, for instance, marital status. Section 9(5) of the Constitution provides that discrimination on the basis of marital status, sex or gender amounts to unfair discrimination unless otherwise established. And that question does arise here.

⁷⁶ *Volks N.O. v Robinson* [2005] ZACC 2; 2009 JDR 1018 (CC); 2005 (5) BCLR 446 (CC) at paras 49-51.

Is the discrimination between married and unmarried men or between unmarried men and unmarried women in relation to child birth registration, indeed reasonable, justifiable and fair?

[114] As stated, the government concedes that the impugned provisions discriminate unfairly against unmarried fathers. But, to determine whether a reasonable justification exists, is not and should not be solely dependent on what government has to say in defence of a statutory provision that actually or potentially limits the rights of citizens. Whether an important or worthy governmental or societal purpose is being served or advanced by the impugned provisions, is an objectively ascertainable factor which a court might well find to exist regardless of what a government functionary says or does not say in defence of or opposition to its retention. In other words, the constitutionality of legislation that limits rights ought not to swim or sink purely on the basis of what government representatives have to say. Well-known or self-evident factors or inferential reasoning based on objectively verifiable factors might well rescue legislation that government functionaries might have mistakenly thought should be left to drown into extinction. Nothing precludes this Court therefore from concluding that the best interests of a child would best be protected and promoted by ascribing to sections 9 and 10 a meaning that brings them within constitutional bounds in spite of the parties' common cause positions on the unconstitutionality of these provisions.

[115] When a couple chooses to have children or raise a family outside the confines of a marital relationship, that would not be a legally regulated relationship and its existence and features would not be as easy to prove as is the case with marriage. This is indeed so because how that relationship would have come into being and what commitments the parties would have made to each other would not ordinarily be readily ascertainable as a result of the absence of a legal framework or a known or settled way of bringing that relationship into being. This extends to the fact that it is not subject to regulation, even in relation to the recording of its essentials and the process leading up to its termination. Witnesses, if any, to its coming into being and when the decision would have been made to translate it into a permanent arrangement would also be difficult to

ascertain or establish, particularly in the event of a dispute or the death of one of the parties. Alive to these practical realities and contrasting this with the situation of a married couple, this Court said:

“Mrs Robinson never married the late Mr Shandling. . . . Her relationship with Mr Shandling is one in which each was free to continue or not, and from which each was free to withdraw at will, without obligation and without legal or other formalities. There are a wide range of legal privileges and obligations that are triggered by the contract of marriage. In a marriage the spouses’ rights are largely fixed by law and not by agreement, unlike in the case of parties who cohabit without being married.

. . .

To the extent that any obligations arise between cohabitants during the subsistence of their relationship, these arise by agreement and only to the extent of that agreement.”⁷⁷

It is not easy to determine what entitlements and obligations cohabitants would have committed to until the terms of their agreement, explicit or implicit, are disclosed or inferred from the surrounding circumstances.

[116] Marriage enjoys constitutional endorsement. Section 15(3)(a)(i) provides that nothing in the Constitution may be construed as an impediment to the recognition of marriages “concluded under any tradition, or a system of religious, personal or family law”. *Volks* correctly observed that this constitutional recognition of the institution of marriage is an important starting point in resolving issues relating to whether discrimination on the ground of marital status is in reality unfair within a constitutional context.⁷⁸

[117] Generally speaking, marriage is a culmination of a consultative process or information-dissemination, planning and the involvement of witnesses who often include extended family members, friends or acquaintances. It is often a public or semi-public, formalised, documented and an evidenced affair. It is a centuries-old institution,

⁷⁷ Id at paras 55 and 58.

⁷⁸ Id at para 51.

accompanied by an exchange of verbalised commitments, from which binding legal, moral and societal obligations flow or are presumed. Its existence is fairly easy to establish.

[118] And marriage is indeed a highly covenantal relationship. Marriage and family are vitally important institutions that have a profoundly beneficial role in the upbringing of children. It is not only characterised by well-established and predictable formalities that make it easy to prove its existence, but it also fossilises covenantal obligations in a structured way, and institutionalises a range of privileges or benefits and a way of life together, which is not supposed to be easily broken. This extends to its centrality to family life and to the rights and entitlements that naturally flow and may be legally and morally inferred from its conclusion. Unlike in the case of unmarried cohabitants, serious legal processes ordinarily have to be embarked upon before marriage may be lawfully ended. This was authoritatively stated by Ngcobo J in these terms:

“Marriage and family are important social institutions in our society. Marriage has a central and special place, and forms one of the important bases for family life in our society. In this regard O’Regan J notes in *Dawood* that:

‘Marriage and the family are social institutions of vital importance. Entering into and sustaining a marriage is a matter of intense private significance to the parties to that marriage for they make a promise to one another to establish and maintain an intimate relationship for the rest of their lives which they acknowledge obliges them to support one another, to live together and to be faithful to one another. Such relationships are of profound significance to the individuals concerned. But such relationships have more than personal significance, at least in part because human beings are social beings whose humanity is expressed through their relationships with others. Entering into marriage therefore is to enter into a relationship that has public significance as well. The institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children. The celebration of a marriage gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the marriage. These legal obligations perform an important social function. This

importance is symbolically acknowledged in part by the fact that marriage is celebrated generally in a public ceremony, often before family and close friends.’

Marriage is also an internationally recognised social institution.

. . .

It is contended that for the law not to oblige survivors of relationships in this category to be maintained entails unfair discrimination against the survivor simply because the survivor does not have the piece of paper which is the marriage certificate. That is an oversimplification. Marriage is not merely a piece of paper. Couples who choose to marry enter the agreement fully cognisant of the legal obligations which arise by operation of law upon the conclusion of the marriage. *These obligations arise as soon as the marriage is concluded, without the need for any further agreement.* They include obligations that extend beyond the termination of marriage and even after death..⁷⁹

[119] It is indeed an oversimplification to treat marriage as a mere piece of paper. For, marriage sits right at the centre of and has, from time immemorial, been foundational to the establishment of a stable and functional family structure or unit. It also gives rise to predictable reciprocal rights and obligations between spouses and their shared duty of care and support for children. When a child is born of a married woman, barring evidence to the contrary, the husband is legally presumed to be the biological father and his surname, ancestry, clan and nationality will without more adhere to the child. This presumption exists for the advancement of the best interests of a child. Drawing from the societal, universal and constitutional recognition and inherent benefits of the institution of marriage, this Court said that it may at times be appropriate to accord certain benefits or entitlements to married people but not to unmarried people.⁸⁰ And this is what Parliament did in terms of sections 9 and 10 of the Act.

⁷⁹ Id at paras 52-3 and 58.

⁸⁰ Id at para 54:

“From this recognition, it follows that the law may distinguish between married people and unmarried people. Indeed, this Court in *Fraser* noted:

‘In the context of certain laws there would often be some historical and logical justification for discriminating between married and unmarried persons and the protection of the institution of marriage is a legitimate area for the law to concern itself with.’

The law may in appropriate circumstances accord benefits to married people which it does not accord to unmarried people.”

[120] The undocumented, somewhat informal and unevidenced nature of a relationship other than marriage out of which a child is born, explains the differentiation. It is precisely because the impairment of the rights and interests of a father, who is in such a relationship, is not manifestly intended by the impugned statutory differentiation, that he is not completely left out of the possibility to register his child, even under his surname. There are safety measures built into the registration process to help him assume his fatherhood responsibilities notwithstanding the fact that he is not married to the mother. The unique role of the mother is recognised by legislation. This is done not to discriminate unfairly on the basis of sex or gender but to protect the interests of a child. The father may not therefore willy-nilly register the child regardless of what the mother's views might be in relation to his professed or assumed sense of responsibility.

[121] The Act, sections 9 and 10 in particular, must thus be understood within the context of the ease with which fatherhood is ascertainable in the case of a married couple, the legal obligations that flow to a child by operation of the law and the risks that flow from allowing any man known or claiming to be the father to register that child's birth without the mother's consent. The relationship is officially documented or recorded, the fact of the marriage being routinely captured in photographs and witnessed by many, who can be easily called to confirm the fact of its existence to Home Affairs, in addition to its own presumably dependable records, provide a rational basis for the distinction. All a possible father or a man professing to be the father of a child born out of wedlock is required to do, in terms of any of the High Court's or the litigants' preferred registration regime, is to simply acknowledge or allege fatherhood in writing. That should not suffice in the absence of the mother's reliable consent. After all, she should ordinarily be best placed to reliably say who the real father of the child is and whether his formalised introduction into the life of the child would be in the best interests of that child, all things considered.

[122] It is true that this recognition of the strategic role or “veto power” of an unmarried mother might be abused by some unscrupulous women. And it is also conceivable that a few women may for one reason or another not be able to register the birth of their children to the potential prejudice of the child. But, using an exception as the basis for developing the entire regulatory framework for a matter so sensitive and important is most likely to yield bad law. In any event, the more comprehensive child registration regime is a matter best left to Parliament. Considerations of separation of powers require that we confine ourselves to our constitutionally-ordained lane of travel and leave the other two lanes to the Executive and Parliament, barring permissible exceptions.

[123] Men are, broadly speaking, entitled to equal treatment with women. This is borne out by the child registration dispensation that applies to married parents. The distinction that applies to unmarried fathers serves an important and worthy societal purpose. And that is to entrust the welfare or protection of the child to the mother as opposed to an unmarried father whose status as such and commitment to the child’s wellbeing is unrecorded and cannot therefore be presumed. Someone who presumably knows who the real father of the child is and whether he is committed to the wellbeing of the child must give this assurance to the State. And the mother of the child is that person.

[124] While it is true that the Act does not accord unmarried fathers the unconditional right to register the birth of their children, that that denial constitutes discrimination and does in reality constitute a disadvantage, that is a consequence of their choice to remain unmarried. The Act cannot therefore be said to impair their rights to equality and dignity or sense of equal worth. It does nothing to preclude anybody from getting married and accessing the legal rights, privileges and entitlements that flow from marriage. And this proposition finds additional reinforcement from what this Court said in *Volks*:

“All that the law does is to put in place a legal regime that regulates the rights and obligations of . . . couples who have chosen marriage as their preferred institution to govern their intimate relationship. Their entitlement to protection under the Act, therefore, depends on their decision whether to marry or not.”⁸¹

[125] It went on to say:

“The Act does not say who may enter into a marriage relationship. The Act simply attaches certain legal consequences to people who choose marriage as their contract. There is a choice at the entry level. The law expects those heterosexual couples who desire the consequences ascribed to this type of relationship to signify their acceptance of those consequences by entering into a marriage relationship. Those who do not wish such consequences to flow from their relationship remain free to enter into some other form of relationship and decide what consequences should flow from their relationships.”⁸²

[126] Marriage is a choice. But, it is also such an important and invaluable social institution that it is not to be decried and wished or spoken out of its necessary existence or role. It is also not some unattainable or exclusionary elitist club that an average person has no easy access to. Contrary to some schools of thought, the law on marriage does not lay down cumbersome requirements to be met in order to enter into marriage and enjoy all the legal protections, privileges and rights that flow from it. Peer and other pressures may well have gotten the better of many and led them to believe that the high expenditure, often associated with the conclusion and celebration of a marriage covenant is an integral part of the legal requirements, when it is in reality not so. Rich or poor, all that is required of South Africans to conclude a valid marriage agreement is that they be of a particular age, have identity documents, and witnesses. To be married or not to be is, at least in so far as most men are concerned, a decision that is not dependent on how financially well-resourced one is. And it cannot therefore be said that this discrimination based on marital status is unfair and impairs the dignity of men

⁸¹ Id at para 91.

⁸² Id at para 92.

who are financially under-resourced. It is not an economic issue. It is a choice issue. This I say, alive to the somewhat unfortunate trend to virtually commercialise the *lobola* component of customary marriages, to the detriment of those who want to marry but do not have the money demanded of them. But, not even *lobola*, the richness of what it really represents notwithstanding, is a legal requirement for or possible impediment to the conclusion of all marriages recognised by our law.

[127] It follows that the institution of marriage is not an instrument of discrimination here. The ease with which a married man can establish his actual or presumed biological fatherhood of a child born of a woman he is married to, and the mother's unique role as the most reliable source to attest to who the father is and whether he should be in the life of the child, render the differential approach to the registration of birth reasonable, justifiable and fair.

Right to dignity

[128] As regards the alleged violation of the right to dignity⁸³ of an unmarried person occasioned by a regime that is more favourable to a married person, this Court had this to say:

“It was also contended that the failure to make provision for the people in the class to which Mrs Robinson belongs offends the dignity of members of that class.

I do not agree that the right to dignity has been infringed. Mrs Robinson is not being told that her dignity is worth less than that of someone who is married. She is simply told that there is a fundamental difference between her relationship and a marriage relationship in relation to maintenance. It is that people in a marriage are obliged to maintain each other by operation of law and without further agreement or formalities. People in the class of relationships to which she belongs are not in that position.”⁸⁴

⁸³ Section 10 of the Constitution provides that “[e]veryone has inherent dignity and the right to have their dignity respected and protected”.

⁸⁴ *Volks* above n 76 at paras 61-2.

[129] Subject to minor contextual adjustments, this reasoning applies with equal force to this matter with regard to a married father's obligations to his children. The dignity of an unmarried father does not get enhanced or impermissibly limited by the child registration requirements. For, they are nothing more than a regulatory framework that reasonably and rightly demands certain assurances from the child's mother about whether a particular man is the father, and, if he is, whether it is appropriate for him to have any role in registering the child and even under his surname. Here too, an unmarried man is not being told that his "dignity is worth less than that of someone who is married". The fundamental difference between the nature of these two relationships informs the differentiation. This logic applies to the unmarried mother's more favourable position or role in the registration of the birth of a child.

[130] An unmarried man's right to equality and dignity in relation to a child is worth much more than the entitlement to register the birth of a child and attach his surname to the child. And the right to dignity cannot be adversely affected only because an unmarried father has certain requirements to meet in order to qualify for the entitlement to register his child in the name of the mother or under his surname.

[131] Circumstances under which a man would have contributed to the birth of a child, a real sense of responsibility and practicalised interest in the wellbeing of the child are more important considerations regarding what is in the best interests of the child. In the case of a married couple, though some fathers are irresponsible, it is the formalised nature of the commitment that comes with the father's predetermined responsibilities or legal obligations which redound to the best interests of the child, that account for the ease with which section 9 allows him to register even under his surname.

[132] In a theoretical and surreal world, it may be considered sufficient that one is a biological father to successfully insist on having an inherently equal or identical entitlement to register the birth of the child as a married man. But, at a more practical level, it should become apparent that the differentiation "is aimed at a worthy and important societal goal" of pre-emptively cutting out some of the potentially

irresponsible or even abusive but merely overzealous men from being so meaningfully introduced into the life of a child with consequences that might prove difficult or impossible to reverse. This is said advisedly because the commitment of those fathers to the wellbeing of the child is unrecorded and may therefore not be readily or legally assumed. And the more dependable safeguard in this regard is the mother of the child who presumably has the best interests of the child, that she carried to birth for about nine months at heart.

[133] This is therefore, not manifestly directed at discriminating unfairly against an unmarried father but precisely so that the best interests of a child and the paramountcy of their importance may be safeguarded.

Best interests of a child

[134] Section 28 of the Constitution provides in relevant parts:

“Children —

(1) Every child has the right—

(a) to a name and a nationality from birth;

(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;

(d) to be protected from maltreatment, neglect, abuse or degradation;

(2) A child’s best interests are of paramount importance in every matter concerning the child.”⁸⁵

[135] One of the inherent dangers of giving carte blanche to any man, who is or claims to be the father of the child but is unmarried to the mother, to register the birth of a child without the mother or a verifiable and reliable next-of-kin confirming his fatherhood and parental credentials, is human trafficking. While it is true that a dishonest man may present a fraudulent marriage certificate in an attempt to secure easy and irregular registration of a child’s birth, he would thankfully have to be more elaborate in his

⁸⁵ Section 28 of the Constitution.

fraudulent enterprise. For, he would also have to contend with the ID and photograph therein of the real husband, and that of the wife, assuming that such a married couple exists. Remember, not only are the ID numbers of the couple included in a marriage certificate, but anyone claiming to be one of the couples reflected in the marriage certificate, would have to produce his or her ID to bear this out. And if the child's real parents are not even married then the Home Affairs records would help expose the fraudulent act. Importantly, not only are most of the marriages conducted by the Department of Home Affairs itself, and those it has authorised to be marriage officers, but Home Affairs is also the custodian of information on all legally regulated marriages, and all identity documents of the citizens of this country. In the event of a presentation of a fraudulent marriage certificate, for the purpose alluded to above, it should, as stated, be easy for Home Affairs, to whom that marriage certificate would be presented, to verify its authenticity based on readily available records. These are some of the measures in place to frustrate the intended fraudulent birth registration of a child in terms of the current legal framework.

[136] Children are vulnerable and their best interests are of paramount importance when issues that concern them have to be addressed. They must be protected and not be exposed to the risk of being easily claimed and “adopted” by people whose relationship with them or suitability to be in their lives, has not been established. Regarding those who might be claiming to be when they are in fact not fathers and the risk of them registering children who are not theirs, without the knowledge of the mother, it should be borne in mind that biometrics are not particularly helpful since they are not mandatory. Section 9(1A) says the “Director-General *may* require that biometrics . . . be taken in the prescribed manner”. Meaning, something or someone would in all likelihood have to trigger the request for biometrics into operation in order for the Director-General to consider requiring it. Ordinarily and absent the need for the mother to have a strong or final say, any man who is in fact the father or merely claims to be the father would, on the approach preferred by the Centre for Child Law and the Department, be entitled to register any child and under his surname, without proper

regard for what is in the best interests of a child which the mother presently helps government to achieve.

[137] A woman and a man who are either in an unformalised relationship, and only got intimate once or a few times resulting in the birth of a child, or a rapist who has subsequently developed a curious interest in the child born out of his criminal and traumatic self-imposition on the woman all fall in the same category of unmarried fathers. That does not or ought not to conduce to the ready acceptance of a child being registered in the name of a man who claims to be the father, without any or particular regard for the views or consent of the one who carried the pregnancy through to birth. These factors are strong warning signs against the proposed drive to simply relax the critical safeguards built into the impugned legislation.

[138] It ought not to be enough that a man is in fact the father or merely acknowledges fatherhood, to then have him register the birth of the child, and even under his surname without the birth registering authority first hearing from the mother. Much more ought to be demanded of the unmarried father before he may do so. All this is to be done out of respect for the paramountcy of the best interests of a child. That a woman carries a pregnancy for about nine months, with all the pain and suffering that comes with it, neighbours and functionaries at medical facilities that offer pre-natal, midwifery and post-natal care presumably have records and can bear testimony to the reality that she gave birth, should be enough to explain why she deserves a special place in the life of her child, and more authority or say regarding the registration of birth and the surname the child must bear. An unmarried man does not have the proof of fatherhood readily available or easily ascertainable and lacks a similarly determinable track record of loving and suffering for the child, unlike the mother whose is evidenced by the pregnancy and birth.

