CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 296/24

In the matter between:

JANA JORDAAN	First Applicant
HENRY VAN DER MERWE	Second Applicant
JESS DONNELLY-BORNMAN	Third Applicant
ANDREAS NICOLAAS BORNMAN	Fourth Applicant
and	
MINISTER OF HOME AFFAIRS	First Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second Respondent

Neutral citation:	*Jordaan and Others v Minister of Home Affairs and Another* [2025] ZACC 19
Coram:	Madlanga ADCJ, Dambuza AJ, Kollapen J, Majiedt J, Mhlantla J, Opperman AJ, Rogers J, Theron J and Tshiqi J
Judgment:	Theron J (unanimous)
Heard on:	4 March 2025
Decided on:	11 September 2025

Summary: Constitutional invalidity — Section 26(1)(a)-(c) of the Births and Deaths Registration Act — confirmation in terms of section 167(5) of the Constitution

Differentiation between men and women — unfair discrimination on listed ground — infringement of right to equality — infringement of right to dignity

Section 9(1) and section 9(3) infringements — Section 36 inquiry — limitation not justifiable

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ORDER

On application for confirmation of an order of constitutional invalidity granted by the High Court of South Africa, Free State Division, Bloemfontein:

1. The order of constitutional invalidity issued by the High Court of South Africa, Free State Division, Bloemfontein is confirmed.
2. Section 26(1)(a)-(c) of the Births and Deaths Registration Act 51 of 1992 (Act) is declared unconstitutional to the extent that, in violation of section 9(1) of the Constitution, it differentiates irrationally on the ground of gender, and to the extent that, in violation of section 9(3) of the Constitution, it unfairly discriminates on the ground of gender, by:

    (a) failing to afford a woman the right to have her spouse assume her surname;
    (b) failing to afford a man the right to assume the surname of the woman after marriage;
    (c) failing to allow for a married or divorced man or widower to resume a surname which he bore at any time; and

(d) failing to 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.

3. The declaration of invalidity is suspended for a period of 24 months to enable Parliament to remedy the defects by either amending existing legislation or passing new legislation within 24 months, in order to ensure that all persons are afforded the right of assumption of another surname.

4. Pending the coming into force of new 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 Act, it is declared that the provisions of section 26(1) shall not apply when:

   (a) a person after their marriage assumes the surname of the spouse with whom such person concluded a marriage or after having assumed such surname, resumes a surname which they bore at any prior time;

   (b) a married or divorced person or a widow or widower resumes a surname which they bore at any time; and

   (c) a person, whether married or divorced, or a widow or widower, adds to the surname which they assumed after the marriage, any surname which they bore at any prior time.

5. Should Parliament fail to correct the defects in the 24-month period, paragraph 4 above shall continue to operate until remedial legislation, if any, is brought into operation.

6. The first respondent is ordered to pay the applicants' costs in this Court, including the costs of two counsel where so employed.

JUDGMENT

THERON J (Madlanga ADCJ, Dambuza AJ, Kollapen J, Majiedt J, Mhlantla J, Opperman AJ, Rogers J and Tshiqi J concurring):

Introduction

[1] This application concerns the constitutionality of section 26(1)(a)-(c) of the Births and Deaths Registration Act[1] (the Act). This section regulates the amendment of the forenames and surnames of South African citizens, and is linked to regulation 18(2)(a) of the Regulations on the Registration of Births and Deaths, 2014[2] (Regulations), which provides the legal framework for individuals to change their names. The High Court of South Africa, Free State Division, Bloemfontein, declared section 26(1)(a)-(c) unconstitutional on the ground that it discriminates on the basis of gender.

[2] In this Court, the applicants seek confirmation of the declaration of invalidity. In terms of section 167(5) of the Constitution, a declaration of constitutional invalidity only takes effect once confirmed by this Court.[3]

Legislative scheme

[3] Section 26(1)(a)-(c) provides:

> "**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

[1] 51 of 1992.

[2] Regulations on the Registration of Births and Deaths, GN 128 *GG* 37373, 26 February 2014.

[3] Section 167(5) reads as follows:

> "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force."

Confirmation proceedings in terms of section 167(5) of the Constitution engage the supervisory jurisdiction of this Court and it is not necessary to enquire further into jurisdiction. See *Qwelane v South African Human Rights Commission* [2021] ZACC 22; 2021 (6) SA 579 (CC); 2022 (2) BCLR 129 (CC) at para 29.

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; 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."

[4] Section 26(2) provides as follows:

"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."

[5] In turn, regulation 18(2), which regulates the assumption of another surname provides:

"**Assumption of another surname—**

(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)." (Emphasis added.)

[6] Section 26(1)(a)-(c) of the Act deals with the assumption of another surname and purports to give legislative approval for the assumption of a common surname after marriage. In essence, in terms of these provisions 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, this does not apply to married *women* in the following circumstances: when (i) 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; (ii) a married, divorced or widowed woman resumes a surname which she bore at any previous time; and (iii) a married, divorced or widowed woman adds to the surname which she assumed after the marriage, any surname which she bore at any time.

[7] In terms of section 26(2) of the Act, when a person applies to the Director-General to assume another surname, the latter must be satisfied that there is "good and sufficient reason" for that person's assumption of another surname. In terms of regulation 18(2)(a) of the Regulations, "good and sufficient reason" must relate to one of three circumstances and only provides for a change of surname when there is a change in the marital status of a woman. The Act does not provide for men in heterosexual marriages who want to assume their wife's surname to do so, nor does it provide for parties in a same-sex marriage or civil union to do so.

[8] As addressed, the Act uses gendered language in its construction, referring to a man and a woman in a marriage. However, this is not consistent with other similar legislation. The Civil Union Act[4] uses gender-neutral language to refer to partnerships, such as person, partner or spouse. Thus, there is no distinction in the Civil Union Act based on a partner's gender, whereas the application of the provisions of the Act vary based on one's gender.

Background

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

[4] 17 of 2006.

respondents are the Minister of Home Affairs and the Minister of Justice and Constitutional Development respectively, each cited in their representative capacities. The Department of Home Affairs (Department) is responsible, among other duties, for maintaining the national population register and the birth, marriage and death records.

