CASE NO.: SA

2/98 IN THE SUPREME COURT OF NAMIBIA

In the matter between

APPELLAN
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MICHAEL ANDREAS MuLLER

And

THE PRESIDENT OF THE REPUBLIC OF NAMIBIA

THE MINISTER OF HOME AFFAIRS

CORAM: Strydom, C.J.; Silungwe, A.J.A. et

Levy, A.J.A. HEARD ON: 1999/04/15

DELIVERED ON: 1999/05/21

APPEAL JUDGMENT

STRYDOM f C.J.: The Appellant, a citizen of the Federal Republic of Germany, visited Namibia in March 1995. He was so taken up with the Country that he decided to settle in Swakopmund. During July 1995 he started to work for the Firm Engelhard Design. On 25 October 1996 he married the owner of the Firm, one Imke Engelhard. Prior to their marriage they decided to adopt the name Engelhard as their family or

surname. They obtained legal advice and were informed that this was possible. After the marriage they requested the same legal practitioner to complete the necessary formalities to give effect to their agreement. They were then informed that while it was possible for a wife

to adopt her husband's surname without any formalities, the converse was not possible, namely for a husband to adopt the surname of his wife, without complying with certain formalities as prescribed by sec. 9(1) of the Aliens Act, Act No. 1 of 1937. (The Aliens Act.)

Appellant consequently launched an application in the High Court of Namibia wherein he claimed the following relief:

" 1. Declaring sec. 9(1)(a) of the Aliens Act, Act No. 1 of 1937 ("the Aliens Act"), to be invalid as being in conflict with the Constitution;

3) Allowing Parliament twelve months from the date of the order to amend section 9(1)(a) of the Aliens Act so that it conforms with the Constitution, failing which the said section will become invalid *Ipso facto.*

4) Authorizing the Applicant to assume the surname of his wife, that is Engelhard;

5) Directing the Second Respondent and any other government official to give effect to the order in paragraph 3 above, insofar as this may be necessary;

6) Granting the Applicant such further or alternative relief as the above Honourable Court may deem fit.

7) Directing that Respondents pay the costs of the application, only if the application is opposed."

In his founding affidavit Appellant stated that sec. 9(1) of the Aliens Act infringes his rights under the Constitution to equality before the law and freedom from discrimination on the grounds of sex (Article 10); that it is an interference with his right and that of his

family to privacy and his right of equality as to marriage and during the marriage (Article 13(1)); and that it is a failure by the State to adequately protect his right to family life (Article 13(3)).

Various reasons were given by the Appellant why he wanted to adopt the surname Engelhard. These were that -

(i) the name Muller is an extremely common German surname whereas Engelhard was a far more unusual surname; (ii) the business Engelhard Design was established by his wife in 1993 and because of the reputation established thereby it would be unwise to change the name now to Muller Design. To market jewellery under a family name implies pride in one's work and ensures trust by customers in such work; (iii) if Appellant was required to keep his surname customers and suppliers would assume that he was only an employee of the firm; and (iv) the daughter born from the marriage of the Appellant was registered in the name Engelhard and Appellant would want to have the same surname as his daughter.

The application was opposed and one Frans Tsheehama, the Deputy Permanent Secretary of the Ministry of Home Affairs, deposed to an affidavit on behalf of the Respondents. Respondents, although they concede that the provisions of sec. 9(1)(a) of the Aliens Act may discriminate against the Appellant on the grounds of sex and equality as to marriage, they denied that the section violated the notion of substantive equality (in contrast to formal equality) which underpins the constitutional commitment to equality. Respondents went on to point out that sec. 9 of the Aliens Act provides machinery whereby the

Appellant could change his surname and avoid all the problems which he now refers to. Respondents further agreed with the Appellant that most women today choose to adopt the surnames of their husbands and went on to state that this is based on traditions and conventions that have existed from time immemorial and which should not be changed without a proper investigation of all the social and economic consequences that such a change may bring about. Respondents consequently prayed that the application be dismissed with costs and after argument the Court *a quo* dismissed the application with costs. Appellant then appealed against the whole of the judgment handed down by the High Court.

