Revised and typographically corrected version

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: 2298/2017

Before: The Hon. Mr Justice Binns-Ward
Hearing: 10 August 2017
Judgment: 6 September 2017

In the matter between:

KOS	First Applicant
MMC	Second Applicant
GNC	Third Applicant
HAC	Fourth Applicant
WJV	Fifth Applicant
HJV	Sixth Applicant
GENDER DYNAMIX	Seventh Applicant

and

MINISTER OF HOME AFFAIRS	First Respondent
DIRECTOR-GENERAL: DEPT. OF HOME AFFAIRS	Second Respondent
DEPUTY DIRECTOR-GENERAL: DEPT. OF HOME AFFAIRS: CIVIC SERVICES	Third Respondent

---

JUDGMENT

BINNS-WARD J:

Introduction

[1] This case came to court because of the difficulties transgendered persons in marriages that were solemnised in terms of the Marriage Act 25 of 1961 are experiencing in obtaining the recordal by the Department of Home Affairs of their sex/gender change, as provided for under the Alteration of Sex Description and Sex Status Act 49 of 2003 ('the Alteration Act').

[2] The first to sixth applicants are three married couples. Their marriages were duly solemnised in terms of the Marriage Act. The first, third and fifth applicants (to whom I shall refer individually as 'KOS', 'GNC', and 'WJV', respectively,[1] or collectively as 'the transgender spouses') were registered at birth as males. That happened because they were born as biologically male. The second, fourth and sixth applicants, with whom KOS, GNC and WJV are respectively wed, are female. After they had married, each of the transgender spouses underwent surgical and/or medical treatment to alter their sexual characteristics[2] from those of a male to those of a female. They did this because from an early age they had experienced tormenting gender dysphoria.[3] Their self-awareness was that of being female

---

[1] At the commencement of the hearing in open court I made an order, as sought in terms of paragraph 20 of the notice of motion, '*Permitting the Applicants to:*

1. *Use the First to Sixth Applicants' initials instead of their full names on all court documents filed that will be available to the public.*

2. *File and provide to the respondents a confidential affidavit that contains the First to Sixth Applicants' full names and unredacted versions of the annexures … that will not be made publically available*'.

The respondents did not oppose the making of the order. I granted it because I considered that it would be just and equitable in the circumstances. It serves to protect the affected applicants' rights to human dignity and privacy, whilst not unduly limiting the operation of the freedom of expression rights under s 16 of the Bill of Rights. However, it was inappropriate for the applicants to have moved for the relief only when the application was called in open court. The public is entitled to uncensored access to any documents filed at court in pending litigious matters unless a court for good reason directs otherwise; see *Cape Town City v South African National Roads Authority and Others* 2015 (3) SA 386 (SCA), [2015] ZASCA 58. I consider that in the circumstances the applicants should have applied *ex parte* in preliminary proceedings, possibly through the chamber book, for permission to file redacted papers upon the institution of the current application. It would have been appropriate to grant them such relief, subject to the right of any third party which considered itself prejudiced thereby to approach the court, on notice to the applicants, for the amendment or rescission of the order.

[2] The term '*sexual characteristics*' is taken from the Alteration Act, in which it is defined as meaning '*primary or secondary sexual characteristics or gender characteristics*'. According to the Act's definition provisions '*Primary sexual characteristics*' denotes '*the form of the genitalia at birth*'; '*secondary sexual characteristics*' means '*those which develop throughout life and which are dependant* (sic) *upon the hormonal base of the individual person*' and '*gender characteristics*' are '*the ways in which a person expresses his or her social identity as a member of a particular sex by using style of dressing, the wearing of prostheses or other means*'.

[3] Dysphoria is a term used in psychiatry. It is defined in the Concise Oxford English Dictionary 10th ed. (revised) (2002), as '*Psychiatry* a state of unease or general dissatisfaction'.

trapped in a male body. Transitioning[4] was the means to liberate them from their gender dysphoria and express their self identification.[5]

[3] The Alteration Act makes provision for the formal acknowledgment, recordal and legal consequences of such transitions. It allows for the alteration, upon application to the director-general of the Department of Home Affairs (who has been cited as the second respondent in these proceedings), of a person's sex description on the birth register and the provision to the person concerned of an altered birth certificate.[6] It also provides that a person whose sex description has been altered is deemed for all purposes to be a person of the sex description so altered '*as from the date of the recording of such alteration*'.[7] Section 3(3) provides that rights and obligations that have accrued to or been acquired by such a person before the alteration of his or her sex description are not adversely affected by the alteration. The legal consequences of the recognition of a sex/gender-change in terms of the Alteration Act are therefore wholly prospective from the date of the recordal; the Act does not have any retrospective effect.

[4] By virtue of its foundation in the agreement between the intending spouses to enter into it, marriage brings about mutual rights and obligations that have been recognised to be contractual in legal character, albeit *sui generis* and entailing public law consequences.[8] The effect of s 3(3) of the Alteration Act is that the recordal of a postnuptial sex/gender change in respect of either or both the spouses has no effect on their mutual marital rights and

---

[4] To '*transition*' in the relevant context means to '*adopt permanently the outward or physical characteristics of the gender one identifies with, as opposed to those associated with one's birth sex*'. See the *Oxford Dictionary of English* (Online version 2.2.1, Copyright © 2005–2016 Apple Inc.).

[5] In *National Legal Services Authority v Union of India and others* AIR 2014 SC 1863, at para. 76, the Supreme Court of India (per K.S. Rahdakrishnan J) acknowledged that '*Gender identity … forms the core of one's personal self, based on self identification, not on surgical or medical procedure*'. In *Bellinger v Bellinger* [2003] 2 All ER 593 (HL), [2003] UKHL 21, [2003] 2 AC 467, at para. 5, Lord Nicholls of Birkenhead, describing various '*indicia of human sex or gender*', identified '*self-perception*' as one of them, and remarked '*Some medical research has suggested that this factor is not exclusively psychological. Rather, it is associated with biological differentiation within the brain. The research has been very limited, and in the present state of neuroscience the existence of such an association remains speculative*'.

[6] Section 3(1) of the Alteration Act read with s 27A of the Births and Deaths Registration Act 51 of 1992.

[7] Section 3(2) of the Alteration Act.

[8] See the discussion in June D Sinclair (assisted by Jacqueline Heaton), *The Law of Marriage*, (Juta, 1996) vol. 1, at pp.311-312; and the description in the *Equality Project* judgment, at para 63, of marriage under the common law, before its recent development, as constituting '*a highly personal and private contract between a man and a woman in which the parties undertake to live together, and to support one another. Yet the words "I do" bring the most intense private and voluntary commitment into the most public, law-governed and State-regulated domain*'.

obligations. Those endure as long as the marriage does. It also has no effect on the transgendered person's rights against, and obligations to third parties.

[5] The effect of an alteration of the record of a person's gender or sex description on their birth register pursuant to the grant of an application in terms of the Alteration Act is that his or her sex descriptor is also altered on the population register. This follows in terms of the provisions of s 5 of the Births and Deaths Registration Act 51 of 1992.[9] The population register is compiled and maintained by the Department of Home Affairs in terms of the Identification Act 68 of 1997.

[6] In terms of s 8 of the Identification Act, the population register must record a comprehensive range of information concerning each and every South African citizen and permanent resident. The information to be recorded includes particulars of such persons' names, dates of birth, gender[10] and identity numbers. It also includes the particulars (if applicable) of each such person's marriage contained in the relevant marriage register or other documents relating to the contracting of the marriage, '*and such other particulars concerning his or her marital status as may be furnished to the director-general*'.[11]

[7] The identity number that is allocated to every person on the population register comprises a set of figures. In addition to a serial, index and control number, it consists of a

---

[9] Section 5 provides insofar as relevant:

(1) The Director-General shall be the custodian of all-
(a) documents relating to births and deaths required to be furnished under this Act or any other law; and
(b) ...
(2) Particulars obtained from the documents referred to in subsection (1) (a) shall be included in the population register and such inclusion is the registration of the births and deaths concerned.

