



14 February 2023

ATT: The Portfolio Committee on Home Affairs

C/O Secretariat: Eddie Mathonsie at emathonsi@parliament.gov.za

ATT: The Portfolio Committee on Social Development

C/O Secretariat: Lindiwe Ntsabo at lnsabo@parliament.gov.za

Dear Chairpersons and Committee Members,

**RE: SUBMISSIONS re VARIOUS DEVELOPMENTS IN THE LAWS RELATED TO BIRTH REGISTRATION AS A RESULT OF
4 RECENT JUDGMENTS**

INTRODUCTION

1. The Centre for Child Law (“the CCL”) is a registered law clinic with the Legal Practice Council based at the University of Pretoria. The CCL contributes toward the establishment and promotion of the best interest of children in South Africa through research, advocacy, litigation, and education.
2. We write to provide you with a brief on, and recommendations regarding, various developments in the law regulating birth registration in South Africa. The text of the Births and Deaths Registration Act 51 of 1992 (“the Act”) has been altered significantly through 4 court judgments in the past 5 years. These judgments have declared several provisions of the Act constitutionally invalid, and have either struck them from the text or have read in additional text.



3. This brief seeks to provide parliamentary decision-makers with a consolidated version of the text of the Act as it currently reads, taking into consideration the latest jurisprudential developments. We hope that our submission will provide insight, as well as an accessible source for what is law scattered across several judgments, to enable you to provide effective monitoring of implementation. Implementation of these judgments have been lacking in the past 5 years.

4. We also make the following recommendations toward better implementation of birth registration rights for affected children. We urge the Committees to request the Department of Home Affairs to:
 - a. Circulate a Departmental directive to all its offices, informing them of the 4 court judgments, and instructing them on implementation procedures.
 - b. Amend the Standard Operating Procedures (SOPs) for birth registration to include instructions regarding the implementation of the 4 court judgments.
 - c. Monitor implementation of the 4 court judgments.
 - d. Withdraw Circular no 5 of 2014 requiring DNA paternity test results from unmarried and/or foreign fathers for the purposes of birth registration.
 - e. Issue a new circular setting out a list of documents to be accepted as sufficient proof of paternity, where an unmarried father seeks to register the birth of their child where the mother is unavailable. Suggested wording is set out in paragraph 16 on page 8 below.

5. The CCL also request an opportunity to address the Portfolio Committees on this matter.



THE 4 JUDGMENTS AND THEIR EFFECT ON THE BIRTH AND DEATHS REGISTRATIONS ACT

6. The judgement in [Centre for Child Law v The Director-General & Others Case number CA319/ \[2020\] 4 All SA 76 \(ECG\)](#) declared the following:
 - a. The following regulations are declared unconstitutional, and are amplified by a reading in:
 - i. Regulation 3(3)(f); 3(3)(i) and 3(5).
 - ii. Regulation 4(3)(f); 4(3)(i) and 4(5).
 - iii. Regulation 5(3)(f); 5(3)(i) and 5(5).
 - iv. Regulation 12(1).

7. The judgement in [Centre for Child Law v The Director-General & Others Case number CA319/ \[2020\] 4 All SA 76 \(ECG\)](#) declared the following:
 - a. Section 10 of the Births and Deaths Registration Act is declared unconstitutional.
 - b. The words “subject to the provisions of section 10” in section 9(2) of the Act is deleted.

8. The judgement in [Centre for Child Law v Director General: Department of Home Affairs and Others \[2021\] ZACC 31](#) declared the following:
 - a. Section 10 of the Act is unconstitutional and is struck from the Act.

9. The judgement in [J & Another v The Minister of Home Affairs \(Case no. 1986/2021\)](#) declared the following:
 - a. Regulation 12(2)(c) of the Act is unconstitutional and invalid.



TABLE A - AFFECTED PROVISIONS OF THE BIRTHS AND DEATHS REGISTRATION ACT 51 OF 1992

Text as amended between 1992 up until latest Amendment Act 18 of 2010, which took effect on 1 March 2014.	Text with amendments / reading from court judgments illustrated and highlighted in yellow
<p>Section 10 Section 9(2)</p>	<p>Section 10 declared invalid and deleted in its entirety by <i>Constitutional Court in CCL v DG Minister of Home Affairs</i> Section 9(2) reference to section 10 deleted</p>
<p>10. Notice of birth of child born out of wedlock.—(1) Notice of birth of a child born out of wedlock shall be given—</p> <p>(a) under the surname of the mother; or</p> <p>(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.</p> <p>(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.</p> <p>Section 9(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.</p>	<p>10. Notice of birth of child born out of wedlock.—(1) Notice of birth of a child born out of wedlock shall be given—</p> <p>(a) under the surname of the mother; or</p> <p>(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.</p> <p>(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.</p> <p>Section 9(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.</p>