Before us appeared Mr. Light, on behalf of the Appellant and Mr. Coetzee, on behalf of the Respondents. At this stage it is necessary to mention that it was common cause between the parties that the Appellant's second reference to Article 13(1) of the Constitution and his reference to Article 13(3) was incorrect and were references to Article 1 4(1) and 14(3) of the Constitution.

The Aliens Act is an Act of the South African Parliament which applied to the then South West Africa. On the 10th February 1978 the administration of the said Act, with certain exceptions, was transferred to the Administrator General by the Executive Powers (Immigration) Transfer

Proclamation, Proclamation AG 9 of 1978. The Aliens Act survived Independence by virtue of Article 140(1) of the Constitution and any reference therein to the Administrator-General must be substituted with reference to the President of the Republic of Namibia. (Art. 140(5) of the Constitution.)

Section 9, as far as is relevant to the present case, provides as follows-

"(1) If any person who at any time bore or was known by a particular surname, assumes or describes himself by or passes under any other surname which he had not assumed or by which he had not described himself or under which he had not passed before the first day of January 1937, he shall be guilty of an offence unless the Administrator General or an officer in the Government Service authorized thereto by him, has authorized him to assume that other surname and such authority has been published in the Official Gazette: Provided that this subsection shall not apply when-

8) a woman on her marriage, assumes the surname of her husband;

9) a married or divorced woman or a widow resumes a surname which she bore at any prior time;

(c)

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..

(cA) .

..

10) ...

11) ...

(0 ...

(2) No such notice as is mentioned in subsection (1) shall be issued unless-

(a) the person concerned has published in the manner hereafter prescribed once in each of two consecutive weeks in the Official Gazette and in each of two daily newspapers which circulate in the district in which the said person resides and which have been designated for such

publication by the magistrate of that district, a notice of his intention to assume another surname; and (b) the Administrator General or an officer in the Government Service authorized thereto by him, has satisfied himself from a statement submitted by the said person and from reports furnished by the Commissioner of the South West African Police and by the said magistrate, that the said person is of good character and that there is a good sufficient reason for his assumption of another surname;

12) ...

13) if any person has lodged with the said magistrate any such objection, as aforesaid the magistrate shall attach that objection to his report mentioned in paragraph (b) of subsection (2).

14) ..."

It seems to me that the general purpose of sec. 9 is to ensure that as from I January 1937 people may change their surnames with Government authority and after due notice of such change has been properly published. This, no doubt, is to ensure greater certainty of identity necessary in the

administration of the State. The legislation provided a criminal sanction in the event of non-compliance. One needs only to consider the chaos which would result in our modern day commercial world should people be allowed to change their surnames without compliance with formalities. This is not to mention the many instances where people are required by the State to use their names when they register property, take out licenses, register motor vehicles, trade, pay their taxes, etc. This much was in general conceded by Mr. Light when he agreed that changing a name, other than

assuming one of the names of the partners in marriage, should be subject to the prescribed formalities.

Relevant to this case are two exceptions to the general rule that a surname can only be changed after certain formalities are being complied with namely that a woman can, but need not, assume the surname of her husband on marriage and can, during the marriage, after a divorce or after becoming a widow, again resume a surname which she bore at any prior time without any formality. A woman who wants to change her name to a name which she did not previously bear would also be required to go through the formalities of obtaining the necessary authority. The two exceptions mentioned are not applicable to men. Of these it is, in my opinion, only the first exception which creates an inequality. The second exception cannot and need not apply to men as men only have one surname which remains the same notwithstanding marriage or becoming a widower. The question is then whether this inequality which allows a woman to assume the surname of her husband on marriage without formalities but does not confer the same right on a husband, infringes the Constitution and more particularly Articles

10, 13(1), 14(1) and 14(3) thereof? During argument it became clear that the main thrust of Mr. Light's attack on sec. 9(I) is based on Article 10(2) of the Constitution.

Article 10 provides as follows:

> "(1) All persons shall be equal before the law.
>
> (2) No person may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status."