[10] The word '*gender*' is used in the Identification Act to the same effect as the expression '*sex description'* is in the Alteration Act. Sex/gender classification in terms of the Identification Act currently operates on a binary model. Everyone is either male or female. Thamar Klein points out that, by contrast, '*Australia, India, Nepal, New Zealand, and Pakistan, for example, all offer an additional legal sex/gender identification option, besides those of female and male, to citizens who identify themselves as otherwise. Australia and New Zealand offer "X" besides "M" and "F" as sex/gender identification on passports, India has included "transgender" in the government citizen ID number system, and Pakistan uses the term "unix" on the national identity cards of transgendered individuals, whereas Nepal has incorporated the category "other" for official identity documents. In all cases, intersexed as well as gender-variant people may apply for these options.*' (T. Klein, '*Who Decides Whose Gender? Medico-legal classifications of sex and gender and their impact on transgendered South Africans' family rights*', (2012) 14(2) *Ethnoscripts* 12-34 (Universität Hamburg), at pp. 22-23.) While judgment in this matter was in the course of preparation it was announced in the news media that Canada also intends issuing 'X'-designated gender neutral passports and other identity documents to citizens who identify as being neither male nor female.

[11] Section 8(e) of the Identification Act.

reproduction, in figure codes, of (a) his or her date of birth, (b) gender; and (c) South African citizenship status.[12] It does not reflect the person's marital status.

[8] The alteration of a person's sex description in terms of the Alteration Act also has other knock-on consequences. Every person on the population register over the age of 16 is required to have an identity card (commonly called an 'ID book'). If for any reason the card does not correctly reflect the holder's particulars, he or she must apply for a replacement identity card.[13] It follows that anyone who has transitioned is obliged to apply for a new identity document, which necessarily will reflect a reassigned identity number incorporating an altered gender-related figure code. In order to be able to comply with that statutory obligation, he or she would be required first to obtain a formal recordal of the change in terms of the Alteration Act. Making application under the Alteration Act in such cases will therefore be a matter of obligation, rather than one of choice.

[9] There must be a 'recent photograph' on the population register of every person over the age of 16. The photograph must be provided or replaced every time such person applies for an identity card or a replacement identity card.[14] The identity card will therefore also include a photograph of the holder; in most cases reflecting the person's appearance as recognisably male or female. Section 17(1) of the Identification Act provides: '*An authorised officer as defined in subsection (3) may at any time request any person reasonably presumed to have attained the age of 16 years to prove his or her identity to that officer by the production of his or her identity card as defined in subsection (4)*'. If anyone is called upon by an 'authorised officer'[15] to prove who he or she is, they are required to produce an 'identity card'. A driver's licence or a passport, being documents '*issued by the State and on which the name and a photograph of the holder appear*', would serve as an identity card for the purposes of proving one's identity.[16]

[10] It will readily be deduced from what I have described thus far that the formal recording of a person's gender or sex description is a matter of material legal and practical

---

[12] Section 7 of the Identification Act.

[13] Section 19 read with chapters 4 and 5 of the Identification Act.

[14] See ss 9 and 15(2) of the Identification Act.

[15] Section 17(3) of the Identification Act provides that an '*authorised officer*' for the purposes of s 17(1) '*means- (a) a peace officer as defined in section 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977); or (b) a person, or a member of a category of persons, designated by the Minister by notice in the Gazette, and who for the purpose of this section shall be deemed to be such a peace officer*'.

[16] In terms of s 17(4) of the Identification Act.

significance. The many and various difficulties that could present for a person whose gender characteristics differ from those recorded on his or her identity card are not hard to imagine. The evidence bears this out.

[11] The transgender spouses applied in terms of s 2(1) of the Alteration Act for the alteration of their sex descriptions on their respective birth registers. The applications had the blessing and support of the transgender spouses' marriage partners. The first to sixth applicants are content in their respective marital relationships and currently have no wish or intention to end them.

[12] It was common ground that, apart from death, divorce is the only manner in which their marriages can be dissolved.[17] A divorce would be obtainable only if it could be proved that there had been an irretrievable breakdown of their marriage relationship, or that one of them was suffering from mental illness or continuous unconsciousness as contemplated in s 5 of the Divorce Act 70 of 1979. They have pointed out, correctly, that as they cherish their marriages there is no legal basis for them to be dissolved.

[13] They consider the fact that the registration of the altered sex status of the transgender parties will result in the public records showing that their marriages have become same-sex marriages to be irrelevant to their marriage status. For reasons to be described presently, the Department of Home Affairs takes a different view. It maintains that the applications by the transgender spouses under the Alteration Act cannot be granted while their marriages remain registered as having been solemnised in terms of the Marriage Act.

[14] In the result, the applications by KOS and GNC in terms of the Alteration Act have effectively been refused; alternatively, the Department has failed to make a decision in respect of them.

[15] In the case of WJV, however, the Department did alter his sex description. But when it did so, it simultaneously deleted the particulars recorded in the population register of the WJV's marriage with the sixth applicant. It did this unasked. It also changed the record of the sixth applicant's surname to her maiden name.

[16] I shall relate the history of each of these applications in some detail later in this judgment.

---

[17] Annulment, by contrast, implies that there never was a valid marriage.

[17] The Department's position is founded on its understanding of the import of the current statutory regime that provides a parallel system for the solemnisation of marriages. Since 30 November 2006, civil marriages may be solemnised under the provisions of either the Marriage Act or the Civil Union Act 17 of 2006. The enactment of the Civil Union Act was the legislative response to the judgment of the Constitutional Court in *Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others*[18]. That case concerned a challenge against the constitutionality of the Marriage Act and the common law definition of marriage because they unfairly discriminated against gay and lesbian couples by precluding them from marrying.

[18] In the *Equality Project* case, the Court declared the common-law definition of marriage to be inconsistent with the Constitution and invalid to the extent that it did not allow for same-sex couples who wanted to formalise their unions to enjoy the status and the benefits, coupled with the responsibilities, that it accorded to opposite-sex couples who married. The Court also declared that the omission from the marriage formula in s 30(1) of the Marriage Act after the words '*or husband*' of the words '*or spouse*' was inconsistent with the Constitution.[19] It declared the Marriage Act to be invalid to the extent of that inconsistency.

[19] The Court suspended the declarations of invalidity for 12 months to enable Parliament to correct the defects. Its order provided that in the event of Parliament failing to correct the defects within the afforded period, s 30(1) of the Marriage Act would thenceforth fall to be read as including the words '*or spouse*' after the words '*or husband*' as they appear in the marriage formula in that provision. Notwithstanding that the Court did not express make a declaration to that effect, the import of its judgment was to develop the common law concept of marriage to connote 'a union of *two persons*, to the exclusion, while it lasts, of all others'.

---

[18] 2006 (1) SA 524 (CC), 2006 (3) BCLR 355, [2005] ZACC 19.

[19] Section 30(1) of the Marriage Act provides:

In solemnizing any marriage any marriage officer designated under section 3 may follow the marriage formula usually observed by his religious denomination or organization if such marriage formula has been approved by the Minister, but if such marriage formula has not been approved by the Minister, or in the case of any other marriage officer, the marriage officer concerned shall put the following questions to each of the parties separately, each of whom shall reply thereto in the affirmative:
'Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage with C.D. here present, and that you call all here present to witness that you take C.D. as ***your lawful wife (or husband)****?',*
and thereupon the parties shall give each other the right hand and the marriage officer concerned shall declare the marriage solemnized in the following words:
'I declare that A.B. and C.D. here present have been lawfully married'.
(Bold print supplied for emphasis.)

That much was necessarily implied in the finding that the previously expressed definition that marriage was 'a union of *one man* with *one woman*, to the exclusion, while it lasts, of all others' was unlawfully discriminatory and infringed the right of gays and lesbians to enter into the sort of publically formalised union that heterosexual couples could by marrying under the Marriage Act.

[20] At the heart of the *Equality Project* case was the right of gays and lesbians to equality with heterosexual persons in respect of the institution of marriage. It perhaps bears emphasis, as an important aside, that sexual orientation or preference - the expression of a person's sexuality – is not an issue in the current proceedings.[20] There is no evidence about the first to sixth applicants' sexuality. Nor was there any need for such. As Lord Nicholls of Birkenhead thought it relevant to point out in *Bellinger*,[21] *'...a transsexual person is to be distinguished from a homosexual person. A homosexual is a person who is attracted sexually to persons of the same sex*'. Many might think that that is to state the obvious, but the literature on transgenderism describes that there is an all too common tendency to conflate sex, gender and sexuality, which is misconceived.[22] The tendency is manifested in the reliance by the respondents, in explanation of their approach to the interpretation and administration of the Alteration Act in respect of persons married in terms of the Marriage Act who subsequently transition, on the reported widespread opposition to any amendment of the Marriage Act to permit the formalisation of marriages between homosexual couples. The opposition to gay marriage was, amongst other things, advanced on the basis of ideas that

---

[20] The applicants did allege that if the respondents were correct in their construction of the applicable legislation, the resultant discriminatory treatment in distinguishing between persons married under the Marriage Act and those wed under the Civil Union Act would, in effect, give rise to unfair discrimination on the basis of sexual orientation. In view of the conclusion to which I have come it has not been necessary to decide that point. The contention seems in any event to be based on the very sort of conflation of concepts that has been criticised in the academic literature.

