

Case: J.J and Others v Minister of Home Affairs and Another

(3626/2024) [2024] ZAFSHC 286 (13
September 2024)

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INTRODUCTION

The case of J.J and Others v Minister of Home Affairs and Another (3626/2024) [2024] ZAFSHC 286 (13 September 2024) deals with the constitutionality of the Births and Deaths Registration Act 51 of 1992 and its regulations with regard to the assumptions of spouse's surnames when registering marriages.

BACKGROUND

The case involves 4 Applicants. The first applicant is (J[...] J[...]), a major female legal practitioner and the second applicant is (H[...] v[...] d[...] M[...]), a major male senior corporate manager. The third applicant is Jess Donnelly-Bornman, a major practising advocate and the fourth applicant is Andreas Nicolaas Bornman, who is a major Legal practitioner.

The first respondent is the Minister of Home Affairs in his representative capacity and the second respondent is the Minister of Justice and Correctional Services.

The first and second applicants were married on 15 July 2021. In the process of registering their marriage, both applicants informed the Department of Home Affairs (DHA) official that the second applicant will be assuming the first applicant's surname. They were informed by the DHA that the system does not allow their request. The first applicant's surname meant a lot to her as it symbolised her connection to her parents who passed away when she was four years old. The second applicant was aware of and supportive of the first applicant's choice.

The third and the fourth applicants were married on 02 April 2022. The third applicant preferred to keep her surname but wanted to hyphenate the fourth's applicant surname with her own. When they were completing the marriage certificate, they realized that there was a provision for the female spouse to change her surname but the same did not exist for a male spouse. They both intended to have the same surname and visited multiple DHA offices to change the fourth applicant's surname.

They were later informed that the Births and Deaths Registration Act 51 of 1992 (the BDRA or the Act) did not permit the type of amendment to their surnames contemplated by them. The relevant section is section 26(1) of the BDRA and Regulation 18 of the regulations to the BDRA (the Regulations).

The applicants contend that the Act and Regulations perpetuated gender norms set by a patriarchal society that entrenches gender inequality and differentiates based on sex and gender. They further contended that this was a violation of section 9(2) of the Constitution which stipulates that the right to equality includes full enjoyment of rights and section 9(3) that states that no one should be unfairly discriminated against based on gender. The applicants argued that section 26(1) still enforces a patriarchal position in that only women are entitled, as of right, to assume a different surname and any person that does not fall within the ambit of section 21(1) of the BDRA must apply to the Director-General for consent to assume a different surname in terms of section 26(2).

The Amicus (friend of the court) supported the argument of the applicants and added that the BDRA is intrusive and serves no compelling state interest in that it requires government involvement in a profoundly personal decision. The Amicus further stated that the provisions fail to recognise modern societal values, including gender equality and others. The Amicus also emphasised that the order should be referred to the Constitutional Court for confirmation under section 172(2)(a) of the Constitution.

THE RELIEF SOUGHT

The applicants seek an order:

1. Declaring section 26(1)(a) –(c) of the Births and Deaths Registration Act to be unconstitutional to the extent that it discriminates on grounds of gender.
2. Declaring Regulation 12(2)(a) unconstitutional to the extent that it discriminates against males by failing to provide for a change in surname.
3. Suspending the declaration of invalidity for a period of 24 months to allow the Parliament to remedy the foregoing defects.

CONCLUSION

The court held that it is satisfied that the applicants have established their entitlement to the relief sought.

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VALUE

The value of the case is that it brings to light that there are laws still in force which at face value are unconstitutional and not aligned with the modern values of our society.



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