IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO. 4996 / 2016

In the matter between:

MZILENI LAWRENCE NAKI	First Applicant
DIMITRILA MARIE NDOVYA	Second Applicant
CENTRE FOR CHILD LAW	Third Applicant
and	
DIRECTOR GENERAL: DEPARTMENT OF HOME AFFAIRS	First Respondent
THE MINISTER OF HOME AFFAIRS	Second Respondent

JUDGMENT

BODLANI AJ

Factual background

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

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

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

[3] In September 2015, the second applicant came to South Africa. She travelled using her DRC passport having been issued, on 23 September 2015, with a visitor's visa which was valid for three months in Lubumbashi, DRC. At the time of expiration of the second applicant's visitor's visa, she was highly pregnant and thus could not apply for a new visa inasmuch as she could not travel back to the DRC. She gave birth to NN[1] at Settler's Hospital in Grahamstown on 01 February 2016. On discharge from Settler's Hospital, she was given a document titled "Department of Home Health, Maternity Certificate Proof of Birth of Infant" to complete and submit to the respondents' department in order to apply for the issue of NN's birth certificate.

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

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

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

[5] Effectively, though a South African citizen[2] the failure to register NN's birth and to issue for her, of a birth certificate, meant that she is not accounted for in the population register that is administered by the second respondent,[3] and no citizenship and other interrelated constitutional rights can be enforced by her parents on her behalf.

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

> "1. Reviewing, setting aside and declaring invalid the decision taken, on behalf the first respondent, to refuse to register the birth of Novuyo Francina Naki, alternatively the failure to take a decision on the application to register her birth.
>
> 2. Directing the first respondent to do all things necessary to register Novuyo Francina Naki's birth in terms of section 9(3A) of the Births and Deaths

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

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

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

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

3. Declaring that:

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

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

4. *Alternatively to prayer 3 above*:

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

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

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

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

order:

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

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

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

3. Alternatively to prayer 2:

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

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

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

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

        5.1.1 under the surname of the mother; or

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

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

6. Alternatively to prayer 5:

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

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

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

9. Condoning the late filing of the affidavit.

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

11. Further and/or alternative relief."

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

filed a notice of opposition on behalf of the respondents.

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

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

The issues

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

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

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

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

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

> **9. Notice of birth**
>
> (1) In the case of any child born alive, anyone of his or her parents or, if neither of his or her parents is able to do so, the person having charge of the child or a person requested to do so by the parents or the said person, shall within 30 days after the birth give notice thereof in the prescribed manner to any person contemplated in section 4.
>
> (2) Subject to the provisions of section 10, the notice of birth referred to in subsection (1) of this section shall be given under the surname of the father of the child concerned.
>
> (3) Where the notice of a birth is given after the expiration of 30 days from the date of the birth, the Director-General may demand that reasons for the late notice be furnished and that the fingerprints be taken of the person whose notice of birth is given.
>
> (4) No registration of birth shall be done of a person who dies before notice of his birth has been given in terms of subsection (1).
>
> (5) The person to whom notice of birth was given in terms of subsection (1), shall furnish the person who gave that notice with a birth certificate, or an acknowledgement of receipt of the notice of birth in the prescribed form, as the Director-General may determine.
>
> (6) No person's birth shall be registered unless a forename and a surname have been assigned to him.
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> **10. Notice of birth of illegitimate child**

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

(a) under the surname of the mother; or

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

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

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

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

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

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

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

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

(i) attended to the birth; or

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

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

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

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

(d) fingerprints of the parents, which shall be verified online against the national population register: Provided that where the fingerprints cannot be verified online, the full set of fingerprints of the parents shall be taken on Form DHA-24/A illustrated in Annexure 1C;

(e) a certified copy of the identity document of the biological or adoptive mother or father or both parents of the child whose birth is sought to be registered, as the case may be;

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

(g) where applicable, a certified copy of a death certificate of any deceased parent;

(h) where applicable, a certified copy of the marriage certificate of the parents of the child whose birth is sought to be registered;

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

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

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

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

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

(i) attended to the birth; or

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

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

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

(d) fingerprints of the parents, which shall be verified online against the national population register: Provided that where the fingerprints cannot be verified online, the full set of fingerprints of the parents shall be taken on Form DHA-24/A illustrated in Annexure 1C;

(e) a certified copy of the identity document of the biological or adoptive mother or father or both parents of the child whose birth is sought to be registered, as the case may be;

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

(g) where applicable, a certified copy of a death certificate of any deceased parent;

(h) where applicable, a certified copy of the marriage certificate of the parents of the child whose birth is sought to be registered;

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

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

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

(j) proof of payment of the applicable fee.

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

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

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

(i) attended to the birth; or

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

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

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

(d) fingerprints of the parents, which shall be verified online against the national population register: Provided that where the fingerprints cannot be verified online, the full set of fingerprints of the parents shall be taken on Form DHA-24/A illustrated in Annexure 1C;

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

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

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

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

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

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

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

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

(m) proof of payment of the applicable fee.

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

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

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

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

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

The approach to statutory interpretation

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

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

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

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

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

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

The meaning of sections 9 and 10 of the BDRA

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

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[7] Id at para 22.

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

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

[10] Id at para 24.

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

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

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

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

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[12] Section 9(1) of the BDRA.

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

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

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

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

constitutionally compliant.

The regulations

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

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

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[14] Section 32 of the BDRA.

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

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

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

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

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

authority to correct the defect.

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

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

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

unsupportable budgetary intrusion.

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

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

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

5.

Costs

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

The order

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

1. Subregulations (3)(f) and (i); (5) to Regulations 3, 4, 5; and subregulation (1) to Regulation 12 of the Regulations on the Registration of Births and Deaths, 2014 are declared unconstitutional.

2. In order to cure the defects in the subregulations mentioned in paragraph 1 of this order, the following remedy shall apply:

   (a) It shall be read in:

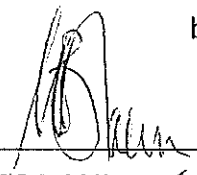
   (i) before the word "a" at the commencement of subregulation (3)(f) to Regulations 3, 4 and 5 the words "where it is available,";

   (ii) immediately after the word "applicable" in subregulation (3)(i) to Regulations 3, 4 and 5 the words "and available";

(iii) immediately after the word "by" to subregulation (1) of Regulation 12 the words "either" and immediately after the word "mother" in that subregulation the words "or father".

(b) Subregulation (5) to Regulations 3, 4 and 5 is declared unconstitutional and invalid.

3. The first and second respondents are directed to pay costs of the application, jointly and severally, the one paying the other to be absolved.



AM BODLANI

ACTING JUDGE OF THE HIGH COURT

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