Article 10, and more particularly sub-art. (1), was only once before the subject of interpretation. The case to which I refer is Mweliie v Minister of Works, Transport and Communication and Another, 1995(9) BCLR 1118 (NmH). The approach of a Court to the Article was set out as follows (at p. 1132 E - H):

> "... Article 10(1) ... is not absolute but ... it permits reasonable classifications which are rationally connected to a legitimate object and that the content of the right to equal protection takes cognizance of 'intelligible differentia' and allows provision therefore."

In regard to sub-art. (2) the Court stated the following:

> "As far as Article 10(2) is concerned it prohibits discrimination on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status. Apart from the provisions of Article 23 any classification made on the grounds enumerated by the sub-article will either be prohibited or be subject to strict scrutiny. For purposes of the present case I need not decide the issue."

Counsel were not agreed as to the Court's approach to the interpretation of Art. 10(2).

Mr. Light submitted correctly that the Court in the Mwellie-case, *supra,* did not deal with Art. 10(2). He argued that, in order to determine whether discrimination based on one of the grounds set out in Article 10(2) exists, a Court should

not apply the rational connection test which was applied to Article 10(1). Counsel submitted that the judgments from Canada and South Africa, in regard to more or less similar provisions in their Constitutions, are particularly useful as comparative sources for the interpretation of Article 10(2).

Mr. Coetzee, on the other hand, urged the Court to also apply the rational connection to a legitimate object test to the provisions of Article 10(2). In this regard Mr. Coetzee's argument was accepted by the Court a *quo* when it concluded, after analysis of various cases and the aforementioned Articles, that:

> "...the principles laid down in Mwellie's case, *supra* in regard to the interpretation of Article 10(1) also apply to the interpretation of Articles 10(2) and 14(1) of the Namibian Constitution including the principles tabulated by Seervai Constitutional Law of India 3rd edition at p. 292. If the language of Article 10(2) is compared with that of Articles 10(1) and 14(1) it would seem that these principles apply *a fortiori* to the interpretation of Article 10(2)."

It will therefore be necessary to first determine what the Court's approach to the interpretation of Art. 10(2) should be.

The Canadian cases which dealt with Sec. 15(1) of the Canadian Charter of Rights and Freedoms, to which we were referred to by Mr. Light, are Thibaudeau v Canada. 29 CRR (2d) 1; Eean v Canada, 29 CRR (2d) 79 and Miron v Trudet, 29 CRR (2d) 189.

Mr. Light correctly pointed out that although the members of the Canadian Supreme Court were to a certain extent divided on a uniform approach to sec. 15, there has been considerable convergence as to such approach since the

judgments in the above cases were delivered.

Sec. 15(1) of the Charter provides as follows:

> "Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental-or physical disability."

I agree with Mr. Light that the tenor of Sec. 15, and allowing for differences in wording and punctuation, closely resembles our Articles 10(1) and (2) as long as one remembers that sec. 15 of the Charter may be limited by sec. 1 of the Charter whereas no such limitation exists in regard to Article 10 of our Constitution.

Regarding the various approaches of the Canadian Supreme Court to Sec. 15(1) of the Charter, Mr. Light referred us to the case of Vriend v Alberta, 50 CRR (2d) 1 (SC); [1998] 1 SCR 493. Cory, J, who wrote the majority judgment of the Court, dealt with these different approaches and stated in paras 73 and 74 as follows:

> "73. These approaches to the analysis of s. 15(1) have been summarized and adopted in subsequent cases, e.g. Eaton (at para 62), Benner (at para 69) and, most recently, Eldriee. In Eldrige La Forest], writing for the unanimous Court, stated (at paras 58 and 74):
>
> > 'While this Court has not adopted a uniform approach to s. 15(1), there is broad agreement on the general analytic framework, see Eaton v Brant Country Board of Education, [1997] 1 SCR 241, at para 62, Miron, *supra.* A person claiming a violation of s. 15(1) must first establish that, because of a distinction drawn between the claimant and others, the claimant has been denied "equal protection" or "equal benefit" of the law. Secondly, the claimant must show that the denial constitutes discrimination on the basis of one of the enumerated grounds listed in s. 15(1) or

one analogous thereto.'