[139] Section 10 is fundamentally in the best interests of a child and gives recognition to the constitutional demand to treat those interests as paramount. The law must not allow, as would be the case in the event of confirmation of any of the High Court's

orders or any of the proposed dispensations, a rapist whose unconstitutional and injurious act resulted in the conception and birth of a child, to just “rock up” at Home Affairs, nine or 10 months since he last traumatised the mother, acknowledge fatherhood in writing or verbally and, where it is thought necessary duly backed-up by biometrics, and then register the birth of that child and give him or her, his surname. This, regardless of what the mother’s views are. Similarly, a man who met the woman once or a few times and was not there during the difficult period of pregnancy should not be allowed to surreptitiously appear and, in the name of dignity and equality, register the child in his surname without the consent of the mother on possible maltreatment or neglect by him, informed by her knowledge of him. If the unmarried or even divorced biological father is caring and responsible the mother of the child would, barring exceptions, most likely grant the consent demanded by section 10.

[140] This analysis also reveals that the differentiation between married and unmarried fathers is not about stereotyping women as those who should bear the primary or sole responsibility for raising children, but about confronting the practical realities that unmarried South African mothers and children have to contend with most of the time. And it is also about giving recognition to and celebrating a married father’s legal or covenantal obligations to help raise and care for the child working together with the mother.

[141] It cannot be seriously disputed that it is in the best interests of a child to be practically and more meaningfully linked to a loving, caring, supportive and responsible father, not just any man who happens to have fathered him or her. All things considered, the mother of that child is best-suited to tell whether the unmarried man claiming to be the father is in fact the father and a responsible one. Hence the need for her consent.⁸⁶

⁸⁶ And that is why abusive fathers get divorced and custody is then awarded to a caring mother.

Conclusion

[142] This, therefore, is not a case of needless, and in reality, unfair discrimination on the basis of marital status, sex or gender. The impugned provisions are predicated on the need to give practical expression to the best interests of a child and their paramount importance. They are also grounded in the lived experiences of South Africans relating to some men who are happy to claim and give their surnames to children without any regard for a concomitant duty of care for them. A child's mother must therefore necessarily be asked to say: (i) whether the man claiming to be the father is indeed the father; and (ii) even if he is, whether he is the kind that would help advance the best interests of the child and give expression to the paramountcy of those interests or one whose somewhat formalised association with the child would be prejudicial to the child's best interests.

[143] A reading of sections 9 and 10 in a way that keeps them within constitutional bounds, does not expose a child to known or foreseeable risks. It protects and advances the best interests of a child and recognises the paramountcy of those interests. Sections 9 and 10 should thus be left intact. It would then be for Parliament, working with the Department, to, if so advised, consider making more appropriate provision for a situation where:

- (a) a mother is for some reason not available to register the birth of her child;
- (b) the mother is available but undocumented or unable to register the child for whatever reason;
- (c) the mother is available but is inexplicably or unreasonably withholding her consent or refusing to register the child; and
- (d) any other practical challenge exists that deserves legislative intervention.

[144] The proposed declaration of section 10 as constitutionally invalid, the deletion of "subject to the provisions of section 10" in section 9(2) and the order are loaded with

serious risks to the best interests of a child. The *Volks* decision on the constitutionality of the discrimination between married and unmarried people is as correct now, as it was then. Then this Court said:

“The distinction between married and unmarried people cannot be said to be unfair when considered in the larger context of the rights and obligations uniquely attached to marriage.”⁸⁷

This is not to say that rights and obligations may never be attached to an intimate relationship outside of marriage. But, to underscore and contrast the uniqueness of their attachment in a marriage setting with the general uncertainty in the case of unmarried couples.

Order

[145] The High Court has correctly cleared the impediment to the registration of the birth of a child that was created by the Regulations. Happily, Mr Naki and Ms Ndovya have presumably been able to or will now be able to register the birth of their daughter unimpeded by the relevant provisions of the Regulations. Regarding sections 9 and 10 of the Act, I would not confirm the declaration of unconstitutionality proposed for confirmation by any of the courts below. And I would therefore set aside the orders they made with no order as to costs.

⁸⁷ *Volks* above n 76 at para 56.

For the Applicant:

J Bhima and N Kekana instructed by
Lawyers for Human Rights

For the First and Second Respondents:

I Jamie SC and S Freese instructed by
State Attorney, Gqeberha

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION: GQEBERHA]**

CASE NO. 1986/2021

In the matter between:

U [....] J [....] D [....] J [....] 1

1st Applicant

V [....] K [....] G [....]

2nd Applicant

and

MINISTER OF HOME AFFAIRS

1st Respondent

MS MBEBE NO

2nd Respondent

JUDGMENT

JOLWANA J:

Introduction.

[1] This matter concerns the amendment of an abridged birth certificate of a minor child (the child) to include the details of the child's biological father. Put differently, it is about the amendment of the birth registration records of the child at the Department of Home Affairs to reflect the second applicant as the father of the child. Both applicants are the biological parents of the child who, for all intents and purposes, live together basically as husband and wife even though they are not

married. The first applicant, the mother of the child is a South African citizen. The second applicant, the father of the child is a citizen of Bulgaria who came to South Africa on a VISA. However, that VISA expired and that made his presence in South Africa illegal. The first respondent is cited *nomino officio* as the Minister responsible for the Department of Home Affairs. The second respondent is also cited *nomino officio* as the head of the office of the local Department of Home Affairs in Gqeberha in which this matter was attended to by various officials. For convenience, at various times in this judgment reference to the respondents shall also mean the officials who attended to the applicants, depending on the context.

The facts.

[2] At some point after the birth of the child the applicants attempted to register the second applicant as the father of the child at the Department of Home Affairs. However, the respondents refused to make the necessary entries in the records of the Department of Home Affairs to reflect the fact that the second applicant is the biological father of the child and to issue to them an unabridged birth certificate of the child. The reason given for such refusal was that the second applicant was no longer legally in the country. Furthermore, as he was not a South African citizen, the results of a paternity test were required to prove that he is in fact the biological father of the minor child. The applicants further allege that they were told that a court order declaring the second applicant as the father of the child would be required in addition to the proof of paternity, which also made these proceedings necessary. Section 11 of the Births and Deaths Registration Act 51 of 1992 as amended (the Registration Act)¹ provides for the amendment of the birth registration details of a child in

¹ Section 11 reads:

- “(1) Any parent of a child born out of wedlock whose parents married each other after the registration of his or her birth may, if such child is a minor, or such child himself or herself may, if he or she is of age, apply in the prescribed manner to the Director-General to amend the registration of his or her birth as if his or her parents were married to each other at the time of his or her birth, and thereupon the Director-General shall, if satisfied that the applicant is competent to make the application, that the alleged parents of the child are in fact his or her parents and that they legally married each other, amend the registration of birth in the prescribed manner as if such child’s parents were legally married to each other at the time of his or her birth.
- (2) If the parents of a child born out of wedlock marry each other before notice of his or her birth is given, notice of such bill shall be given and the birth registered as if the parents were married to each other at the time of his or her birth.
- (3) ...

circumstances where a father wishes to acknowledge himself as the father of a child born out of wedlock subject to the submission of conclusive proof of paternity.

[3] The applicants launched these proceedings apparently following the guidance of the respondents. The respondents opposed the application on the basis of the second applicant's illegal presence in the country. However, at the eleventh hour, the respondents filed their main heads of argument and attached thereto a draft order containing some indication on the basis of which they wanted the matter settled. On the day of the hearing the respondents made a 180 degree turn conceding essentially all the relief sought by the applicants. This concession was made not even at the door step of the court but right inside the court during the hearing of the matter. Despite that full concession on the main relief, applicants' counsel persisted with a constitutional challenge on Regulation 12(2)(c) raised pertinently in the papers. I deal with the details of the constitutional challenge and its gravamen later in this judgment.

The issues.

[4] It was submitted on behalf of the applicants that even though the matter has largely been settled, albeit, belatedly, it was not just necessary for the constitutional issue pertinently raised by the applicants in the papers to be determined but also very important as it was a matter of some significant general public interest. I then directed that supplementary heads should be filed dealing specifically with the issues pertaining to the constitutional challenge. These are whether this Court should still pronounce on the constitutionality of Regulation 12(2)(c) of the Registration Act despite the respondents having conceded the main relief sought by the applicants. If

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- (4) A person who wishes to acknowledge himself to be the father of a child born out of wedlock, may, in the prescribed manner, with the consent of the mother of the child apply to the child, apply to the Director- General, who shall amend the registration of the birth of such child by recording such acknowledgement and by entering the prescribed particulars of such person in the registration of the birth of such child.
- (4A) An amendment of the particulars of a person who has acknowledged himself as a father of a child as contemplated in subsection (4) and section 10(1)(b) of the Act shall be supported by the prescribed conclusive proof of that person being the father of the child.
- (5) Where the mother of a child has not given her consent to the amendment of the registration of the birth of her child in terms of subsection (4) the father of such a child shall apply to the High Court of competent jurisdiction for a declaratory order which confirms his or her paternity of the child and dispenses with the requirement of consent of the mother contemplated in subsection (4).
- (6) When the court considers the application contemplated in subsection (5) the provisions of section 26 (b) of the Children's Act shall apply.

the answer is in the affirmative, the merits of the constitutional challenge will have to be determined. If not, that will be the end of that issue. The second issue was whether the court should exercise its discretion and award costs against the respondents on a punitive scale.

The parties' contentions.

[5] The central theme of the respondents' argument is that their concession on the main relief brought to an end the legal basis for this Court to consider the papers and pronounce or even comment on the constitutionality of Regulation 12(2)(c). A pronouncement on the constitutionality of any legislation including regulations is a very serious matter. It may have serious implications for the separation of powers doctrine because of the implicated issues of ripeness and mootness. Therefore, once the jurisdictional factors for such a pronouncement are no longer in existence, with the matter having been fully disposed of in the sense that a full concession was made on the relief sought, so contended the respondents, it would offend the doctrine of separation of powers for the court to make a pronouncement on the constitutional issue raised in the circumstances.

[6] There have indeed been a number of judicial pronouncements on the implicated principles all the way to the Constitutional Court over the course of time even though on varying factual circumstances. For example, in *Aurecon*² the court said:

"Given that this matter is disposed of on the basis that the City was out of time and failed to make out a proper case for condonation in terms of s 9 of PAJA, it is not necessary to venture into the arguable point of law raised, namely the prior involvement of a prospective tenderer. Although the applicant and CESA implored this court to pronounce on the proper meaning of 'involved with' as contained in 27(4) of the SCM Regulations and clause 95 of the SCMP, the general principle as set out by this court in *National Coalition* is that this court does not pronounce on issues which are moot (which essentially would equate to providing an advisory opinion)."

² City of Cape Town v Aurecon SA (PTY) Ltd 2017 (4) SA 223 (CC) at 214 para 54.

[7] In their supplementary heads of argument the respondents contend that the court should eschew making any determination on the constitutional challenge of the Regulation. The respondents made two submissions in the main. The first one is that of mootness and the second one is the issue of ripeness. The applicants have, in their heads of argument, dealt with these issues under the rubric of justiciability. Justiciability in this sense is, by and large, part of the court's application and observance of the doctrine of separation of powers raised by the respondents.

[8] Not so long ago the Constitutional Court explained the approach to these interlocking principles and emphasized the courts' obligation to exercise restraint where necessary without shirking their responsibility to intervene in deserving cases. In *Mwelase*³, in the words of Cameron J, in the context of a consideration of the need for the judicial arm of the state to provide an effective relief, the court expressed itself as follows:

“In cases that cry out for effective relief, tagging a function as administrative or executive, in contradistinction to judicial, though always important, need not always be decisive. For it is crises in governmental delivery, and not any judicial wish to exercise power, that has required the courts to explore the limits of separation of powers jurisprudence. When egregious infringements have occurred, the courts have had little choice in their duty to provide effective relief. That was so in *Black Sash 1*, and it is the case here. In both, the most vulnerable and most marginalised have suffered from the inefficiency of governmental delivery.”

[9] The respondents' contention on Regulation 12 (2) (c), as I understand it, is simply this. Because during the hearing of this application they conceded that the Regulation was inapplicable, the issue of the constitutional challenge was therefore not ripe for adjudication. The respondents do not explain and have not filed any affidavit to explain their earlier stance: before the application was launched; after the papers were filed and when they filed a rather comprehensive answering affidavit insisting that the Regulation made it impossible for them to enter the details of the

³ *Mwelase and Others v Director-General: Department of Rural Development and Land Reform and Another* 2019 (6) SA 597 (CC) at 622 para 48.

father in the registration records of the child. They just, literally out of the blue, attached to their very late heads of argument, a draft order containing what appeared to be a half-hearted caving in, only to make a full concession on the main relief during the hearing. They had, throughout, been contending vociferously that this Regulation prevented them from registering the second applicant as the father of the minor child on the basis of his illegal status in the country.

[10] One would have thought that this sudden change of tack and their preparedness to now enter the child's father's details called for an explanation. This is especially the case because it goes against everything the respondents, under oath in their answering affidavit, said to this Court. With that explanation not having been given, it is impossible to appreciate what informed this sudden change and it makes it even difficult to resist the temptation to conclude that the sudden change of mind was in bad faith, designed to cripple and disable the court from enquiring into the constitutionality of the Regulation. This, in circumstances in which as the applicants submitted, the insistence on compliance with the Regulation caused considerable distress to them and which, it was argued, continues to bedevil those children born in similar circumstances as the child in this matter.

[11] The respondents cannot plead ignorance about which Regulation or subregulation is applicable and in which circumstances. The Regulations are theirs and theirs alone and the first respondent's predecessor must be presumed to have known what he intended when he issued them and the first respondent, likewise when he enforces them. I find the sentiments expressed by Cameron J in *Kirkland*⁴ in the context of a PAJA review apposite. He expressed himself as follows:

“...PAJA requires that the government respondents should have applied to set aside the approval, by way of formal counter-application. They must do the same even if PAJA does not apply. To demand this of government is not to stymie it by forcing upon it a senseless formality. It is to insist on due process, from which there is no reason to exempt government. On the contrary, there is a higher duty on the state to respect the law, to fulfil

⁴ MEC for Health, Province of the Eastern Cape NO and Another v Kirkland Investments (Pty) LTD 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC) para 82

procedural requirements and to thread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty; to whom courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly."

[12] The constitutional rights of minor children are specifically provided for in the Children's Act 38 of 2005. Most relevant for the purposes of this discussion is section 6 (2) thereof which provides as follows:

"(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 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 the ground of health status or disability of the child or a family member of the child."

[13] Axiomatically, some of the rights enacted in some detail in the Children's Act have been taken directly from the Constitution. The Legislature, in passing the Children's Act with such a huge amount of detail and attention concerning the rights of minor children, sought to leave nothing to chance in ensuring that children's rights are always respected, protected, promoted and fulfilled. This it did by passing a comprehensive piece of legislation dedicated to ensuring that the interests of a minor child will, without exception, be always considered as paramount in any situation where a child is affected or is concerned.

[14] To the extent that the respondents contend, as they do in their supplementary heads of argument, that they have agreed that the child concerned could have the details of his father entered into the records of the department –despite the fact that

his father is illegally in the country, the issue of the constitutionality of the Regulation is not ripe for adjudication and is in fact moot, I disagree. I disagree for a number of reasons. First, the issue became ripe when the respondents joined issue contending very strongly that this child could not have the details of his father entered in his birth certificate only because his father was illegally in the country. And Regulation 12(2)(c) did not allow them to enter into the registration details of the child, his father's details. On these facts nothing has changed. The illegal status of the child's father has not changed, the very issue at the core of their refusal to amend the birth registration details of the child.

[15] Second, the respondents not only maintained this stance on numerous occasions that the applicants visited their offices but also filed a notice to oppose the application when the applicants instituted these proceedings. The respondents further filed a comprehensive answering affidavit contending that Regulation 12(2)(c) was applicable and prevented them from making the necessary amendments. Even in the main heads of argument the respondents never conceded that Regulation 12(2)(c) was in fact unconstitutional. They merely conceded that the applicable Regulation was Regulation 14 and not Regulation 12. It is not without significance that it is the respondents themselves that raised Regulation 12(2)(c) as the reason for their refusal to come to the assistance of the minor child, not the applicants. Therefore, the question of the constitutionality of Regulation 12 was not conceded and even in the supplementary heads of argument no such concession has been made. I therefore do not see how this Court entertaining the matter of the constitutionality of Regulation 12(2)(c) can be said to be not ripe or to be moot.

[16] The argument seems to be that because the respondents have changed their minds about the applicability of Regulation 12(2)(c) which, ironically, was raised by them, the issue is not ripe. Therefore, so goes the argument, as I understand it, as they have given the applicants the relief they sought all along, the matter should die a natural death and the court should not pronounce on the issue. That, in my view, cannot be so. It cannot be so amongst many other reasons also because as can be gleaned from the respondents' answering affidavit, every day in all the Department of Home Affairs offices throughout the country, those seeking the registration of their details in the birth records of their children are turned away if they are fathers who

happen to be illegal foreigners. The question that must follow logically is whether the respondents' contention on ripeness or mootness in this matter is sustainable. I fail to see how the constitutional challenge can be said to be moot or not ripe, absent a concession on the unconstitutionality of the Regulation and an intention by the respondents to immediately suspend the Regulation until it is otherwise amended. There is not even an explanation for their change of heart. Rights of citizens cannot, in my view, be subject to the whims or attitudes of the attending officials in government offices. It cannot be gainsaid that courts must act when rights of citizens, especially the rights of children are allegedly being undermined or somehow trampled upon.

[17] It is indeed so that the child concerned in these proceedings should, by now, have the details of his father entered into his birth records because of the respondents' concession and the court order that was consequently issued in that regard. That is, assuming that the respondents have timeously complied with the said court order. However, the court cannot ignore the fact that there may be literally thousands of other children who are treated no differently from this child at the respondents' offices country wide even as we speak. Should this Court in such circumstances not investigate and pronounce on the constitutionality of the Regulation which is at the core of how this child's rights to dignity were allegedly trampled upon? I do not think so. I am fortified in this approach by the sentiments expressed by Yacoob J in *Lawyers for Human Rights*⁵ in which, writing for the majority, he said:

"The issue is always whether a person or organisation acts genuinely in the public interests. A distinction must, however, be made between the subjective position of the person or organisation claiming to act in the public interest on the one hand, and whether it is, objectively speaking, in the public interest for the particular proceedings to be brought. It is ordinarily not in the public interest for proceedings to be brought in the abstract. But this is not an invariable principle. There may be circumstances in which it will be in the public interest to bring proceedings even if there is no live case. The factors set out by O'Regan J do help to determine this question. The list of relevant

⁵ *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC) at 136 para 18.

factors is not closed. I would add that the degree of vulnerability of the people affected, the nature of the rights said to be infringed, as well as the consequence of the infringement of the rights are also important considerations in the analysis.”

[18] The respondents made a half-hearted concession at the time their main heads of argument were filed, which was very late and not in compliance with the rules. They even attached to their heads of argument a draft order in terms of which they wanted the matter disposed off on the basis that this Regulation was not applicable in this matter. However, the fact of the matter is that even before the proceedings were instituted, it was the position of the respondents that this Regulation was in fact applicable. Even after the application was launched, the respondents decided to oppose the application insisting that the Regulation was applicable and ought to be complied with. They went on to file a comprehensive answering affidavit in which they contended very strongly that it was applicable and must be complied with. Therefore, these proceedings became necessary also because of the respondents’ stance about which they were clearly prepared to file an answering affidavit explaining themselves. The application became fully opposed and was set down in the opposed motion court for no reason other than the respondents’ insistence that the applicants must comply with Regulation 12(2)(c) by submitting the documents provided for therein.