[21] *Bellinger v Bellinger* supra at note 5, in para. 10.

[22] A short but useful overview on the subject is given in *Victor, Victoria or V? A constitutional perspective on transsexuality and transgenderism* (C. Visser and E. Piccara), 2012 SAJHR 506. The authors observe that '*The labels of transsexual, transgenderist, intersexed, transvestite, heterosexual, homosexual, bisexual and pansexual are all labels that are used in an attempt to describe the many permutations of human identity and sexuality. However, the conflation of sex, gender and sexual orientation has tainted our understanding of what these terms actually mean, leading to the perpetuation of misconceptions that have impacted on the legal treatment of transsexual and transgender issues. At the outset, a distinction has to be drawn between those terms that refer to the sexual orientation of an individual; those that have their application in reference to the biological sex of an individual; and those that describe the gender configuration of the individual*' (at pp. 510-511). Albertyn and Goldblatt say that the '*Constitutional Court tends to use sex and gender interchangeably in the relatively large number of cases it has considered on these grounds. Sex is generally taken to mean the biological differences between men and women, while gender is the term used to describe the socially and culturally constructed differences between men and women*.' (C. Albertyn and B Goldblatt, '*Equality*', in S. Woolman and M. Bishop (eds.) *Constitutional Law of South Africa* 2nd ed, at 35-55.)

'*sex is … an essential determinant of the relationship called marriage*' and that '*the capacity for natural heterosexual intercourse*' is essential for the subsistence of a marriage – I quote from the judgment of Ormrod J in *Corbett v Corbett*,[23] which was also a case concerning marriage and transgenderism. That viewpoint, or opinions aligned to it, seem to reflect what the respondents, in the context of the current case, characterise as relevant '*deep public and private sensibilities*' that allegedly bear on their ability to record the transgender spouses' sex/gender change[24] That such views have long since been legally discredited is evidenced, for example, by the following statement in the judgment of the European Court of Human Rights in *Cossey*'s case[25]:

> … Mr Justice Ormrod's arguments are clearly unacceptable. Marriage is far more than a sexual union, and the capacity for sexual intercourse is therefore not "essential" for marriage. Persons who are not or are no longer capable of procreating or having sexual intercourse may also want to and do marry. That is because marriage is far more than a union which legitimates sexual intercourse and aims at procreating: it is a legal institution which creates a fixed legal relationship between both the partners and third parties (including the authorities); it is a societal bond, in that married people (as one learned writer put it) "represent to the world that theirs is a relationship based on strong human emotions, exclusive commitment to each other and permanence"; it is, moreover, a species of togetherness in which intellectual, spiritual and emotional bonds are at least as essential as the physical one. (Footnotes omitted.)

I am unable to find anything in that statement that is inconsistent with the concept of marriage in our modern law.[26]

[21] As mentioned, Parliament responded to the *Equality Project* judgment by enacting the Civil Union Act. It left s 30(1) of the Marriage Act on the statute book unchanged. It may be inferred that the legislature's approach was that by enacting the Civil Union Act it had corrected the identified constitutional incompatibility in that provision of the Marriage Act.

[22] 'Marriage' is not defined in either Act. It is established that the word is used in the Act consistently with its meaning in the common law.[27] Counsel on both sides accepted,

---

[23] [1970] 2 All ER 33 (P.D.A.), at p. 48.

[24] For an insight into how 'conservative' submissions on the draft bills affected the enactment of the Civil Union Act and the decision not to amend the Marriage Act, see P. de Vos and J. Barnard, *Same-sex marriage, civil unions and domestic partnerships in South Africa: critical reflections on an ongoing saga* 2007 (124) SALJ 795.

[25] *Cossey v. The United Kingdom* [1990] ECHR 21, (1991) 13 EHRR 622, at para. 4.5.2.

[26] Cf. Sinclair *The Law of Marriage*, op cit supra (at note 8), especially s.v '*The Marriage Relationship, (a) Consortium Omnis Vitae*' at pp. 422-424.

correctly in my view, that the word also has that meaning in the Civil Union Act.[28] It follows that it was also not in issue between the parties that the common law has been developed in the manner described earlier.[29]

[23] The parties appeared to be in agreement at the hearing that, by reason of the unchanged wording of s 30(1) of the Marriage Act,[30] only marriages in which the intending parties are of opposite sex can be solemnised under that statute.[31] Equivalent unions under Civil Unions Act, by contrast, may be solemnised irrespective of the sex/gender of the parties thereto.[32] The parties entering into a formalised union under that Act must elect whether it is to be called a 'marriage' or a 'civil partnership'.[33] Whichever designation is chosen, the character of a union entered into in terms of the Civil Union Act is indistinguishable in its legal effect and consequences from one solemnised under the Marriage Act.[34] The Civil

---

[27] In *Equality Project*, at para. 3, Sachs J noted that '[t]*he common law* [in respect of marriage] *is not self-enforcing, and in order for such a union to be formalised and have legal effect, the provisions of the Marriage Act have to be invoked*'.

[28] See s 13 of the Civil Union Act quoted in note 34 below.

[29] In paragraph [19] above.

[30] See the highlighted words of the provision quoted in note 19 above.

[31] The applicants' counsel had argued in their heads of argument that same-sex marriage was possible under the Marriage Act through '*an approved marriage formula*'. The submission was no doubt based on the opinion to that effect expressed in the majority judgment in *Fourie and Another v Minister of Home Affairs* 2005 (3) SA 429 (SCA), at paras. 35-37. The subsequent introduction of Civil Union Act called the feasibility of that approach into question. I am not aware whether there has yet been a case raising the interesting question whether an intended marriage in which one of the parties has already transitioned can be solemnised under the Marriage Act. The respondents' answering affidavit posits a positive answer. The second respondent averred '*Had a partner to a relationship undergone a sex alteration <u>prior to</u> marriage and had such a marriage resulted in them entering into a heterosexual relationship, such couples* (sic) *would have been entitled to marry their respective partners under the Marriage Act*'. (Underlining in the original.) The respondents' position in this respect is somewhat ironic in the context of the importance they attach in other respects to the public's 'sensibilities' about any amendment to the Marriage Act.

[32] Parliament sought to correct the defect identified in s 30(1) of the Marriage Act by providing the following formula in s 11(2) of the Civil Union Act to be used in the solemnisation of unions under the latter Act:

*In solemnising any civil union, **the marriage officer** must put the following questions to each of the parties separately, and each of the parties must reply thereto in the affirmative:*
*'Do you, A.B., declare that as far as you know there is no lawful impediment **to your proposed marriage**/civil partnership with C.D. here present, and that you call all here present to witness that you take C.D. as **your lawful spouse**/civil partner?',*
*and thereupon the parties must give each other the right hand and **the marriage officer** concerned must declare the marriage or civil partnership, as the case may be, solemnised in the following words:*
*'I declare that A.B. and C.D. here present **have been lawfully joined in a marriage**/civil partnership.'*
(Emphasis supplied for highlighting.)

The formula is plainly based on that in s 30(1) of the Marriage Act quoted in note 19 above. The only material difference is the use of the words '*your lawful spouse/civil partner*' instead of '*your lawful wife (or husband)*'.

[33] Section 11(1) of the Civil Union Act.

[34] This follows from s 13 of the Civil Union Act, which provides:

Union Act is therefore available to both opposite- and same-sex couples for the solemnisation of their intended marriages. A man and a woman intending to get married to each other accordingly have a choice about the statute under which they will exchange their vows;[35] a same-sex couple does not. I shall describe the reported reason for this anomaly presently.

[24] Marriage officers who hold their position *ex officio* by virtue of s 2 of the Marriage Act are automatically also 'marriage officers' in terms of the Civil Union Act.[36] However, in terms of s 6 of the Civil Union Act a marriage officer *ex officio* may notify the Minister that he or she objects on grounds of conscience, religion and belief to solemnising a civil union between two persons of the same sex, whereupon he or she is not obliged to solemnise such a civil union. Save as aforesaid, a marriage officer under the Civil Union Act '*has all the powers, responsibilities and duties, as conferred upon him or her under the Marriage Act, to solemnise a civil union'*.[37]

[25] Whether or not the dichotomous regime in respect of the solemnisation of marriages is constitutionally compatible is not a question that has to be decided in this case.[38]

[26] In addition to the six applicants identified thus far, a registered non-profit organisation called Gender Dynamix ('GDX') was also party, as the seventh applicant, to the institution of the proceedings. Using a human rights framework, GDX seeks to advance, promote and defend the rights of transgender and 'gender non-conforming' persons in South Africa and beyond. The seventh applicant has been working for a decade now on various issues

---

Legal consequences of civil union
(1) The legal consequences of a marriage contemplated in the Marriage Act apply, with such changes as may be required by the context, to a civil union.
(2) With the exception of the Marriage Act and the Customary Marriages Act, any reference to-
(a) marriage in any other law, including the common law, includes, with such changes as may be required by the context, a civil union; and
(b) husband, wife or spouse in any other law, including the common law, includes a civil union partner.