74. In this case, as in Eaton. Benner and Eldridee, any differences that may exist in the approach to s. 15(1) would not affect the result, and it is therefore not necessary to address those differences. The essential requirements of all these cases will be satisfied by enquiring first, whether there is a distinction which results in the denial of equality before or under the law, or an equal protection or benefit of the law; and second, whether this denial constitutes discrimination on the basis of an enumerated or analogous ground."

As to what would amount to discrimination it was stated in the Egarj-case, *supra,* that the question is whether the distinction has the effect on the claimant of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to benefits or advantages which are available to others, (p. 132) It is therefore clear that the rational connection test was not applied by the Supreme Court of Canada.

In Prinsloo v Van der Linde and Another, 1997(3) SA 1012 (1997(6) BCLR 759) at para 29 the Constitutional Court of South Africa, dealing with sec. 8 of the Interim Constitution, i.e. the equality clause, stated that that Court -

> "should be astute not to lay down sweeping interpretations at this stage but should allow equality doctrine to develop slowly and hopefully, surely. This is clearly an area where issues should be dealt with incrementally and on a case by case basis with special emphasis on the actual context in which each problem arises."

I respectfully agree with this approach. As previously pointed out, there has so far only been one case in which the High Court was called upon to interpret Article 10(1). This, notwithstanding the fact that in jurisdictions like Canada and India, prolific litigation has arisen around the equality and non-discrimination clauses. Our culture of non-discrimination is nine years old and not yet out of its

infancy. We have a background history of discrimination which was rife and which was based on all of the enumerated grounds set out in Article 10(2). On top of this we still have a legacy of legislation which was inherited on Independence, some of which gave the force of law directly or indirectly to such discrimination or inequality. To apply without more to such a situation a fine-tuned approach which was developed over many years in a developed and sophisticated society which did not have our background history of discrimination may lead to a perpetuation of those inequalities which may. still exist rather than to eliminate them. The

purpose of Article 10 is clearly not only to prevent discrimination and inequality but also, in our context and history, to eliminate them and it is in this elimination process, in an attempt to level the playing field, where such legislation may fall foul of the Canadian approach. However to the extent that people were disadvantaged by past discriminatory laws or practices in the social, economical and educational fields, Article 23 of the Constitution permits Parliament to enact legislation for the advancement of such people. Although Art. 23 covers a wide field, it does not cover all forms of past discrimination. We, in Namibia, are also faced with a history of discrimination against the majority of the people the elimination of which may call for greater tolerance than the definition of discrimination set out in the Canadian cases.

The decisions of the South African Courts, and more particularly that of the Constitutional Court, are very relevant and in the past this Court and the High Court of Namibia, have frequently applied these decisions but this must always be done with due recognition of the differences that may exist between our two Constitutions. In my opinion there are some differences between our Article 10 and sec. 8 of the Interim Constitution and sec. 9 of the South African Constitution, which must be kept in mind when comparisons are drawn.

First of all the word "unfair", as a prefix describing the word discrimination, is not part of our Article 10. Secondly sec. 8(2) and 9(3) and (4) make it clear that the prohibition against discrimination is not limited to the enumerated grounds set out in sections 8(2) and 9(3) of the South African Constitutions. In Namibia any discrimination based on other grounds than those mentioned in Article 10(2) will have to be dealt with and will have to be brought in under Article 10(1) and/or Article 8(1), which provides that the dignity of all persons shall be inviolable. The third difference is that once it is established

that the discrimination is based on one of the enumerated grounds set out In sec. 8 or 9, it shall be presumed that it is unfair unless "it Is established that the discrimination is fair". No such presumption arises in terms of the Namibian Constitution. Lastly, if it is found that the discrimination is unfair it must still be determined whether it can be justified under the limitation clause (sec. 33 of the Interim Constitution and sec. 36 of the Constitution). The Namibian Constitution does not contain a general limitation clause.