<p>Regulations 3(3)(f) and (i), and 3(5) Regulations 4(3)(f) and (i), and 4(5) Regulations 5(3)(f) and (i), and 5(5)</p>	<p>Regulations 3, 4, 5 (with reading-in highlighted in yellow as read in by Bodlani AJ in <i>Naki v DG Home Affairs</i>)</p>
<p>3 (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 –</p> <p>(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;</p> <p>(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;</p> <p>3 (5) A notice of birth which does not meet the requirements of subregulations (3) and (4), shall not be accepted.</p>	<p>3(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 –</p> <p>(f) where it is available 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;</p> <p>(i) where applicable, and available 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;</p> <p>3 (5) A notice of birth which does not meet the requirements of subregulations (3) and (4), shall not be accepted.</p>
<p>4 (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 –</p> <p>(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;</p> <p>(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;</p> <p>4 (5) A notice of birth which does not meet the requirements of subregulations (3) and (4), shall not be accepted.</p>	<p>4(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 –</p> <p>(f) where it is available 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;</p> <p>(i) where applicable, and available 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;</p> <p>4 (5) A notice of birth which does not meet the requirements of subregulations (3) and (4), shall not be accepted.</p>



<p>5 (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 –</p> <p>(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;</p> <p>(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;</p> <p>5 (5) A notice of birth which does not meet the requirements of subregulations (3) and (4), shall not be accepted.</p>	<p>5(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 –</p> <p>(f) where it is available 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;</p> <p>(i) where applicable, and available 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;</p> <p>5 (5) A notice of birth which does not meet the requirements of subregulations (3) and (4), shall not be accepted.</p>
<p>Regulation 12(1)</p>	<p>Regulation 12(1) with reading in by Bodlani AJ in <i>Naki v DG Home Affairs</i></p>
<p>12. Notice of birth of child born out of wedlock (1) A notice of birth of a child born out of wedlock shall be made by the mother of the child on Form DHA-24 illustrated in Annexure 1A or Form DHA-24/LRB illustrated in Annexure 1A, whichever applicable.</p>	<p>12. Notice of birth of child born out of wedlock (1) A notice of birth of a child born out of wedlock shall be made by either the mother or father of the child on Form DHA-24 illustrated in Annexure 1A or Form DHA-24/LRB illustrated in Annexure 1A, whichever applicable.</p>
<p>Regulation 12(2)(c)</p>	<p>Regulation 12(2)(c) declared unconstitutional and invalid by Jolwana J in <i>UJDJ1 v Minister Home Affairs</i></p>
<p>12. Notice of birth of child born out of wedlock (2) The person who acknowledges that he is the father of the child born out of wedlock must - (c) have his fingerprints verified online against the national population register: Provided that in the event of the father being a non-South African citizen, he must submit a certified copy of his valid passport and visa or permit, permanent resident's identity document or refugee identity document.</p>	<p>12. Notice of birth of child born out of wedlock (2) The person who acknowledges that he is the father of the child born out of wedlock must - (c) have his fingerprints verified online against the national population register: Provided that in the event of the father being a non-South African citizen, he must submit a certified copy of his valid passport and visa or permit, permanent resident's identity document or refugee identity document.</p>



BARRIERS TO BIRTH REGISTRATION THROUGH EXPENSIVE DNA REQUIREMENTS

10. The CCL receives hundreds of requests for assistance from unmarried fathers who are barred from registering the births of their children. Officials at the local offices instruct them to return with DNA proof of paternity at a cost of between R1500 and up to R4500 depending on how many children he has. This is an unaffordable expense to many South Africans. Children go undocumented as a result.

11. Having considered the matter carefully, the CCL has come up with a list of alternative ways of proving paternity which are free, and which already exist within South African law. We recommend that these alternatives to DNA proof of paternity be adopted by the Department and circulated via Departmental Circular to all its offices.

12. The children of married persons are not required to provide DNA proof of paternity. The marriage certificate is accepted as proof of the birth mother's spouse's paternity. This is regulated under regulation 3(3)(h). The children of unmarried parents who register the birth of their child within 30 days are not required by the Circular to provide DNA test results.