[35] Provided that they are both over 18 (see the definition of '*civil union*' in s 1 of the Civil Union Act).

[36] Paragraph (a) of the definition of 'marriage officer' in the Civil Union Act provides that the term means '*a marriage officer ex officio or so designated by virtue of section 2 of the Marriage Act*'. Section 2 of the Marriage Act provides:

(1) Every magistrate, every special justice of the peace and every Commissioner shall by virtue of his office and so long as he holds such office, be a marriage officer for the district or other area in respect of which he holds office.
(2) The Minister and any officer in the public service authorized thereto by him may designate any officer or employee in the public service or the diplomatic or consular service of the Republic to be, by virtue of his office and so long as he holds such office, a marriage officer, either generally or for any specified class of persons or country or area.

[37] Section 4(2) of the Civil Union Act.

[38] See note 24 above.

concerning '*the lack and/or improper implementation of the* [Alteration] *Act*'. A number of its employees or former employees had contributed to the enactment of the statute.

The history of problems regarding the Alteration Act

[27] The current executive director of the seventh applicant testified that the organisation's experience was that the implementation of the Alteration Act has been attended by a variety of problems. She described that these fall into 'three basic categories:

(a) Ignorance by relevant officials of the existence and content of the Act.

(b) The absence of prescribed forms and procedures for the administration of the Act,[39] with the result that some persons experienced what was described as 'persecution' when making applications under the Act.

and

(c) The requirement by the Department of Home Affairs that applicants who were in marriages that had been solemnised in terms of the Marriage Act first obtain a divorce before being allowed to have their altered sex/gender recorded under the Alteration Act; alternatively, '*in extreme cases*', the arbitrary deletion or alteration by the Department of the official record of the affected marriages when a sex/gender alteration was recorded. (In one example given by the deponent, a person who submitted an application under the Alteration Act in 2009 had had the record of her marriage, which had been solemnised in 1976 in terms of the Marriage Act, changed, without her foreknowledge, to that of a marriage purportedly solemnised under the Civil Union Act in 2009.)

[28] The deponent to the seventh applicant's supporting affidavit related that the reasons offered to applicants by the Department for the last-mentioned category of difficulty have included its understanding of the effect of the dichotomous regime provided by the existence side by side of the Marriage Act and the Civil Union Act and the reported inability of the Department's data capturing system to reflect parties to marriages that had been solemnised under the Marriage Act as being of the same sex. According to the deponent, the Department's perception that a catch-22 situation prevails has resulted in a number of applications just being left undetermined by the Director-General. One of the consequences

[39] The Alteration Act, unusually, does not contain a provision for the making of regulations to assist in the administration of the statute.

has been that the ability of applicants to avail of the internal appeal remedies afforded in terms of the Alteration Act has been thwarted.[40]

[29] The Department has not been absolutely consistent, however, about its inability to register an alteration of sex in terms of the Alteration Act when the applicant has been party to a subsisting marriage in terms of the Marriage Act. The example was cited of a person who had applied for relief under the Act in 2011. Having initially been informed that she would first need to obtain a divorce, which she refused to do, the Department was eventually persuaded, after the applicant had obtained legal representation with the assistance of GDX, to amend the gender marker despite the continued subsistence of the marriage. It did so without 'converting' the record of the union to one under the Civil Union Act.[41]

[30] The absence of a uniform approach by the Department to these matters is striking.

[31] The seventh applicant has been involved since 2011 in a series of engagements with the Department and the parliamentary portfolio committee for Home Affairs in an endeavour to resolve the difficulties. These have not borne fruit, and in some instances its approaches were not even favoured with acknowledgment. According to its executive director, GDX has assisted the first to sixth applicants to institute and prosecute the current proceedings because the organisation's '*advocacy efforts on the issue have simply been ignored*'.

[32] The experiences of the transgender spouses confirm that the Alteration Act is being unsatisfactorily administered. It is appropriate to describe them in greater detail because they have each sought declarations in terms of s 172(1)(a) of the Constitution that the respondents' conduct in respect of their applications under the Alteration Act was inconsistent with the Constitution. The affirmative significance of such declarations, quite apart from any remedial or ancillary relief that might attend them, is axiomatic.

KOS's application in terms of the Alteration Act

[33] KOS was born in 1981. She was raised as a male, but says that she 'always knew that [she] was different'. She married the second applicant in 2011, a year before she was diagnosed with gender dysphoria. She has been on hormone therapy since 2013 preparatory to gender reassignment surgery.

---

[40] See also the description of difficulties encountered by applicants under the Alteration Act in the paper by T. Klein (note 10 above).

[41] It is not apparent on the papers how the reported inadequacies of the Department's data capturing system must have been overcome in this particular instance.

[34] She submitted her application in terms of the Alteration Act in March 2014 at the Department of Home Affairs' offices in George. Her wife accompanied her. The first official with whom they dealt refused to accept the application, despite KOS having a copy of the Act with her. The official advised KOS that it could not be possible to alter her gender as that '*must be an offence of some kind*'. So despondent was KOS at this treatment that it was only at the insistence of her wife that they thereafter arranged to see a different official, who agreed at least to accept the application, whilst nonetheless expressing reservations about its feasibility. (KOS's reception at the Home Affairs office manifests the category of problem described in paragraph [27](a) and (b) above.)

[35] Despite repeated enquiries KOS and her family were unable to obtain any information or feedback about the progress of the application. An email from KOS's mother to the Minister in February 2015, which catalogued nine fruitless telephone calls to the Department's client services desk during the period November 2014 to February 2015 about the lack of response to the application, was not favoured with reply or acknowledgment.

[36] During the prolonged period that her application was mired in bureaucratic inertia, KOS was all the while gradually coming to look more like a woman than a man as a result of the hormonal treatment that she was receiving. She consequently found herself in embarrassing situations in which she was called upon to explain why her appearance did not correspond with that depicted on her official identity cards. Some people proved sympathetic to her predicament; from others it elicited reactions of suspicion or hostility. This caused her increasingly to withdraw from dealing with the outside world and leave the management of her affairs to her wife.

[37] Eventually, in April 2015, KOS approached the Department's provincial headquarters in Cape Town. She set out the unsatisfactory history of her application and pointed out that the altered birth certificate that she had applied for was essential to enable her '*to be able to resume my life as a registered South African citizen*'. She explained that without it she could not obtain her '*new ID book, driver's licence, passport* [or] *even open… a bank account*'. An official there took up the first applicant's cause.

[38] It was discovered that the Department's head office in Pretoria, to which the office in George should have directed the application, had no record of it. However, even after a copy of the application was then faxed to the Pretoria on two occasions, a response was still not

forthcoming. To their credit, KOS's exasperation about the lack of progress was shared by the officials in Cape Town who were dealing with the matter.

[39] On 23 June 2015, the Department's head office advised that more information in the form of expert reports was required; in particular, a letter from a medical doctor stating that '*the operation was done*'. Gender reassignment surgery is actually not a requirement for relief in terms of the Alteration Act. (The head office request was a further manifestation of the problem described in paragraph [27](a) above.) KOS nevertheless provided an additional letter from her doctor, but this notwithstanding, another four months passed without progress.

[40] After pressing the official dealing with the matter for a response, KOS was informed by telephone in late October 2015 that it had been ascertained that she was married and that the application could not be processed without proof that she had obtained a divorce (the problem identified in paragraph [27](c) above). The reason given was that two women could not be married to each other. When KOS challenged the validity of that proposition, she was told that the problem related to the Department's computer system, which would not allow KOS's identity number to be changed while she remained registered as having been married under the Marriage Act. (It will be recalled that a person's marital status is not reflected on their identity number.[42]) It was suggested that she and the second applicant should go through with divorce proceedings and then remarry under the Civil Union Act.

[41] KOS and the second applicant thereafter took legal advice concerning divorce proceedings and were advised, correctly, that absent an irretrievable breakdown in their marital relationship, no grounds existed for them to seek an order under the Divorce Act for the dissolution of their marriage.