[19] I emphasize this issue also to make the point that the Department of Home Affairs must be assumed to have consistent rules and policies throughout the country and deal with people in similar circumstances as the applicants consistent with this stance nationwide. That said, it must be therefore that the enquiry into the constitutionality of this Regulation is a matter of public importance and affects not just the applicants and their child. Therefore, the issue of mootness raised by the respondents is difficult to understand. This is especially so in this matter in which the issue has been comprehensively canvassed in the papers and the heads of argument. After all, the first respondent is the National Minister of the Department of Home Affairs and his vacillation on such an important issue affecting the rights of minor children is a huge cause for concern. Besides the issue of the rights of the affected minor children, even the parents of the children must be attended to both

professionally and competently by government officials and mixed signals are totally unhelpful and utterly confusing. Their own rights to dignity and to an efficient public service are implicated and are not without significance.

[20] When courts do become aware of possible unconstitutional conduct that undermines constitutional rights, it must follow that they are required to act and deal with any unconstitutionality decisively where the issues have been fully canvassed in the papers. This is more so in a country like ours in which the majority of the people are both poor and uneducated which indeed is a double whammy for such people, so to speak. If courts do not act on allegations of unconstitutional conduct that is properly brought to their attention, they risk being spectators even in cases of wanton abuse and negation of constitutional rights. In doing so they would be shirking their constitutional obligations on the basis of some ill-conceived and lofty technical argument on mootness or ripeness, a luxury that courts cannot afford. The consequences of this may very well be that the Constitution itself and indeed the rights contained therein could become illusory and meaningless for those entitled to constitutional protection. I am of the firm view that for the courts to look away when they become aware of constitutional violations, taking comfort in some vague technical argument on mootness is not in keeping with the courts' duty as the ultimate arbiters on constitutional rights. After all, courts are the last bastion of protection for ordinary people when their rights are being rendered nugatory, even if unwittingly by government officials.

[21] I do not understand our law to be that even when a matter may truly be said to be moot, that is always a bar to judicial scrutiny and indeed pronouncement. In *Mukhandiva*⁶, writing a unanimous judgment of the Constitutional Court, Moseneke DCJ aptly expressed some of the considerations applicable to the issues of mootness in the following terms:

“The fact that a matter may be moot in relation to the parties before the court is not an absolute bar to the court considering it. The court retains discretion, and in exercising that discretion it must act according to what is required by

⁶ Director-General: Department of Home Affairs and Another v Mukhandiva 2014 (3) BCLR 306 (CC) para 40.

the interests of justice. And what is required for the exercise of this discretion is that any order made by the court has practical effect either on the parties or others. Other relevant factors that could be considered include: the nature and extent of the practical effect the order may have; the importance of the issue; and the fullness of the argument advanced. Another compelling factor could be the public importance of an otherwise moot issue.”

[22] It is indeed so that this case was brought to protect the interests of the child concerned. However, its determination would have a wider effect and will affect many other children in his or similar circumstances. It will also bring clarity and certainty to the respondents themselves on how they should deal with children born of fathers who may be illegal foreigners. Anecdotal evidence suggests that there may be millions of illegal foreigners in this country. Surely once they are in the country and intermingle as they surely do with local citizens, naturally millions of children are possibly born yearly around the country. The rights concerned are those of the minor children. Neither the Constitution nor the Children’s Act distinguish between children on the basis of citizenship of their parents as far as I am aware when they provide for the protection of the rights of children. I, therefore, am of the view that this matter is justiciable, it being neither moot nor not ripe in these circumstances. Its determination will not offend any of the principles of the separation of powers and judicial restraint as adequately explained in numerous cases by the Constitutional Court.

Is Regulation 12(2)(c) constitutional?

[23] The above conclusion brings me to the actual determination of the constitutionality of Regulation 12(2)(c). Regulation 12(2)(c) has been a major bone of contention in this matter from the onset and the parties remain poles apart on its constitutionality. It reads thus:

“12 (1) A notice of a birth of a child born out of wedlock shall be made by the mother of the child on form DHA-24 illustrated in Annexure 1A or Form DHA-24/LRB illustrated in Annexure 1A, whichever is applicable⁷.

(2) The person who acknowledges that he is the father of the child born out of wedlock must:

(a) enter his particulars and sign on Part D of Form DHA-24 illustrated in Annexure 1A or on Part D of Form DHA-24/LRB illustrated in Annexure 1B, as the case may be, at the offices of the Department and in the presence of an official of the Department as contemplated in section 10 (1) (b) of the Act,⁸

(b) submit an affidavit on Form DHA-288/C illustrated in Annexure 2D in which he:

(i) states his relationship to the mother; and

(ii) acknowledges paternity of the child; and

(c) have his fingerprints verified online against the national population register: Provided that in the event of the father being a non-South African citizen, he must submit a certified copy of his valid passport and visa or permit, permanent resident's, identity document or refugee identity document.”

[24] The applicants contend that the effect of Regulation 12(2)(c) is that a father who is a foreigner may not be identified as the father of the child born outside of the bonds of marriage on the child's birth certificate, unless that father is legally in South Africa. In this case the child concerned is a South African citizen. The applicants' contention is that the child is being discriminated against and deserves protection from this Court which is the upper guardian of all minor children. There is a wide

⁷ Regulation 12(1) was declared unconstitutional in *Naki v Director-General of Home Affairs and Another* [2018] 3 All SA 802 (ECG). It is reflected herein for completeness and ease of reading.

⁸ Section 10 has since been declared unconstitutional by the Constitutional Court in *Centre for Child Law v Director-General: Department of Home Affairs and Others* 2022 (2) SA 131 (CC).

range of such children who may be in difficult circumstances, not of their own making. The applicants' heads of argument mention as examples, children whose fathers may not be in South Africa at the time of their birth or may not be willing to home to this country, fathers who may be illegal foreigners as well as those who may be undocumented foreign nationals. At the centre of the discrimination is in the first place, the fact that the child is born of unmarried parents and the obvious difficulties associated with that and secondly the father being a foreigner or worse an illegal foreigner. For these reasons the child is prejudiced and discriminated against, irrationally on the basis of Regulation 12(2)(c) because of the circumstances of her or his birth.

[25] There cannot be any cogent justification for such discrimination and none was advanced. This is hardly surprising. If there was a proper basis for the discrimination on the basis of the illegality of this child's father's presence in this country, it escapes me why the respondents have agreed to the amendment of the child's registration records. After all, the father is still illegally in the country. It baffles me how the respondents, especially the Minister, can consent to this child's father's details being entered into the birth registration records of this child and still argue that Regulation 12(2)(c) is valid and should remain extant. This would have the inevitable consequence of its continued enforcement by hapless officials of the Department, a situation of total chaos, confusion and inconsistent application of the Regulation. This surely should not be countenanced.

[26] This Regulation indeed is clearly unconstitutional and irrational in my view. For instance, the second applicant got into this country on a valid VISA which later expired. On the respondents' submissions, the event of the expiry of a VISA must determine if the child who is born should be allowed to have a birth certificate with full details of his or her father. This defies all sense of logic. In this case the father was not able to renew his VISA for reasons that obviously had nothing to do with the child. As a result, his continued stay in this country became illegal. None of that has anything to do with the child and his right to have the identity of his father officially recognised, not for the father but most importantly, for the child. The identity of his father is intertwined with his own identity both of which are interlinked with his

cultural identity. Therefore, the rights of the child to dignity was imperilled by the Regulation and its resolute enforcement by the respondents.

[27] Some of the more tangible effects of the respondents' refusal to amend the birth certificate in respect of this particular child, it was submitted, include the following: The father of the child is a Bulgarian citizen and therefore according to Bulgarian law, the child is entitled to Bulgarian citizenship. However, the Bulgarian Embassy will not process the registration of the child as a Bulgarian citizen without a full birth certificate reflecting his father's names in it. Bulgarian citizenship would entitle the child to VISA free travel to European Union member states. That would open other opportunities to the child which all citizens of the European Union member states enjoy including educational opportunities, and financial assistance to which being a citizen of a European Union member state would entitle him. No argument was advanced to gainsay these submissions save for the dismissive submission that they are irrelevant. These are in addition to all the other rights that are enshrined in our Constitution which find expression in quite some detail in the Children's Act.

[28] The irrationality of this Regulation becomes more pronounced if regard is had to the fact that recognising, protecting, respecting and fulfilling the rights of the affected children does not in any way curtail the respondents' ability to deal with the fact of the illegality of the presence of their fathers in this country. For instance the respondents are entitled to deport the second applicant in the normal course or deal with him in any way they decide within the framework of the law as they should with any other illegal foreigner. Therefore, the entry of his details in the child's birth certificate does not limit any of that. In fact, it only prejudices the child and does so unjustifiably and irrationally, without serving any useful purpose.

[29] In circumstances such as these, the courts' intervention is required and not intervening, not only for this child but also for the many others who may be in the same or similar circumstances would amount to the betrayal of the children's rights which are constitutionally guaranteed. This Court must do what it is enjoined to do to prevent the derogation of the affected children's rights and in doing so, it must ensure that children's rights are always protected and treated as paramount. In *De*

*Lille*⁹ the court expressed the following apt sentiments when it comes to the courts' constitutional obligation to intervene where rights of people are adversely affected:

"This enquiry must crucially rest on the Constitution of the Republic of South Africa. It is Supreme-not Parliament. It is the ultimate source of all lawful authority in the country. No Parliament, however bona fide or eminent its membership, no President, however formidable be his reputation or scholarship and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the Constitution. Section 2 of the Constitution expressly provides that law or conduct inconsistent with the Constitution is invalid and the obligations imposed by it must be fulfilled. It follows that any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorised by the Constitution is entitled to the protection of the courts. No Parliament, no official and no institution is immune from judicial scrutiny in such circumstances."

Some of the international instruments on children's rights.

[30] I also find it strange that it was the first respondent, the Minister who decided to pass a far reaching Regulation such as this. A Regulation that unlawfully interferes with the constitutional rights of the children without any parliamentary consideration and the parliamentary debate as well as the public participation processes applicable to the consideration of parliamentary legislation. One would have expected it to be Parliament that deals with the issue of children born in these circumstances. There are some international instruments dealing with the rights of children which cannot be ignored by our country in any domestic instruments that are passed. These include Article 3 (1) of the United Nations Convention on the Rights of the Child. It reads:

"In all actions concerning children, whether 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."

⁹ Speaker of the National Assembly v De Lille [1999] All SA 241 (A) at para 14.

[31] The United Nations Committee on the Rights of the Child issued General Comment no 14 of 2013 in which it defined the content of the rights contained in the Article 3 (1) as follows:

“The rights of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general.”

[32] Even coming closer to home, I find it telling that section 11 of the Registration Act does not discriminate between children born of parents who are foreigners some of whom may be illegal foreigners where such parents are not married. In the Registration Act all children born of unmarried parents are treated similarly with no provision dedicated to children who may be born of illegal foreigners. Section 11(4) is very clear and is worth repeating. It reads:

“(4) a person who wishes to acknowledge himself to be the father of a child born out of wedlock may, in the prescribed manner, with the consent of the mother of the child, apply to the Director-General, who shall amend the registration of the birth of such a child by recording such acknowledgement and by entering the prescribed particulars of such person in the registration of the birth of such child.”

[33] This provision makes no distinction between local and foreign fathers or those that are legally in the country and those that are not. The legislature, in its wisdom, uses the words “any person”. This must be because the focus is more on the interests of the children and less about who the father is or what his circumstances are. It merely provides similarly for all children born of unmarried parents. It surely cannot be that a discriminatory provision can lawfully be made in a Regulation in circumstances where the Legislature elected not to discriminate between children and elected to treat them the same as children.

Conclusion.

[34] I have therefore come to the ineluctable conclusion that the applicants must succeed in their application on the constitutional challenge of Regulation 12(2)(c). It follows that Regulation 12(2)(c) must be declared unconstitutional to the extent that it imposes discriminatory conditions in the recordal of fathers who are unmarried and who may be illegal foreigners in the children's registration of births or who may not be present in this country or even be willing to come to this country.

The issue of costs.

[35] The last issue that I must deal with is the issue of the scale of costs that must be awarded to the applicants with the respondents having conceded costs on a party and party scale. This is where some of the history of this matter becomes even more relevant and at the risk of being repetitious, it is worth re-encapsulating. As pointed out earlier the respondents started by delaying in filing a simple notice to oppose. They only did so once the matter was enrolled in the unopposed motion court roll more than a month later thus necessitating the matter being removed from the roll. It has not been explained in the answering affidavit why the respondents delayed in filing their notice to oppose within the time frames provided for in the rules. The answering affidavit itself was filed more than two months after the issuing and service of the papers. This was also more than a month after the filing of the notice to oppose the application. None of this is explained in the answering. One would have thought that non-compliance with the rules called for an explanation and a condonation application, that being a trite rule of practice.

[36] The filing of the answering affidavit happened long after the respondents had already been furnished with the proof of paternity of the child with the respondents still steadfastly refusing to register the details of the second applicant as the father of the child in their official records. This, despite the paternity of the child being no longer in issue or uncertain. There were several visits in August 2021 by the applicants to the Department of Home Affairs in all of which they were turned away unassisted. It would appear that behind the respondents' refusal was their determination to insist on a court order whose obtaining in this application they eventually opposed. It is not clear why there was even this misguided insistence on a court order in circumstances in which the respondents knew that they were against it

being obtained. This was clearly a misapplication of section 11(5) which makes reference to a court order. This, however, is only in circumstances where the mother of the child did not consent to the details of the father being entered. In this case the insistence on a court order being required is confusing, after proof of paternity having been furnished to them and the mother consenting, they had no other reason for their refusal to make the entries. If they did have a legally justifiable reason for the refusal, they would not have conceded to the granting of the relief as they did on the eleventh hour. This is especially so if they believed that the illegal presence of the second applicant in the country constituted a bar to the entering of the details of the second applicant as the father of the minor child being made in their records.

[37] It must be emphasized that the first respondent is responsible for the Births and Deaths Registration Act and the Regulations. The respondents should, therefore, know what they themselves require and should be able to give proper guidance to the people that need it for a seamless issuing of documents in deserving cases. This would alleviate to some extent, the notoriously long queues that the Department of Home Affairs is known for. For them to force people such as the applicants to approach court only to then admit that they were wrong from the onset in refusing to enter the second applicant as the child's father is troubling. The concession made in court during the hearing on what they should have always known all along is also something that deserves an appropriate opprobrium from this Court by way of an appropriate costs order.

The results.

[38] In the result the following order shall issue:

1. It is declared that Regulation 12(2)(c) of the Births and Deaths Registrations Act, 2014 is unconstitutional and therefore invalid in so far as the child's unmarried father may not be in South Africa or may not be in South Africa legally.

2. The respondents are ordered to pay costs of this application on a scale as between attorney and client including the costs occasioned by the employment of two counsel.

M.S. JOLWANA
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicants : E. CROUSE SC WITH A.N. MASIZA

Instructed by : ANNALI ERASMUS INC.
GQEBERHA

Counsel for the Respondent: S. J. CUBUNGU

Instructed by : STATE ATTORNEY
GQEBERHA

Date heard : 20 October 2022

Delivered on : 10 January 2023

(1 March 2014 – to date)

[This is the **current** version and applies as from **1 March 2014**, i.e. the date of commencement of the Births and Deaths Registration Amendment Act 18 of 2010 – **to date**]

BIRTHS AND DEATHS REGISTRATION ACT 51 OF 1992

(Gazette No. 13953, dated 6 May 1992. Commencement date: 1 October 1992 [Proclamation No. R.79, Gazette No. 14182, dated 9 September 1992])

As amended by

(General Law Third Amendment Act 129 of 1993 – Gazette No.14995, dated 23 July 1993. Commencement date: 1 September 1993, [Proclamation No.R.81, Gazette No.15102, dated 1 September 1993]).

(Home Affairs Rationalisation Act 41 of 1995 – Gazette No.16655, dated 5 September 1995. Commencement date: 5 September 1995)

*(**Note:** Section 2 of Act 41 of 1995 says that this Act, namely Act 51 of 1992, applies uniformly throughout the Republic)*

(Births and Deaths Registration Amendment Act 40 of 1996 – Gazette No.17412, dated 5 September 1996. Commencement date: 5 September 1996)

(Births and Deaths Registration Amendment Act 67 of 1997 – Gazette No.18484, dated 3 December 1997. Commencement date: 3 December 1997)

(Natural Fathers of Children Born out of Wedlock 86 of 1997 – Gazette No.18502, dated 12 December 1997. Commencement date: 4 September 1998 [Proclamation No.R.89, Gazette No.19228, dated 4 September 1998])

(Births and Deaths Registration Amendment Act 43 of 1998 – Gazette No.19215, dated 4 September 1998. Commencement date: 4 September 1998)

(Adoption Matters Amendment Act 56 of 1998 – Gazette No.19286, dated 28 September 1998. Commencement date: 4 February 1999 [Proclamation No.R.7, Gazette No.19703, dated 29 January 1999])

(Births and Deaths Registration Amendment Act 1 of 2002 – Gazette No.23243, dated 19 March 2002. Commencement date: 19 March 2002)

(Alteration of Sex Description and Sex Status Act 49 of 2003 – Gazette No.26148, dated 15 March 2004. Commencement date: 15 March 2004)

(Births and Deaths Registration Amendment Act 18 of 2010 – Government Notice 1174 in Government Gazette 33851 dated 7 December 2010. Commencement date: 1 March 2014 [Proc. No. R11, Gazette No. 37373].

ACT

To regulate the registration of births and deaths; and to provide for matters connected therewith.

(Afrikaans text signed by the State President)

(Assented to 26 April 1992)

(The principal Act is hereby amended by section 20 of Act 18 of 2010 by the substitution for the words "he", "him" and "his", wherever they occur, of the words "he or she", "him or her" and "his or her", respectively.)

BE IT ENACTED by the State President and the Parliament of the Republic of South Africa, as follows:

1. Definitions

In this Act, unless the context otherwise indicates -

"biometrics" means photographs, fingerprints (including palmprints), hand measurements, signature verification or retinal patterns that may be used to verify the identity of individuals;

'birth', in relation to a child, means the birth of a child born alive;

'burial' means burial in earth or the cremation or any other mode of disposal of a corpse;

'burial place' means any public, private or other place which is used for a burial;

'child born out of wedlock' does not include a child whose parents were married to each other at the time of his or her conception or at any time thereafter before the completion of his or her birth;

'Children's Act' means the Children's Act, 2005 (Act No. 38 of 2005);

'competent court' means a magistrate's court, and a children's court established in terms of the Children's Act;

'corpse' means any dead human body, including the body of any still-born child;

'Department' means the Department of Home Affairs;

'Director-General' means the Director-General: Home Affairs;

'forename' means the word or words by which a person is designated as an individual and which precede his or her surname;

'major' means any person who is 18 years or older, and **"person of age"** has a similar meaning;

'marriage' means-

- (a) a marriage concluded in terms of-
 - (i) the Marriage Act, 1961 (Act No. 25 of 1961); or
 - (ii) the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998);
- (b) a civil union concluded in terms of the Civil Union Act, 2006 (Act No. 17 of 2006); or
- (c) a marriage concluded in terms of the laws of a foreign country;

'Minister' means the Minister of Home Affairs;

'minor' or **'minor person'** means any person who is not a major or a person of age;

'population register' means the population register contemplated in section 5 of the Identification Act, 1997 (Act No. 68 of 1997);

'prescribed' means prescribed by regulation;

'registration', in relation to a birth or a death, means the registration thereof mentioned in section 5;

'still-born', in relation to a child, means that it has had at least 26 weeks of intra-uterine existence but showed no sign of life after complete birth, and **'still-birth'**, in relation to a child, has a corresponding meaning;

'this Act' includes the regulations.

