

SOUTH AFRICA / JUDGMENT

J.J and Others v Minister of Home Affairs and Another (3626/2024) [2024]

ZAFSHC 286 (12 September 2024)

[2024] ZAFSHC 286

COURT

Free State High Court, Bloemfontein

BEFORE

Mhlambi

CASE / FILE NUMBER

3626/2024

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FLYNOTES:

FAMILY – Marriage –
Choice of surname –
Department's refusal to
allow male spouse to assume surname of female spouse –
Alleging Act is unconstitutional
– Act retained an archaic
and patriarchal default position that only women are entitled to
assume a different surname
– Limitation does not meet
rational connection and proportionality tests – Renders
limitation unjustifiable –
Applicants established
entitlement to relief – Births and Deaths Registration Act
51 of 1992, ss 26(1)(a), (b) and (c).
IN THE HIGH COURT
OF SOUTH AFRICA,
FREE STATE
DIVISION, BLOEMFONTEIN

Reportable: NO
Of Interest to other
Judges: NO
Circulate to
Magistrates: NO
CASE NO: 3626/2024
In

the matter between: J[...]
J[...]
1st
Applicant
H[...]
V[...] D[...] M[...]
2nd
Applicant
JESS
DONNELLY-BORNMAN
3rd
Applicant
ANDREAS
NICOLAAS BORNMAN
4th
Applicant
And
THE
MINISTER OF HOME AFFAIRS
1st
Respondent
THE
MINISTER OF JUSTICE AND COSTITUTIONAL
2nd
Respondent
DEVELOPMENT
HEARD

ON: 29 August 2024

JUDGMENT

BY: MHLAMBI, J

DELIVERED ON: 12 September 2024

Introduction

- [1] The applicant approached the court seeking an order in the following terms:
1. Declaring Section 26(1)(a) — (c) of the Births and Deaths Registration Act 51 of 1992, to be unconstitutional to the extent that it discriminates on the ground of gender, by failing to:

1.1 Afford a female person the right to have her spouse assume her surname;

1.2 Afford a male person the right to assume the surname of the woman with whom they conclude a marriage or after having assumed her surname, resume a surname which he bore at any prior time;

1.3 Allow for a married or divorced man or a widower to resume a surname which he bore at any time;

1.4 Allow for a man, whether married or divorced or a widower, to add to the surname which he assumed after the marriage, any surname which he bore at any prior time;

1.5 Thereby subjecting any change to the surname of a male person after marriage to the authorization of the Director

General in terms of Section 26(2) of the Births and Deaths Registration Act, Act 51 of 1992.

2. Declaring Regulation 18(2)(a) of the Regulations on the Registration of Births and Deaths, 2004 to be unconstitutional to the effect that it discriminates against male persons by failing to provide for the change in the marital status of a man.

3.

4. Suspending the declaration of invalidity in paragraphs 1 and 2 above for a period of 24 months to enable the President and Cabinet, together with Parliament to remedy the foregoing defects by either amending existing legislation, or passing new legislation within 24 months, in order to ensure that male persons are afforded the right of assumption of another surname.

5.

6. Pending the coming into force of legislation or amendments to existing legislation, designed to afford the right of assumption of another surname as set out in Section 26(1) of the Births and Deaths Registration Act, Act 51 of 1992:

4.1 It is declared that the provisions of Subsection 26(1) of the Births and Deaths Registration Act, Act 51 of 1992 shall not apply when:

4.1.1 A person after his or her marriage assumes the surname of the man or wife with whom such person

concluded such marriage or after having assumed such surname, resumes a surname which such person bore at any prior time;

4.1.2 A married or divorced woman or man or a widow or widower resumes a surname which he or she bore at any time; and

4.1.3 A person, whether married or divorced, or a widow or widower adds to the surname which he or she assumed after the marriage, any surname which he or she bore at any prior time.

4.2 The First Respondent is ordered to within 20 days after the granting of this order/immediately effect the following changes in terms of the aforesaid prayer 4.1:

4.2.1 To amend the surname of the First Applicant to "J[...]",

4.2.2 To amend the surname of the Second Applicant to "J[...]"

4.2.3 To amend the surname of the First and Second Applicants' child to "J[...]",

4.2.4 To amend the surname of the Fourth Applicant to "Donnelly-Bornman".

7. Pending the coming into force of regulations, or amendments to existing regulations, designed to afford the right of assumption of another surname as set out in Section 26(1) of the Births and Deaths Registration Act, Act 51 of 1992 it is declared that the reasons referred to in section 26(2) of the Births and Deaths Registration Act, Act 51 of 1992 must relate to, inter alia, a change in the marital status of a person.

8. That the Order granted in favour of the applicants shall be referred to the Constitutional Court in terms of Section 172(2)(a) of the Constitution of the Republic of South Africa for confirmation of constitutional validity

9. An order for costs, including the costs of two counsel to the extent of their employment;

8. Further and/or alternative relief.

[2] The applicants duly caused a notice in terms of Uniform Rule 16A to be placed on the notice board and the application was served on the respondents. The respondents did not oppose the application. I gave the following order in the unopposed motion:

"1. The Application is postponed to the 29th day of August 2024 to the opposed motion roll for arguments.