[10] The first and second applicants were married in Bloemfontein in 2021. They had agreed, prior to their marriage, that the second applicant would assume the surname of the first applicant in order to preserve her familial ties to her deceased biological parents. Upon registration of the marriage, the first and second applicants were advised by the Department that it was not possible for the second applicant to assume the first applicant's surname. The first and second applicants have a child who they would like to bear the surname "Jordaan".

[11] The third applicant too wished to retain her surname to preserve familial ties with her biological parents as an only child. The third and fourth applicants opted for their surname to be reflected as "Donnelly-Bornman". They were advised by the Department that only a female spouse may amend her surname, not a male spouse.

[12] The applicants instituted proceedings in the High Court in which they sought, among others, 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.

[13] 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.

[14] The applicants argued that the Act and Regulations perpetuate patriarchal gender norms and differentiate on the basis of sex and gender in violation of section 9(2) and 9(3) of the Constitution. They contended that the impugned provisions violate the Constitution by arbitrarily differentiating 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*,[5] the applicants contended that the Act and Regulations are in contravention of the goal of promoting equality and prohibiting unfair discrimination under the Constitution.

[15] The applicants further relied on the statement in *Wile*,[6] where Bozalek J 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*[7] to pass constitutional muster.

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

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

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

> "In order to determine whether the discriminatory provision has impacted on complainants unfairly, various factors must be considered. These would include:
>
> (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. In *Hugo*, for example, the purpose of the Presidential Act was to benefit three groups of prisoners, namely, disabled prisoners, young people and mothers of young children, as an act of mercy. The fact that all these groups were regarded as being particularly vulnerable in our society, and that in the case of the disabled and the young mothers, they belonged to groups who had been victims of discrimination in the past, weighed with the Court in concluding that the discrimination was not unfair;
>
> (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."

[16] The High Court made an order in the following terms:

> "1. Section 26(1)(a)-(c) of the [Act] [is declared] 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 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 authorisation of the Director-General in terms of section 26(2) of the [Act].
>
> 2. Regulation 18(2)(a) of the [Regulations] [is declared] to be unconstitutional to the [extent] that it discriminates against male person[s] by failing to provide for the change in the marital status of a man.
>
> 3. The declaration of invalidity in paragraphs 1 and 2 shall be suspended 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.
>
> 4. 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 [Act]:
>
> 4.1 It is declared that the provisions of subsection 26(1) of the [Act] 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 'Jordaan';

4.2.2 To amend the surname of the Second Applicant to 'Jordaan';

4.2.3 To amend the surname of the First and Second Applicants' child to 'Jordaan';

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

5. 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 [Act] it is declared that the reasons referred to in section 26(2) of the [Act] must relate to, inter alia, a change in the marital status of a person.

6. 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 [in]validity.

7. Costs to be paid on an unopposed basis, including the costs of two counsel on scale C to the extent of their employment."

In this Court

[17] The applicants maintain the position they had adopted in the High Court that the impugned provisions are patriarchal, discriminate on a prohibited ground and cannot be justified in an open and democratic society. The applicants allege that section 26(1)(a)-(c) of the Act and regulation 18(2)(a) of the Regulations are inconsistent with the provisions of section 9 (the equality provisions) and section 10 (the provisions relating to the right to dignity) of the Constitution. They further contend that in terms of section 7(3) read with section 36 of the Constitution, the limitation of these rights is not justifiable.

[18] The first and second respondents filed notices of intention to abide in this Court. On 6 February 2025, the Chief Justice issued directions calling upon the first and second respondents to file written submissions, specifically addressing the relief sought by the applicants.

[19] 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.

Issues

[20] This matter raises the following issues:

(a) the constitutionality of section 26(1)(a)-(c) of the Act;

(b) the constitutionality of regulation 18(2)(a) of the Regulations; and

(c) the appropriate remedy.

Analysis

Is section 26(1)(a)-(c) of the Act unconstitutional?

Historical context

[21] Historically, gender discrimination, not only in our society but worldwide, is well-established and entrenched.[8] In *Sithole*, Tshiqi J held:

> "Patriarchy has resulted in different forms of discrimination against women with dire consequences. It is therefore one of the main drivers of the oppression of women

[8] See *Rahube v Rahube* [2018] ZACC 42; 2019 (1) BCLR 125 (CC); 2019 (2) SA 54 (CC) at para 23; *Sithole v Sithole* [2021] ZACC 7; 2021 (5) SA 34 (CC); 2021 (6) BCLR 597 (CC) at para 31; and *Mudau v S* [2014] ZASCA 43 at para 6.

> through gender stereotyping and the abuse of cultural practices. These dire consequences have rendered women vulnerable and this vulnerability is an aspect of social reality."[9]

[22] In *Rahube*, Goliath AJ held:

> "It is important to recognise that the pervasive effects of patriarchy meant that women were often excluded even from seemingly gender-neutral spaces. The perception of women as the lesser gender was, and may still be, a widely held societal view that meant that even where legislation did not demand the subjugation of women, the practices of officials and family members were still tainted by a bias towards women. The prioritisation of men is particularly prevalent in spheres of life that are seen as stereotypically masculine, such as labour, property and legal affairs."[10]

[23] In many African cultures, women retained their birth names after marriage, and children often took their mother's clan name. There are several historical and cultural authorities that suggest this as evidenced by traditional African cultures, customary law in many African countries, colonial records and accounts from the 18th and 19th centuries, missionary records from the same period and oral tradition.[11]

[24] In parts of Africa, the tradition of a woman assuming her husband's surname is rooted in colonialism, religion and patriarchal cultural norms. With the arrival of the European colonisers and Christian missionaries, and the imposition of Western values, the tradition of women taking their husband's surname was introduced. This practice reinforced patriarchal norms, where women were seen as subordinate or legally inferior (akin to a minor) to their husbands and expected to assume their identity.[12]

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[9] *Sithole* id at para 31.

[10] *Rahube* above n 8 at para 23.

[11] See Saidi "Women in Precolonial Africa" *Oxford Research Encyclopedia of African History* (2020), available at: https://oxfordre.com/africanhistory/display/10.1093/acrefore/9780190277734.001.0001/acrefore-9780190277734-e-259.