(Section 1(1) amended by section 3 of Act 41 of 1995)

(Section 1(1) amended by section 1 of Act 40 of 1996)

(Section 1(1) amended by section 1 of Act 1 of 2002)

(Section 1(1) substituted by section 1(a) of Act 18 of 2010)

(2) ...

(Section 1(2) inserted by section 1(b) of Act 40 of 1996)

(Section 1(2) deleted by section 1(b) of Act 18 of 2010)

CHAPTER I ADMINISTRATION

2. Application of Act

The provisions of this Act shall apply to all South African citizens, whether in the Republic or outside the Republic, including persons who are not South African citizens but who sojourn permanently or temporarily in the Republic, for whatever purpose.

3. Director-General to administer Act

The Director-General shall be charged with the administration of this Act.

4. Transfer of powers and duties

- (1) The Director-General may, subject to such conditions as he or she may deem necessary, in writing authorize any person, whether or not he or she is in the service of the State, or an officer or category of officers or an employee or category of employees or a person or category of persons in the Public Service, to exercise or perform, in general or in a particular case or in cases of a particular nature, any power or duty conferred or imposed on the Director-General by or in terms of this Act.
- (2) The Director-General shall not be divested of any power or duty so transferred and may set aside or amend any decision made in the exercise of a power or the performance of a duty so transferred.

5. Custody of records and registration of births and deaths

- (1) The Director-General shall be the custodian of all -
 - (a) documents relating to births and deaths required to be furnished under this Act or any other law; and
 - (b) records of any births and deaths preserved, prior to the commencement of this Act, in terms of the Acts repealed by this Act.
- (2) Particulars obtained from the documents referred to in subsection (1)(a) shall be included in the population register and such inclusion is the registration of the births and deaths concerned.

- (3) In the case of a non-South African citizen who sojourns temporarily in the Republic, particulars obtained from documents mentioned in subsection (1)(a) shall not be included in the population register and the issuing of a certificate in respect of such particulars is the registration thereof.

6. Reproduction of documents

- (1) Notwithstanding anything to the contrary contained in any law, the Director-General may reproduce or cause to be reproduced any document submitted in terms of this Act or record mentioned in section 5(1)(b), by means of any process in accordance with the regulations which in his or her opinion accurately and durably reproduces such document or record, and he or she may preserve or cause to be preserved that reproduction in lieu of such document or record and may destroy such document or record.
- (2) A reproduction mentioned in subsection (1) shall, notwithstanding anything to the contrary contained in any law, for all purposes be deemed to be the original document or record from which it was reproduced, and a copy of such reproduction certified to be a true copy of the original by the Director-General shall in any court of law be conclusive proof of the contents of the original document or record.

7. Verification, supplementation and rectification of particulars

- (1) The Director-General may -
 - (a) require the person who has furnished any particulars in terms of this Act to furnish the Director-General with proof of the correctness of such particulars; and
 - (b) investigate or cause to be investigated any matter in respect of which particulars are to be used for the registration thereof in terms of section 5.
- (2) If in the course of the administration of this Act it comes to the attention of the Director-General that any particulars in respect of any person in any document submitted or preserved in terms of this Act or included in the population register are not correctly reflected, the Director-General may supplement and rectify such particulars in consultation with the person in question.

(Section 7(2) substituted by section 2(a) of Act 18 of 2010)
- (3) Any person who is in possession of a certificate or other document purported to be issued in terms of this Act, which does not correctly reflect the particulars in any document referred to in subsection (2) or in the population register, shall within the prescribed period hand over or send by registered post such certificate or document to the Director-General for rectification.

(Section 7(3) substituted by section 2(b) of Act 18 of 2010)

- (4) Any person may apply, in the prescribed manner, to the Director-General to request the amendment or rectification of his or her particulars furnished in terms of this Act.

(Section 7(4) added by section 2(c) of Act 18 of 2010)

(Section 7 amended by section 1 of Act 67 of 1997)

8. Fees payable

The Director-General may with the concurrence of the Minister of Finance determine the fees payable for any specified act performed in accordance with the provisions of this Act by the Director-General or any person contemplated in section 4, and shall publish such fees in the *Gazette*.

(Section 8 substituted by section 3 of Act 18 of 2010)

CHAPTER II REGISTRATION OF BIRTHS

9. Notice of birth

- (1) In the case of any child born alive, any one of his or her parents, or if the parents are deceased, any of the prescribed persons, shall, within 30 days after the birth of such child, give notice thereof in the prescribed manner, and in compliance with the prescribed requirements, to any person contemplated in section 4.

(Section 9(1) substituted by section 4 of Act 41 of 1995)

(Section 9(1) substituted by section 4(a) of Act 18 of 2010)

- (1A) The Director-General may require that biometrics of the person whose notice of birth is given, and that of his or her parents, be taken in the prescribed manner.

(Section 9(1A) inserted by section 4(b) of Act 18 of 2010)

- (2) ~~Subject to the provisions of section 10,~~ the notice of birth referred to in subsection (1) of this section shall be given under the surname of either the father or the mother of the child concerned or the surnames of both the father and mother joined together as a double barrelled surname.

(Section 9(2) substituted by section 2 of Act 1 of 2002)

- (3) ...

(Section 9 substituted by section 4 of Act 41 of 1995)

(Section 9(3) deleted by section 4(c) of Act 18 of 2010)

- (3A) Where the notice of a birth is given after the expiration of 30 days from the date of birth, the birth shall not be registered, unless the notice of the birth complies with the prescribed requirements for a late registration of birth.

(Section 9(3A) inserted by section 1 of Act 43 of 1998)

(Section 9(3A) substituted by section 4(d) of Act 18 of 2010)

- (4) No registration of birth shall be done of a person who dies before notice of his or her birth has been given in terms of subsection (1).
- (5) The person to whom notice of birth was given in terms of subsection (1), shall furnish the person who gave that notice with a birth certificate, or an acknowledgement of receipt of the notice of birth in the prescribed form, as the Director-General may determine.
- (6) No person's birth shall be registered unless a forename and a surname have been assigned to him or her.
- (7) The Director-General may on application in the prescribed manner issue a prescribed birth certificate from the population register.

(Section 9(7) added by section 4(e) of Act 18 of 2010)

- (8) An original birth certificate issued in terms of subsection (7) shall in all courts of law be on the face of it evidence of the particulars set forth therein.

(Section 9(8) added by section 4(e) of Act 18 of 2010)

~~10. Notice of birth of child born out of wedlock~~

- ~~(1) Notice of birth of a child born out of wedlock shall be given~~

~~(a) under the surname of the mother; or~~

~~(b) at the joint request of the mother and of the person who in the presence of the person to whom the notice of birth was given acknowledges himself in writing to be the father of the child and enters the prescribed particulars regarding himself upon the notice of birth, under the surname of the person who has so acknowledged.~~

- ~~(2) Notwithstanding the provisions of subsection (1), the notice of birth may be given under the surname of the mother if the person mentioned in subsection (1)(b), with the consent of the mother, acknowledges himself in writing to be the father of the child and enters particulars regarding himself upon the notice of birth.~~

~~*(Section 10 amended by section 2 of Act 40 of 1996)*~~

11. Amendment of birth registration of child born out of wedlock

- (1) Any parent of a child born out of wedlock whose parents married each other after the registration of his or her birth, may, if such child is a minor, or such child himself or herself may, if he or she is of age,

apply in the prescribed manner to the Director-General to amend the registration of his or her birth as if his or her parents were married to each other at the time of his or her birth, and thereupon the Director-General shall, if satisfied that the applicant is competent to make the application, that the alleged parents of the child are in fact his or her parents and that they legally married each other, amend the registration of birth in the prescribed manner as if such child's parents were legally married to each other at the time of his or her birth.

(Section 11(1) substituted by section 5(a) of Act 18 of 2010)

- (2) If the parents of a child born out of wedlock marry each other before notice of his or her birth is given, notice of such birth shall be given and the birth registered as if the parents were married to each other at the time of his or her birth.

- (3) ...

(Section 11(3) deleted by section 5(b) of Act 18 of 2010)

- (4) A person who wishes to acknowledge himself to be the father of a child born out of wedlock, may, in the prescribed manner, with the consent of the mother of the child, apply to the Director-General, who shall amend the registration of the birth of such child by recording such acknowledgement and by entering the prescribed particulars of such person in the registration of the birth of such child.

- (4A) An amendment of the particulars of a person who has acknowledged himself as a father of a child as contemplated in subsection (4) and section 10(1)(b) of the Act shall be supported by the prescribed conclusive proof of that person being the father of the child.

(Section 11(4A) inserted by section 5(c) of Act 18 of 2010)

- (5) Where the mother of a child has not given her consent to the amendment of the registration of the birth of her child in terms of subsection (4), the father of such a child shall apply to the High Court of competent jurisdiction for a declaratory order which confirms his or her paternity of the child and dispenses with the requirement of consent of the mother contemplated in subsection (4).

- (6) When the court considers the application contemplated in subsection (5) the provisions of section 26(b) of the Children's Act shall apply.

(Section 11(6) substituted by section 5(d) of Act 18 of 2010)

(Section 11 amended by section 3 of Act 40 of 1996)

(Section 11(4),(5) and (6) added by section 8 of Act 56 of 1998)

12. Notice of birth of abandoned or orphaned child

- (1) The notice of birth of an abandoned child which has not yet been given, shall be given, after an enquiry in respect of the child concerned in terms of the Children's Act, by the social worker concerned: Provided that in the event of any parent of the child being traced after the registration of

the birth and the particulars in any document or record in respect of the child not being reflected correctly, the Director-General may on application, in the prescribed manner, amplify and correct the said particulars.

- (2) The notice of birth of an orphaned child which does not list any of the persons contemplated in terms of section 9(1), shall be given by a social worker, after conclusion of an enquiry in respect of such child concerned in terms of the Children's Act.

(Section 12 substituted by section 6 of Act 18 of 2010)

13. Birth outside the Republic

If a child of a father or a mother who is a South African citizen is born outside the Republic, notice of birth may be given to the head of a South African diplomatic or consular mission, or a regional representative in the Republic.

CHAPTER III REGISTRATION OF DEATHS

14. Death due to natural causes

- (1)
 - (a) In the case of a death due to natural causes any person who was present at the death, or who became aware thereof, or who has charge of the burial concerned, shall give, as soon as practicable, by means of a certificate mentioned in section 15(1) or (2), notice thereof to a person contemplated in section 4.
 - (b) Where notice of a person's death cannot be given by means of a certificate mentioned in section 15(1) or (2) because a medical practitioner did not attend him or her before his or her death, or was not available to examine the corpse, any person who was present at the death, or who became aware thereof, must give notice of the death in the prescribed manner, and the person contemplated in section 4 must deal with such notice in accordance with the prescribed procedure.
- (2) If the person contemplated in section 4 is satisfied on the basis of the certificate issued in terms of section 15(1) or (2) that the death was due to natural causes, he or she shall complete the prescribed death register and issue a prescribed burial order authorizing burial.
- (3) If, before a prescribed burial order has been issued, a person contemplated in section 4 has reasonable doubt whether the death was due to natural causes, he or she shall not issue a burial order and he or she shall inform a police officer as to such doubt.

- (4) If, after a prescribed burial order has been issued, a person contemplated in section 4 has reasonable doubt whether the death was due to natural causes, he or she shall inform a police officer as to such doubt, and before the police officer acts in terms of the provisions of section 16, he or she shall, if the corpse has not yet been buried, withdraw and cancel the burial order.

(Section 14(1)(b) inserted by section 2 of Act 43 of 1998)

15. Certificate by medical practitioner

- (1) Where a medical practitioner is satisfied that the death of any person who was attended before his or her death by the medical practitioner was due to natural causes, he or she shall issue a prescribed certificate stating the cause of death.
- (2) A medical practitioner who did not attend any person before his or her death but after the death of the person examined the corpse and is satisfied that the death was due to natural causes, may issue a prescribed certificate to that effect.
- (3) If a medical practitioner is of the opinion that the death was due to other than natural causes, he or she shall not issue a certificate mentioned in subsection (1) or (2) and shall inform a police officer as to his or her opinion in that regard.

16. Duty of police officer on receipt of certain information

Whenever a police officer receives information mentioned in section 14(3) or (4), 15(3) or 18(4) or (5), he or she shall act in terms of the provisions of section 3 of the Inquests Act, 1959 (Act No. 58 of 1959).

17. Death due to other than natural causes

- (1) After an investigation as to the circumstances of a death due to other than natural causes in terms of section 3 of the Inquests Act, 1959 (Act No. 58 of 1959), the medical practitioner concerned shall, as soon as he or she is satisfied that the corpse concerned is no longer required for the purposes of an examination mentioned in the said section 3, issue a prescribed certificate to that effect and deliver it to the police officer concerned.
- (2) After the certificate referred to in subsection (1) has been issued, the police officer concerned, or any person contemplated in section 4, as the case may be, may, on the basis of the said certificate, complete the prescribed death register, without stating a cause of death, and the police officer concerned or the person contemplated in section 4, as the case may be, may issue the prescribed burial order authorizing burial.

18. Still-birth

- (1) A medical practitioner who was present at a still-birth, or who examined the corpse of a child and is satisfied that the child was still-born, shall issue a prescribed certificate to that effect.
- (2) If no medical practitioner was present at the still-birth, or if no medical practitioner examined the corpse of a still-born child, any person who was present at the still-birth shall make a prescribed declaration thereanent to any person contemplated in section 4.
- (3) The certificate mentioned in subsection (1) or the declaration mentioned in subsection (2) shall be deemed to be the notice of the still-birth, and a person contemplated in section 4 shall, on the basis of such notice and if he or she is satisfied that the child was still-born, issue under the surname of any parent concerned a prescribed burial order authorizing burial.
- (4) If, before a prescribed burial order has been issued, a person contemplated in section 4 has reasonable doubt whether the child was still-born, he or she shall not issue a burial order and he or she shall inform a police officer as to such doubt.
- (5) If, after a prescribed burial order has been issued, a person contemplated in section 4 has reasonable doubt whether the child was still-born, he or she shall inform a police officer as to such doubt, and before the police officer acts in terms of the provisions of section 16, he or she shall, if the corpse has not yet been buried, withdraw and cancel the burial order.

19. Death outside the Republic

- (1) If any person who is lawfully and permanently resident in the Republic dies outside the Republic, his or her death shall be registered in terms of the provisions of this Act on the strength of a death certificate or other similar document issued by the authority concerned in the country in which the death occurred.
- (2) If the corpse concerned is to be buried within the Republic, a person contemplated in section 4 at the relevant port of entry shall, on the strength of the death certificate or other similar document mentioned in subsection (1), complete the prescribed death register and issue a prescribed burial order authorizing burial.
- (3) Notwithstanding the provisions of section 2, the Director-General may, if he or she deems fit, grant permission that a prescribed burial order be issued authorizing burial in the Republic of a person who was not lawfully and permanently resident in the Republic and who died outside the Republic.
- (4) For the purposes of this section 'port of entry' has the meaning assigned thereto by section 1 of the Immigration Act, 2002 (Act No. 13 of 2002).

(Section 19(4) substituted by section 7 of Act 18 of 2010)

20. Burial order

- (1) No burial shall take place unless notice of the death or still-birth has been given to a person contemplated in section 4 and he or she has issued a prescribed burial order.
- (2) The burial order mentioned in subsection (1) shall be delivered by the person who has charge of the burial to the person who has control of the burial place concerned.
- (3) If the burial of a corpse is to take place outside the magisterial district within which the death occurred, the corpse may only be removed by virtue of a burial order to a place outside the said magisterial district.

21. Burial register

Any person having charge of a burial place shall maintain a burial register in which he or she shall enter from the burial order the prescribed particulars regarding every burial in such burial place.

22. Issuing of death certificate

After a death has been registered in terms of this Act, the Director-General shall issue a prescribed death certificate.

22A. Designation of funeral undertakers

- (1) in order to be designated as a funeral undertaker for the purposes of engaging in the activities relating to the registration of deaths in terms of this Act, any person who conducts a business of a funeral parlour may apply, in the prescribed manner and in compliance with the prescribed requirements, to the Director-General, who may approve an application and allocate a designation number to any such person so designated.
- (2) The Director-General shall maintain a register of persons whose applications he or she approved and designated as funeral undertakers in terms of subsection (1).
- (3) The Director-General may remove any person from the said register for failure to comply with prescribed requirements, after having afforded such a person an opportunity to be heard.
- (4) Any administrative action taken in terms of this section is subject to the provisions of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000).
- (5) No funeral undertaker other than the persons contemplated in subsection (2) shall engage in the activities relating to the registration of deaths in terms of this Act.

(Section 22A inserted by section 8 of Act 18 of 2010)

CHAPTER IV GENERAL

23. Amplification of birth registrations

If the birth of any person was registered before the commencement of this Act without the assignment to him or her of any forename or surname, any parent of a minor, or a person of age, may apply to the Director-General for the amplification of the registration of his or her birth by the entry of his or her forename or surname, and the Director-General shall thereupon, if satisfied that the applicant is competent to make the application, so amplify the birth register in respect of such person.

(Section 23 substituted by section 9 of Act 18 of 2010)

24. Alteration of forename

- (1) Any parent of a minor, or a person of age, may apply in the prescribed manner to the Director-General for the alteration of his or her forename under which his or her birth is registered, and the Director-General may alter such forename accordingly in the prescribed manner.

(Section 24(1) substituted by section 10(a) of Act 18 of 2010)

- (2) ...

(Section 24(2) deleted by section 10(b) of Act 18 of 2010)

25. Alteration of surname of minor

- (1) When –
 - (a) the birth of any minor born out of wedlock has been registered and the mother of that minor marries any person other than the natural father of the minor;
 - (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;
 - (c) the birth of any minor born out of wedlock has been registered under the surname of his or her natural father and the natural father consents thereto in writing, unless a competent court grants exemption from such consent; or
 - (d) a minor is in the care of a guardian,

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.

- (1A) Notwithstanding subsection (1)(b) and (c), the natural father's written consent is not required where the mother has sole guardianship of the child concerned.
- (2) Any parent of a minor whose birth has been included under a specific surname in the population register, may on the strength of a reason not mentioned in subsection (1), apply in the prescribed manner to the Director-General for the alteration of the surname of the minor under which his or her birth was registered, and the Director-General may, on submission of a good and sufficient reason given for the contemplated alteration of the surname, alter the said original surname accordingly in the prescribed manner.

(Section 25(2) substituted by section 11 of Act 18 of 2010)

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

(Section 25 amended by section 2 of Act 67 of 1997)

(Section 25 amended by section 11 of Act 86 of 1997)

(Section 25(1A) inserted by section 3 of Act 1 of 2002)

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 subsection 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 a widow resumes a surname which she bore at any prior time.
- (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.

(Section 26(2) substituted by section 12 of Act 18 of 2010)

(Section 26 amended by section 3 of Act 67 of 1997)

(Section 26(1)(c) amended by section 4 of Act 1 of 2002)

27. Publishing of alterations and amplifications of forenames and surnames

- (1) In the case of an alteration or amplification of forename or surname 55 mentioned in sections 23, 24(1) and 26(2), the Director-General shall as soon as possible after such alteration or amplification has been authorized, cause any such alteration or amplification which relates to a person of age, to be published in the prescribed manner by notice in the *Gazette*.
- (2) Subsection (1) shall not apply where the alteration was authorized in the prescribed manner under a witness protection plan.

