

Case: Jordaan and Others v Minister of Home Affairs and Another

[2025] ZACC 19

INTRODUCTION

The case of Jordaan and Others v Minister of Home Affairs deals with the Constitutional invalidity of Section 26(1)(a)-(c) of the Births and Deaths Registration Act 51 of 1992 (herein after referred to as the “**Act**”) in so far as it is in violation of section 9(1) of the Constitution, it differentiates irrationally on the ground of gender. The section of the act is responsible for the amendment of the forenames and surnames of South African Citizens. The latter is linked to regulation 18 (2)(a) of the Regulations on the Registration of Births and Deaths, 2014 which provides for the legal framework for individuals to change their names. The Act deals with the assumption of another surname and purports to give legislative approval for the assumption of a common surname after marriage. Essentially, no person may assume or describe themselves by another surname other than that under which they have been registered in the population register, unless the Director – General authorises the person to do so.

However, the above does not apply to the following categories of married women:

1. when a woman assumes the surname of the man she married after such marriage, or after assuming his surname resumes a surname that she bore at any prior time;
2. a married, divorced or widowed woman resumes a surname which she bore at any previous time; and
3. a married, divorced or widowed woman adds to the surname which she assumed after the marriage, any surname which she bore at any time.

The Constitutional Court granted the order of constitutional invalidity, issued by the High Court of South Africa, Free State Division, Bloemfontein.

PARTIES

Ms. Jana Jordaan, the first applicant, is married to Mr. Henry van der Merwe, the second applicant. Ms. Jess Donnelly-Bornman, the third applicant, is married to Mr. Andreas Nicolaas Bornman, the fourth applicant.

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In their respective representative capacities, the Ministers of Justice and Constitutional Development and Home Affairs are the first and second respondents, respectively. Among other things, the Department of Home Affairs (the “Department”) is in charge of keeping administering the birth, marriage, and death certificates as well as the national demographic register.

BACKGROUND

The first and second applicant were married in Bloemfontein in 2021 before marriage, they both reached an agreement that the second applicant would assume the surname of the first applicant to preserve the ties with her deceased biological parents. Upon registration of the marriage, the department of Home Affairs advised the first and second respondents that it is not possible for the second applicant to assume the surname of the first applicant. They also have a child who they would like to bear the surname “Jordaan”.

The third applicant also intended on keeping her surname in order to preserve same since she was the only child born from her biological parents. The third and fourth applicants elected to use their combined surnames as Donnelly-Bornman. They were however, advised by the Department of home affairs that only the female spouse may amend her surname.

The applicants referred the matter to the high court seeking an order declaring section 26(1)(a)-(c) of the Act and regulation 18(2)(a) to be unconstitutional to the extent that they discriminate on the grounds of gender. They also sought ancillary relief regarding the assumption of their preferred surnames. The applicants argued that the act and regulations maintain and perpetuate patriarchal gender norms and differentiate on the basis of sex and gender and as such violate section 9(2) and (3) of the Constitution.

The Applicants contended that the provisions being challenged violate the Constitution in that they arbitrarily differentiate between people's ability to change their surnames upon marriage or of their own accord, on the basis of their sex or gender.

Relying on *Hugo*¹, the applicants contended that the Act and Regulations are in contravention of the goal of promoting equality and prohibiting unfair discrimination under the Constitution. They further relied on the statement in *Wile*², where Judge Bozalek held that to the extent that regulation 18 seeks to create a closed list of reasons for changing one's surname, it was *ultra vires* (beyond the powers of the Minister). Finally, the applicants submitted that section 26(2) and regulation 18 must meet the equality test articulated in *Harksen*³ to pass constitutional muster.

The respondents did not oppose the matter in the High Court. At the request of the High Court, the Free State Society of Advocates was admitted as amicus curiae (friend of the court). The amicus curiae supported the argument advanced by the applicants that the impugned provisions perpetuated patriarchal gender norms in violation of section 9 – the right to equality – of the Constitution and unfairly discriminated on the basis of gender.

HIGH COURT

The High Court ordered that section 26(1)(a)-(c) of the Act be declared to be unconstitutional to the extent that it discriminates on the ground of gender, by failing to:

1. afford a female the right to have her spouse assume her surname,
2. by failing to afford a man a right to assume the surname of his spouse,
3. by failing to allow a divorced man to continue using the surname assumed when he married his spouse,
4. by failing to afford a man a right to add the surname which he assumed after marriage or before marriage and by making a change of male surname to be subjected to confirmation by the director general in terms of section 26(2) of the Act.