2. The Court appointed counsel, nominated by the Free State Society of Advocates, shall file heads of argument on or before Wednesday, 21 August 2024 at 12h00.

3. The Applicants shall file supplementary heads of argument if so advised, on or before Friday, 23 August 2024 at 11h00.

4. Costs of the postponement shall be costs in the cause.

[3] The application was argued on 29 August 2024, and I reserved judgment. I am grateful to the helpful contributions of the applicants and the amicus curiae.

The parties

[4] The first applicant is J[...], a major female legal practitioner and practising attorney of 3 Paddy Goodrick Street, Pentagon Park, Bloemfontein.

- [5] The second applicant is H[...] v[...] d[...] M[...], a major male senior corporate manager resident at 3 Paddy Goodrick Street, Pentagon Park, Bloemfontein. Both the first and second applicants act in their representative capacities as guardians and biological parents of L[...] v[...] d[...] M[...], born on 1[...] M[...] 2023.
- [6] The third applicant is Jess Donnelly-Bornman, a major practising advocate and member of the Free State Society of Advocates with chambers at the Advocates' Chambers, 3 Zola Budd Street, Bloemfontein.
- [7] The fourth applicant is Andreas Nicolaas Bornman, a major legal practitioner practising in the name and style of Donnelly-Bornman Law Inc. with offices at 129 President Reitz Avenue, Westdene, Bloemfontein.
- [8] The first respondent is the Minister of Home Affairs in his representative capacity as such with offices situated at FSI Building, First Floor, Arcadia Street, Pretoria, Gauteng c/o the State Attorney, Fedsure Building, 11 Floor, 49 Charlotte Maxheke Street, Bloemfontein CBD, Bloemfontein.
- [9] The second respondent is the Minister of Justice and Correctional Services in his representative capacity as such, with offices situated at SALU Building, 28th Floor, 316 Thabo Sehume Street, Pretoria, Gauteng, c/o the State Attorney, Fedsure Building, 11 Floor, 49 Charlotte Maxheke Street, Bloemfontein CBD, Bloemfontein.

Background: 1st and 2nd Applicants

- [10] The first and second applicants were married at the branch of the Department of Home Affairs, ("the DHA"), at 10988 Corner George Lubbe in Moshoeshoe Streets, Rocklands, Bloemfontein on 15 July 2021. After their marriage was solemnised, and in the process of its registration, the second applicant was asked by the DHA official whether she was assuming the second applicant's surname or retaining hers. When both applicants informed the official that the second applicant would assume the first applicant's surname, he replied that the system did not allow that. On further inquiry, a second staff member in the department confirmed that the applicant's request could not be accommodated. The applicants elected to retain their different surnames. Their daughter carries a surname they did not intend to be their family name.
- [11] The applicants had always intended that the second applicant would assume the first applicant's surname upon marriage. J[...] was the first applicant's biological parents' surname and symbolized her connection to them. They passed away when she was four years old. She has no intention of ever changing her surname, and she explained this to the second applicant at a very early stage of their relationship, around 2014.
- [12] The second applicant pledged his unwavering support for her stance and, in turn, expressed his wish to assume her surname upon marriage so that they could become the J[...] family and raise their children with that surname.

Background 3rd and 4th Applicants

- [13] The third applicant is an only child whose maiden surname is important to her. Before their marriage, she informed the fourth applicant that she preferred to keep her maiden surname and would rather hyphenate the fourth applicant's surname with her own. Both did not wish to have different surnames from each other and their children. They preferred to combine their surnames to reflect their familial unit.
- [14] They were married on 02 April 2022 at Knysna. On completing their marriage certificate, they realized that though a provision was made for the female spouse to change her surname, no such provision existed for the male spouse. The third applicant changed her surname to that of their new familial unit ("Donnelly-Bornman") when she completed the marriage certificate. They intended to apply to the DHA to amend the fourth applicant's surname as soon as they could.
- [15] In July 2022, they visited the DHA offices at Botshabelo. The third applicant wanted a new identity document and passport which would reflect her new surname. The fourth applicant wanted to change his surname to that of the applicant and their familial unit, ("Donnelly-Bornman"). The DHA officials informed them that it was not possible for the fourth applicant to change his surname. When they were pressed for an answer by the applicants, none was forthcoming. The same position obtained in their second attempt at the same offices in September 2022.
- [16] In October 2022, they visited the DHA offices in George but were informed that the Births and Deaths Registration Act, 51 of 1992, did not permit the type of amendment sought. The third applicant was provided with an email address of the Director-General's office to make inquiries and seek guidance. She sent an email on 31 October 2022 but has received no response.

The Unlawful amendment of the 1st applicant's surname

- [17] On/or about 1 November 2021, the first applicant became aware from a portal related to the registration for National Elections that her surname was unilaterally amended by the DHA to the second applicant's surname, to wit "V[...] d[...] M[...]" She had not applied for the change of her surname and had no intention to do so. This amendment affected her FICA and credit records with ABSA Bank. Her FICA documentation was non-compliant and detrimentally affected her home loan status. Though ABSA Bank has since resolved the issue, it resulted in unnecessary and unavoidable administrative delays.