(Section 27(2) inserted by section 3 of Act 43 of 1998)

27A. Alteration of sex description

- (1) If the Director-General grants an application, made in the prescribed manner, or a magistrate issues an order in terms of section 2 of the Alteration of Sex Description and Sex Status Act, 2003 (Act No. 49 of 2003), the Director-General shall alter the sex description on the birth register of the person concerned.

(Section 27A(1) substituted by section 13 of Act 18 of 2010)

- (2) An alteration so recorded shall be dated and after the recording of the said alteration the person concerned shall be entitled to be issued with an amended birth certificate.

(Section 27A inserted by section 4 of Act 49 of 2003)

27B. Recording of adoption in birth register

- (1) The recording of adoption in a birth register contemplated in section 245(1) of the Children's Act shall be made upon application, in the prescribed manner, accompanied by the supporting documents mentioned in section 245(2) of the Children's Act, and any other prescribed requirements in terms of this Act.

- (2) The Director-General shall, subject to the provisions of this Act, record in the prescribed manner the adoption and any change of surname of the adopted child in the birth register in accordance with the adoption order.

(Section 27B inserted by section 14 of Act 18 of 2010)

28. Issuing of certificates

- (1) The Director-General may, upon application in the prescribed manner and in compliance with the prescribed requirements, issue a certificate from the population register in the prescribed form.

(Section 28(1) substituted by section 15 of Act 18 of 2010)

- (2) Every certificate issued in terms of subsection (1), shall in all courts of law be *prima facie* evidence of the particulars set forth therein.

29. Secrecy

- (1) Subject to the provisions of subsection (2), no person shall publish or communicate to any other person any information obtained from documents or records mentioned in section 5(1), and which he or she acquired by virtue of his or her functions in terms of this Act or any other law, except for the purposes of this Act, judicial proceedings or the performance of functions in terms of any other law, and no person who has come into possession of any such information shall publish the information or communicate it to any other person.

- (2) Notwithstanding the provisions of subsection (1), the Director-General may furnish any information in relation to a person submitted in terms of this Act to -

- (a) any department of State, local authority or statutory body for any of the statutory purposes of that department, authority or body; or
- (b) any person who has applied, in the prescribed manner, with a full exposition of the purposes for which the information is required and who has paid the prescribed fees, if any: Provided that the Director-General is satisfied that the furnishing of that information-
 - (i) will not amount to an unreasonable disclosure of that person's personal information as contemplated in section 1 of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000);
 - (ii) is for the protection of the rights, and in the interest, of the person whose particulars are being requested; or
 - (iii) is in the public interest.

(Section 29(2)(b) substituted by section 16 of Act 18 of 2010)

30. ...

(Section 30 repealed by section 17 of Act 18 of 2010)

31. Offences, penalties and evidence

(1) Any person who -

- (a) without reasonable cause fails to furnish any notice, information, statement or certificate required by this Act;
- (b) makes or causes to be made any false statement relating to any of the particulars required by this Act to be made known and registered;
- (c) having the custody of any document or record mentioned in section 5 or a reproduction thereof, loses it or damages it or destroys it or allows it to be damaged or destroyed;
- (d) falsely makes or counterfeits or causes to be falsely made or counterfeited any document or record mentioned in this Act, a certified copy thereof or a certified extract therefrom;
- (e) gives out any writing to be a copy of or extract from any document or record mentioned in section 5 or a reproduction thereof, knowing such writing to be false in any part;
- (f) charges or receives fees for any act performed or to be performed in accordance with the provisions of this Act which are higher than the fees payable in terms of this Act for such act, or where no fees are payable in terms of this Act for such act; or
- (g) without reasonable cause fails to hand over or send any certificate or document as contemplated in section 7(3),

shall be guilty of an offence and on conviction liable to a fine or to imprisonment for a period not exceeding 15 years or to both such fine and such imprisonment.

(Words following section 31(1)(g) substituted by section 18 of Act 18 of 2010)

- (2) If in any proceedings the question arises whether, or it is alleged that, any person obtained in contravention of the provisions of this Act any certificate which has been or may be issued in terms of this Act, and such certificate is forged or spurious, such person shall be presumed to have so obtained such certificate and it shall be presumed that such certificate is forged or spurious until the contrary is proved.

(Section 31 amended by section 4 of Act 67 of 1997)

32. Regulations

The Minister may make regulations relating to-

- (a) the forms which may be used for the purposes of making applications for processes of the Act;
- (b) the requirements and conditions for making applications in terms of this Act;
- (c) the certificates which may be issued under this Act and the requirements for the issuing of certificates;
- (d) any matter that may be prescribed under this Act; and
- (e) any ancillary or incidental administrative or procedural matter that it is necessary to prescribe for the proper implementation and administration of this Act.

(Section 32 substituted by section 19 of Act 18 of 2010)

33. Repeal and amendment of Acts, and savings

- (1) Subject to the provisions of subsection (2), the Acts mentioned in the Schedule are hereby repealed or amended to the extent set out in the third column thereof.
- (2) Anything done under any provision of an Act repealed by subsection (1) and which could be done under a provision of this Act shall be deemed to have been done under the latter provision.
- (3) A person who was in the process of undergoing a change of sex before commencement of this Act, may on completion of the said process apply in terms of section 7B of the Births, Marriages and Deaths Registration Act, 1963, for the alteration of the sex description in his or her birth register.

(Section 33(3) inserted by section 76 of Act 129 of 1993)

34. Short title

This Act shall be called the Births and Deaths Registration Act, 1992, and shall come into operation on a date fixed by the State President by proclamation in the *Gazette*.

SCHEDULE**Acts repealed or amended****(Section 33)**

No. and year of Act	Title	Extent of repeal or amendment
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1 of 1937	Aliens Act, 1937	So much as is unrepealed
25 of 1961	Marriage Act, 1961	Insertion after section 29 of the following section: "Registration of marriages <u>29A. (1) The marriage officer solemnizing any marriage, the parties thereto and two competent witnesses shall sign the marriage register concerned immediately after such marriage has been solemnized.</u> <u>(2) The marriage officer shall forthwith transmit the marriage register and records concerned, as the case may be, to a regional or district representative designated as such under section 21(1) of the Identification Act, 1986 (Act No. 72 of 1986)."</u>
81 of 1963	Births, Marriages and Deaths Registration Act, 1963	The whole
17 of 1967	Births, Marriages and Deaths Registration Amendment Act, 1967	The whole
18 of 1968	Births, Marriages and Deaths Registration Amendment Act, 1968	The whole
58 of 1970	Births, Marriages and Deaths Registration Amendment Act, 1970	The whole
51 of 1974	Births, Marriages and Deaths Registration Amendment Act, 1974	The whole
35 of 1982	Births, Marriages and Deaths Registration Amendment Act, 1982	The whole
41 of 1986	Marriages, Births and Deaths Amendment Act, 1986	The repeal of the whole, except sections 1, 2, 3 and 22, and the amendment of section 22 by the deletion therein of the words "or under a provision of the Births, Marriages and Deaths Registration Act, 1963".

(1 March 2014 – to date)

BIRTHS AND DEATHS REGISTRATION ACT 51 OF 1992

(Gazette No. 13953, dated 6 May 1992. Commencement date: 1 October 1992 [Proclamation No. R.79, Gazette No. 14182, dated 9 September 1992])

REGULATIONS ON THE REGISTRATION OF BIRTHS AND DEATHS, 2014

Government Notice R128 in Government Gazette 37373 dated 26 February 2014. Commencement date: 1 March 2014.

The Minister of Home Affairs has, in terms of section 32 of the Births and Deaths Registration Act, 1992 (Act No. 51 of 1992), made the Regulations in the Schedule.

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1. Definitions

In these regulations any word or expression to which a meaning has been assigned in the Act shall have that meaning and, unless the context otherwise indicates -

“Children's Act” means the Children's Act, 2005 (Act No. 38 of 2005);

“informant” means a person who gives notice of death under regulation 14;

“funeral undertaker” means a person who is designated as such in terms of section 22A of the Act;

“identity document” means an identity document or card issued in terms of the Identification Act;

“Identification Act” means the Identification Act, 1997 (Act No. 68 of 1997);

“Immigration Act” means the Immigration Act, 2002 (Act No. 13 of 2002);

“Inquests Act” means the Inquests Act, 1959 (Act No. 58 of 1959);

“inspectorate” means the inspectorate established in terms of section 33(1) of the Immigration Act;

“late registration of birth” means a notice of birth given after the expiry of the period of 30 days contemplated in section 9(3A) of the Act;

“medical practitioner” means a person registered as a medical practitioner under the Health Professions Act, 1974 (Act No. 56 of 1974) and who has a valid practice number issued by the relevant health professions council;

“national population register” means the population register contemplated in section 5 of the Identification Act;

“non-South African citizen” means a person who holds a valid temporary residence visa contemplated in sections 11 to 23 of the Immigration Act, and includes an asylum seeker or refugee issued with a permit in terms of section 22 or 24 of the Refugees Act;

“Refugees Act” means the Refugees Act, 1998 (Act No. 130 of 1998);

“South African Citizenship Act” means the South African Citizenship Act, 1995 (Act No. 88 of 1995);

“the Act” means the Births and Deaths Registration Act, 1992 (Act No. 51 of 1992); and

“valid passport” means a valid passport as contemplated in regulation 2 of the Regulations made under the Immigration Act.

2. Powers and duties of Director-General

- (1) Subject to the provisions of the Act, the Director-General shall -
 - (a) safeguard and take charge of, and subject to the provisions of section 6(1) of the Act, preserve all books, registers, forms, notices, records and any other document of which he or she is the custodian, or which is required to be furnished to him or her, in terms of the Act or these Regulations;
 - (b) keep supplies of forms, certificates, notices, registers and any other document required to be used with regard to the implementation of the provisions of the Act and these Regulations with a view to supply such forms, certificates, notices, registers or any other document to any person contemplated in section 4(1) of the Act; and

- (c) receive from informants and persons referred to in section 4(1) of the Act, the completed registers, forms, notices or any other documents accompanied by supporting declarations and certificates, where prescribed, and verify such documents.
- (2) If a birth has been registered twice in the national population register, the Director-General shall cancel one of the two registrations.
- (3) The Director-General must reject a notice of birth or death if he or she is satisfied that the notice -
 - (a) is not in compliance with the Act;
 - (b) contains information that is inaccurate or cannot be verified; or
 - (c) amounts to misrepresentation or fraud.
- (4) Where the notice of birth is rejected, the Director-General shall cause the rejected notice to be safely stored as part of the records of the Department.
- (5) Where it appears to the Director-General that any person has knowingly made any false statement relating to any notice in terms of the Act, he or she must lay a charge or cause a charge to be laid against such person as contemplated in section 31(1)(b) of the Act.

REGISTRATION OF BIRTHS

3. Notice of birth for children born of South African citizens

- (1) Any South African citizen must give notice of the birth of his or her child within 30 days of the birth as contemplated in subregulation (3).
- (2) Where both parents of a child whose birth is sought to be registered in terms of subregulation (1) are deceased, the notice of birth must be made by the next-of-kin or legal guardian of the child.
- (3) A notice of birth referred to in subregulation (1) must be given by, where possible, both parents to the Director-General on Form DHA-24 illustrated in Annexure 1A and be accompanied by -
 - (a) proof of birth on Form DHA-24/PB illustrated in Annexure 1D attested to by a medical practitioner who -
 - (i) attended to the birth; or
 - (ii) examined the mother or the child after the birth of the child;

- (b) an affidavit attested to by a South African citizen who witnessed the birth of the child where the birth occurred at a place other than a health institution on Form DHA-24/PBA illustrated in Annexure 1E;
- (c) biometrics, in the form of a palm, foot or fingerprint of the child whose birth is sought to be registered in the appropriate space on Form DHA-24 illustrated in Annexure 1A;
- (d) fingerprints of the parents, which shall be verified online against the national population register: Provided that where the fingerprints cannot be verified online, the full set of fingerprints of the parents shall be taken on Form DHA-24/A illustrated in Annexure 1C;
- (e) a certified copy of the identity document of the biological or adoptive mother or father or both parents of the child whose birth is sought to be registered, as the case may be;

where available

- (f) a certified copy of a valid passport and visa or permit, where one parent is a non- South African citizen;

- (g) where applicable, a certified copy of a death certificate of any deceased parent;
- (h) where applicable, a certified copy of the marriage certificate of the parents of the child whose birth is sought to be registered;

and available

- (i) where applicable, a certified copy of the identity document or valid passport and visa or permit of the next-of-kin or legal guardian; and

- (j) where applicable, Form DHA-288/B illustrated in Annexure 2C.

- (4) Where a woman gives birth to more than one child during a single confinement, a notice of birth referred to in subregulation (1) must, be given for each child on a separate Form DHA-24 illustrated in Annexure 1A with all the supporting documents contemplated in subregulation (3) and the exact time of each birth must be recorded on this Form.

- ~~(5) A notice of birth which does not meet the requirements of subregulations (3) and (4), shall not be accepted.~~

4. Late registration of birth of children of South African citizens

- (1) A notice of birth given later than 30 days after the birth but before the child is older than one year, shall be given in accordance with subregulation (3).

- (2) Where both parents of a child whose birth is sought to be registered in terms of subregulation (1) are deceased, the notice of birth must be given by the next-of-kin or legal guardian of the child.
- (3) A notice of birth referred to in subregulation (1) must be given by, where possible, both parents to the Director-General on Form DHA-24/LRB illustrated in Annexure 1B and be accompanied by -
 - (a) proof of birth on Form DHA-24/PB illustrated in Annexure 1D attested to by a medical practitioner who -
 - (i) attended to the birth; or
 - (ii) examined the mother or the child after the birth of the child;
 - (b) an affidavit attested to by a South African citizen who witnessed the birth of the child where the birth occurred at a place other than a health institution on Form of DHA-24/PBA illustrated in Annexure 1E;
 - (c) biometrics, in the form of a palm, foot or fingerprint, of the child whose birth is sought to be registered in the appropriate space on Form DHA-24 illustrated in Annexure 1A;
 - (d) fingerprints of the parents, which shall be verified online against the national population register: Provided that where the fingerprints cannot be verified online, the full set of fingerprints of the parents shall be taken on form DHA-24/A illustrated in Annexure 1C;
 - (e) a certified copy of the identity document of the biological or adoptive mother or father or both parents of the child whose birth is sought to be registered, as the case may be;

where available

- (f)  a certified copy of a valid passport and visa or permit, where one parent is a non- South African citizen;
- (g) where applicable, a certified copy of the death certificate of any deceased parent;
- (h) where applicable, a certified copy of the marriage certificate of the parents of the child whose birth is sought to be registered;
- and available**
- (i) where applicable,  a certified copy of the identity document or valid passport and visa or permit of the next-of-kin or legal guardian;
- (j) Form DHA-288/A illustrated in Annexure 2A;
- (k) where applicable, Form DHA-288/B illustrated in Annexure 2C; and

(l) proof of payment of the applicable fee.

(4) Where a woman gives birth to more than one child during a single confinement, the notice of birth contemplated in subregulation (1) must be given for each child separately on Form DHA-24 illustrated in Annexure 1A with all the supporting documents contemplated in subregulation (3) and the exact time of each birth must be recorded in that Form.

~~(5) A notice of birth which does not meet the requirements of subregulations (3) and (4), shall not be accepted.~~

5. Late registration of birth of children older than one year born of South African citizens

(1) A notice of birth for a child or a person who is older than one year must be made by the biological parents of the child or a person as contemplated in subregulation (3).

(2) Where both parents of a child or person whose birth is sought to be registered in terms of subregulation (1) are deceased, the notice of birth must be given by the next-of-kin or legal guardian of the child or person: Provided that where the person whose birth is sought to be registered is 18 years or older, such a person may give notice of his or her own birth.

(3) A notice of birth referred to in subregulation (1) must be given by, where possible, both parents to the Director-General on Form DHA-24/LRB illustrated in Annexure 1B and be accompanied by -

(a) proof of birth on Form DHA-24/PB illustrated in Annexure 1D attested to by a medical practitioner who -

(i) attended to the birth; or

(ii) examined the mother or the child after the birth of the child;

(b) an affidavit attested to by a South African citizen who witnessed the birth of the child or the person where the birth occurred at a place other than a health institution on Form DHA-24/PBA illustrated in Annexure 1E;

(c) biometrics, in the form of a palm, foot or fingerprint, of any child younger than 7 years whose birth is sought to be registered in the appropriate space on Form DHA-24 illustrated in Annexure 1A;

(d) fingerprints of the parents and the child or person who is 7 years or older, which shall be verified online against the national population register: Provided that where the parents, or the child or the person's fingerprints cannot be verified online, the full set of fingerprints of the parents, the child or the person shall be taken on Form DHA-24/A illustrated in Annexure 1C;

- (e) two recent identity size photographs of a child or person who is 7 years or older, affixed to the appropriate space on Form DHA-24/A illustrated in Annexure 1C;

where available

- (f) [^] a certified copy of the identity document or passport and visa or permit of the parents of the child or person whose birth is sought to be registered, where one of the parents is a non-South African citizen;

- (g) where applicable, a certified copy of the death certificate of any deceased parent of the child or person;

- (h) where applicable, a certified copy of the marriage certificate of the parents of the child or person;

and available

- (i) where applicable, [^] a certified copy of the identity document or passport and visa or permit of the next-of-kin or legal guardian of the child or person;

- (j) Form DHA-288/A illustrated in Annexure 2A;

- (k) Form DHA-288 illustrated in Annexure 2B;

- (l) where applicable, Form DHA-288/B illustrated in Annexure 2C; and

- (m) proof of payment of the applicable fee.

- (4) Where a woman gives birth to more than one child during a single confinement, the notice of birth contemplated in subregulation (1) must be given for each child separately on Form DHA-24 illustrated in Annexure 1A with all the supporting documents contemplated in subregulation (3) and the exact time of each birth must be recorded in that Form.

- ~~(5) A notice of birth which does not meet the requirements of subregulations (3) and (4), shall not be accepted.~~

6. Verification, approval or rejection of notice of birth

- (1) Upon approval of a notice of birth given in accordance with regulations 3,4 and 5 the Director-General must issue to the parents -

- (a) a birth certificate on Form DHA-5 illustrated in Annexure 4; or

- (b) an acknowledgement of receipt on Form DHA-25 illustrated in Annexure 3, if, for any reason, the birth certificate cannot be issued immediately.

- (2) Any person who is issued with a birth certificate must verify the information contained therein and if found to be incorrect must, within 7 days of receipt of the birth certificate, return such birth certificate to the Director-General for rectification as contemplated in section 7 of the Act.
- (3) The Director-General must, in respect of each notice of birth contemplated in regulations 3, 4 and 5, authenticate the veracity of the information furnished to him or her and either approve or reject the notice.
- (4) For the purposes of subregulation (3), the Director-General may prior to approval of notice of birth contemplated in regulation 3, 4 or 5 cause any person who gives the notice or supported such notice to be interviewed by a screening committee established by him or her.
- (5) The screening committee must, after interviewing all relevant persons relating to the information contained in the notice, make recommendations to the Director-General who shall consider and approve or reject the notice.
- (6) Where it is apparent from a notice of birth that the child or the person whose birth is sought to be registered is a non-South African citizen, the Director-General may deal with the notice as contemplated in regulation 8.
- (7) The date of birth or identity number allocated to a child or person whose notice of birth was approved as contemplated in subregulation (1) may not be rectified after the period contemplated in subregulation (2).
- (8) Where a notice of birth is rejected, the Director-General shall inform the parents, in writing, of the rejection of the notice.
- (9) If at any time after a birth certificate has been issued it becomes apparent that the birth certificate was issued erroneously to any person, the Director-General must cancel the birth registration, birth certificate and any other documents, including an identity document or passport issued to the holder of such birth certificate.