Having regard to the wording of our Article 10(2), it seems to me that there is no scope for applying the rational connection test. Article 10(1) requires the Court to give content to the words "equal before the law" so as to give effect to the general acceptance that -

> "... in order to govern a modern country efficiently and to harmonise the interests of all its people for the common good, it is essential to regulate the affairs of its inhabitants extensively. It is impossible to do so without classifications which treat people differently and which impact on people differently. It is unnecessary to give examples which abound in everyday life in all democracies based on equality and freedom. ... In regard to mere differentiation the Constitutional State is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate purpose for that would be inconsistent with the rule of law and the fundamental premises of the Constitutional State. ... Accordingly, before it can be said that mere differentiation infringes s. 8 it must be established that there is no rational relationship

between the differentiation in question and the governmental purpose which is proffered to validate it."

(See Prinsloo's-case, *supra,* pa. 24.)

In regard to Article 10(2), there seems to be no basis, on the strength of the wording of the sub-article, to qualify the extent of the impact thereof and to save legislation which discriminates on one of the enumerated grounds from unconstitutionality on the basis of a rational connection and legitimate legislative object test. As was pointed out by Mr. Light

this would permit a relevant legislative purpose to override the constitutional protection of non-discrimination. Art. 10(2) which guarantees non-discrimination on the basis of the grounds set out therein would be defeated if the doctrine of reasonable classification is applied thereto and would be to negate that right. See Thibaudeau's-case, *supra,* at p. 36 and EgajVs-case, *supra,* p. 103 to 197. The grounds mentioned in Article 10(2), namely sex, race, colour, ethnic origin, religion, creed or social or economic status, are all grounds which, historically, were singled out for discriminatory practices exclusively based on stereotypical application of presumed group or personal characteristics. Once it is determined that a differentiation amounts to discrimination based on one of these grounds, a finding of unconstitutionality must follow.

The approach of our Courts towards Article 10 of the Constitution should then be as follows-

(a) ARTICLE 10f 11

The questioned legislation would be unconstitutional if it allows for differentiation between people or categories of people and that differentiation is not based on a rational

connection to a legitimate purpose. (See Mweilie's-case, *supra,* at 11 32 E - H and Harksen's-case. *supra,* pa (54).)

(b) ARTICLE 10(2)

The steps to be taken in regard to this sub-article are to determine -

(i) whether there exists a differentiation between people or categories of people; (ii) whether such differentiation is based on one of the enumerated grounds set out in the sub-article; (iii) whether such differentiation amounts to discrimination against such people or categories of people; and (iv) once it is determined that the differentiation amounts to discrimination, it is unconstitutional unless it is covered by the provisions of Article 23 of the Constitution.

The appellant in this matter succeeded in proving that sec. 9 of the Aliens Act differentiates between males and females, as was also conceded by the Respondents. This differentiation is, as I have tried to show, limited to the fact that the section provides for females to adopt the surnames of their husbands on marriage without having to comply with certain formalities whereas the same right is not accorded to husbands. It is in my opinion also clear that this differentiation is based on one of the enumerated grounds set out in Article 10(2) namely sex. The remaining question is then whether sec. 9 discriminates against the

Appellant.

The Concise Oxford dictionary, 9Jh Ed, 1995 gives the meaning of the words "discriminate" and "discrimination" as follows:

> "'discriminate': 2. Make a distinction, esp. unjustly and on the basis of race, age, sex etc. 3. intr. - (foil, by against) select for unfavourable treatment.
>
> 'discrimination': 1. Unfavourable treatment based on prejudice, esp. regarding race age or sex."

It seems to me that inherent in the meaning of the word discriminate is an element of unjust or unfair treatment. In South Africa, the Constitution clearly states so by targeting unfair discrimination, and thus makes it clear that it is that particular type of discrimination that may lead to unconstitutionality. Although the Namibian Constitution does not refer to unfair discrimination, I have no doubt that in the context of our Constitution that is also the meaning that should be given to it.