[42] The upshot is that KOS's application has effectively been refused; alternatively, the Director-General has failed to make the decision that he was required to in terms of the Alteration Act.

GNC's application in terms of the Alteration Act

[43] GNC was born in 1953. She experienced gender dysphoria from her early years, but for a long time resisted accepting her female self. She did this by consciously adopting especially masculine roles, such as voluntarily enlisting in a combat unit during her

[42] See paragraph [7] above.

compulsory army service and later becoming a geologist, which she perceived to be a profession preponderantly associated with men.

[44] GNC married the fourth applicant in 1988, long before the enactment of the Civil Union Act. They have a daughter, who was born in 1992.

[45] For many years GNC internalised her gender dysphoria and suffered considerable distress by having to live with what she called her 'secret'. She disclosed her situation to her wife only in 2014. The fourth applicant has been understanding of GNC's situation and supported her decision to transition.

[46] GNC has undergone gender reassignment surgery. She has also succeeded in changing her forenames and obtaining an identity document that reflects her appearance as a female, but incongruously continues to indicate her sex/gender as male. When she applied for an altered birth certificate she was informed, in July 2016, by the same official who dealt with KOS's application that the Department's computer system '*simply* [would] *not allow an amendment to* [her] *gender as* [she] *was married in terms of the Marriage Act*'. GNC was also advised to obtain a divorce and to remarry under the Civil Union Act. Understandably, she sees '*no need to get a divorce to satisfy a computer system*'. In the circumstances, GNC's application has also effectively been refused.

[47] Like KOS, GNC has encountered difficulties and embarrassment in her day to day dealings with the outside world. This has been caused by the discrepancy between her appearance and the sex/gender descriptor on her identity documents.

WJV's application in terms of the Alteration Act

[48] WJV was born in 1971. She experienced gender dysphoria from an early age. When she told her father that she was in fact not a boy, but a girl, she was given a severe beating and subsequently compelled to participate in what her father regarded as masculinising activities. She came close to physically transitioning in the early 1990's but was persuaded by her psychologist that medical intervention might not be necessary. She was drafted into the army before she could make a decision. She did not fit in well in the military and her experience there was an unhappy one.

[49] WJV met the sixth applicant after her discharge from the army. They were married on 13 September 1997. WJV had told her wife about her gender dysphoria before the marriage.

[50] WJV commenced the process of physically transitioning in 2012. She approached the offices of the Department of Home Affairs at Roodepoort in November 2013 with a view to having her registered names and sex descriptor changed. The official with whom she dealt there advised that it would be better to tackle those objectives using a two-stage process; that is by first having her names changed, and then, when that had been done, applying for her sex description to be altered. The official advised that trying to achieve both objectives together would '*confuse the system*' and be likely to cause '*a slowing and/or stalling of the application*'.

[51] Not wishing to prejudice her applications, WJV went along with the advice and applied first for a change of forenames. In March 2014 she received notice that her forenames had been officially changed in terms of s 24 of the Births and Deaths Registration Act 51 of 1992, and she was issued with a replacement identity document.

[52] WJV submitted her application under the Alteration Act on 7 June 2014. She was able to track the progress of the application through the official channels. The application was cleared in respect of fingerprints on 24 June 2014. By 15 July 2014 the system reflected that the application had been 'processed', and then showed that the 'rectification department' had received it on 21 July. From that stage, however, the hitherto reasonably efficient treatment of the application ceased.

[53] The lack of any further progress caused WJV to enlist the assistance of the Legal Resources Centre ('LRC') in December 2014. The LRC wrote repeatedly to the Department, including direct approaches to the Director-General and the Minister. The papers suggest that, save for one reply from the Department's client services centre, the correspondence from the LRC was not even acknowledged.

[54] Eventually, in October 2015, WJV was invited to come to the Department's office in Roodepoort as her documents were ready. She was advised that her wife should accompany her, as it would be necessary for the sixth applicant to apply for a replacement identity document. On arrival at the office, WJV was handed a letter confirming that her gender had been changed. The sixth applicant was informed that she was required to obtain a replacement identity card. It was explained to WJV and her wife that as a consequence of the registration of WJV's sex/gender change, the Department had had to delete its record of their marriage, and that the sixth applicant's surname had therefore reverted to her maiden name. WJV and the sixth applicant learned that the Department's 'system' now reflected that they

had never married. They were advised that they were free to marry under the Civil Union Act, and told that the Department would be willing to facilitate the solemnisation of a marriage between them under that Act.

[55] WJV also testified to various difficulties that she had had with her shopping and banking accounts because of the disparity between her registered and apparent identities. Her work requires her to travel to neighbouring countries, which she says 'are known to be hostile to LGBTI communities'. It has been a constant concern to her that the incongruence between her identity documents and her physical presentation might lead to difficulties on these trips, as is the prospect of being stopped by the local law enforcement authorities and having to explain her situation to strangers who might not accept her account and arrest her.

The relief sought in these proceedings

[56] The applicants applied in their notice of motion for varied and wide-ranging relief. It is sufficient at this point to describe it in the broad. By way of primary relief they sought various types of declaratory relief affirming the subsistence of their marriages; declaring that the second respondent '*is required by law to alter a person's sex description in terms of the Alteration* [Act] *... irrespective of that person's marital status*' and declaring that the Department's refusal to process the applications of KOS and GNC in terms of Alteration Act because they were married in terms of the Marriage Act was unconstitutional and unlawful, and that its deregistration of the marriage between WJV and the sixth applicant was also unlawful and unconstitutional.[43] They also sought interdicts directing the second respondent to grant the applications by KOS and GNC under the Alteration Act and to correct the population register to reflect that WJV and the sixth applicant are married to each other.

[57] Contingently upon the court taking the view that the primary relief, or at least part of it, fell properly to be sought in proceedings under the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), the applicants sought condonation, in terms of s 9 of that Act, for having instituted the proceedings outside the time limit prescribed in s 7(1) of the Act and, in terms of s 7(2)(c), exempting them from exhausting the internal remedies under the Alteration Act.

[58] By way of secondary relief, sought in the alternative to the aforementioned primary relief, and contingently upon the court upholding the Department's understanding of the

[43] The lastmentioned head of relief is that which I categorised earlier (at para. [32]) as having been sought in terms of s 172(1)(a) of the Constitution.

statutory scheme, the applicants sought a declaration that the Alteration Act and/or the Marriage Act and/or the Civil Union Act is/are inconsistent with the Constitution and invalid to the extent that any or all of them fail to allow the alteration of a person's sex description and sex status while that person is in a marriage that was solemnised under the Marriage Act. Various forms of other relief ancillary to any such declaration were also sought.

[59] The applicants have sought certain of the relief not only in their own interest, but also, in terms of s 38 of the Constitution, in the interest of all other couples who find themselves in a similar situation.

The respondents' case

[60] The respondents opposed the application. The Director-General of the Department of Home Affairs deposed to an answering affidavit on behalf of all three respondents[44]. He averred that '*the issues presented in this application are novel and have not been previously canvassed by the Department prior to them having been raised by GDX in its engagement with the Department*'. He proceeded '[t]*his matter squarely raises an intersectional debate of issues related to same-sex relationships, marriage and sex alteration*'.

[61] The respondents contend that there is a gap in the existing legislation that needs to be filled if the applicants' complaints are to be effectively addressed. They aver that the effect of the statutory framework currently in place is the following (I quote from paragraph 13 of the answering affidavit):

1. *Once a partner to a marriage undergoes a sex alteration (thereby converting the relationship into a same-sex one), such a relationship does not constitute a marriage under the Marriage Act.*
2. *However, the law provides no mechanism by which to convert such a marriage concluded under the Marriage Act into a marriage under the Civil Union Act or indeed to provide grounds upon which such a couple may divorce (it being accepted that the grounds for divorce under the Divorce Act do not apply on the facts of* [the current] *matters.*
3. *The result is that such a couple remains married under the Marriage Act, but that their sex alteration cannot be registered as contemplated under the Alteration Act.*

[44] The first respondent is the Minister of Home Affairs and the third respondent is the Deputy Director-General, Department of Home Affairs: Civic Services.

4. *This state of affairs results in persons who are in marriages concluded under the Marriage Act (and who were at the time of concluding such marriages in heterosexual relationships) being deprived of* (sic) *registering a sex alteration under the Alteration Act.*

[62] The respondents accept that there is nothing in the Alteration Act, read on its own, to support the notion that an applicant's marital status has any bearing on his or her entitlement to obtain an altered birth certificate under that Act. They contend, however, '*that the issues presented in this matter cannot be viewed in isolation solely through the lens of the Alteration Act*'. '*Equally important*', they say' '*are the implications of an alteration under the Alteration Act for the Marriage Act*'. They argue that the current matter involves '*a question of* [?marital] *status*'. The respondents say it is also '*a matter that touches on deep public and private sensibilities which* [they] *aver Parliament is well-suited to finding the best ways to vindicate*'.