7. Notice of birth of children born of permanent residents and refugees

- (1) Regulations 3, 4, 5 and 6 shall apply with the necessary changes to persons who hold permanent residence status in terms of section 26 or 27 of the Immigration Act and to persons who hold refugee status in terms of section 24 of the Refugees Act.
- (2) Upon approval of a notice of birth, the Director-General must issue to the parents a birth certificate with an identity number for holders of a valid -

- (a) permanent residence permit issued in terms of the Immigration Act, on a Form DHA-19 illustrated in Annexure 24, as contemplated in terms of section 7(2)(b) of the Identification Act; or
- (b) refugee permit issued in terms of section 24 of the Refugees Act, on Form DHA-19 illustrated in Annexure 24, as contemplated in terms of section 7(2)(b) of the Identification Act.

8. Notice of birth of children born of parents who are non-South African citizens

- (1) A notice of birth of a child born of parents who are non-South African citizens and who are not permanent residents or refugees must be given as contemplated in subregulation (3) by either parent of the child within 30 days of the birth of the child in the Republic.
- (2) Where the parents of the child whose birth is sought to be registered as contemplated in subregulation (1) are deceased, the notice of birth may be given by the next-of-kin or legal guardian of the child.
- (3) A notice of birth referred to in subregulation (1) must be given to the Director-General on Form DHA-24 illustrated in Annexure 1A and be accompanied by -
 - (a) proof of birth on Form DHA-24/PB illustrated in Annexure 1D attested to by a medical practitioner who -
 - (i) attended to the birth; or
 - (ii) examined the mother or the child after the birth of the child;
 - (b) an affidavit attested to by a person who witnessed the birth of the child where the birth occurred at a place other than a health institution on Form DHA-24/PBA illustrated in Annexure 1F;
 - (c) a certified copy of a valid passport and visa or permit of the mother or father, or both parents, of the child, as the case may be;
 - (d) where applicable, a certified copy of the valid identity document or passport and visa or permit of the next-of-kin or legal guardian;
 - (e) where applicable, a certified copy of an asylum seeker permit issued in terms of section 22 of the Refugees Act of the mother or father or both biological parents of the child;
 - (f) where applicable, a certified copy of the death certificate of any deceased parent of the child;
 - (g) where applicable, a certified copy, of the marriage certificate of the parents of the child whose birth is sought to be registered;

- (h) where applicable, Form DHA-288/B illustrated in Annexure 2C; and
 - (i) proof of payment of the applicable fee.
- (4) Where a woman gives birth to more than one child during a single confinement, the notice of birth contemplated in subregulation (1) must be given for each child separately on Form DHA-24 illustrated in Annexure 1A with all the supporting documents contemplated in subregulation (3) and the exact time of each birth must be recorded in that Form.
- (5) Upon approval of a notice of birth, the Director-General must issue to the parents a birth certificate without an identity number on Form DHA-19 illustrated in Annexure 24, in terms of section 5(3) of the Act.

9. Notice of birth of abandoned or orphaned children

- (1) A notice of birth of an abandoned or orphaned child in terms of section 12 of the Act must be given on Form DHA-24 illustrated in Annexure 1A by a social worker within 60 days of obtaining a court order in terms of section 156 of the Children's Act, and must be accompanied by -
- (a) a court order issued by the children's court;
 - (b) a certified copy of the identity document or valid passport and visa or permit of the social worker;
 - (c) where available, a certified copy of the identity document or passport and visa or permit of the parents of the child;
 - (d) where available, a certified copy of the death certificate of the parents of the child; and
 - (e) a social workers' report that was presented to the children's court.
- (2) Where it is apparent from a notice of birth that the child whose birth is sought to be registered in terms of the court order is a non-South African citizen, the Director-General may deal with the notice as contemplated in regulation 8 and inform the relevant children's court accordingly.
- (3) The social worker who submits a notice of birth of a child referred to in subregulation (1), must give a name or surname, or both name and surname, to that child if the name or surname or both name and surname have not been given to the child.
- (4) A birth certificate issued in terms of section 12 of the Act must contain the particulars of the parents of the child where such particulars are known.

10. Recording of adoption in birth register

- (1) An application for recording of adoption referred to in section 27B of the Act must be made by the adoptive parents, within 90 days of the registration of the adoption order by the adoption registrar, on Form DHA-1773 illustrated in Annexure 13.
- (2) The application contemplated in subregulation (1) must be supported by the documentation referred to in section 245 of the Children's Act, which are -
 - (a) a certified copy of the adoption order;
 - (b) a certified copy of the original birth certificate of the child; and
 - (c) where applicable, proof of payment of the applicable fee.
- (3) Upon approval of the application to record the adoption of the child on the birth register, the old identity number of the adopted child must be blocked and marked and a new identity number issued, together with a corresponding birth certificate recording the names of the adoptive parents.

11. Birth outside Republic

- (1) A notice of birth given for a child born of South African citizens outside the Republic as contemplated in section 13 of the Act shall be on Form DHA-24 illustrated in Annexure 1A and be accompanied by -
 - (a) Form DHA-529 illustrated in Annexure 5; and
 - (b) an unabridged birth certificate or other similar document issued by the relevant authority in the country where the birth occurred.
- (2) A notice of birth contemplated in subregulation (1) must comply with the requirements as set out in regulation 3, 4 or 5, as the case may be.
- (3) A notice of birth contemplated in subregulation (1) must be given to the Head of a South African diplomatic or consular mission or to any district or regional office of the Department in the Republic.
- (4) The Director-General must, in respect of each notice received in terms of this regulation, determine the citizenship of the parents in accordance with the provisions of the South African Citizenship Act, and if one of the parents is a South African citizen, register the birth in terms of section 5(2) of the Act and issue a birth certificate to the parents.

- (5) Any person who, in terms of section 6 of the South African Citizenship Act, has lost and subsequently applied for resumption of his or her South African citizenship and requires his or her child to be registered in terms of this regulation, must give such notice in the Republic.

CHILDREN BORN OUT OF WEDLOCK

12. Notice of birth of child born out of wedlock

- either or the father**
- (1) A notice of birth of a child born out of wedlock shall be made by the mother of the child on Form DHA-24 illustrated in Annexure 1A or Form DHA-24/LRB illustrated in Annexure 1A, whichever applicable.
- (2) The person who acknowledges that he is the father of the child born out of wedlock must -
- (a) enter his particulars and sign on Part D of Form DHA-24 illustrated in Annexure 1A or on Part D of Form DHA-24/LRB illustrated in Annexure 1B, as the case may be, at the offices of the Department and in the presence of an official of the Department as contemplated in section 10(1)(b) of the Act;
 - (b) submit an affidavit on Form DHA-288/C illustrated in Annexure 2D in which he -
 - (i) states his relationship to the mother; and
 - (ii) acknowledges paternity of the child; and
 - ~~(c) have his fingerprints verified online against the national population register. Provided that in the event of the father being a non South African citizen, he must submit a certified copy of his valid passport and visa or permit, permanent residents identity document or refugee identity document.~~

13. Amendment of birth registration of child born out of wedlock

- (1) An application for an amendment of birth registration referred to in section 11(1) of the Act shall be made on Form DHA-59 illustrated in Annexure 7.
- (2) The Director-General must upon the approval of the application contemplated in subregulation (1), amend the registration of the birth and issue a new birth certificate in accordance with the said application.

14. Application for insertion of unmarried father's particulars in birth register of child born out of wedlock

- (1) An application for the insertion of the father's particulars in terms of section 11(4) of the Act shall be made on Form DHA-1682 illustrated in Annexure 6.
- (2) An application contemplated in subregulation (1) made by a person who is a non-South African citizen shall be accompanied by original paternity test results, not older than 3 months, from an institution designated by the Director-General confirming that such person is the biological father of the child.
- (3) The Director-General must authenticate the veracity of the information furnished to him or her in respect of the application contemplated in subregulation (1) before approving the application.
- (4) Upon approval of the application, the Director-General must record the particulars of the person as the father of the child on the birth register of the child and issue to such person -
 - (a) a birth certificate on Form DHA-5 illustrated in Annexure 4; or
 - (b) an acknowledgement of receipt on Form DHA-25 illustrated in Annexure 3, if, for any reason, the birth certificate cannot be issued immediately.

AMENDMENTS OR ALTERATIONS

15. Alteration of particulars of registered father of child born out of wedlock

- (1) Any person who requires to alter the particulars of a father whose particulars already appear in the birth register of a child as the father as contemplated in sections 10(1)(b) and 11(4) of the Act, shall submit an application on Form DHA-1682 illustrated in Annexure 6, supported by conclusive proof contemplated in subregulation (2).
- (2) The conclusive proof contemplated in subregulation (1) shall be in the form of original paternity test results not older than 3 months, obtained at the cost of the applicant from an institution designated by the Director-General.

16. Alteration of forename

- (1) An application for the alteration of a forename referred to in section 24 of the Act must be made on Form DHA-85 illustrated in Annexure 8.
- (2) A person of age who, in terms of section 24 of the Act, has previously applied for and was granted a change of a forename, may not thereafter apply for a subsequent change of his or her forename, unless -
 - (a) there are exceptional circumstances, which circumstances must be clearly stated and attested to in the Form of an affidavit; or

(b) his or her forename was initially changed whilst he or she was still a minor.

- (3) The identity number of a person who has altered his or her forename in terms of section 24 of the Act may not be amended.

17. Alteration of surname of minor

- (1) An application for the alteration of a surname of a minor referred to in section 25 of the Act must be made on Form DHA-193 illustrated in Annexure 9.
- (2) Despite the alteration of a surname of a minor, the recorded particulars of the biological father must not be amended on the birth certificate of the minor except upon approval of the application made in terms of regulation 11, 12 or 13, or where the minor is the subject of an adoption order or a court order has been granted to that effect.
- (3) The identity number of a minor whose surname has been altered in terms of section 25 of the Act may not be amended.

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 DHA-462 or DHA-196 illustrated in Annexure 10 and Annexure 11, as the case may be.
- (2) The reasons referred to in section 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 No. 112 of 1998).
- (3) An application contemplated in subregulation (1) must be accompanied by -
- (a) a certified copy of the identity document or birth certificate of the applicant;
 - (b) a certified copy of the identity document or valid passport of the biological mother or father or both parents of the child, as the case may be;
 - (c) where applicable, a certified copy of the marriage certificate of the parents;

- (d) where applicable, a certified copy of the death certificate of any deceased parent;
 - (e) where applicable, a letter issued by the Director: Witness Protection; and
 - (f) proof of payment of the applicable fee.
- (4) Upon approval of an application contemplated in subregulation (1), any alteration of a forename, surname or assumption of another surname made in terms of section 24, 25 or 26 of the Act must be made -
- (a) by entering the altered forename or surname or assumed surname of the minor in the birth register; and
 - (b) if the particulars of the person have been included in the national population register, by including the altered forename, surname or assumed surname in the national population register,
- without erasing the previous forename, surname or assumed surname.
- (5) The assumption of another surname contemplated in subregulation (2)(a), (b) or (d) shall not have the effect of changing a person's identity number.

19. Alteration of sex description

An application for alteration of sex description contemplated in section 27A of the Act, must be made on Form DHA-526 illustrated in Annexure 12.

20. Publication of amplification of birth register, alterations of forenames and surnames

In the case of an alteration or amplification of a forename or surname referred to in section 27 of the Act, the full names of the person as they existed before the alteration or amplification, his or her identity number and his or her altered or amplified forename or surname, must be published in the *Government Gazette*.

REGISTRATION OF DEATHS

21. Notice of death for South African citizens

- (1) A notice of death must be given within 72 hours of the death by the informant -

- (a) on Form DHA-1663 illustrated in Annexure 14 to the Director-General, where the cause of death certificate contemplated in section 15(1) or (2) of the Act was issued by a medical practitioner; or
 - (b) on Form DHA-1680 illustrated in Annexure 15 where the cause of death certificate contemplated in section 15(1) or (2) of the Act was not issued by a medical practitioner; and
 - (c) be accompanied by the following supporting documents:
 - (i) the original identity document of the deceased;
 - (ii) in respect of a minor, the original birth certificate;
 - (iii) the biometrics of the deceased and the informant must be affixed in the appropriate space provided on Form DHA-1680 illustrated in Annexure 15 and, in the case where the biometrics cannot be affixed, an affidavit containing the reasons as to why such biometrics were not affixed must be attached; and
 - (iii) a certified copy of the identity document of the informant.
- (2) An official of the Department to whom a notice of death is given as contemplated in subregulation (1) must -
- (a) verify the particulars of the deceased against the national population register;
 - (b) verify the particulars of the informant or the authorised funeral undertaker online against the national population register and attach the online verification report to the death register: Provided that where the fingerprints cannot be verified online, the informant or the funeral undertaker must have his or her full set of fingerprints taken on Form DHA-24/A illustrated in Annexure 1C;
 - (c) record the cause of death as -
 - (i) “natural causes”, if satisfied that the death was due to natural causes;
 - (ii) “unnatural causes”, if satisfied that the death was due to unnatural causes; or
 - (iii) “under investigation” and the case number, if the death is still under investigation in terms of section 3 of the Inquests Act;
 - (d) take possession of, cancel and destroy the original identity document of the deceased in terms of section 20 of the Identification Act or mark the birth certificate as “deceased”;

- (e) issue to the informant a death certificate on Form DHA-5 illustrated in Annexure 4 or, if the death certificate cannot be issued immediately, proof of notice of death on Form DHA-1577 illustrated in Annexure 17; and
- (f) issue to the informant a burial order on Form DHA-14A illustrated in Annexure 16.

22. Notice of death for non-South African citizens

- (1) A notice of death must be given within 72 hours of the death by the informant -
 - (a) on Form DHA-1663 illustrated in Annexure 14 to the Director-General, where a cause of death certificate contemplated in section 15(1) or (2) of the Act was issued by a medical practitioner; or
 - (b) on Form DHA-1680 illustrated in Annexure 15 where a cause of death certificate contemplated in section 15(1) or (2) of the Act was not issued by a medical practitioner; and
 - (c) be accompanied by the following supporting documents:
 - (i) A certified copy of the identity document or valid passport of the informant;
 - (ii) the biometrics of the deceased and the informant must be affixed in the appropriate space provided on Form DHA-1680 illustrated in Annexure 15 and in the case where the biometrics cannot be affixed, an affidavit containing the reasons as to why such biometrics were not affixed must be attached; and
 - (iii) a certified copy of the identity document of the informant.
- (2) An official of the Department to whom a notice of death is given as contemplated in subregulation (1) must -
 - (a) verify the particulars of the deceased;
 - (b) verify the particulars of the informant or the funeral undertaker online against the national population register and attach the online verification report to the death register: Provided that where the informant or funeral undertaker's fingerprints cannot be verified online, the informant or the funeral undertaker must have his or her full set of fingerprints taken on Form DHA-24/A illustrated in Annexure 1C;
 - (c) record the cause of death as -

- (i) “natural causes”, if satisfied that the death was due to natural causes;
 - (ii) “unnatural causes”, if satisfied that the death was due to unnatural causes; or
 - (iii) “under investigation” and the case number, if the death is still under investigation in terms of section 3 of the Inquests Act;
- (d) issue to the informant a death certificate on Form DHA-18 illustrated in Annexure 25; and
- (e) issue to the informant a burial order on Form DHA-14A illustrated in Annexure 16.

23. Certificate by medical practitioner

- (1) A certificate in respect of a death due to causes referred to in sections 15(1) and (2) and 17(1) of the Act, must be issued on Form DHA-1663 illustrated in Parts A, B, C and G of Annexure 14.
- (2) The medical practitioner concerned must, on request and free of charge, issue to the informant or funeral undertaker the original Form DHA-1663 illustrated in Annexure 14, excluding Part G, and preserve a copy of the Annexure 14 for a period of at least five years.
- (3) The Director-General may at any time require the concerned medical practitioner to submit a copy of any cause of death certificate issued by him or her.

24. Notice of stillbirth

- (1) A notice of stillbirth must be given within 72 hours, in terms of section 18(1) of the Act, on Form DHA-1663 illustrated in Parts A, B, D, and F of Annexure 14.
- (2) The declaration referred to in section 18(2) of the Act must be on Form DHA-6 illustrated in Annexure 18.

25. Death outside Republic

- (1) A notice of death of a person who died outside the Republic as contemplated in section 19(1) of the Act may be given to the head of any South African diplomatic or consular mission or to any district or regional office of the Department in the Republic.
- (2) A notice of death contemplated in subregulation (1) shall be accompanied by -
 - (a) a death certificate or any other document issued by the authority of the country where the death occurred;

- (b) a copy of the identity document or passport of the deceased; and
 - (c) a copy of the identity document or passport and visa or permit of the informant;
- (3) On receipt of the notice contemplated in subregulation (1), the official at the mission must complete Form DHA-1663 illustrated in Annexure 14 and issue proof of notice of death to the informant on Form DHA-1577 illustrated in Annexure 17.
- (4) The head of a mission must, as soon as possible, forward to the Director-General each completed DHA-1663 illustrated in Annexure 14, together with all the supporting documents, and the Director-General shall record the death as contemplated in regulation 21(2).
- (5) A proof of notice of death must be issued upon registration of death, in addition to a burial order.
- (6) The granting of permission in terms of section 19(3) of the Act for the issuing of a burial order, must be made, in writing, on the strength of a death certificate or other similar document issued by the authority concerned in the country where the death occurred and the Director-General may, in his or her discretion, request any further information in respect of the deceased, or investigate or cause to be investigated the desirability or not of the burial in the Republic.

26. Burial order

A burial order referred to in sections 14(2), 17(2), 18(3), 19(2) and 20(1) of the Act must be on Form DHA-14B illustrated in Annexure 19.

27. Burial register

The particulars to be entered into the burial register as contemplated in section 21 of the Act are -

- (a) the names and surname of the deceased, as contained in the burial order;
- (b) the identity number or passport number of the deceased;
- (c) the date of death of the deceased;
- (d) the serial number on the burial order;
- (e) the details of the funeral undertaker;
- (f) the date of burial; and
- (g) where applicable, the grave number.

28. Death certificate

A death certificate referred to in section 22 of the Act must be issued on Form DHA-5 or DHA-20 illustrated in Annexure 4 and Annexure 20, as the case may be.

29. Designation of funeral undertakers

- (1) An application for designation as a funeral undertaker in terms of section 22A(1) of the Act must be made on Form DHA-1774 illustrated in Annexure 21 and be accompanied by -
 - (a) a certified copy of the identity document of the applicant;
 - (b) a certificate of competence issued by the relevant municipality or authority;
 - (c) where applicable, a business licence;
 - (d) a recent valid tax registration certificate for the business issued by the South African Revenue Service;
 - (e) proof of registration with any federation or association of funeral undertakers; and
 - (f) proof of payment of the applicable fee.
- (2) In order to qualify for designation as funeral undertaker, a person must -
 - (a) be a South African citizen of 18 years or older;
 - (b) not be an official employed by the Department; and
 - (c) demonstrate to the Director-General his or her knowledge of the Act by successfully completing a written examination conducted by the Department from time to time.
- (4) A designated funeral undertaker who acts as an informant on behalf of the family of the deceased must submit proof of appointment to confirm him or her as the representative of the family of the deceased whose notice of death is being given by such funeral undertaker.
- (5) The Director-General may withdraw the designation as a funeral undertaker if satisfied that the funeral undertaker has not complied with the provisions of the Act or has been convicted of a criminal offence without the option of a fine.