13. When a birth is registered after the 30-day period has lapsed, the registration becomes a late registration of birth (LRB) (see section 9(3A) and regulations 3, 4, and 5. Additional requirements must be complied with in an LRB application. Although the regulations do not prescribe DNA as a requirement of LRB, a Departmental Circular (5 of 2014) requires all LRB applications of children of unmarried parents, where one of the parents is a foreigner, to provide DNA proof of paternity. This DNA proof of paternity acts as an absolute barrier to the right to birth registration and is unconstitutional as a result.

14. The CCL suggest that a Departmental Circular be issued and circulated to all offices which confirms the alternative documents to prove paternity. We suggest the following documents in line with existing South African law:



SUGGESTED WORDING FOR ALTERNATIVES TO DNA TESTING FOR PROOF OF PATERNITY

- a. The following documents shall serve as sufficient proof of paternity for the purposes of birth registration, including late registration of birth:
- i. Where the child's parents are married; a marriage certificate.¹
 - ii. Where the child's parents are unmarried, an affidavit deposed to by each parent confirming the paternity of the father, including where either parent is undocumented and / or illegally present in the Republic in terms of the Immigration Act.²
 - iii. Where the child is adopted, the adoption order, as is already allowed by section 27B of the Act.
 - iv. Where the child is conceived via artificial fertilisation, a marriage certificate (where the parents are married); or an affidavit by both parents (where the parents are unmarried).
 - v. Where the child is being registered by an unmarried father and the father is in possession of a court order declaring his rights in terms of section 21 of the Children's Act, a copy of such order which declares his parental rights and responsibilities as the unmarried father of the child.
 - vi. Where the child is being registered by an unmarried father and the father is in possession of a court order declaring his paternity in terms of section 26 of the Children's Act, a copy of such order.

¹ When parents are married, the common law presumption of paternity establishes a rebuttable presumption that the spouse of the mother is the biological parent. This presumption is already allowed by the Act and is uncontested.

² The common law presumption of paternity, which is also codified in section 36 of the Children's Act, is triggered by such an affidavit. In the absence of proof to the contrary by the party who denies paternity, the person who is proved to have had intercourse with the mother at any time when that child could have been conceived is presumed to be the father of the child. An affidavit by both parents confirming such intercourse is acceptable evidence in a court of law, and thus also in a Home Affairs application.



- vii. Where the child is being registered by an unmarried father and the mother cannot or does not provide consent, an order of the Children’s Court or the High Court declaring him to be the father of the child in terms of section 36 of the Children’s Act.

ANNEXURES IN SUPPORT

15. To this end we attached the following annexes:

- a. The judgement of Bodlani AJ in the High Court Eastern Cape Division, Makhado in [Centre for Child Law v The Director-General & Others Case number 4996/2016 \(ECG\)](#) delivered on 27 June 2018 (annexures page 10 – 33).
- b. The judgement of Rugunanan J in the High Court Eastern Cape Division, Makhado, sitting as an appeal court in [Centre for Child Law v The Director-General & Others Case number CA319/ \[2020\] 4 All SA 76 \(ECG\)](#) delivered on 19 May 2020 (annexures page 34 – 49).
- c. The judgement of the Constitutional Court of South Africa in [Centre for Child Law v Director General: Department of Home Affairs and Others \[2021\] ZACC 31](#) delivered on 22 September 2021 (annexures page 50 – 110).
- d. The judgment of the High Court Eastern Cape Division, Makhado, in [UJDJ1 & another v The Minister of Home Affairs](#) (Case no. 1986/2021) delivered on 10 January 2023 (annexures page 111 – 130).
- e. The consolidated text of the Act as amended up until the last Amendment Act (18 of 2010) and its Regulations Act published in GN R128 in Government Gazette 37373 which took effect on 1 March 2014, with the changes affected by the judgements highlighted in yellow (annexures page 131 – 173).
- f. Departmental Circular numbers 5 of 2014; and 14 of 2021 regarding the requirement of DNA paternity testing for unmarried fathers (annexures page 174 – 180).
- g. [Parliamentary question and reply](#) regarding the implementation of the judgement c above (annexures page 181 – 182).



- h. A letter sent to the Ministry of Home Affairs to request a solution for the DNA proof of paternity barrier, and providing evidence that the Constitutional Court judgment in *CCL v DG of Home Affairs & others* is not being implemented, including a list of approximately 30 children being assisted by the CCL and Lawyers for Human Rights (annexures page 183 - 194).

Yours faithfully,



Liesl H. Muller

Senior Attorney, Centre for Child Law