In discussing the words "without derogating from the generality of this provision" which appear in s. 8(2) of the South African Constitution the authors, Davis, Cheadle and Haysom in their book Fundamental Rights in the Constitution: Commentary and Cases, argued that the above words, which prohibit discrimination also on other grounds than those enumerated in the sub-section, are not an invitation to admit any or all grounds or classifications. The learned authors argued at p. 59 that discrimination on grounds other than those enumerated, should be limited to analogous grounds to those mentioned. This was stated as follows -

> "As we have argued earlier, the list of grounds reveals a distinct strand, a particular approach to the *genus* of prohibited characteristics. They are all human traits. They are all either immutable characteristics or inherent features of the human personality. The unstated classifications contemplated by the clause ought to be limited to analogous classifications for the reasons stated in our commentary above. They are

> all classifications that have been used to make invidious distinctions between human beings for the benefit of one group at the expense of another."

Although Article 10(2) of the Namibian constitution is not open ended regarding discrimination on other grounds than those enumerated in the sub-article, what is stated in regard to the list of grounds contained in sec. 8(2) of the South African Constitution is apposite and even more true of the grounds mentioned in Article 10(2) of our

Constitution. Also in regard to Article 10(2) the drafters thereof were aware of the past history of the Namibian people and "realized that it was necessary both to proscribe such forms of discrimination and to permit positive steps to redress the effects of such discrimination" per O'Regan, J, discussing the appropriate approach to the interpretation of sec. 8 in Brink v Kitshoff N.O.$_r$ (1996(6) BCLR 775 (CC)).

The learned writers of the book Fundamental Rights in the Constitution, *op cit,* p. 56 further point out that "the phrase 'unfairly discriminate' arises from a concern that a discrimination has both a pejorative and a benign meaning. The addition of the word 'unfair' is to make it absolutely clear that what is not permitted is invidious classification (the protected zone)."

Namibia shared with South Africa the years of discrimination based on those very grounds enumerated in Article 10(2) of our Constitution which gave rise to invidious distinctions which benefited one group at the expense of another. Therefore, in the context of our Constitution and bearing in mind the background and history which inspired its drafting, 1 am satisfied that the words "discriminate against" in Article 10(2) of our constitution refer to the pejorative meaning of discrimination. This was also concluded by Sastri, C.J. in the case of Kathi Raning

Rawat v The State of Saurashtra, (1952) SCR 435 where the learned Chief Justice discussed the expression "discriminate against" which appears in Articles 1 5 and 16 of the Indian Constitution. (Arts. 14 and 15(1) of that Constitution is perhaps the closest in wording to our Articles 10(1) and (2)). At p. 442, after referring to the meaning of the words "discriminate against" in the Oxford Dictionary, the following is stated -

> "... Discrimination thus Involves an element of unfavourable bias and it is in that sense that the expression has to be understood in this context. If such bias is disclosed and is based on any of the grounds mentioned in Articles 15 and 16, it may well be that the statute will, without more, incur condemnation as violating a specific constitutional prohibition unless it is saved by one or other of the provisos of those articles."

(The provisos referred to are contained in Articles 15(3) and (4) which are very much

the same as our Article 23.)

Sastri, C.J., after looking at the purpose of the legislation and its impact on the complainants, came to the conclusion that, although involving disparity of treatment of persons, it did not discriminate against such persons.

Also in regard to the Namibian Constitution the recognition of the equal worth of all human beings lies at the root of the provisions thereof. In its preamble, the Constitution starts off with recognition of the inherent dignity of all members of the human family and expresses the desire to promote amongst all the dignity of the individual and this is further echoed and implemented in the various articles of Chapter 3, and others, of the Constitution.

To sum up, I am of the opinion that the words "discriminate against" in Article 10(2) were intended to refer to the pejorative meaning of the word "discriminate", and not to its benign meaning. This stems from the fact that the

grounds enumerated in Article 10(2) are all grounds which in the past were singled out for discrimination and which were based on personal traits where the equal worth of all human beings and their dignity was negated. This is the history against which the drafters of the Constitution formulated the provisions of the Constitution and more particularly Article 10. Furthermore, read with Article 23, the purpose of Article 10 is not only to prevent further discrimination

on these grounds but also to eliminate discrimination which occurred in the past. To that extent, and where Article 23 does not cover the situation, Article 10 should not become an obstacle in the elimination process.