30. Issuing of certificates

Prepared by:

In partnership with:

- (1) An application for a certificate contemplated in section 28(1) of the Act must be made on Form DHA-132 or DHA-154 illustrated in Annexures 21 and 22, as the case may be.
- (2) A certificate issued as a duplicate must be clearly marked as a “duplicate”.
- (3) A certificate contemplated in subregulation (2) must be issued subject to the provisions of section 29 of the Act.

31. Surrender of documents and certificates containing incorrect information and rectification

- (1) The holder of a certificate or document referred to in section 7(3) of the Act, or his or her parent, next-of-kin or legal guardian must, if he or she or his or her parent, next-of-kin or legal guardian has been requested to do so, hand such certificate or document to the Director-General.
- (2) An application for amendment or rectification of particulars made in terms of section 7(4) of the Act must be on Form DHA-526 illustrated in Annexure 12.
- (3) The Director-General must, if satisfied that the particulars contained in the national population register are incorrect, amend or rectify such particulars by including the correct particulars in the national population register and link the new particulars to the previous particulars without erasing the previous particulars.

MISCELLANEOUS

32. Repeal of Regulations and savings

- (1) The Regulations on the Registration of Births and Deaths, 1992, published by Government Notice No. R.2139 of 9 September 1992, are hereby repealed.
- (2) Anything done under a provision of the Regulations repealed by subregulation (1) which could have been done under a provision of these Regulations, shall be regarded as having been done under the provision of these Regulations.

33. Short title

These Regulations shall be called the Regulations on the Registration of Births and Deaths, 2014 and shall come into operation on 1 March 2014.

LIST OF ANNEXURES

FORM	ANNEXURE	DESCRIPTION
DHA-24	Annexure 1A	APPLICATION FOR A BIRTH CERTIFICATE (WITHIN 30 DAYS)
DHA-24/LRB	Annexure 1B	APPLICATION FOR A BIRTH CERTIFICATE (AFTER 30 DAYS)
DHA-24/A	Annexure 1C	FINGERPRINTS FOR THE NOTICE OF BIRTH
DHA-24/PB	Annexure 1D	PROOF OF BIRTH
DHA-24/PBA	Annexure 1E	AFFIDAVIT RELATING TO PROOF OF BIRTH (For South African citizens)
DHA- 24/PBA	Annexure 1F	AFFIDAVIT RELATING TO PROOF OF BIRTH (For non South African citizens)
DHA-288/A	Annexure 2A	AFFIDAVIT FOR NOTICE OF BIRTH GIVEN AFTER 30 DAYS UP TO 1 YEAR
DHA-288	Annexure 2B	AFFIDAVIT BY PARENT IN SUPPORT OF NOTICE OF BIRTH GIVEN AFTER 1 YEAR
DHA-288/B	Annexure 2C	AFFIDAVIT GIVEN BY NEXT OF KIN / LEGAL GUARDIAN
DHA-288C	Annexure 2D	AFFIDAVIT FOR CONFIRMATION OF PATERNITY FOR CHILDREN BORN OUT OF WEDLOCK
DHA-25	Annexure 3	ACKNOWLEDGEMENT OF RECEIPT OF NOTICE OF BIRTH
DHA		UNABRIDGED BIRTH CERTIFICATE
DHA-529		DETERMINATION OF CITIZENSHIP STATUS
DHA-1682	Annexure 6	APPLICATION FOR INSERTION OF UNMARRIED NATURAL FATHER'S PARTICULARS IN THE BIRTH REGISTER OF A CHILD BORN OUT OF WEDLOCK
DHA-59	Annexure 7	APPLICATION FOR AMENDMENT OF MARITAL STATUS OF PARENTS OF A CHILD BORN OUT OF WEDLOCK
DHA-85	Annexure 8	APPLICATION FOR ALTERATION OF FORENAMES
DHA-193	Annexure 9	APPLICATION FOR ALTERATION OF SURNAME OF MINOR
DHA-462	Annexure 10	AFFIDAVIT FOR CHANGE OF SURNAME OF A CHILD BORN OUT OF WEDLOCK
DHA-196	Annexure 11	APPLICATION FOR AUTHORITY TO ASSUME ANOTHER SURNAME
DHA-526	Annexure 12	APPLICATION FOR VERIFICATION, SUPPLEMENTATION OR RECTIFICATION OF PERSONAL PARTICULARS
DHA-1773	Annexure 13	APPLICATION FOR RECORDING OF ADOPTION
DHA-1663 A		NOTICE OF DEATH / STILLBIRTH
DHA-1680	Annexure 15	DEATH REPORT BY AUTHORISED PERSON
DHA-14A	Annexure 16	BURIAL ORDER
DHA-1577	Annexure 17	PROOF OF NOTICE OF DEATH
DHA-6		DECLARATION RELATING TO A STILL BIRTH BY A PERSON

FORM	ANNEXURE	DESCRIPTION
		OTHER THAN A MEDICAL PRACTITIONER
DHA-14B	Annexure 19	REMOVAL ORDER
DHA-20		ABRIDGED DEATH CERTIFICATE
DHA-1774	Annexure 21	APPLICATION FOR DESIGNATION AS FUNERAL UNDERTAKER
DHA-154	Annexure 22	APPLICATION FOR COPY OF BIRTH CERTIFICATE
DHA-132		APPLICATION FOR DEATH CERTIFICATE
DHA-19		UNABRIDGED BIRTH CERTIFICATE (For non-South African citizens)

(Please note that copies of the above forms will be provided upon request. Kindly refer to our website for our contact details.)



home affairs

Department
Home Affairs
REPUBLIC OF SOUTH AFRICA

230 Johannes Ramokhoase Street, Private Bag X114, PRETORIA, 0001
Parliamentary Office, 120 Plein Street, Private Bag X9048 Cape Town, 8000

Enq Mphokane Shoki, Tel (012) 402 2248 email Shoki.Mphokane@dha.gov.za

**DEPARTMENT OF HOME AFFAIRS: HEAD OFFICE
PROVINCIAL OFFICES
REGIONAL AND DISTRICT OFFICES**

DEPARTMENTAL CIRCULAR NUMBER 5 OF 2014

**REQUIREMENTS RELATING TO PATERNITY TESTS IN RESPECT OF REGISTRATION OF
BIRTHS AND REFERRAL TO NATIONAL HEALTH LABORATORY
SERVICES**

1. NOTICE OF BIRTH OF CHILD BORN OUT OF WEDLOCK

(a) Where both parents are South African citizens

NO paternity test is required

(b) Where one of the parents is a non-South African citizen (father/mother)

Where a Notice of Birth is given within 30 days of the birth of the child, NO paternity test is required **UNLESS** where an official of the Department has **reasonable** suspicion regarding the paternity of the child (based on the information provided in support of the Notice of Birth). In this event, the official may request the parents to provide conclusive proof of paternity in the form of paternity tests not older than 3 months and issue them with a Referral Letter (see Annexure "A" for template) to visit any Centre of the National Health Laboratory Services, as the designated institution to conduct paternity tests (see Annexure "B" for list nearest Centre).

Department of Home Affairs • Letapha la Merero ya Setjaba • Letapha la Dikhatatso le Ntse • leAnyango wezasekhaya • Mthetho wa zwa Munc • Department van Unieslandse Sake • Kwaro ya Merero ya Sijabae • Ndzanulo ya ta-ri Khaya • Letiko la Tasekhaya • ISebhe lezisekhaya • Umthungo wezasekhaya

2. APPLICATION FOR INSERTION OF UNMARRIED FATHER'S PARTICULARS IN BIRTH REGISTER OF CHILD BORN OUT OF WEDLOCK

(a) Where the father (the applicant) is a South African citizens

NO paternity test is required.

(b) Where the father (the applicant) is a non-South African citizen

Paternity test is required.

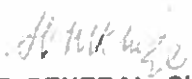
3. ALTERATION OF PARTICULARS OF REGISTERED FATHER OF CHILD BORN OUT OF WEDLOCK

Paternity test is required, regardless of the nationality or citizenship of the father (the applicant).

Note:

1. All other requirements must still be fulfilled.
2. Officials should advise the applicant(s) to contact the National Health Laboratory Services centres to make appointments.

Should you have any enquiries, please contact Mr Aaron Ramodumo at (012) 402 2009, e-mail Aaron.Ramodumo@dha.gov.za or Mr Shoki Mphokane at (012) 402 2248, e-mail Shoki.Mphokane@dha.gov.za or Ms Caroline Pienaar at (012) 402-228, e-mail Caroline.Pienaar@dha.gov.za

MR. S.V. MKHIZE 
DEPUTY DIRECTOR-GENERAL: CIVIC SERVICES

DATE: 05/09/2014





home affairs

Department
Home Affairs
REPUBLIC OF SOUTH AFRICA

191A SF

230 Johannes Ramukhoase Street, Private Bag X114 PRETORIA 0001
Parliamentary Office 120 Plein Street Private Bag X9048 Cape Town 8000

Annexure A

Enquiries

Referral Officer

Telephone Number

Fax

Office Address

Email District Manager Operations

Ref: *Identity Number of parent & DOB of child*

NATIONAL HEALTH LABORATORY SERVICES

REFERRAL FOR PATERNITY TESTS IN RESPECT OF APPLICATION FOR REGISTRATION OF BIRTH OF (*Surname, forenames of child*)

- 1 The above matter refers
- 2 You are kindly requested to conduct paternity tests in relation to
(*surnames, forenames of child*), whose parents are—
(a) Mother (*surname, forenames*) – (*identity number*); and
(b) Father: (*surname, forenames*) – (*identity number*)
- 3 Please take note that the applicant(s) will be responsible for payment of the costs of the tests. Kindly send the original test results to the District Manager Operations
..... (*Name of District*) on the above-mentioned e-mail address.
- 4 I trust that you find the above in order

Kind regards

SIGNATURE

DESIGNATION:

NAME OF OFFICE:

DATE:

Department of Home Affairs • Lelapha le Merero ya Edingweni • Lelapha le Dikaba tsa Lelapha • UmNyango wezazi Khosi • Mkhazini wa zazi Muno • Department van Binnelandse Sake • Kgoro ya Merero ya Solobane • Ndabakulo ya ta le Khaya • L. Tso le Tso khaya • Diketo lezamekhaya • UmNyango wezazi Khosi

Annexure B

LIST OF CENTRES FOR NATIONAL HEALTH LABORATORY SERVICES

Head Office number: 011 489 9286 Fax 011 489 9209

ROVINCE	TOWN	ADDRESS	CONTACT NO.
Gauteng	Johannesburg	Corner of Hospital and De Korte Streets Ext, Braamfontein	(011) 489 9470 / 1
Limpopo	Polokwane	Corner of Dorp and Hospital Streets - Polokwane Provincial Hospital	(015) 297 1099
	Lephalale (Ellisras)	Chris Hani Road - Ellisras Provincial Hospital.	(014) 763 2254
North West	Klerksdorp	Benji Olifant Street, Joubertina Location - Tshepong Provincial Hospital Klerksdorp.	(018) 465 4088
		Desmond Tutu Street - Klerksdorp Provincial Hospital.	
Eastern Cape	Port Elizabeth	Corner Eastbourne & Buckingham Road Mount Cruix - (Next to Provincial Hospital)	(041) 395 6111
	East London	Amalinda Drive (Next to Frere Provincial Hospital.	(043) 143 3000
Mpumalanga	Nelspruit	Madiba Drive at Rob Ferreira Hospital.	(013) 741 1014
	Ermelo	1 Joubert Street at Ermelo Provincial Hospital	(017) 811 3305 / 3402
Northern Cape	Kimberley	Du Toit Span Road at Kimberley Hospital Complex (4 th Floor), Kimberley Provincial Hospital	(053) 833 1641/2




Circular 2024



home affairs

Department:
Home Affairs
REPUBLIC OF SOUTH AFRICA

Tel: (012) 300 8570

Email: Richard.Sikuzane@cha.gov.za

Ref: DNA/PATERNITY TESTS

DEPARTMENT OF HOME AFFAIRS: HEAD OFFICE
FOREIGN OFFICES
PROVINCIAL OFFICES
REGIONAL AND DISTRICT OFFICES

CIRCULAR No.: 14 OF 2021: INCLUSION OF PRIVATE INSTITUTIONS TO CONDUCT DNA (PATERNITY) TESTS.

The Department of Home Affairs has an operational procedure which according to Births and Deaths Act (Act 51 of 1992), certain circumstances require a client to provide conclusive proof in the form of paternity/DNA test results from an institution designated by the Director-General in order to prove biological relationship between a parent and a child.

Initially, the National Health Laboratory Services (NHLS) was the only state service provider designated by Home Affairs to conduct paternity/DNA tests. Considering complaints raised by clients around accessibility (distance) and delays to acquire such service, the Director-General hereby enlist additional accredited services providers for which clients can be referred to for purposes of conducting DNA/paternity. Such institutions include amongst others, Ampath Laboratories, Lancet Laboratories, Unistel and Molecular Diagnostic Services (Pty) Ltd (MDS).

CIRCULAR NO 14 OF 2021: INCLUSION OF PRIVATE INSTITUTIONS TO CONDUCT DNA (PATERNITY) TESTS



Careful considerations should be taken on the nature of the circumstance that requires paternity, and that procedure contemplated in the Regulations on the Registration of Births and Deaths (2014) should be followed. In the event one is

CIRCULAR NO 14 OF 2021: INCLUSION OF PRIVATE INSTITUTIONS TO CONDUCT DNA (PATERNITY) TESTS

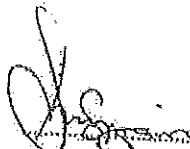
Careful considerations should be taken on the nature of the circumstance that requires paternity, and that procedure contemplated in the Regulations on the Registration of Births and Deaths (2014) should be followed. In the event one is not sure whether a particular matter should be referred for paternity, such a person should not hesitate to contact a Supervisor or Office Manager and ultimately Provincial Manager.

This circular therefore, serves to inform all offices that paternity/DNA tests from the abovementioned private institutions are also acceptable. It is important that where officials are doubtful, such paternity/DNA test results be verified with the institution from which they come.

Attached please find the list of public and private health facilities approved by the Department of Health.

Should you have any enquiries regarding the contents of this Circular, please contact Mr. Richard Skakane at 012 300 6570.

This circular must be read together with circular 6 of 2014, dated 08 September 2014 on requirements relating to paternity tests in respect of registration of births and referral to National Health Laboratory Services.


.....
MR THOMAS SIGAMA
DEPUTY DIRECTOR-GENERAL: CIVIC SERVICES
DATE: 19/10/2021

NHLS sampling and testing sites

Province/Country	Town	Address	Contact No.
Gauteng	Johannesburg	Cnr De Korte and Hospital streets, Braamfontein, JHB (sampling and testing site)	011-469 9470/1
Limpopo	Potokwane	Cenar Dorp and Hospital streets, Potokwane Provincial Hospital	015-297 1099
Limpopo	Lephalala (Bheasae)	Chris Hani Road, Bheasae Hospital	014-763 2264
North West	Klerksdorp	Benji Oelard Street, Joubertina Location at Tsepong Provincial Hosp	018-408 3372/4181
North West	Klerksdorp	Desmond Tutu Street	082 750 1842
North West	Rustenburg	Klerksdorp Provincial Hospital	018-465 4088 078 086 4604
Eastern Cape	Port Elizabeth	Corner Eastbourne & Buckingham Road Mount	014-592-2702/4143
Eastern Cape	East London	Amalinda Drive (Next to Frere Provincial Hospital)	041-395 6111
Eastern Cape	Mthatha		043-143 3000 082 971 0867
Eastern Cape	Mthatha		067 416
Mpumalanga	Nelspruit	Madiba Drive at Rob Ferreira Hospital	7799/081 304 7551
Mpumalanga	Emelo		013-741 1014
North West	Kimberly	1 Joubert Street at Emelo Provincial Hospital	017-611
North West	Kimberly	Du Toit Open Road at Kimberly Hospital Complex, 4 th Floor, Kimberly Provincial Hospital	33053/402/2031 017-818 2283
Free State	Bloemfontein	University of the Free State, DF Mahesbe Drive, Bloemfontein (sampling and testing site)	053-833 1041/2
Western Cape	Observatory	NHLS, Grootu Schuur Hospital, C17, Observatory, Cape Town (sampling and testing site)	051-405 3263
Kwa Zulu Natal	Durban	Admission Hospital, Eridans Terrace, South Beach	021-404 3001
			031 327 2483

Private testing labs:
 Lancet Laboratories
 Ampath
 Unilever
 MDS

QUESTION FOR WRITTEN REPLY

QUESTION NO. 1677

DATE OF PUBLICATION: FRIDAY, 29 APRIL 2022

INTERNAL QUESTION PAPER 15 – 2021

1677. Ms L L van der Merwe (IFP) to ask the Minister of Home Affairs:

- (1) Whether, with regard to the Naki 2018 judgment and the 2021 Constitutional Court judgment on the rights of unmarried fathers to register the births of their children in the absence of the mother, and noting that the Deputy Director-General (DDG) of Civic Service reported to the Portfolio Committee on Social Development on 2 March 2022 that his department had sent communication to local offices informing them of the Naki 2018 and Constitutional Court 2021 judgments, he will furnish Ms L L van der Merwe with a copy of the letter sent to local offices, in which his department communicated the judgments; if not, why not; if so, what are the relevant details;
- (2) whether, with reference to the report by the DDG of Civic Service in his department to the Portfolio on Social Development on 2 March 2022, that his department had revised their Standard Operating Procedure (SOP) in line with the Naki 2018 and Constitutional Court 2021 court judgments, and that his department had already begun training officials in KwaZulu-Natal using the revised SOP, he will furnish Ms L L van der Merwe with a copy of the revised SOP; if not, what is the position in this regard; if so, what are the relevant details;
- (3) whether, with regard to the report of the DDG of Civic Service who reported to the Portfolio Committee on Social Development on 2 March 2022, that the directive explaining the above judgments for officials was not yet finalised but would be soon, it has since been finalised; if not, (a) why not and (b) on what date will it be (i) finalised and (ii) sent to the Portfolio Committee on Social Development and all local offices; if so, will he furnish Ms L L van der Merwe with a copy of the final directive?

NW2005E

REPLY:

- (1) The Naki 2018 and Constitutional Court 2021 judgment was brought to the attention of all Provincial Managers for further communicating to local offices via WhatsApp on 23 September 2021. Print out of the WhatsApp communication is hereto attached. WhatsApp is one of the various communication channels the Civic Services Branch has established to deal with urgent matters that affect daily operations.

- (2) The revised Birth Registration Standard Operating Procedures (SOP) is hereto attached. Training on the new SOP took place between 17 January 2022 to 4 April 2022.
- (3) As indicated in response 1 above, the Home Affairs front offices have been informed as per the attached WhatsApp message and the court order is being implemented by offices as alluded to in slide 9 of the presentation made to the Portfolio Committee on 2 March 2022. Further to this, the department is in the process of drafting regulations on the registration of births and deaths with the view to align it to the court order.