[63] The respondents assert that they '*do not accept the correctness of an argument seemingly advanced by the applicants that even though the Marriage Act does not allow for the conclusion of a same-sex marriage, it does allow for and apply to a marriage that was concluded as heterosexual and subsequently became same-sex*'. They point out that after the judgment in the *Equality Project* case the Department '*gave careful consideration to the question whether the Marriage Act should be amended to make it applicable to same-sex marriages. There was extensive and wide ranging objection, inter alia from the religious sector to follow such a course; the Civil Union Act was accordingly opted for*', (Underlining in the original.) They contend that in the result there is a '*parallel regime of the law governing marriage*'.

[64] The essence of the respondents' contentions is that the first to sixth applicants are the victims of a legislative conundrum. They accept that on their approach the resultant situation would impel a finding that some (unspecified) law or conduct involved was inconsistent with the Constitution, and that a declaration in terms of s 172(1)(a) of the Constitution would be indicated. The Director-General averred that '*the respondents have no objection to an order declaring that the Civil Union Act is unconstitutional for its failure to recognise as a valid marriage (either in its own right or by converting a marriage concluded under the Marriage Act), the marriage of two persons who were married as a heterosexual couple under the Marriage Act, and where, subsequent to such marriage, one person to that marriage registers a sex alteration on the Birth Register pursuant to the alteration Act*'. Elsewhere in the

answering affidavit the Director-General postulates that the conundrum might also be addressed by amendments to Alteration Act,[45] or the Marriage Act.[46]

[65] The respondents averred that while they '*accept that the vindication of rights or indeed the addressing of legislative lacuna*[e] *are not dependent on public opinion, … the value of a public consultative process cannot be underestimated.* They stressed that the Department was '*mindful of the widespread and extensive public opposition to an amendment of the Marriage Act'* which had '*… largely informed Parliament's decision to adopt the Civil Union Act (as opposed to amending the Marriage Act), in order to give effect to the Order of the Constitutional Court in* [the *Equality Project* case]'.

[66] The Director-General sought to explain the advice given by departmental officials to four of the applicants that they should obtain a divorce and remarry under the Civil Union Act as having been premised on the notion that '*under the current legislative framework a person in a same-sex relationship cannot conclude or remain in a marriage under the Marriage Act*'. (My underlining.) He summed up this explanation with the statement '*I accept that is indeed correct as a matter of law*'.

[67] The Director-General's response to the deletion by the Department of the record of WJV's marriage was, however, entirely inconsistent with his notion that a person in a same-sex relationship '*cannot remain in a marriage under the Marriage Act*'. He said that the registration of the alteration of WJV's sex/gender in terms of the Alteration Act and the attendant deletion of the registration of his and the sixth applicant's marriage had been 'a mistake'. He reiterated his understanding that the '*legislative framework … does not simultaneously allow for a person married under the Marriage Act who has undergone a sex alteration to have their sex alteration registered on the system while simultaneously allowing*

[45] The suggestion was that the Alteration Act could be amended '*so as to provide that a condition or pre-requisite to an application for a sex alteration by a married person is consent by such person (and their marriage partner) to convert their marriage from one under the Marriage Act to one under the Civil Union Act*'. The case does not call for any determination in this regard, but I would venture that any such amendment would be unlikely to withstand constitutional scrutiny for a number of reasons. It would also be founded on a false premise. Relief under the Alteration Act affords recognition of a sex alteration, not permission to undertake one.

[46] The postulated amendment to the Marriage Act would comprise of '*a deeming provision … (with or without the consent of the other marriage partner) that a marriage concluded under the Marriage Act between a heterosexual couple is deemed to be a marriage under the Civil Union Act in instances where one party to a marriage concluded under the Marriage Act has undergone a sex alteration under the Alteration Act*'. The postulate is misconceived. First, a person does not undergo a sex alteration under the Alteration Act, he or she merely obtains an altered birth certificate in consequence of a sex/gender alteration that has already been undergone. Second, a postnuptial deeming of a marriage solemnised under one Act as one concluded under another Act would be vacuous if it would have no practical effect whatsoever on the marriage partners' subsisting rights and obligations vis à vis each other, or third parties.

such a person to remain married under the Marriage Act; this is because the result of the sex alteration would be that that person would be in a same sex relationship, which is not permitted under the Marriage Act'.

Discussion

[68] I have described the Director-General's reasoning as 'inconsistent' because he tendered to restore the registration of the marriage of WJV and the sixth respondent on the system, subject to the simultaneous reversal of the recordal of WJV's sex/gender change under the Alteration Act. In other words, notwithstanding his averment that a couple that have become a same-sex couple as a result of one of them transitioning cannot '*remain married under the Marriage Act'*, he is nevertheless willing to restore the registration of WJV and the sixth applicant's marriage. And he clearly does not have mind deeming it a marriage under the Civil Union Act. What he is apparently content to tolerate is an inaccurate population register and a continuing breach by WJV of the obligation under the Identification Act to obtain a replacement identity card by reason of her altered circumstances.

[69] This highlights, I think, the confusion that appears to exist in the minds of the respondents and officialdom in the Department concerning the import and effect of the relevant legislation. I regret to say that their approach appears to have been coloured by the persisting influence of the religious and social prejudice against the recognition of same-sex unions[47] that, according to their evidence, was accommodated by the decision not to amend the Marriage Act but to bring in the Civil Union Act alongside it instead. They have not identified a single provision in any of the legislation to which they refer that expressly forbids the processing and positive determination of the transgender spouses' applications under the Alteration Act. All that they have been able to point to are the socio-religious objections that reportedly influenced the legislature's decision to introduce the Civil Union Act and leave the Marriage Act unamended. They do not explain why those considerations should, or properly could, weigh to distort the plain meaning of the enactments as they appear in the statute book.

[70] What is also strikingly absent from the respondents' answer is any acknowledgment of the expressly enshrined constitutional principle that statutes must be interpreted in a

[47] In *Fourie* (SCA) supra, at para. 20, Cameron JA referred to '*the acknowledged fact that most South Africans still think of marriage as a heterosexual institution, and that many may view its extension to gays and lesbians with apprehension and disfavour*'. I have little doubt that the same can be said about attitudes towards same-sex marriages that come about incidentally because of the sex/gender change of one of the originally opposite-sex partners in existing unions. Prejudice, however, can never justify unfair discrimination; *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 at para. 37 and see also *Equality Project* at paras. 112-113.

manner consistent with the promotion of the spirit, purport and object of the Bill of Rights. Although s 39(2) of the Constitution places the interpretative duty on adjudicative bodies such as courts and tribunals, the provision necessarily implies that organs of state charged with administering legislation are expected to do so consistently with the meaning which the courts are called upon to give it. Organs of state fulfil that obligation by complying with s 7(2) of the Constitution, which obliges the state '*to respect, protect, promote and fulfil the rights in the Bill of Rights*'. The manner in which the applications by the transgender spouses were treated manifests a regrettable lack of compliance by the Department with its constitutional obligations in a number of respects.

[71] Furthermore, had there indeed been a serious concern that there was a gap in the legislation that required to be addressed in order to meet what the respondents admit has been the unconstitutional treatment of the first to sixth applicants (and others like them whose rights have been advocated by the seventh applicant), one would have hoped that the Department would by now be able to show that it had conscientiously engaged with the issues. Section 237 of the Constitution enjoins that all constitutional obligations must be performed diligently and without delay. It is regrettable, having regard to history, that at this late stage the Department has not formulated concrete proposals in respect of the supplementary provisions it contends are needed, and that it reports that it should be afforded a period of 24 months from the date of any order the court may make in terms of s 172(1)(a) of the Constitution to remedy the situation.[48]

Proper construction of the pertinent legislation

[72] I turn now to consider whether the respondents' argument that there is a lacuna in the legislation can be sustained upon a proper construction of the extant laws.