The High Court further ordered that the surname of the:

1. first applicant be amended to Jordaan;
2. second applicant be amended to Jordaan;
3. first and second applicants child to Jordaan; and
4. fourth applicants surname be amended to Donnelly-Bornma.

CONSTITUTIONAL COURT

The first and second respondents filed notices of intention to abide in this Court. The Chief Justice issued directions calling upon the first and second respondents to file written submissions, specifically addressing the relief sought by the applicants.

In their submissions the respondents do not oppose the confirmation of the declaration of unconstitutionality. They agree with the applicants that the impugned

provisions in the Act are rooted in colonialism and patriarchal norms. The respondents concede that the Act should be amended to reflect constitutional values and agree with the proposal made by the applicants that the order of constitutional invalidity be suspended and Parliament be granted a two-year period within which to remedy any such defect.

The issues before the constitutional court were the following:

1. the constitutionality of section 26(1)(a)-(c) of the Act;
2. the constitutionality of regulation 18(2)(a) of the Regulations; and
3. the appropriate remedy.

The Constitutional court noted that the gradual progression of Women's rights in South Africa has paved the way for significant advancement of gender equality and self-determination for women but despite that, there are still practices and laws which continue to perpetuate harmful stereotypes regarding the role and autonomy of women.

The court further noted that, the applicants have placed a particular emphasis on men. Patriarchy has exalted the position of men in society and insulated them from the harsh effects of sexism and gender-based discrimination. However, this does not mean that men cannot and do not suffer from the effects of patriarchy. The inability of husbands to assume their wives' surnames removes their right to make choices pertaining to their own identity. Further, it prevents them from determining how to structure their familial unit. However, the provision is at the same time demeaning to women, since it conveys that only the man's surname deserves to serve as the family surname. The man's surname is thereby given a superior status to that of the woman's. The ability of women, with the cooperation of their husbands, to give their surname to the family is prohibited.

The discrimination is against both men and women and this was correctly conceded by the respondents. The assumption that husbands' surnames will be the default surname of the family violates the right to equality of both men and women by reinforcing power dynamics and gender hierarchies within relationships. The impugned provisions have its roots in the colonial custom for wives to assume their husband's surname upon marriage, inherited from Roman-Dutch law.

Justice Theron held,

In my view, this discrimination, as in *National Coalition II*, "occurs at a deeply intimate level of human existence and relationality"; the unequal treatment of spouses, and the underlying assumptions justifying such treatment, serve only to further entrench the position of women as the "inferior" spouse in the relationship.

The court then held that there is a differentiation in that the Act does not allow the Male spouse to assume his female spouses surname and where the differentiation is on the grounds specified in terms of section 9(3) of the constitution then it is presumed in terms of section 9(5) of the constitution, to constitute unfair discrimination.

The court emphasized that not only Women but also Men suffers from the effects of patriarchy which takes away from different spouses the choice to assume each other's surname. As such it was held that it constitute differentiation without legitimate purpose.

In its Order, the Court declaring section 26(1)(a)-(c) of the Act unconstitutional to the extent that, it differentiate irrationally on the ground of gender in violation of section 9(1) and 9(3) of the constitution.

The remainder of the order mirrored that of the high court order above.

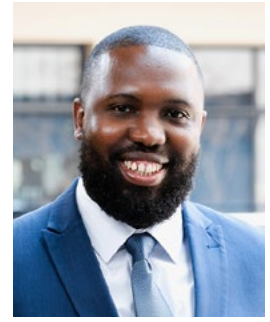
CONCLUSION

Both the Constitutional court and the High Court declared section 26(1)(a)-(c) of the Act unconstitutional, thus directing the legislator to amend the section within 24 months of the order, to allow spouses and their children to assume surnames of their choices with no limitation and/or restriction in terms of gender.

Please note: this article is for general public information and use. It is not to be considered or construed as legal advice. Each matter must be dealt with on a case-by-case basis and you should consult an attorney before taking any action contemplated herein.



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

²*Wile v MEC, Department of Home Affairs, Gauteng* [2016] 3 All SA 945 (WCC); 2017 (1) SA 125 (WCC) at paras 46-9.

³*Harksen v Lane N.O.* [1997] ZACC 12; 1997 (11) BCLR 1489 (CC); 1998 (1) SA 300 (CC) at para 52.