[12] See Kubayi "On Double-barrel Surnames: Perceptions from Young Unmarried Women in Rural Limpopo Province, South Africa" (2022) 36 *Nomina Africana* 33 and Bonthuys "Equal choices for Women and Other Disadvantaged Groups" (2001) *Acta Juridica* 39. See also *Sithole* above n 8 at para 31.

[25] The custom that a wife takes the husband's surname existed in Roman-Dutch law, and in this way was introduced into South African common law. This custom also came into existence as a result of legislation that was introduced by countries that colonised African countries south of the Sahara.[13]

[26] An example, under Roman law, is the marriage *cum manu* (with the hand)[14] which is discussed in "Marriage in Roman Law".[15] The authors discuss two kinds of conjugal unions which coexisted for several centuries in the early Roman Empire and which gave rise to two different kinds of wives, namely, the *materfamilias* (mother of the family) and the *matrona* (matron). The *materfamilias* became a member of the new family, but only if she broke all ties with her former family. The *matrona* remained a member of her original family, merely leaving her father or her *agnates* (relatives through the father's side) but retaining her own goods and property. The wife (*matrona*) remained under the power of her father.[16]

[27] In a marriage *cum manu* the woman became part of the family of the husband and submitted (was subject) to the power that existed under the name of the *manus* (hands). This power attached exclusively to the father of the husband. It would only pass to the husband when he became the head of the family. The wife became a daughter to her husband with a juridical status of that similar to her children.[17] The Roman-Dutch influence of this tradition held that a husband was entitled to the "full right to the person of his wife with whom he has consummated a marriage."[18]

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[13] See Spiro "The Name of a Married Woman" (1949) 66 *SALJ* 189.

[14] In a *cum manu* marriage, the wife became part of her husband's family and was under his guardianship. See Stocquart "Marriage in Roman Law" (1907) 16 *Yale Law Journal* 303 Trans: by Bierkan.

[15] Id.

[16] Id at 310-12.

[17] Id at 310.

[18] Swartz et al "Is a Husband Criminally Liable for Raping his Wife? A Comparative Analysis" (2015) 3 *International Journal of Academic Research and Reflection* 8, citing J de Damhouder, *Practycke in Crimineele Saken* (1650).

[28] In modern times, in South Africa, the marital power regime, which was similar to the doctrine of coverture which existed in the English common law,[19] perpetuated the historical philosophy that women are not equal to men and become akin to a minor upon marriage. In a speech by Lord Wilson at the High Sheriff of Oxfordshire's Annual Law Lecture, he explained:

> "The change following the Norman conquest reflected the hierarchical nature of the feudal system which was then introduced. Just as you went from the King at the top, down to the Lord, then down to the master, and ultimately down to the peasant, so you went from the husband down to the wife. Norman society was also much more pre-occupied with land tenure and its passage down from father to son. The heart of the new order was reflected in the principle of coverture. In the words of law-French, the wife was a 'feme covert' instead of a 'feme sole'. In law she was 'covered up' by her husband. Hence my title this afternoon: *the wife was legally in the shadow of the husband and she was substantially invisible to the law*. Coverture subsisted throughout a marriage and since . . . there was until 1857 no practical ability for a husband or wife to get a divorce, it therefore subsisted while both of them remained alive."[20] (Emphasis added.)

[29] The marital power regime has since been abolished.[21] The steadfast progression of women's rights in South Africa has allowed for the significant advancement of gender equality and the self determination of women, however, there are still many

[19] Lord Wilson "Changes over the Centuries in the Financial Consequences of Divorce" (address to the University of Bristol Law Club, 20 March 2017), available at https://www.bailii.org/uk/other/speeches/2017/170320.pdf at para 7:

> "The obligation to support a wife during the marriage is easy to understand. It arises out of the doctrine of coverture, which operated from medieval times and under which a wife's legal identity was substantially covered up by her husband. On marriage he became owner of her property. She could not enter into a contract. If she committed a tort (delict), it was the husband whom the victim sued and who was required to pay the damages. Conversely, if she was the victim of a tort (delict), it was the husband who sued the offender and pocketed the damages. Any money earned by the wife also went to the husband. So the husband's further promise to her in church – 'with all my worldly goods I thee endow' – rang rather hollow. In return, however, for taking all the wife's money, the husband had – in theory – an obligation to support her."

[20] Lord Wilson "Out of His Shadow: The Long Struggle of Wives under English Law" (The High Sheriff of Oxfordshire's Annual Law Lecture, 9 October 2012), available at https://www.bailii.org/uk/other/speeches/2012/121009.pdf at 3.

[21] In terms of section 11 of the Matrimonial Property Act 88 of 1984.

practices and laws that continue to perpetuate harmful stereotypes regarding the role and autonomy of women.

Infringement on the right to equality

[30] The right to equality is enshrined in section 9 of the Constitution.[22] Section 9(1) provides that everyone is equal before the law and has the right to equal protection and benefit of the law. Section 9(2) provides for the achievement of full and equal enjoyment of all rights and freedoms and authorises legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination. Section 9(2) envisages substantive equality. Subsections 9(1) and (2) are complementary and they both contribute to the constitutional goal of achieving equality to ensure "full and equal enjoyment of all rights".[23] On the other hand, section 9(3) proscribes unfair discrimination by the state against anyone on any ground including those specified. Section 9(5) renders discrimination on one or more of the listed grounds unfair unless its fairness is established.[24]

[22] Section 9 of the Constitution reads:

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
>
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[23] *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) (*National Coalition I*) at para 62.

[24] *Minister of Finance v Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) (*Van Heerden*) at para 28.

[31] In *Harksen*,[25] this Court laid down a two-stage test to determine unfair discrimination: first, the court must determine whether the provision differentiates between people or categories of people, and if so, whether this differentiation serves a legitimate government purpose.[26] If the provision fails this test, it violates section 9(1), the guarantee of equality before the law. If the provision passes this test, the court must still enquire, secondly, whether the differentiation amounts to discrimination and whether such discrimination is unfair.[27]

[32] Where discrimination is on a ground specified in section 9(3), it is presumed, in terms of section 9(5), that the differentiation constitutes unfair discrimination "unless it is established that the discrimination is fair". The burden to show that a provision is fair rests on the state.[28]

[33] Constitutional rights violations must be examined with reference to the purpose of the right and the constitutional values which underpin it.[29] The constitutional vision is to achieve a "non-racial and non-sexist egalitarian society underpinned by human dignity, the rule of law, a democratic ethos and human rights".[30]

Is there differentiation?