END



CENTRE FOR
CHILD LAW

LAWYERS FOR
HUMAN RIGHTS

6 December 2021

Att: Mr Livhuwani Makhode

Director-General

Department of Home Affairs

Email: directorgeneral@dha.gov.za

Att: Mr Thomas Sigama

Deputy Director General – Civic Services

Department of Home Affairs

Email: thomas.sigama@dha.gov.za

Att: Dr Aaron Motsoaledi

Minister of the Department of Home Affairs

Email: hacc@dha.gov.za

Att: Adv Tsietsi Sebelemetja

Acting Chief Director: Legal Services

Department of Home Affairs

Tel: (012) 406 4271

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Email: Tsietsi.Sebelemetja@dha.gov.za / Mpho.Seotlela@dha.gov.za

CC: Mr. Richard Sikakane

E-mail: Richard.Sikakane@dha.gov.za

CCL LITIGATION: K Ozah (Director), L Stwayi, S Malematja
LHR JNB LITIGATION: W Ncube (National Director), J Lawrence, C Tracey, N Manyasa, M Sebei, N Mia



CENTRE FOR
CHILD LAW

LAWYERS FOR
HUMAN RIGHTS

Re: *Centre for Child Law v Director General: Department of Home Affairs and Others*
[2021] ZACC 31

Introduction

1. This is a joint letter by the Centre for Child Law and Lawyers for Human Rights (“We”, “Our”).
 - 1.1. The Centre for Child Law (“the CCL”) is a law clinic registered with the Legal Practice Council, based at the University of Pretoria. The CCL contributes towards the establishment and promotion of the best interests of children in South Africa through research, advocacy, litigation and education.
 - 1.2. Lawyers for Human Rights (LHR) is an independent human rights organisation that employs a holistic approach to social justice and human rights enforcement in South Africa through strategic litigation, advocacy, law reform, human rights education, and community mobilisation and support. LHR operates a Statelessness Project that advocates for legal identity for all in South Africa and the eradication of childhood statelessness.
 - 1.3. Both the CCL and LHR provide direct legal assistance to individuals, including children, who face barriers in securing their right to birth registration.
2. The purpose of this letter is to address the Department of Home Affairs on the implementation of the recent Constitutional Court judgment in the matter of *Centre for Child Law v Director General: Home Affairs and others* [2021] ZACC 31¹, and the persistent barriers to birth registration our clients face.

¹ Centre for Child Law v Director General: Home Affairs and others [2021] ZACC 31 available at <https://collections.concourt.org.za/bitstream/handle/20.500.12144/36654/%5bJudgment%5d%20CCT%20101-20%20Centre%20for%20Child%20Law%20v%20Director%20General%20Department....pdf?sequence=18&isAllowed=y>



Centre for Child Law v Director General: Department of Home Affairs and Others [2021] ZACC 31 (“the Constitutional Court judgment”)

3. On 22 September 2021, the Constitutional Court handed down a judgment concerning the notification of births of children born to unmarried parents. The Court declared Section 10 of the Birth and Deaths Registration Act 51 of 1992 (“BDRA”) invalid to the extent that it limits the right of unmarried fathers to give notice of the birth of their child[ren] in their surname thereby unfairly discriminating against children born to unmarried parents. This declaration took effect from the date of the order and means that either parent is now eligible to register the birth of their child(ren).
4. This, therefore, means that the Department of Home Affairs (“the Department”) is prohibited from frustrating efforts of unmarried fathers to register the birth of their children.
5. Pursuant to the judgment, we were notified by some clients that they had approached their local Department of Home Affairs’ offices to register their children, but they were informed by the officials that they were not aware of the judgment. Furthermore, other clients were informed that it was mandatory to conduct a paternity test before proceeding with the birth registration process.

Circular 5 of 2014 re: Requirements to Paternity Tests in Respect of Registration of Births and Referral to National Health Laboratory Services (“the Circular”)

6. The BDRA and its Regulations of 2014 do not contain any provision requiring proof of paternity in the form of paternity tests for birth registration. However, we note that the Department instead relies on the abovementioned Circular to demand paternity tests from unmarried fathers who wish to register their children. In our opinion, the Circular is a continuous and concerted effort by the Department to (i) frustrate the efforts of unmarried fathers who wish to register their children’s births and (ii) prevent the effective implementation of the Constitutional Court judgment.



7. As far as the notification of birth of children who are born to unmarried parents is concerned section 1(a-b) of the Circular provides as follows:

“NOTICE OF BIRTH CHILD BORN OUT OF WEDLOCK

- (a) Where both parents are South African citizens

NO paternity test is required.

- (b) Where one of the parents is a non-South African citizen (father/mother)

Where a Notice of Birth is given within 30 days of the birth of the child, NO paternity test is required UNLESS where an official of the Department has reasonable suspicion regarding the paternity of the child (based on the information provided in support of the Notice of Birth). In this event, the official may request the parents to provide conclusive proof of paternity in the form of paternity tests not older than 3 months and issue them with a Referral Letter (see Annexure “A” for template) to visit any Centre of the National Health Laboratory Services, as the designated institution to conduct paternity tests (see Annexure “B” for list nearest Centre).”

8. As is evident, section 1(b) demands that the Department officials accept the application and issue a birth certificate within 30 days or request proof of paternity where there is “reasonable suspicion regarding the paternity of the child”. The Public Protector of South Africa has opined as follows:

“...these options are provided in the alternative and cannot be read to mean that both options can be exercised in any given situation. It thus follows that a birth certificate can validly be issued to a child with a foreign parent even in the event that there was no paternity test taken...”²

² Public Protector's Report No. 27 of 2019/20 on an investigation into allegations of maladministration by the Department of Home Affairs in respect of the alleged improper revocation of a minor child's birth certificate and consequently his South African citizenship available at



9. We agree with the analysis made by the Public Protector. In addition, we emphasise that the section's insistence on the provision of proof of paternity in the form of paternity tests has prevented our clients from registering their children's births.
10. Therefore, we submit that the Circular is unlawful and unconstitutional for the following reasons:
 - 10.1. The requirement to provide proof of paternity in the form of paternity tests has no basis in law and is *ultra vires* the BDRA. Although section 7 of the BDRA makes reference to "proof" it does not explicitly refer to paternity tests. The Circular therefore prescribes additional criteria and requirements in relation to birth registration that are not provided for in the principal Act. This is despite the fact that other requirements in the Act and Regulations provide sufficient safeguards such as affidavits or fingerprint verifications.
 - 10.2. There is nothing explaining what informs the "reasonable suspicion" referred to in section 1(b). It is left to the discretion of the official and such broad and unfettered discretion creates a potential for bias and unfair discrimination. A grammatical interpretation of the section suggests that "reasonable suspicion" implies foreigners. This is arguably a prejudicial approach towards persons from other countries and it perpetuates xenophobic attitudes towards non-citizens and their children.
 - 10.3. Section 1(b) of the Circular unfairly differentiates between children born of national citizens vs children born of a national and non-national citizen, in a manner that amounts to unequal treatment or unfair discrimination on the ground of birth. Accordingly, it falls foul of section 9 (1) & (3) of the Constitution in that there is no rational connection between the differentiation in question and the legitimate governmental purpose it is designed to further or achieve.

http://www.pprotect.org/sites/default/files/legislation_report/Report%20of%202019-20-DHA%20REVOCATION%20OF%20ID%20NUMBER.pdf.



- 10.4. The requirement for a paternity test irrationally and unfairly discriminates against unmarried South African fathers on the ground of marital status, in that they are the only parents whose parental status is questioned and thus are prevented from registering the births of their children. This is precisely the kind of discrimination that the Constitutional Court eliminated in the Constitutional Court judgment. It stated as follows:

“Because of the different approach to the traditional concept of marriage, whether in the form of a permanent life relationship or other forms of relationships, it is the unmarried father who has to be subjected to the indignity of having his child registered as being born out of wedlock. The import of section 10 of the Act is that the unmarried father who has shown the necessary commitment to the child by wanting to possibly register the child with his surname, is discriminated against. Surely, there must be many unmarried fathers who, like the unmarried father in this case, commit to the notification and registration of their children in their surnames, which reinforces their commitment as fathers.”

- 10.5. The Circular is, generally and section 1(b) specifically, unlawful and must be set aside to the extent that it places an undue financial burden on indigent parents who cannot afford to pay for paternity tests in order to register their children. It, evidently, is exclusionary, discriminatory and arbitrary. The requirement for paternity tests is not only exclusionary and discriminatory but blatantly ignores the socio-economic landscape in South Africa.
- 10.6. The requirement for paternity testing, moreover, blatantly ignores the socio-economic landscape in South Africa. The majority of parents simply cannot afford to undergo the testing, let alone afford to travel to the limited number of National Health Laboratory Services (“NHLS”) offering this service. This compounds and exacerbates their plight and is constitutionally unacceptable.



10.7. Further to the above, the Department fails to recognise the cumbersome role it has placed on NHLS as a sole provider. The refusal for results from other laboratory services such as Lancet has led to lengthened turnaround for DNA appointments and results. The situation was further exacerbated by the covid-19 pandemic. Linked to this, is the turning away of the few of our clients who have conducted paternity tests through private labs without knowledge that currently, only the NHLS paternity tests results are deemed acceptable by the Department. The clients who had already spent money they do not have, are being told to re-do the DNA tests through the NHLS.

10.8. In *Ahmed v Minister of Home Affairs*,³ the court emphasised that :

“...Directive could be said to constitute an exercise of public power which is reviewable, be it under the Promotion of Administrative Justice Act 44 (PAJA) or the principle of legality. The application of its terms by officials would merely be an extension of this conduct. If that conduct – the issuing of the Directive and its subsequent application by officials – was based on a material error of law the result under legality or administrative review would be the same: it would be invalid and unlawful.”

11. Section 1(b) of the Circular is a clear infringement of children's rights to a name and nationality from birth. In addition to violating their rights to a name and nationality, it is also a violation of their right to equality, their dignity and their right to have their best interests considered of paramount importance in every matter concerning them.

Our clients' rights

12. We believe that there are sufficient constitutional grounds for us to proceed against the Department and officials who have failed to provide our clients, attached in **annexure A**, a service to which they are entitled to and to issue to them their official

³ Ahmed v Minister of Home Affairs Case CCT 273/17 available at <https://collections.concourt.org.za/bitstream/handle/20.500.12144/34593/Full%20judgment%20Official%20version%209%20October%202018.pdf?sequence=48&isAllowed=y>



birth certificates. We also believe that our clients, as well as children who are similarly placed in their position, suffer greatly by the dilatory conduct and prejudicial approaches of the Department officials and there is no reason why they should continue to be at your mercy for a service to which they are entitled to as South African citizens.

13. We remind you of the importance of the right to a name and nationality, and the vulnerability of its primary beneficiaries:

- 13.1. Birth registration is a fundamental constitutional right of a child and a child's interests are of paramount importance in all matters concerning the child.

- 13.1.1. In *Hadebe v Minister of Home Affairs [2007] JOL 18906 (D)*, the court found that section 28 (1)(a) imposes a duty on the Department to ensure the registration of births. At para 14, the court stated as follows:

"It is clear that if a child has, as is provided in section 28(1)(a) of the Constitution, the "right to a name from birth", the official of the state who is charged with doing those things that enable his or her name to be recorded must have a correlative duty to facilitate the registration of that name in the records of the state. The court further stated that it is certainly not part of the function of the official to place technical difficulties in the way of such registration."

- 13.2. South Africa has ratified the Convention on the Rights of the Child ("CRC") and the African Charter on the Rights and Welfare of the Child ("ACRWC"). Both treaties and the South African Constitution, clearly articulate the right of every child to birth registration.
- 13.3. The African Committee of Experts on the Rights and Welfare of the Child ("ACERWC") in its General Comment on article 6 of the African Charter on the Rights and Welfare of the Child stated: "Registration of birth is a fundamental right of a child. Birth registration is the act of recording the birth



of a child by an administrative authority. It establishes the existence in law of a child, and sets the foundation for the recognition of the child as a legal persona. A child who is not registered does not legally exist and runs a substantial risk of falling outside of the reach of government's protective actions towards the realization of child rights".

- 13.4. In addition, in the Concluding Observations and Recommendations of the ACERWC to the Government of the Republic of South Africa on its First Periodic Report on the Implementation of the ACRWC, the ACERWC stated as follows at para 13:

"The Committee appreciates the measures taken by the State Party to ensure the right to name, nationality and birth registration of children. However, the Committee notes with concern that Regulations accompanying the new Births and Deaths Registration Act (BDRA) have introduced a fee for late registration of births. Moreover, the Committee has also learned that the Government of South Africa has issued a directive requiring all children who are born to one foreign parent to produce proof of paternity in the form of a DNA test if the birth is registered late. The Committee is of the view that attaching penalty and other similar preconditions that have the effect of serving as a barrier to late birth registration may discourage parents from registering birth of their children and hinder registration of some birth that can be declared late. As the Committee elaborated in its General Comment 2, the State Party should, in all circumstances, provide for late registration where children's birth has not been registered immediately. The late registration should be without any precondition. On this basis, the Committee recommends to the Government of South Africa to review the BDRA regulations and remove the penalty fee for late registration of birth. Furthermore, the Committee calls upon the South African Government to consider the withdrawal of the requirement of DNA tests to be done at late registration of children



born to one foreign parent birth and rely on other evidence to prove paternity as this precondition discriminates against a child whose one of his/her parents is foreigner and highly hampers birth registration of these children.”⁴ (emphasis added)

14. Both the ACERWC General Comment and Concluding observations vehemently state that South Africa must ensure that all barriers hindering children from getting their birth registered are removed.

Our demand

15. We request that the Department:
 - 15.1. Issues a directive to inform its officials of the ***Centre for Child Law v Director General: Department of Home Affairs and Others [2021] ZACC 31*** judgment. Specifically indicating, amongst other things, that:
 - 15.1.1. Section 10, in its entirety, was declared invalid with the Constitution and consequently severed from the Act;
 - 15.1.2. The declaration of constitutional invalidity of the above section was effective immediately from the date of the judgment i.e. 22 September 2021;
 - 15.1.3. “...The contention that a married father can be trusted, without more, whereas an unmarried father automatically raises suspicions, is ultimately a prejudicial approach.” -para 85
 - 15.2. Withdraws the Circular.

⁴ CONCLUDING OBSERVATIONS AND RECOMMENDATIONS OF THE AFRICAN COMMITTEE OF EXPERTS ON THE RIGHTS AND WELFARE OF THE CHILD TO THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA ON ITS FIRST PERIODIC REPORT ON THE IMPLEMENTATION OF THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD (2019) available at <https://acerwc.africa/wp-content/uploads/2019/07/Concluding%20observation%20for%20South%20African%20Periodic%20State%20Party%20Report.pdf>.



CENTRE FOR
CHILD LAW

LAWYERS FOR
HUMAN RIGHTS

16. As a result of the number of children who are undocumented and the far reaching consequences of this Circular, we kindly request a response by no later than **31 January 2022**.
17. If you refuse our request, we ask that you provide us with written reasons by **31 January 2022**. Should a response not be forthcoming by then, we will approach a court for relief.

Yours faithfully

Centre for Child Law and Lawyers for Human Rights

PP: Hlalisa Mgidlana, Thandeka Chauke & Tshegofatso Mothapo

CCL LITIGATION: K Ozah (Director), L Stwayi, S Malematja
LHR JNB LITIGATION: W Ncube (National Director), J Lawrence, C Tracey, N Manyasa, M Sebei, N Mia

Annexure A

CHILD'S FULL NAME	CHILD'S DATE OF BIRTH	FATHERS' FULL NAME	FATHER'S IDENTITY NUMBER	MOTHERS' FULL NAME	DHA OFFICE
N [REDACTED]	31/03/2008	T [REDACTED]	7 [REDACTED]	30 S [REDACTED]	Aliwal North, Eastern Cape
E [REDACTED]	05/05/2013	S [REDACTED]	8 [REDACTED]	32 M [REDACTED]	Johannesburg CBD, Gauteng
R [REDACTED]	19/11/2015	M [REDACTED]	8 [REDACTED]	36 L [REDACTED]	Aliwal North, Eastern Cape
L [REDACTED]	12/04/2011	T [REDACTED]	8 [REDACTED]	38 A [REDACTED]	Aliwal North, Eastern Cape
S [REDACTED]	08/05/2008	J [REDACTED]	6 [REDACTED]	34 N [REDACTED]	Aliwal North, Eastern Cape
R [REDACTED]	30/05/2021	S [REDACTED]	8 [REDACTED]	31 T [REDACTED]	Secunda, Mpumalanga
H [REDACTED]	23/05/2016	S [REDACTED]	8 [REDACTED]	31 T [REDACTED]	Secunda, Mpumalanga
H [REDACTED]	20/04/2021	V [REDACTED]	8 [REDACTED]	34 T [REDACTED]	Johannesburg CBD, Gauteng
T [REDACTED]	02/07/2019	L [REDACTED]	9 [REDACTED]	32 A [REDACTED]	Randfontein, Gauteng
A [REDACTED]	05/04/2014	S [REDACTED]	9 [REDACTED]	37 V [REDACTED]	Piet Retief & Ermelo, Mpumalanga
S [REDACTED]	25/08/2020	S [REDACTED]	9 [REDACTED]	37 V [REDACTED]	Piet Retief & Ermelo, Mpumalanga
N [REDACTED]	24/06/2015	S [REDACTED]	9 [REDACTED]	37 V [REDACTED]	Piet Retief & Ermelo, Mpumalanga
L [REDACTED]	29/07/2011	S [REDACTED]	9 [REDACTED]	37 V [REDACTED]	Piet Retief & Ermelo, Mpumalanga
Z [REDACTED]	06/06/2002	F [REDACTED]	7 [REDACTED]	39 N [REDACTED]	Piet Retief, Mpumalanga
F [REDACTED]	23/07/2004	F [REDACTED]	7 [REDACTED]	39 N [REDACTED]	Piet Retief, Mpumalanga
F [REDACTED]	18/08/2021	M [REDACTED]	9 [REDACTED]	35 N [REDACTED]	Piet Retief, Mpumalanga
A [REDACTED]	31/12/2002	V [REDACTED]	6 [REDACTED]	39 D [REDACTED]	Piet Retief, Mpumalanga
T [REDACTED]	05/02/2003	T [REDACTED]	8 [REDACTED]	34 N [REDACTED]	Piet Retief, Mpumalanga
M [REDACTED]	25/04/2005	T [REDACTED]	8 [REDACTED]	34 N [REDACTED]	Piet Retief, Mpumalanga
N [REDACTED]	11/11/2011	T [REDACTED]	8 [REDACTED]	34 N [REDACTED]	Piet Retief, Mpumalanga
A [REDACTED]	15/06/18	J [REDACTED]	8 [REDACTED]	36 C [REDACTED]	Pretoria, Gauteng
N [REDACTED]	11/07/2019	J [REDACTED]	8 [REDACTED]	36 C [REDACTED]	Pretoria, Gauteng
G [REDACTED]	06/12/2010	T [REDACTED]	7 [REDACTED]	36 N [REDACTED]	Katlehong, Gauteng
N [REDACTED]	07/01/2013	T [REDACTED]	7 [REDACTED]	36 N [REDACTED]	Katlehong, Gauteng
E [REDACTED]	24/04/2015	T [REDACTED]	7 [REDACTED]	36 N [REDACTED]	Katlehong, Gauteng
M [REDACTED]	18/06/2017	T [REDACTED]	7 [REDACTED]	36 N [REDACTED]	Katlehong, Gauteng
L [REDACTED]	17/06/2010	J [REDACTED]	7 [REDACTED]	31 A [REDACTED]	Orange Farm, Gauteng
A [REDACTED]	08/08/2013	J [REDACTED]	7 [REDACTED]	31 A [REDACTED]	Orange Farm, Gauteng
E [REDACTED]	02/07/2015	J [REDACTED]	7510203671031	A [REDACTED]	Orange Farm, Gauteng