Against this background and in the light of this Court's interpretation of Article 10(2), it seems to me that the approach of the Constitutional Court of South Africa in determining whether discrimination is unfair, leaving aside the presumption, will also be helpful and relevant to this Court's approach to the problem. See Hueo's-case, paras [41] and [43] and the Harksen-case, *supra,* paras [51] to [53]. In these cases it was stated that various factors play a role, the cumulative effect of which must be examined in the determination of whether the discrimination was unfair. In this regard, the Court must not only look at the disadvantaged group but also the nature of the power causing the discrimnation as well as the interests which have been affected. This enquiry focuses primarily on the "victim" of the discrimination and the impact thereof on him or her. To determine the effect of such impact consideration should be given to the complainant's position in society, whether he or she suffered from patterns of disadvantage in the past and whether the discrimnation is based on a specified ground or not. Furthermore, consideration should be given to the provision or power and the purpose sought to be achieved by

it and with due regard to all such factors, the extent to which the discrimnation has affected the rights and interests of the complainant and whether it has led to an impairment of his or her fundamental human dignity, it was further made clear that these factors do not constitute a closed list but that other factors may emerge as the equality jurisprudence continues to develop. This latter remark would most certainly also be true of the development of this jurisprudence in Namibia.

In conclusion I therefore agree with the submission of Mr. Light that in regard to Article 10(2) there Is no scope for the application of the rational connection test. The reliance thereon by Mr. Coetzee on the strength of decisions, *inter alia,* by the European Court for Human Rights does not take sufficient cognizance of our background history of past discrimination based on human traits. (See Darby-case 17/1989/177/233) ECHR, given on 23/10/1990, pa. 31.) The approaches of the Canadian Supreme Court and the South African Constitutional Court not to apply in regard to their provisions, which are more or less similar to our Article 10(2), the rational connection test, seem to me correct. However, whereas the Canadian approach does not draw so clear a distinction between the pejorative and benign meanings of the word "discriminate" or "discrimination" that distinction is clearly drawn by the South African Constitution. It must therefore be accepted that not every differentiation based on the enumerated grounds will be unconstitutional but only those which unfairly or unjustly discriminate against a complainant on the lines set out above. To this extent those guidelines laid down by the Constitutional Court of South Africa as well as any other factors which may be relevant to a particular situation are useful also in the determination of discrimination in Article 10(2) of our Constitution.

It must now be determined whether sec. 9(1) "discriminates"

against the Appellant in the way set out before. Although it was accepted that the differentiation created by sec. 9(1) of the Aliens Act is based on one of the specified grounds contained in Article 10(2), there is no question that such differentiation in any way impairs the dignity of the Appellant. Nor was it alleged that that was the case. The Appellant, being a white male, who immigrated to Namibia after Independence, cannot claim to have been part of a prior disadvantaged group. It can furthermore not be said that the purpose of the section was to impair the dignity of males individually or as a group or to disadvantage males. It

was pointed out by Mr. Coetzee that surnames fulfil important social and legal functions to ascertain a person's identity for various purposes such as social security, insurance, license, marriage, inheritance, election and voting, passports, tax, police and public records as well as many other instances where proper identity plays a role. (See Coeriel et al v The Netherlands, Human Rights Committee, Communication no. 453/1991, p. 7.)

in this instance the power was exercised by the South African Parliament which was empowered to do so at the time and which, together with the public, had a clear interest in regulating the use of names. The many cases quoted to us show that in most countries of the world the change of a surname is subject to certain conditions and control.