[34] The inability of men to assume their wives' surnames squarely fits the definition of differentiation. Under the current marital scheme, spouses are not granted the same freedoms, and this is based on gender alone. I am therefore satisfied that the impugned provisions differentiate between persons on the basis of gender.

[25] *Harksen* above n 7.

[26] Id at para 43.

[27] Id at para 53.

[28] *Van Heerden* above n 24 at para 36.

[29] See Albertyn "Substantive Equality and Transformation in South Africa" (2007) 23 *SAJHR* 253.

[30] *Van Heerden* above n 24 at para 26.

Does the differentiation serve a legitimate government purpose?

[35] The provision is extensive as it applies to all married heterosexual couples. The Act repealed the Birth, Marriages and Deaths Registration Act[31] (the 1963 Act) in its entirety. The 1963 Act had provided for the alteration of a name (including a surname) on application to the Director-General and payment of a prescribed fee. The Director-General had to be satisfied that the person was competent to change their name. The 1963 Act and subsequent amendments thereto did not deal with the assumption of another surname, as is provided for in the current Act.

[36] In 1992, the current Act introduced provisions to regulate the assumption of a surname from the time that a birth is registered. In general, the objective of regulating a surname is to ensure that new surnames are not created which bear no connection to the family. The Legislature decided, that in keeping with practice in South Africa, and to regulate the situation where a person reaches an age to *apply* for a *change* of surname, there should be limitations as to the circumstances under which a person may assume another surname. The circumstances which were then added to the legislation related to marriage and applied specifically to women.

[37] The state, in seeking to regulate any situation, must do so in a rational manner.[32] In *Prinsloo*, this Court cautioned:

> "[The state] should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner."[33]

[31] 81 of 1963.

[32] *Prinsloo v Van der Linde* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 25.

[33] Id.

[38] The respondents, in their written submissions, acknowledge that the Act is an outdated piece of legislation promulgated before the advent of our constitutional democracy, and has not come before the South African Law Reform Commission for the development and modernisation thereof.

[39] The legitimate government purpose in this case, namely seeking to regulate surnames to ensure that new surnames are not created which bear no connection to the family surname, is not served by the differentiation. This is because the restriction imposed on assuming another surname is not removed if the differentiation is remedied; persons wishing to change their surnames may only assume an existing surname, that of their spouse. Thus, the differentiation serves no legitimate government purpose.

[40] It follows that section 26(1) violates the equality guarantee in section 9(1) of the Bill of Rights.[34] I now turn to consider the question whether it also violates the prohibition against unfair discrimination.

Does the differentiation constitute unfair discrimination?

[41] The differentiation is on the listed ground of gender, under section 9(3). In terms of section 9(5), "[d]iscrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair".

[42] Both in the High Court and this Court, the respondents did not contend that the discrimination was fair. However, this Court must still be satisfied, on a consideration of all the circumstances, that the discrimination is unfair.[35]

[34] *Harksen* above n 7 at para 43.

[35] *National Coalition I* above n 23at para 18.

[43] The Act and Regulations perpetuate gender norms set by a patriarchal society that entrenches gender inequality.[36] The fact that the husband's surname is used after marriage is probably one of the best examples of this.

[44] Whilst there have been major developments in marital law in South Africa over the last 70 years, most notably the limitation and eventual removal of marital power applicable to women of different cultures and backgrounds, the impugned provisions of the Act and Regulations that form the subject matter of this application unfortunately still entrench and perpetuate gender inequality.

[45] The discrimination negatively affects both men and women. In the case of men, they are deprived of the ability to take their wives' surnames if they so wish. In the case of women, the effects of this scheme are far more insidious. It is not merely so that they are deprived of the right to have their surnames serve as the family surname where their husbands wish to take that surname. It also reinforces patriarchal gender norms, which prescribe how women may express their identity, and it makes this expression relational to their husband, as a governmental and cultural default. Furthermore, it is clear that there is not a "worthy or important societal goal"[37] that is realised through the prohibition of a man assuming his wife's surname upon marriage. The prohibition, thus, infringes upon the right to equality.

[46] In *Harksen*, this Court posited a number of considerations to which regard must be had in order to determine the extent and impact of the discrimination and whether the discrimination is unfair. These include (i) the position of the complainants and whether they have suffered from patterns of disadvantage in the past; (ii) the nature of the provision or power and the purpose sought to be achieved by it; and (iii) the extent

[36] De Vos "Unconstitutional Law Assumes Married Women Will Take Their Husband's Surnames But Never Other Way Around" *Constitutionally Speaking* (5 August 2019), available at https://constitutionallyspeaking.co.za/unconstitutional-law-assumes-married-women-will-take-their-husbands-surnames-but-never-other-way-around/.

[37] *VJV v Minister of Social Development* [2023] ZACC 21; 2023 (6) SA 87 (CC); 2023 (10) BCLR 1250 (CC) (*VJV*) at para 18.

to which the discrimination has affected the complainants' rights or interests and whether it has led to an impairment of their dignity.[38]

[47] In this matter, 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.

[48] The Constitution promotes and requires a substantive approach to equality. This has been affirmed in the jurisprudence of this Court.[39] In *National Coalition I*, this Court held that section 9 of the Constitution encapsulates the notion of "substantive as opposed to formal equality".[40] It reasoned:

> "It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied."[41]

[38] *Harksen* above n 7 at para 52.

[39] See *National Coalition I* above n 23; *Du Toit v Minister of Welfare and Population Development* [2002] ZACC 20; 2002 (10) BCLR 1006 (CC); 2003 (2) SA 198 (CC) (*Du Toit*); and *MEC for Education, KwaZulu-Natal v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC).

[40] *National Coalition I* id at para 61.

