

**CONSTITUTIONAL COURT AFFIRMS THE RIGHT OF CHILDREN OF UNMARRIED
FATHERS TO HAVE THEIR BIRTHS REGISTERED BY THEIR FATHERS****FOR IMMEDIATE RELEASE:****22 September 2021**

“A surname connects us to our heritage and roots us in history and family tradition. In many African cultures, names not only connect a person to their immediate family, but also convey a spiritual connection to one’s broader community, clan, and ancestors.”

These are the words of Victor AJ in a judgment handed down by the Constitutional Court today confirming a declaration of invalidity of section 10 of the Births and Deaths Registration Act 51 of 1992.

In September 2020, the Constitutional Court heard arguments from the Centre for Child Law (“CCL”), represented by Lawyers for Human Rights (“LHR”) asking it to confirm a finding of the Makhanda High Court, that section 10 of the Births and Deaths Registration Act (“BDRA”) is unconstitutional because it creates insurmountable barriers to the birth registration of children of unmarried fathers. The CCL, whose clients at the time were all citizens with valid South African identity documents, argued that the matter dealt with a legal provision and practice that has proven to be a fundamental hurdle to children being able to access their right to birth registration and ultimately their right to nationality. Section 10 of the BDRA regulates the provision of a surname to a child born to unmarried parents. The section provides for the child receiving:

- 1) the mother’s surname;
- 2) the father’s surname at the joint request of the father and mother; and
- 3) the mother’s surname, with the father’s details inserted onto the birth certificate, and with the consent of the mother.

The section did make provision for a child to receive their father’s surname or details of their father on their birth certificate without the mother’s involvement. There are a number of reasons why a mother may not be involved in the birth registration process. The mother may be deceased, absconded, is undocumented herself or cannot be located.

The Constitutional Court confirmed the finding of the High Court. It found that the section discriminates against both children and their unmarried fathers and infringes on their dignity. It held that it is not justifiable to distinguish between children born to married parents and children born to unmarried parents for the purpose of regulating what surname may be given to a child.

The Constitutional Court held that the section penalises children born to unmarried parents, an approach that cannot be justified, is invidious and unconstitutional. Section 10 infringes on a child's right to not to be discriminated against on the grounds of social origin and birth, the child's right to dignity, as well as a child's right for their interests to be paramount in terms of section 28(2) of the Constitution.

Noting the vulnerability that children of unmarried fathers find themselves in due to such discrimination, the Constitutional Court notes that

[s]ocial attitudes have ... historically led to active prejudice towards children born out of wedlock. This may have been ameliorated somewhat in modern times but still a child born out of wedlock remains outside of the stereotypical nuclear family where a married couple and their dependent children are regarded as a basic social unit. These social attitudes are unfortunate and keeping the category of separate registration for children born out of wedlock on the statute book further reinforces these perceptions. [The children's] vulnerability also goes to the family affiliation where the child is that of one parent as opposed to married parents. Children may see themselves as being of inferior status as they do not have a proper family, and this can cause stresses such as social isolation and social stigma.

In finding that the section discriminates against unmarried fathers, the Constitutional Court states that the section “establishes a prejudicial distinction between married and unmarried fathers. The impact on unmarried fathers is clear. They cannot register the birth of their child with their surname without the mother's consent or presence. The unmarried father and the child of unmarried parents are a vulnerable group who are affected by the discrimination. They are stripped of the rights that married fathers have to register children in their own name as these rights are made conditional and dependent on their relationship with the mother. This is a barrier to their full participation as parents and perpetuates gendered narratives about men's caregiving.”

The Court reminds us of the important link between *ubuntu* and the protection of the right to dignity and how section 10 of the BDRA does harm to this link. Section 10 not only deprives the unmarried father and his child of their dignity, but also of *ubuntu*. Section 10 injures the unmarried father's dignity,

and perpetuates the societal stigma attached to unmarried couples and their children. The section sees the bond between the child and unmarried father as less worthy and demeans them.

On the issue of the risk of child trafficking if unmarried fathers are allowed to register children without the mother's involvement, the Constitutional Court equivocally states that the law has in place sufficient safe guards to protect against attempts to traffic children. It is important to point out that leaving a child unregistered in fact exacerbates the risk of them becoming victims of human trafficking (and raises other child protection issues) as lack of documentation makes them untraceable.

The Centre for Child Law and Lawyers for Human Rights applaud this judgment, which will have far-reaching implications for the many children of unmarried fathers who face many barriers. Section 10 essentially left these children stateless and were also deprived of their ability to access basic rights and services. Children without birth certificates are at greater risk of exclusion from the education system, from accessing social assistance and healthcare, and crucially, to access to their nationality. The judgment also affirms the children's intrinsic worth and sense of belonging. We call on the Department of Home Affairs to do the same and do everything possible to ensure the implementation of the court order.

Ends.

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