The effect of the differentiation on the interests and rights of the Appellant must be seen, as was submitted by Mr. Coetzee, against the background that the Aliens Act gave effect to a tradition of long standing in the Namibian community that the wife normally assumes the surname of the husband. In this regard, there is also the uncontested evidence of Mr. Tsheehama that he is not aware of any other husband in Namibia who wanted to assume the surname of his wife. What is more the Appellant is not without a remedy. Sec. 9 provides a specific mechanism which would enable the

Appellant to fulfil his aim. This may involve a certain inconvenience but, as was conceded by Mr. Light, there is a necessity, for the sake of certainty, for Parliament to regulate the change of a person's surname. The impact of this differentiation on the interests of the Appellant is, to say the least, very minimal, nor does it affect his standing in the community in any detrimental way. The fact that sec. 9 does not accord to a husband the same right to assume on marriage the surname of his wife, as is accorded to the wife, i.e. without complying with

the formalities, serves In my opinion the purpose of the Aliens Act without discriminating against the Appellant In the context of our Constitution.

Lastly, there is Mr. Light's reliance on the other provisions of the Constitution, namely Articles 13(1), 14(1) and 14(3). Counsel did not make any stand on Articles 13(1) and 14(3) other than to say that these Articles should be considered in relation to, and in the interpretation of Art. 10(2). Article 13 deals with privacy and 14(3) with protection of the family by society and the State. A Constitution must of course also be interpreted in context with the other provisions thereof. However, in the context of the present case it does not seem to me that either Article can assist the Appellant. The claim of the Appellant to assume the surname of his wife does not constitute interference with the privacy of the Appellant's home, correspondence or communications or illegal search thereof (Art. 1 3), nor would it give rise to protection of the family by society and the State (Art. 14(3)).

Article 14(1) provides as follows:

> "Men and women of full age, without any limitation due to race, colour, ethnic origin, nationality, religion, creed or social or economic status shall have the right to marry and to found a family. They shall be entitled to equal rights as to

marriage, during marriage and at its dissolution."

Mtambanengwe, J, in the Court a *quo,* came to the conclusion that Article 14(1), being an equality clause, allows for reasonable classification as long as it is based on a rational connection to a legitimate object of the Legislator.

Article 14(1) follows to a certain extent the scheme set out by Article 10. The first part can be compared to Article 10(2) which gives the right to marry to men and women of full age without limitation based on any of the enumerated grounds, in the second part it accords equal rights to partners in marriage, and is comparable to Article 10(1).

The Appellant's case is based on the second part of Article 14(1) and I agree with the learned judge *a quo* that it would be permissible in that instance for the Legislator to make reasonable classifications rationally connected to a legitimate object. (See Mwellie's case. *Supra,* Van Raalte v The Netherlands, ECHR given on 21 February 1997, pa 39 and Malaysian Bar and Ano v Government of Malaysia, (1988) LRC (Const.) 428 and Darby v Sweden, ECHR, 23 October 1990.)

The differentiation which was created by sec. 9(1) of the Aliens Act was to create legal security and certainty of identity. It was enacted in the interests of the State and the public at large. As such it has a rational connection to the object which the Legislator wanted to achieve. It was further demonstrated that such differentiation has hardly any effect on the Namibian Community and is in essence artificial. The reasons put forward by the Appellant for his desire to adopt his wife's surname reflect this, as was

pointed out by Mr. Coetzee.

Mr. Light also relied on certain conventions such as the Convention on the Elimination of All Forms of Discrimination against Women which was acceded to by the National Assembly on 17 July 1992 in terms of Article 63(2)(e) of the Constitution. Such Conventions are of course subject to the Constitution and cannot change the situation. I am therefore of the opinion that the appeal should be dismissed.

Mr. Light submitted that the Court should not make any order as to costs in the event of the appeal not succeeding as this could have the effect of inhibiting persons who wish to bring constitutional cases of merit and substance to the Courts. I would have been tempted to do so had the Appellant exhausted his remedies in terms of the Aliens Act. Under the circumstances there is no cogent reason to deviate from the general rule that costs follow the result.

The appeal is dismissed with costs.

STRYDOM, C.J.

I agree.

SILUNGWE, A.J.A.

I agree.

LEVY, A .J. A

COUNSEL FOR THE APPELLANT:	Mr C. Light
Instructed by:	Legal Assistance Centre
COUNSEL FOR THE RESPONDENT:	Adv. G.S. Coetzee
Instructed by:	Government Attorneys