[41] Id at para 60.

[49] As mentioned, the tradition of women taking their husband's surname was a colonial import. This practice reinforced patriarchal norms where women were seen as subordinate to their husbands and expected to assume their identity. There are many consequences of this practice. The symbolic consequence is that women's identities are subsumed into their husbands' families after marriage.[42] This has the inevitable upshot of entrenching the notion that the husband is the head of the household.[43] This practice further reinforces an arbitrary distinction between men and women, by implying that a man's identity is fixed and unchangeable while a woman's identity is adaptable. This practice also perpetuates the historical philosophy that women are not equal to men and become akin to minors upon marriage.

[50] Through the lens of substantive equality, it is clear that the impugned provisions rest on patriarchal assumptions about how families should be structured and removes the ability for spouses in heterosexual relationships to make personal and consequential choices for their family. The underlying hierarchy of power between men and women in marriages is exacerbated when the default culture is for women to assume their husband's surname without any scope for the reverse position. The impugned provisions therefore entrench underlying patterns of gender discrimination and patriarchy. The Constitution's vision of non-sexism requires a concerted effort to eliminate these norms to give life to the constitutional values of freedom, dignity and equality for all.

[51] The extent to which the discrimination has affected the rights and interests of complainants and impacts on their dignity is a further consideration. This Court has on several occasions emphasised the importance of human dignity to our constitutional scheme.[44] In *Dawood*, the Court held that "[h]uman dignity therefore informs

[42] Bonthuys "Deny Thy Father and Refuse Thy Name: Namibian Equality Jurisprudence and Married Women's Surnames" (2000) 117 *SALJ* 464 at 469.

[43] Id. This, historically and presently, has justified various kinds of abuse and subjugation within heterosexual marriages. For instance, by virtue of this notion, husbands were able to commit rape without attracting criminal liability for rape (see *R v Miller* [1954] 2 All ER 529).

[44] See, for example, *S v Makwanyane* [1995] ZACC 3; 1995 (2) SACR 1; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 144. See also *Ferreira v Levin N.O.*; *Vryenhoek v Powell N.O.* [1995] ZACC 13; 1996 (1) SA

constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights".[45] This Court has also acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality.[46] The decision to take the surname of one's partner is a matter of defining significance for many, if not most, people and to prohibit the possibility of such a choice impairs the ability of the individual to achieve personal fulfilment in an aspect of life that is of central significance.[47] The impugned provisions clearly constitute an infringement of the right to dignity.

[52] 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. As pointed out above, 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. 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.[48]

[53] It has been suggested that, in determining unfair discrimination, courts should assess historical patterns of disadvantage, prejudice, stereotyping and stigmatisation, emphasising a dignity-centric approach that seeks to eliminate systemic

984 (CC); 1996 (1) BCLR 1 (CC) at paras 47-9; *Hugo* above n 5 at para 41; *Prinsloo* above n 32 at paras 31-3; *Harksen* above n 7 at paras 50 and 51; *National Coalition 1* above n 23 at para 28; and *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (1) BCLR 39 (CC); 2000 (2) SA 1 (CC) (*National Coalition II*) at paras 41-2 and 48.

[45] *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 para 35.

[46] Id.

[47] Id at para 37.

[48] *National Coalition II* above n 44 at para 42.

discrimination.[49] It would be difficult to achieve the constitutional goal of a society free of discrimination when *all* spouses are not afforded the choice of assuming the surname of their spouse, but instead this choice is only available to those of a certain gender.

[54] The ineluctable conclusion is that the impugned provisions constitute differentiation without a supportive legitimate government purpose and further constitute unfair discrimination. It therefore directly violates the right to equality.

Section 36 analysis

[55] Section 36 of the Constitution provides that rights "may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom". Section 36 mandates an enquiry into relevant factors, including:

> "(a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose."[50]

[56] The nature of the rights to equality and dignity are of fundamental importance to our constitutional democracy, and any limitation thereto must be "appropriately tailored and narrowly focused".[51] Even though the respondents did not advance any justification for the limitation created by the impugned provisions, this is an exercise that must be undertaken by this Court.[52] As mentioned, the purpose of the Act is to regulate the assumption of a surname from the point that a birth is registered. The objective was to ensure that no surnames could be assumed without a connection to the family lineage,

[49] See, for example, Kruger "Equality and Unfair Discrimination: Refining the Harksen Test" (2011) 128 *SALJ* 479.

[50] Section 36(1) of the Constitution.

[51] *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* [2013] ZACC 35; 2013 (12) BCLR 1429 (CC); 2014 (2) SA 168 (CC); at para 95.

[52] *Du Toit* above n 39 at para 31 and *VJV* above n 37 at para 64.

thus, the Legislature sought to regulate and limit the circumstances under which people could change their surnames.

[57] Previously, a woman automatically assumed the surname of her husband upon marriage. This was later amended to afford a woman the choice to assume her husband's surname or to retain her surname or to assume a double-barrelled surname of her own surname and her husband's surname.

[58] The respondents have no objection to a man assuming another surname after marriage, provided that the new surname is linked to an already existing surname.

[59] It is therefore clear that the prohibition on a man assuming his wife's surname is not linked to a "worthy or important societal goal".[53] The limitation rests on presumptions of superiority and removes individuals' ability to make their own determinations regarding a personal choice. The prohibition results in serious impediments to the rights of equality and dignity which cannot be sustained under an "open and democratic society based on human dignity, equality and freedom".[54] Thus, section 26(1)(a)-(c) of the Act is unconstitutional to the extent that it violates section 9(1)-(3) and section 10 of the Constitution.

Is regulation 18(2)(a) unconstitutional?

[60] The Minister of Home Affairs is empowered by section 32 of the Act to promulgate regulations. Regulation 18 governs the assumption of another surname subject to the provisions of section 26 of the Act.

[61] This Court in *Liebenberg*[55] held that the Constitution does not prescribe how regulations are to be made or enacted. All it does is to provide in section 92(1) that

[53] *VJV* id at para 18.

[54] Section 36(1) of the Constitution.