The failure to amend the 2nd and 4th applicant's surnames

[18] The applicants believe that the failure of the Department of Home Affairs to allow the second applicant to assume the first applicant's surname and the fourth applicant to assume the third applicant's surname is the result of the provisions of the Births and Deaths Registration Act 51 of 1992 and the Regulations on the Registration of Births and Deaths, 2014.

The Act and its Regulations

[19] Section 26(1) of the Births and Deaths Registration Act 51 of 1992 provides as follows:

- (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 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; and
 - (c) a woman, whether married or divorced, or a widow, adds to the surname which she assumed after the marriage any surname which she bore at any prior time.

[20] Regulation 18 of the Regulations on the Registration of Births and Deaths, 2014, made by the first respondent in terms of section 32 of the Act, deals with the assumption of another surname. Regulation 18(2)(a) provides that the reasons referred to in section 26 (2) of the Act must relate to a change in the marital status of a woman.

The Parties' Contentions

[21] The applicants contend that the Act and the Regulations perpetuate gender norms set by a patriarchal society that entrenches gender inequality and differentiates based on sex and gender. In contrast, section 9(2) of the Constitution stipulates that the right to equality includes the full and equal enjoyment of all rights and freedoms. Section 9(3) provides explicitly that the State may not unfairly discriminate directly or indirectly against anyone based on, among other things, gender or marital status. Relying on the President of the Republic of South Africa and another v Hugo,[1] the applicants contended 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.

[22] Despite the abolition of the marital power and the advent of the new Constitutional order of equality regardless of sex, gender or marital status, the applicants argued that the Act has retained an archaic and patriarchal default position that only women are entitled, as of

right, to assume a different surname. Any person who does not fall within the ambit of section 26(1) must, in terms of section 26(2) of the Act, apply to the Director-General for consent to assume a different surname and, in terms of section 26(2), be satisfied that suitable and sufficient reason exists for such a change. Therefore, according to the Act and the regulations, only men and not women may assume a different surname upon marriage.

[23] I was also referred to the dictum in *Wile v MEC, Department of Home Affairs, Gauteng*,^[2] where Bozalek J opined that to the extent that regulation 18 seeks to establish a closed list of reasons for assuming another surname, it is *ultra vires* in that it misconceives the meaning and scope of section 26(2) of the Act.^[3] The applicants submitted that the provisions of section 26(2) and Regulation 18 will be constitutionally invalid if they do not pass the “equality test” formulated in *Harksen v Lane NO and Others*.^[4]

[24] The Amicus supported the arguments and submissions advanced by the Applicants and contended that if the court granted the relief sought, the order should be referred to the Constitutional Court for confirmation under section 172(2)(a) of the Constitution. The Amicus took the inquiry further and submitted that the limitation was not justifiable under the limitation clause for the following reasons:

24.1. It perpetuates gender inequality and robs individuals of their identity and autonomy.

Similarly, by restricting a man's right to assume their wife's surname, the law violates the principles of gender equality and perpetuates harmful stereotypes, as men are denied a choice that is available to women,

24.2 It fails to recognise modern societal values like gender equality and fluidity in identity choices and reinforces the norm that men must conform to traditional masculine norms;

24.3 It is intrusive and serves no compelling state interest in that it requires government involvement in a profoundly personal decision, violating Individual privacy and autonomy. There is no compelling interest in regulating surname changes, and existing legal processes can be amended to manage these changes without the intervention of the DirectorGeneral, and the bureaucracy that goes with it.

24.4 Finally, these provisions fail to recognise modern societal values, including gender equality, fluidity in identity choices, and the rejection of rigid gender roles. Updating the law to reflect these values and promote a more inclusive and equitable society is essential.

24.5 In the premises, the limitation does not meet the 'rational connection' and 'proportionality' tests, rendering the limitation unjustifiable.

[25] The amicus concluded that Section 26(1)(a) -(c) and Regulation 18(2)(a) should be held to be inconsistent with the Constitution because it discriminates based on gender.

[26] Having considered the above, I am satisfied that the applicants have established their entitlement to the relief sought.

[27] I, therefore, make the following order:

Order:

1. Prayers 1-6 of the notice of motion are granted.
2. Costs to be paid on an unopposed basis, including the costs of two counsel on scale C to the extent of their employment.

MHLAMBI, J

On behalf of Plaintiff: Adv. N. Snellenburg SC, Instructed by: Stander & Associates 29 President Steyn Avenue Westdene Bloemfontein
On behalf of the Amicus: Adv. S Grobler SC Adv. K Motselebane Instructed by: Free State Bar of Advocates 3 Zola Budd Street Bloemfontein

[1] 1997(4) SA 1 CC.

[2]

[2016] 3 All SA 945 (WCC) paras 46-49.

[3] Ramolebo v Minister of Home Affairs and Another [2019] JOL 45828 (FB).

[4] 1998(1) SA 300 (CC), para 54.

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