[73] As mentioned, the respondents concede that there is nothing in the Alteration Act itself that expressly or impliedly indicates that the applicant's marital status has any bearing on the ability or entitlement of a person who has transitioned to obtain administrative relief

[48] A prevailing reluctance to embrace and advance equality in the areas of sex and gender, especially when issues concerning homosexuality might be involved, is suggested by the fact that the significant advances made towards the realisation of constitutional rights and protections in this area since the dawn of the constitutional era have in the main been achieved through activist litigation, and not, as s 7(2) of the Constitution would contemplate, proactive executive and legislative action. See the long list of cases, many of them involving the Department, referred to in paras. 12-14 and the footnotes thereto in *Fourie* (SCA) supra. The examples of legislatively initiated amelioration referred to by Ackermann J in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39, at para 37, have, by comparison, been relatively limited in their ambit.

under the provisions of the statute. The object of the Act is reflected in its long title, which is '[An Act]: *To provide for the alteration of the sex description of certain individuals in certain circumstances; and to amend the Births and Deaths Registration Act, 1992, as a consequence; and to provide for matters incidental thereto*'. The sole criterion for obtaining an altered birth certificate under the Act is proof, in the form prescribed by s 2(2), to the reasonable satisfaction of the Director-General, that the applicant has altered his or her sex/gender. The Alteration Act therefore does not contain anything to support the respondents' interpretation of the statutory framework.

[74] I have already described the administrative consequences of an altered birth registration in terms of the Alteration Act.[49] The consequences are plainly directed towards facilitating the maintenance of an accurate and meaningfully informative population register. As I have highlighted, the failure by a person who has transitioned to obtain a replacement identity card is a criminal offence under the Identification Act. Such a person can obtain a replacement card only after going through the process provided in terms of the Alteration Act. The purpose of the Identification Act, as reflected in its long title is '[t]*o provide for the compilation and maintenance of a population register in respect of the population of the Republic; for the issue of identity cards and certain certificates to persons whose particulars are included in the population register; and for matters connected therewith*'. The evident purpose of the population register is to provide generally for a database to be used to assist in matters of public administration. The content of the population register is not publically available and it may be accessed only with the specific consent of the Director-General.[50] This confirms the primarily governmental purpose of the register. Similarly, the particulars recorded in the population register may be amended only with the consent of the Director-General.[51]

[75] The public working of the register is manifested by its system of identity cards. The purpose of identity cards is to combat fraud in both the public and private sectors, and to assist in law administration and enforcement. A person's marital status does not impact on the formulation of his or her allocated identity number in terms of s 7 of the Act. On the contrary, the indication of any personal particulars apart from the person's date of birth,

[49] At paragraphs [5]-[9] above.

[50] Section 6 of the Identification Act.

[51] Section 6 of the Identification Act.

gender and citizenship status is expressly precluded from inclusion in their identity number.[52] Many of life's ordinary undertakings such as travel, legally driving a motor vehicle, or opening a banking account require every South African resident to carry one or more of the various types of identity card recognised in terms of the Identification Act. As the practical experience of the transgender spouses testifies, identity cards do not serve those purposes well if they do not accurately reflect the actual identity of the cardholder as he/or she would present in ordinary circumstances to the outside world. It will not help if anyone whose sex/gender characteristics have been altered from male to female is forced to keep a card showing their original sex/gender with a photograph depicting them as a person of the opposite sex to that which they actually appear to be. Having regard to the objects of the Identification Act, no conceivable purpose could be served by maintaining an inaccurate record of the particulars of any individual. On the contrary, to do so would thwart the effective operation of the Act and impede the exercise of personal rights and freedoms.

[76] I have already referred to the provisions of s 8(e) of the Identification Act.[53] In the case of the first to sixth applicants, it has the effect that the particulars of their respective marriages on the relevant marriage registers must be recorded on the population register. That will be so even if the marriages are subsequently terminated. The second respondent is obliged to supplement the information so recorded on the population register with any '*such other particulars concerning* [a person's] *marital status as may be furnished to the Director-General*'. Information concerning the termination of a marriage would be an obvious example of '*such other particulars*'. The particulars of a divorce order would fall to be added to the information on the register concerning the person's marital status. The respondents concede that the first to sixth applicants' marriages, remain valid notwithstanding the actual change of sex/gender of one of the parties thereto, and that they can be terminated only by death or divorce. It is not apparent to me why information concerning an alteration of sex/gender - something that does not affect the subsistence or legal effect of a recorded marriage - would constitute particulars falling to be recorded under s 8(e) of the Identification Act. All that would be required is an amendment of the particulars recorded in respect of the person's gender in terms of s 8(b).

---

[52] Section 7(2) of the Identification Act, and in particular the following words therein '*and no other particulars whatsoever*'.

[53] In paragraph [6] above.

[77] When regard is had to the close and direct inter-relationship between the workings of the Alteration Act and the Identification Act - both of which are administered by the Ministry of Home Affairs - it is perplexing that the respondents omitted to deal with this most directly practical aspect of the legislation in their answering papers. Indeed, they made no mention of the Identification Act in their answering papers whatsoever, or of the effect on its administration of the 'lacuna' they would seek to identify in the relevant statutory framework.[54] It is obvious that the practical inter-relationship between the Alteration Act and the Identification Act for the purposes of government administration is immediate and real. The nature of its alleged 'intersectional' relationship with the Marriage Act or the Civil Union Act on the other hand has proved difficult for the respondents to pinpoint, unsurprisingly.

[78] The problem with the implementation of the Alteration Act that the respondents have sought to identify seems to arise from their understanding of the Marriage Act and the Civil Union Act.

[79] The object of the Marriage Act appears from its long title. It is '[t]*o consolidate and amend the laws relating to the solemnization of marriages and matters incidental thereto*'. (Underlining supplied for emphasis). It is unnecessary to analyse the content of the Act in detail. The 'matters incidental' to the solemnisation of marriages with which it deals are the appointment and authority of marriage officers; the formalities that must be observed before a marriage can be solemnised, and what must be done by the marriage officer if objections are raised to a proposed marriage; the circumstances in which a marriage between two minors without parental or guardian consent may be dissolved; the prohibition of the marriage of boys under 18 and girls under 15 without ministerial permission; permitting the marriage of certain persons connected by affinity by virtue of previous marriages; and providing when and where marriages may be solemnised and for the presence thereat of at least two competent witnesses.

[80] The difficulties that the respondent rely on appear to lie in ss 29A and 30(1) of the Marriage Act.

---

[54] The only mention of the population register was at para. 99 of the respondents' answering affidavit, where the deponent stated '*I do not accept that an alteration of a person's sex description in the Population Register would not affect the validity of a marriage.*'

[81] Section 30(1) of the Act provides for the marriage formula to be used in the solemnisation ceremony. As discussed earlier,[55] this is the provision that was centrally under consideration in the *Equality Project* case, which, because it has been left unamended by the legislature, continues to have the effect of precluding same-sex couples from having their partnerships solemnised under the Marriage Act. '*Solemnisation*' is a noun derived from the verb form '*solemnise*', which means '*duly perform (a ceremony, especially that of marriage) › mark with a formal ceremony*'.[56] That is what s 30(1) is concerned with. It does not bear on the consequences of any marriage solemnised in terms of its provisions. Indeed, as mentioned earlier, the Act does not contain any provision concerning *the consequences* of a marriage solemnised under its auspices. On the contrary, it is common ground that those are determined by the common law and are indistinguishable from those of a marriage or civil partnership solemnised under the Civil Union Act.

[82] The Marriage Act, moreover, does not contain anything prohibiting a party to a marriage duly solemnised in terms of the formula prescribed in s 30(1) from undergoing a sex-change or obtaining an altered birth certificate in terms of the Alteration Act. Any provision that had such an effect would, for a number of reasons, be of very doubtful constitutional validity. It would probably be found to offend against the basic rights of everyone to equality because it would be likely to unfairly discriminate against affected parties on one or more of the grounds set out in s 9(3) of the Bill of Rights and also to unjustifiably infringe the right that everyone has to bodily and psychological integrity, including the right to security in and control over their body (s 12(2)(b) of the Bill of Rights). There being no express provision in the Marriage Act having the effect contended for by the respondents, why should one be imputed? For the reasons canvassed earlier, it would be against constitutional principle to interpret or apply the express provisions of the Marriage Act in a manner that would undermine, rather than promote the spirit, purport and objects of the Bill of Rights. For all these reasons I am unable to find a cognisable basis in the facts of this case for interconnecting s 30(1) of the Marriage Act with the implementation of the Alteration Act.

[83] Section 29A of the Marriage Act prescribes the registration of a marriage solemnised under the Act: It provides:

---

[55] At paragraphs [18]- [19], and note19.

[56] *Concise Oxford English Dictionary* 10th ed., revised (OUP, 2002).

Registration of marriages

(1) The marriage officer solemnizing any marriage, the parties thereto and two competent witnesses shall sign the marriage register concerned immediately after such marriage has been solemnized.