[55] *Minister of Home Affairs v Liebenberg* [2001] ZACC 3; 2001 (11) BCLR 1168 (CC); 2002 (1) SA 33 (CC).

"Ministers are responsible for the powers and functions of the executive assigned to them by the President".[56] Ministers exercise no more than subordinate, delegated authority when they make regulations in terms of Acts of Parliament or perform other ministerial duties. Accordingly, regulations are not Acts of Parliament[57] and their invalidity is not subject to confirmation by this Court.[58]

[62] In *Satchwell*,[59] this Court dealt with the confirmation of constitutional invalidity of sections 8 and 9 of the Judges' Remuneration and Conditions of Employment Act[60] and regulations 9(2)(b) and 9(3)(a) of the regulations thereunder. Relying on *Liebenberg*, this Court held that it was directly concerned only with those parts of the order which related to the enabling provisions. This was because parts of the order dealt with the Act, whereas other parts dealt with the regulations, and confirmation of the declaration of invalidity in relation to regulations was not required.[61] In *Scalabrini*, this Court also affirmed that it was not required to confirm the order striking down regulations.[62] *Scalabrini* explained:

> "The impugned subsections were implemented in terms of regulation 9 of the Regulations. As already stated, the High Court made an order declaring regulation 9 unconstitutional. The respondents did not apply for leave to appeal that order. This Court is not required to confirm the order striking down regulation 9. Since the impugned subsections were struck down, regulation 9 could hardly stand."[63]

[63] Accordingly, the High Court's declaration with regard to the regulations stands, and need not separately be pronounced on by this Court.

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[56] Id at para 13.

[57] See section 43(a) read with section 44 of the Constitution.

[58] *Liebenberg* above n 55 at para 13.

[59] *Satchwell v President of Republic of South Africa* [2002] ZACC 18; 2002 (6) SA 1 (CC); 2002 (9) BCLR 986 (CC).

[60] 88 of 1989.

[61] *Satchwell* above n 59 at para 2.

[62] *Scalabrini Centre of Cape Town v Minister of Home Affairs* [2023] ZACC 45; 2024 (3) SA 330 (CC); 2024 (4) BCLR 592 (CC) at para 26.

[63] Id.

International and foreign law

[64] When interpreting the Bill of Rights, a court is required, in terms of section 39(1) of the Constitution,[64] to consider international law and it may have regard to foreign law. Under international law and in foreign jurisdictions, jurisprudence supports a spouse's ability to adopt their spouse's surname regardless of gender or sex.

[65] Under the International Covenant on Civil and Political Rights (ICCPR),[65] there are several provisions that support one's ability to assume a surname change without regard to gender. Article 3 protects the equal enjoyment of civil and political rights by men and women.[66] General Comment No 28 adds that spouses should have an equal opportunity to choose whether to retain a family name or choose a new family name.[67] Such language supports the proposition that the ability of spouses to choose their family name should apply regardless of their gender.

[66] Article 17 of the ICCPR states that there shall be no unlawful interference with one's family or home.[68] It is complemented by General Comment No 16, which

[64] Section 39(1) of the Constitution provides:

> "When interpreting the Bill of Rights, a court, tribunal or forum—
>
> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
>
> (b) must consider international law; and
>
> (c) may consider foreign law."

[65] International Covenant on Civil and Political Rights, 16 December 1966 (ratified by South Africa on 10 December 1998).

[66] Article 3 of the ICCPR states: "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."

[67] CCPR General Comment No 28: Article 3 (The Equality of Rights Between Men and Women), 29 March 2000 states: "States parties should ensure that no sex-based discrimination occurs in respect of . . . the right of each spouse to retain the use of his or her original family name or to participate on an equal basis in the choice of a new family name".

[68] Article 17 of the ICCPR states: "No one shall be subjected to arbitrary or unlawful interference with [their] privacy, family, home or correspondence".

provides that there must not be "arbitrary interference" with family and home life under the ICCPR.[69]

[67] Article 23(4) further provides that States Parties must take steps to protect the equality of rights and responsibilities in a marriage, and during its dissolution.[70] General Comment No 19 adds that such equality includes the right to retain an original family name or equally participate in choosing a new family name.[71]

[68] Finally, Article 26 protects against sex-based discrimination and requires protection thereof by law.[72] General Comment No 18 adds that legislation adopted by a State party must be consistent with Article 26 and must not be discriminatory.[73]

[69] In the United Nations' Human Rights Committee[74] case of Müller,[75] Mr Müller had moved from Germany to Namibia and sought to adopt the surname of his wife, Ms Engelhard. The Namibian Aliens Act,[76] however, did not provide for a man to change his surname.[77] The couple approached the Human Rights Committee, arguing that the

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[69] CCPR General Comment No 16: Article 17 (Right to Privacy), 8 April 1988.

[70] Article 23(4) of the ICCPR states at para 12: "States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution."

[71] CCPR General Comment No. 19: Article 23 (The Family), 27 July 1990 states: "The right of each spouse to retain the use of his or her original family name or to participate on an equal basis in the choice of a new family name should be safeguarded."

[72] Article 26 of the ICCPR states: "[T]he law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as . . . sex."

[73] CCPR General Comment No 18: Non-discrimination states: "[W]hen legislation is adopted by a State party [even if such legislation does not pertain to a right under the Covenant], it must comply with the requirement of [A]rticle 26 that its content should not be discriminatory."

[74] The Human Rights Committee is an instrument of the ICCPR that monitors implementation of the ICCPR. It has the power to consider inter-State complaints under Article 41 of the ICCPR and the Optional Protocol to the ICCPR allows the Human Rights Committee to examine individual complaints regarding alleged violations of the Covenant by States parties to the Protocol.

[75] *Müller and Engelhard v. Namibia*, Comm. 919/2000, U.N. Doc. A/57/40, Vol. II, at 243 (HRC 2002) U.N. Doc CCPR/C/74/D/919/2000 (2002).

[76] 1 of 1937.