(2) The marriage officer shall forthwith transmit the marriage register and records concerned, as the case may be, to a regional or district representative designated as such under section 21 (1) of the Identification Act, 1986 (Act 72 of 1986)[57]

The only legal and practical effect of registration in terms of s 29A is to create an official record of the *solemnisation* of the marriage in terms of the Act as an historical fact. I have already discussed the consequential significance of the registration for the workings of the Identification Act. Registration is a matter of record keeping; it has no more bearing than s 30 does on the legal consequences of the marriage.

[84] The respondents' counsel drew attention to the fact that the marriage certificate and other official forms provided for in terms of the regulations made under the Marriage Act identify the parties as 'husband' and 'wife', and raised this as presenting a practical difficulty should either of the parties subsequently change their sex/gender. If there is a difficulty, I fail to see why the Minister should not be able to address it by exercising her regulatory powers in terms s 38(1)(a) of the Act to make provision for an appropriate form to cater for any required amendments to the official records or registers. There is nothing in the Act that prohibits the amendment of records to take account of subsequent name and/or sex/gender details of persons whose marriages were duly solemnised under the statute. The Minister cannot rely on any shortcomings in the regulatory record-keeping mechanisms of the Marriage Act to deny transgendered persons their substantive rights under the Alteration Act, or to frustrate the substantive requirements of the Identification Act. Apart from any other considerations, to do so would be to act inconsistently with her obligations in respect of the provision of effective and coherent government.[58]

[85] Turning to the Civil Union Act. Its objects are expressed in the long title, which is repeated in s 2 of the statute, s.v. '*Objective of Act*', namely, '*(a) to regulate the solemnisation and registration of civil unions, by way of either a marriage or a civil partnership; and (b) to provide for the legal consequences of the solemnisation and*

[57] The obligation imposed on marriage officers in terms of s 29A(2) with reference to the repealed Identification Act, 1986, would fall to be construed, in terms of s 12(1) of the Interpretation Act 33 of 1957, as applicable with appropriate modification with reference to the current Identification Act, 1997.

[58] Section 41(1)(c) of the Constitution.

registration of civil unions'. Apart from its provision of a gender neutral marriage formula, there are no pertinent differences between the prescribed formalities in respect of the solemnisation of marriages under the Civil Union Act and those under the Marriage Act. Unlike the Marriage Act, the Civil Union Act deals with the legal consequences of the unions that are solemnised under its auspices. As mentioned, it does so by providing that the legal consequences are the same '*with such changes as may be required by the context*' as those of a marriage solemnised in terms of the Marriage Act.[59] As discussed, both acts treat marriage as 'a union of *two persons*, to the exclusion, while it lasts, of all others'. There is thus no parallel system of civil marriage, as contended by the respondents; there is only a parallel system for the solemnisation of marriages. The notion propounded by the respondents that there is scope for a 'conversion' from one type of duly solemnised marriage to another has accordingly been advanced on a false premise.

[86] Furthermore, the development of our common law of marriage and the associated enactment of legislation enabling the formalisation of same-sex marriage has meant that the difficult socio-political issues identified by the House of Lords as standing in the way of its ability to come to the assistance of Mrs Bellinger,[60] and requiring the attention of Parliament, do not preclude a positive outcome of the application for the applicants in this case.[61]

Conclusion

[87] The applicants are entitled in the circumstances to the primary relief for which they have applied. The failure of the Director-General to decide the applications of KOS and GNC under the Alteration Act, alternatively, his effective refusal of their applications amounted to 'administrative action' within the meaning of PAJA, and therefore fell, in terms of the principle of subsidiarity, to be challenged in terms of the provisions of that statute. The proceedings were instituted outside the time limit prescribed in terms of s 7 of PAJA and can be entertained only if an extension of time is granted in terms of s 9 of the Act. As mentioned, the applicants have applied for such an extension. The respondents, quite properly in the circumstances, have not opposed the application for an extension of time. The application raises important issues that bear materially on the lives of a section of South African society and on matters of public administration. It would therefore be in the interests

[59] See s 13 of the Civil Union Act, which has been set out in note 34 above.

[60] See *Bellinger v Bellinger* note 5 above.

[61] The law has also moved on in the United Kingdom since *Bellinger*. There has been far-reaching statutory reform. See, for example, the Gender Recognition Act 2004 (c. 7) and The Marriage (Same Sex Couples) Act 2013 (c. 30).

of justice that the required extension should be granted. The context also makes it appropriate, to the extent necessary, to exempt the first to sixth applicants from having to exhaust the internal remedies under the Alteration Act.

[88] It is not clear to me that the Department's deletion of the record of the marriage between WJV and the attendant unilateral change of the sixth applicant's surname back to her maiden name is 'administrative action'. The action was not taken in terms of any law. It was clearly unlawful and falls to be set aside for being in breach of the doctrine of legality. Lest I should be thought to be wrong in this approach, however, I shall contingently, to the extent that may then be necessary, also grant relief in terms of s 9 of PAJA in respect of the challenge mounted against those actions.

[89] The applicants sought an order declaring that the second respondent '*does not have the power to delete a marriage from the Population Register, or to alter a spouse's surname because one spouse has successfully applied for an alteration of their sex descriptor in terms of the* [Alteration Act]'. I am not persuaded that making such an order would be appropriate. The respondents have conceded that the second respondent has no such power and have explained that what happened in connection with WJV's application under the Alteration Act was 'a mistake'. Similarly, I do not think it to be necessary or appropriate to make an order declaring that the first to sixth applicants' respective marriages are valid marriages in terms of the Marriage Act. It was common cause on the papers that the marriages were valid. The statement by the second respondent that such marriages could not continue to exist if one of the spouses altered his or sex was uttered in the context of his confused and contradictory attempts to explain the Department's understanding of the 'intersectional' effect of the Alteration Act, the Marriage Act and the Civil Union Act. I consider that the declaratory orders that will be made will adequately address those aspects.

Orders

[90] The following relief is granted:

1. It is declared, in terms of s 172(1)(a) of the Constitution, that the manner in which the Department of Home Affairs dealt with the applications by the first, third and fifth applicants under the Alteration of Sex Description and Sex Status Act 49 of 2003 ('the Alteration Act') was conduct inconsistent with the Constitution and unlawful in that it

    (a) infringed the said applicants' right to administrative justice;

(b) infringed the said applicants' rights and those of the second, fourth and sixth applicants to equality and human dignity; and

(c) was inconsistent with the State's obligations in terms of s 7(2) of the Constitution

2. It is further declared that the second respondent is authorised and obliged to determine applications submitted in terms of the Alteration Act by any person whose sexual characteristics have been altered by surgical or medical treatment or by evolvement through natural development resulting in gender reassignment, or any person who is intersexed, for the alteration of the sex description on such person's birth register irrespective of the person's marital status and, in particular, irrespective of whether that person's marriage or civil partnership (if any) was solemnised under the Marriage Act 25 of 1961 or the Civil Union Act 17 of 2006

3. An order is made in terms of section 9 of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') extending the period within which the first to sixth applicants were permitted to commence proceedings for the judicial review of the second respondent's determination of, alternatively failure to determine, the respective applications submitted by the first, third and fifth applicants in terms of the Alteration Act to the date upon which the current application was instituted.

4. Insofar as might be necessary, an order is made in terms of section 7(2)(c) of PAJA exempting the first, third and fifth applicants from exhausting the internal remedies provided under the Alteration Act.

5. The second respondent's rejection of, alternatively failure to decide, the applications by the first and third respondents in terms of the Alteration Act is reviewed and set aside; and the second respondent is hereby directed to reconsider and, within 30 days of the date of this order, determine those applications in accordance with the provisions of the Alteration Act construed in the light of this judgment.

6. It is declared that the deletion by the Department of Home Affairs of the particulars in the population register compiled and maintained by the Department in terms of the Identification Act 68 of 1997 in respect of the marriage between the fifth and sixth applicants in terms of the Marriage Act, 1961, was unlawful; and the second respondent is hereby directed to, within 30 days of the date of this order, unconditionally, and without derogation from his approval of the fifth applicant's

application in terms of the Alteration Act, reinstate on the register the record of the particulars of the solemnisation of the said marriage in terms of the Marriage Act.

7. The first respondent is directed to pay the applicants' costs of suit, including the costs of two counsel.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

Applicants' counsel:	**N. Bawa SC**
	M. Bishop
	E. Webber
Applicants' attorneys:	**Legal Resources Centre**
	(Cape Town and Johannesburg)
Respondents' counsel:	**K. Pillay**
	T. Mayosi
Respondents' attorneys:	**State Attorney**
	Cape Town