[77] Section 9 of the Namibian Aliens Act, as amended in 1989, stated:

> "If any person who at any time bore or was known by a particular surname, assumes or describes himself by or passes under any other surname which he had not assumed or by which he had not described himself or under which he had not passed . . . he shall be guilty of an offence unless the Administrator-General or an officer in the Government Service authorized thereto by

inability of Mr Müller to assume his wife's surname without a lengthy administrative process – which women under similar circumstances are not subjected to – violates the right to equality as to marriage under Article 23(4), constitutes an arbitrary and unlawful interference with one's privacy under Article 17(1) and discriminates based on sex under Article 26 of the ICCPR.[78]

[70] The Human Rights Committee pronounced that the Act was inconsistent with Article 26 because it differentiated on the basis of sex[79] and thus, found it unnecessary to address the arguments raised under Articles 17(1) and 23(4).[80] A decision of the Human Rights Committee is not binding, but it does provide a persuasive analysis on the interpretation of the ICCPR. There are similarities in the grounds upon which the Act in the *Müller* decision was found inconsistent with Article 26 and the grounds on which I find that the impugned provisions in the Act in the present matter are inconsistent with our Constitution.

[71] Namibia has recently recognised and sought to remedy this defect. On 30 December 2024, the Legislature published in the Namibian Government Gazette the Civil Registration and Identification Act.[81] Although it has not yet entered into force, the Act allows a spouse to assume their spouse's surname without regard to gender. In the explanatory memorandum to the Act, Parliament referred to the *Müller* decision and identified the reason for the adoption of the Act so as to comply with Namibia's obligations under international law.[82]

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him, has authorized him to assume that other surname and such authority has been published in the Official Gazette: Provided that this sub-section shall not apply when—

(a) a woman on her marriage, assumes the surname of her husband".

[78] *Müller* above n 75 at para 6.7.

[79] Id. Of note, the Human Rights Committee appears to use the terms "gender" and "sex" interchangeably.

[80] *Müller* id at para 6.9.

[81] 13 of 2024; available at https://namiblii.org/akn/na/act/2024/13/eng@2024-12-30.

[82] Explanatory Memorandum to the Civil Registration and Identification Bill, 2024, available at: https://www.parliament.na/wp-content/uploads/2024/08/Explanatory_Memorandum_Civil_Registration_and_Identification_Bill.pdf.

[72] The European Commission of Human Rights (Commission) considered this very issue before the turn of the millennium. In *Burghartz*,[83] the applicants were dual Swiss and German nationals who were married in Germany, under German law. The applicants had elected to adopt the wife's surname, Burghartz, as the family name. Despite this, the Swiss registry office recorded the husband's surname, Schnyder, as the family surname. The applicants applied to the Commission on the basis that certain articles in the Swiss Civil Code infringed on the applicants' rights as contained in Articles 8[84] and 14[85] of the European Convention on Human Rights.

[73] The Commission found that there had been a violation of the applicants' right of protection against the prohibition of discrimination under Article 14 as well as their right to privacy under Article 8. The Commission found that there was plain discrimination on the ground of sex[86] and held that the government of Switzerland was not able to provide any compelling reasons for the discrimination.[87] This decision was confirmed by the European Court of Human Rights.[88]

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[83] *Burghartz v. Switzerland*, no 16213/90, European Commission of Human Rights 1992.

[84] Article 8 reads:

> "8. Right to respect for private and family life
>
> (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[85] Article 14 reads:

> "14. Prohibition of discrimination
>
> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

[86] *Burghartz* n 83 above at para 58.

[87] Id at para 68.

[88] *Burghartz v. Switzerland*, no 16213/90, ECtHR1994.

[74] Zimbabwe does not differentiate name changes based on gender. In Zimbabwe, name changes are governed by that country's Births and Deaths Registration Act.[89] Under the legislation, an application may be made by spouses to change their surname by filing an application, paying a registration fee, filing a notarial deed and registering the change in the Government Gazette.[90] An application may be denied if the proposed name change is for an unlawful purpose.[91] There is no qualifier with regard to marriage nor are there different options available depending on gender.

[75] In sum, a combination of international and foreign law supports the view that there should be no gendered qualifier on the ability of spouses to amend their surnames after marriage. South African law, by allowing only women to amend their surname, commits unfair gender discrimination in contravention of international law principles.

Remedy

[76] Once a law or provision of a law has been declared invalid, the Court has a range of options at its disposal to remedy the invalidity.[92] Section 172(1)(b)(ii) affords this Court the power to temporarily suspend the effect of a declaration of invalidity. The purpose of this power is to honour the separation of powers doctrine and mandate Parliament to correct the constitutional defect.[93] If Parliament fails to cure the defect within the time stipulated in the order, the declaration of invalidity comes into effect.[94]

[89] Births and Deaths Registration Act, Chapter 5:02 of 1986.

[90] Section 18(3) of the Births and Deaths Registration Act, Chapter 5:02 of 1986.

[91] Section 18(4)(a)-(b) of the Births and Deaths Registration Act, Chapter 5:02 of 1986.

[92] This includes reading-in, severance, limiting the retrospective effect of the declaration, and suspension of orders of invalidity.

[93] See, for example, in relation to the Interim Constitution 1993, *Executive Council, Western Cape Legislature v President of the Republic of South Africa* [1995] ZACC 8; 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) (*Executive Council*) at para 106.

[94] Id at para 113.

[77] Suspension orders are usually necessary when the striking down of a statute may create a lacuna in the law;[95] if the striking down would abrogate an important regulatory framework;[96] or if it would result in undue budgetary strain.[97] In this case, the second category is applicable. The striking down of section 26(1)(a)-(c) would require a suspension in order for Parliament to make the provisions constitutionally compliant and to preserve, in the meanwhile, the regulatory framework that permits (albeit deficiently) spouses upon marriage to change their surnames.

[78] The applicants request an interim reading-in remedy during the period of suspension. Reading-in is generally employed when there is an omission in the current wording of the statute and the insertion of words would be sufficient to cure its constitutional defects.[98] As held in *National Coalition II*, reading-in would be appropriate only if—

> "a court can define with sufficient precision how the statute ought to be extended in order to comply with the Constitution. Moreover, when reading in (as when severing) a Court should endeavour to be as faithful as possible to the legislative scheme within the constraints of the Constitution. Even where the remedy of reading in is otherwise justified, it ought not to be granted where it would result in an unsupportable budgetary intrusion."[99]

[79] In this case, the applicants seek a reading-in of masculine terms to section 26(1)(a)-(c) pending the coming into force of constitutionally compliant legislation. The purpose of the provision is to provide for name changes in the event of marriage, which would not be undermined with the interim reading-in measure. Instead,

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[95] *J v Director General, Department of Home Affairs* [2003] ZACC 3; 2003 (5) BCLR 463 (CC); 2003 (5) SA 621 (CC) at para 21; and *Executive Council* above n 93 at para 107.

[96] *South African National Defence Union v Minister of Defence* [1999] ZACC 7; 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC) at para 42.

[97] *Mvumvu v Minister of Transport* [2011] ZACC 1; 2011 (2) SA 473 (CC); 2011 (5) BCLR 488 (CC) at paras 49-53.

[98] *National Coalition II* above n 44 at para 64.

[99] Id at para 75.

the interim reading-in would allow for both spouses to assume the surname of the other spouse upon their marriage.

[80] This remedy has been utilised in a long line of cases relating to gender and sexual equality rights. Often, reading-in has been used to widen the meaning of "spouse" to include same-sex life partners.[100] There is no rational reason why the reading-in cannot be used in the same manner in this case. To ensure that the reading-in remedy does not cause further discrimination on the basis of gender, I employ the language of the Civil Union Act. The Civil Union Act refers to persons, partners, and spouses, rather than men and women or husbands and wives.[101] This language not only remedies the constitutional defect that exists by unfairly discriminating on the basis of gender, but accords more with the Constitution because it is inclusive of all identities.[102]

[81] The applicants also seek an order directing the first respondent to amend the surname of the first and second applicants' child to "Jordaan".[103] This relief was granted by the High Court. Where the High Court grants consequential relief flowing from the order of invalidity, such relief will also be before this Court in confirmation proceedings.[104]

[82] No case was made out in the High Court, or in this Court, why this relief should be granted. The High Court gave no reasons for the grant of this relief. The declaration of invalidity in this matter pertains to the violation of the right to equality on the ground

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[100] See *Du Toit* above n 39 at para 44; *Satchwell* above n 59 at para 37; and *Gory v Kolver N.O.* [2006] ZACC 20; 2007 (3) BCLR 249 (CC); 2007 (4) SA 97 (CC) at para 66.

[101] Section 1 of the Civil Union Act provides, in part:

> "'[C]ivil union' means the voluntary union of two persons who are both 18 years of age or older, which is solemnised and registered by way of either marriage or a civil partnership, in accordance with the procedures prescribed in this Act to the exclusion while it lasts of all others;
>
> 'civil union partner' means a spouse in a marriage or a partner in a civil partnership, as the case may be, concluded in terms of this Act."

[102] See section 9(3) of the Constitution.

[103] High Court order at para 4.2.3.

[104] *Dawood* above n 45 at para 18.

of gender, in the specific context of marriage. It cannot follow, as a matter of course, from the declaration of invalidity that a child whose surname is determined under a different provision of the Act[105] may have their surname changed following such declaration.

[83] The first and second applicants were entitled to register their child's surname as the surname of the first applicant, the second applicant, or as a double-barrelled surname of both the first and second applicants' surnames. In light of this Court's finding that section 26(1)(a)-(c) is unconstitutional, the first and second applicants will be entitled to change their familial surname to "Jordaan". The first and second applicants will be entitled to apply to the Director-General to change their child's surname, as provided for under section 25(2) of the Act, and there is no compelling reason why this Court should intervene if that remedy is available to the first and second applicants.

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[105] See section 9(1) read with section 9(2) of the Act:

> "**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.
>
> . . .
>
> (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 25(2) of the Births and Deaths Registration Act reads:

> "**25. Alteration of surname of minor**
>
> . . .
>
> (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."

Costs

[84] The applicants request costs, including the costs of two counsel. In this case, the respondents submitted that they will abide the decision and order of this Court, but consistent with *Biowatch*,[106] costs are inappropriate. In my view, it is appropriate for a costs order to be awarded against the first respondent. This is because, but for the constitutionally offensive provisions, the applicants would not have had to bring this litigation to vindicate their constitutional rights. There has been no appeal against the costs order made by the High Court, so this Court will only make a costs order in respect of the confirmation proceedings.

Order

[85] I therefore make the following order:

1. The order of constitutional invalidity issued by the High Court of South Africa, Free State Division, Bloemfontein is confirmed.
2. Section 26(1)(a)-(c) of the Births and Deaths Registration Act 51 of 1992 (Act) is declared unconstitutional to the extent that, in violation of section 9(1) of the Constitution, it differentiates irrationally on the ground of gender, and to the extent that, in violation of section 9(3) of the Constitution, it unfairly discriminates on the ground of gender, by:

    (a) failing to afford a woman the right to have her spouse assume her surname;
    (b) failing to afford a man the right to assume the surname of the woman after marriage;
    (c) failing to allow for a married or divorced man or widower to resume a surname which he bore at any time; and
    (d) failing to 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.

[106] *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

3. The declaration of invalidity is suspended for a period of 24 months to enable Parliament to remedy the defects by either amending existing legislation or passing new legislation within 24 months, in order to ensure that all persons are afforded the right of assumption of another surname.

4. Pending the coming into force of new 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 Act, it is declared that the provisions of section 26(1) shall not apply when:

   (a) a person after their marriage assumes the surname of the spouse with whom such person concluded a marriage or after having assumed such surname, resumes a surname which they bore at any prior time;

   (b) a married or divorced person or a widow or widower resumes a surname which they bore at any time; and

   (c) a person, whether married or divorced, or a widow or widower, adds to the surname which they assumed after the marriage, any surname which they bore at any prior time.

5. Should Parliament fail to correct the defects in the 24-month period, paragraph 4 above shall continue to operate until remedial legislation, if any, is brought into operation.

6. The first respondent is ordered to pay the applicants' costs in this Court, including the costs of two counsel where so employed.

For the Applicants:	N Snellenburg SC and I Macakati instructed by Stander and Associates.
For the First and Second Respondents:	K D Moroka instructed by Office of the State Attorney, Bloemfontein.